

THE FIFTH AMENDMENT & THE ENDANGERED SPECIES ACT:  
AN EXAMINATION OF REGULATORY TAKINGS & THE CALIFORNIA WATER CRISIS

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## ABSTRACT

This study was conducted to determine if reductions in water deliveries to farmers in the San Joaquin Valley due to enforcement of the Endangered Species Act has resulted in a compensable Fifth Amendment taking of property. A case study of the California Water Crisis is examined. The subject of this case study is the Westlands Water District.

The details of the California Water Crisis were outlined. The necessary elements of a takings investigation were identified for the case study. These elements were applied to takings criteria that has been established by the courts. Using prior court rulings as a guide to apply the criteria, it was determined that a taking of property has not occurred.

Alternatives to compensation for a taking of property that would provide relief to farmers affected by the California Water Crisis are discussed. Ensuring long-term reliability of the state's water supply requires Endangered Species Act reform and improvements to water storage and conveyance infrastructure.

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## CHAPTER ONE

### INTRODUCTION

In 1922, the Supreme Court ruled in the case of *Pennsylvania Coal Co. v. Mahon* that “if regulation goes too far it will be recognized as a taking” of property, thus creating the doctrine of regulatory takings (*Pennsylvania Coal* 1922). It was found that a state law requiring a mining company to leave a certain amount of coal in the ground to prevent surface subsidence had such an impact on the use of the property that it had the effect a taking of property. Before this case, a taking was only considered to be the seizure of property and all the included rights to the use of the property, as in instances of eminent domain. After the ruling in the *Pennsylvania Coal* case, any regulation that interferes with the ability of an individual to use his or her property could potentially constitute a taking.

Because of this doctrine of regulatory takings, many challenges have been brought by property owners claiming that regulations restricting the use of property have resulted in a regulatory taking of private property. Such a taking of property would necessitate compensation under the Takings Clause of the Fifth Amendment. Subsequent rulings by the court have attempted to clarify the regulatory takings doctrine and when a regulation “goes too far” by creating tests to determine if certain conditions are satisfied to constitute a taking of property (Mandelker et al. 2008).

The courts have established criteria for what constitutes a taking. The Supreme Court has expressed that the determination of a regulatory taking should be on the basis of “ad hoc, factual inquiries” (*Penn Central* 1978). Although there is a set of guidelines to determine if a taking has occurred, ad hoc inquiries require a case by case evaluation of the facts, which has led to a tremendous number of lawsuits alleging regulatory takings. One of the most common areas in which regulatory takings have been alleged is land use. Many land owners have claimed that regulations, particularly environmental regulations, have so restricted their ability to use the land that a compensable taking has occurred.

Since the enactment of the Endangered Species Act (ESA) in 1973, landowners have been subject to the stringent rules required in the name of species preservation. The ability of a property owner to use his or her land may be greatly restricted if such use might harm a protected species. Examples of uses that have been restricted because of the ESA include the development of homes, harvesting lumber, or growing agricultural crops. Many landowners have brought lawsuits claiming such restrictions on the use of their property constitute a taking, which would require compensation. For the most part, these scenarios would result from a physical occupation of property by a species, where a protected species inhabits that property, or it is designated as critical habitat. However, there may be instances where the use of property has been affected, but there is no species within many miles of the property.

In California, a complex system of water projects delivers water from the north to users in the San Joaquin Valley and southern California. Water flows through a network of reservoirs and rivers to the Sacramento-San Joaquin River Delta, where it is pumped out by massive pumping stations and sent south through a system of canals. Agriculture in the San Joaquin Valley utilizes this water for irrigation, which has allowed the region to become the most

productive agricultural region in the nation. This region has suffered tremendously in recent years from cutbacks in water deliveries to farmers. Hundreds of thousands of acres of farmland have gone fallow, tens of thousands of farm workers are unemployed, and the region as a whole has suffered huge economic losses, all in the name of preserving a fish called the Delta smelt (Campbell 2007). Without water to irrigate their crops, many farmers have lost all ability to economically use their land. Because of the inflexible nature of the ESA, the fish has been given priority over the people of the San Joaquin Valley. In such a tragic situation, one must wonder whether the regulation has gone too far.

### Problem Statement

Does enforcement of the Endangered Species Act and its subsequent impact on the use of water constitute a regulatory taking under the Fifth Amendment to the Constitution?

### Hypothesis

The reductions in water deliveries from the Sacramento-San Joaquin River Delta due to enforcement of the Endangered Species Act will have such an effect on property that it will constitute a regulatory taking.

## Objectives

- 1) To identify the critical elements required for a taking of property in a case study of the California Water Crisis.
- 2) To apply the standards of the Supreme Court tests to the case study.
- 3) To determine whether a compensable taking of property has occurred according to the facts of the presented case study.

## Justification

California is the nation's leading agriculture state, with an industry valued at \$32 billion in 2005 (CDFA 2007). That year, the state's 76,500 farms and ranches accounted for 13.3% of the nation's total agricultural value. California produces more fruits and vegetables than any other state in the nation, and some crops are only grown in California. The San Joaquin Valley is comprised of eight counties, yet is home to seven of the ten most productive agriculture counties in California, including Fresno County, the most productive agricultural county in the nation. Agricultural employment accounts for over 13% of all employment in the region, and well over 20% in some counties (Umbach 2005). Over 170,000 jobs in the San Joaquin Valley are credited to the agriculture industry. The economic viability of rural communities in the San Joaquin Valley is directly related to the agricultural economy of the region.

The agricultural industry of this region is dependent upon irrigation water provided in part by the Bureau of Reclamation (USBR) through the federal Central Valley Project (CVP) and the California Department of Water Resources (DWR) through the State Water Project (SWP).

Cut-backs in water deliveries from the CVP and SWP have caused widespread economic devastation in the region. Hundreds of thousands of acres of farmland have been left idle, unable to produce a crop due to lack of water. Reports from five of the eight counties have estimated over 500,000 acres of farmland have been fallowed, and losses of \$1.4 billion (Miller 2009). With no crops to tend to, tens of thousands of farm workers are unemployed. A University of California study estimated as many as eighty thousand jobs have been lost due to this crisis (Pollack 2009). Unemployment in some rural communities is forty percent, and many of the workers who used to harvest crops in the most productive agriculture region in the world now stand in food lines (Grossi and Rodriguez 2009). Continued viability of this region's most important industry is uncertain at best as long as water deliveries are restricted.

The remedy much desired by the farmers and farm workers of the San Joaquin Valley is to turn the pumps on and deliver water to the farms so they can continue to grow crops and make a living. Until that time comes, the economic devastation, the unemployment, the food lines, and the loss of production will continue. However, the Fifth Amendment requires just compensation to be paid whenever property is taken by the government. If the result of the government actions causing the reductions in water deliveries is found to be a taking of property, then the deprived property owners are entitled to financial relief. Though not ideal, temporary relief of this nature may provide farmers with the financial cushion necessary to weather the storm and allow them to continue to farm once the water deliveries are restored.

This project will examine a case study of the California Water Crisis, identifying relevant facts of the case and applying those facts to takings requirements identified by the courts. It will focus on agricultural users in the San Joaquin Valley. In doing so, one can make a reasonable determination of how the courts will rule in such a case, and if it is worthwhile for affected

parties to seek compensation from the government through an inverse condemnation claim.

Once the details of this case have been examined, a recommendation will be made regarding whether or not a takings claim should be pursued, or if alternative courses of action are available for the affected parties to consider.

## CHAPTER TWO

### REVIEW OF THE LITERATURE

#### Fifth Amendment Takings

The Fifth Amendment to the United States Constitution reads in part: “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” (Mandelker et al. 2008). These phrases are known as the “Due Process Clause” and the “Takings Clause,” respectively. The Bill of Rights places a great deal of restrictions on the government in order to protect the rights of individuals. However, neither of these clauses are an absolute restriction on the government’s power, as is the case in other clauses of the Constitution. For instance, the First Amendment expressly prohibits the government from abridging the freedom of speech. On the other hand, the Due Process and Takings Clauses of the Fifth Amendment do not expressly prohibit any government action; rather these clauses mandate obligations of the government if such actions are carried out (Mandelker et al. 2008).

Mandelker et al. (2008) identify two powers which the government possesses: the police power and the power of eminent domain. The police power is the authority of the government to pass and enforce laws and regulations to protect the public health, safety, morals, or general welfare. The Due Process Clause requires a certain established procedure to be followed when

the government passes and enforces laws that might deprive a person of life, liberty, or property. An example would be a law that prohibits theft. Before such a law was established, it went through the proper procedures required by the legislature in order to be passed. If an individual violates this law by stealing something, this person is not simply thrown in jail, which is to deprive him of his liberties; he must first be accused of the crime, tried in court, and found guilty by a jury beyond a reasonable doubt.

Eminent domain is the power to take private property for public use. This makes it possible for the government to acquire property, usually land, in an effort to establish public facilities. Public schools, post offices, military bases, and freeways often require the government to exercise its power of eminent domain in order to construct these projects. The process of condemnation must be followed before the government can gain title to the property and put it to a public use. When this happens, the government must pay just compensation to the previous owner of the property. This is mandated by the Takings Clause. Taking private property without following due process or paying just compensation would be unconstitutional (Mandelker et al. 2008).

Within the Takings Clause there are several terms that have been interpreted by the courts in such a way that it has caused the general understanding of the clause to change from its literal interpretation. These terms are: “just compensation,” “public use,” “property,” and “taken.” This project does not intend to argue the merits of these interpretations, but an understanding of how these terms are understood by the courts is important.

Just compensation is perhaps the least controversial of these terms. The idea behind just compensation is best described by the Supreme Court opinion in the case *Armstrong v. United States* (1960), which expresses that “the Fifth Amendment’s guarantee [is] designed to bar

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” (Noel 1987). It has long been accepted that, in the case of acquiring a parcel of land through eminent domain, just compensation is the fair market value of the property in question. This is to serve the same effect as if another private party had purchased the property from the previous owner, so as to not leave that person in a disadvantaged position due to the property being taken for public use.

Public use in its most literal sense means “to be used by the public.” This is the case when land is acquired to build a government building or a public works project. However, the courts have expanded the meaning of this term to be understood as “public purpose,” which would be to provide some public benefit (Wenar 1997). The public purpose question has been visited several times by the Supreme Court. *Berman v. Parker* (1954) and *Kelo v. City of New London* (2005) held that the government can acquire private property through its power of eminent domain and then provide that newly acquired property to private developers to promote economic revitalization in that area. Similarly, in *Hawaii Housing Authority v. Midkiff* (1984), the Supreme Court held that it served a public purpose to use eminent domain to acquire private property from large landowners and transfer title to longtime tenants of the land in an effort to reduce the concentration of land ownership in Hawaii. In writing the opinion in this case, Justice O’Conner, referring to the *Berman* decision, stated: “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause...[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause” (*Hawaii Housing Authority* 1984). Because the property is not required to be used by the public, property could be

taken for a variety of reasons, so long as it is rationally related to a conceivable public purpose and the owner of the property is compensated.

The courts have come to understand property not as things, but as rights. Eagle (2002) describes property as a set of rights. What is called property is defined by an individual's relationship to a particular thing, which can be explicit or abstract. When an individual owns property, this person holds a set of rights that establish his or her relationship to a parcel of land, an automobile, or an idea.

Among the crucial set of rights that make up property are exclusive possession, disposition, and use. When Eagle (2002) speaks of exclusive possession, his implications are the holding of the set of rights in such a manner that no others may hold those rights. In essence, to own property and hold a set of rights includes the ability to exclude others from those rights. The disposition of property means the forfeiture of rights. This can take many shapes. The example used by Eagle (2002) is "the right to invite others to share in his interests." The owner is giving up his right to exclude others from his property, albeit temporarily. Another example would be the owner of a house burning it to the ground. This is a forfeiture of the right to use the house, which in this case is a permanent forfeiture of rights because the thing that the owner holds the set of rights over (the house) is destroyed, thus severing the relationship the owner once had with the house.

The use is inherently important, and would include the enjoyment of the property for a variety of purposes. The economic development of the property is an essential use that creates a measurable value. Other uses can create value that may be intrinsic, such as open space or a natural landscape when considering land, or the value one places on a family heirloom. Ultimately, the value of property is derived from its use. One is free to use and enjoy one's own

property in any manner one sees fit, so long as it does not create a public nuisance or infringe upon another's ability to use and enjoy his or her property. If a conflict arises, it can be settled by the courts or by the police power of the government in the form of a regulation.

At the heart of this discussion is the determination of what is a taking. The acquisition of a parcel of land by the government is a taking, as is the case in many eminent domain proceedings. Because the governmental use and the private use of that land cannot happen simultaneously, the government acquires the title and property rights associated with that land, making it possible to accomplish its purposes. It has been demonstrated that the government does not have to maintain possession of the property, as is the case in many economic revitalization situations upheld by the Supreme Court. However, just compensation in the form of the fair market value must be provided to make the previous owners whole.

Prior to 1922, a taking of property was understood to be the seizure of property by the government for a public purpose, as described above. However, the decision in *Pennsylvania Coal Co. v. Mahon* (1922) established that, in addition to eminent domain takings, the exercise of the government's police power through regulations may affect property in such a way that a regulatory taking occurs. The occupation of property and the restriction of the use of property resulting from a regulation are two such effects that the courts have determined may constitute takings (Mandelker et al. 2008).

A permanent physical occupation will almost always result in a taking of property. The Supreme Court ruled in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) that a "per se taking" was the result of a "permanent physical occupation" required by a New York statute (*Loretto* 1982). The statute required landlords to allow cable companies to run cables across and attach cables to the apartment buildings the landlords owned. Although the space occupied was

less than one-eighth of one cubic foot of the plaintiff's building, it was ruled a taking. This is because the property owner is required to forfeit his or her right to exclude others (the cable company) from his or her property, and has lost the ability to use that portion of the property. Justice Marshall found that the benefit to the public and the economic impact on the owner is not relevant in cases of occupation. In this regard, the permanent physical occupation authorized by the statute would be equivalent to the government exercising the power of eminent domain and gaining title to the affected property because it infringes upon such essential rights of the owner of the property. The government does not actually gain title to the property as it does in eminent domain cases, but the effect of a physical occupation is seen as the same as if that property had been condemned in an eminent domain proceeding (*Loretto* 1982).

The type of taking at issue in the *Pennsylvania Coal* case has to do with the restriction of the use of property, as opposed to the occupation of it. As discussed earlier, the government has the authority to regulate property through its police power. However, lawsuits have been brought against nearly every level of government claiming that the restrictions placed on the use of property by regulations are so great that the regulation has had the same effect as the government taking the property through eminent domain. It was this sort of excessive regulation that Justice Holmes was referring to in the *Pennsylvania Coal* opinion, when he said regulation that goes too far will be recognized as a taking. It is not difficult to recognize when the government enacts the condemnation process to take property through eminent domain, nor is it particularly difficult to recognize a physical occupation of property, but determining whether a regulation goes too far is rather subjective, to say the least. In the Supreme Court case of *Penn Central Transportation Co. v. City of New York* (1978), Justice Brennan admitted that the court had not developed any "set formula" to determine when it was required that property owners be

compensated for economic injuries caused by regulatory takings. To assist in determining whether a regulation goes too far and a taking has occurred, the Supreme Court established a number of tests. These tests are applied on a case-by-case basis and are meant to determine whether the facts of the case support the claim based on criteria set by the court (*Penn Central* 1978).

The decision in the *Penn Central* case created a balancing test that is widely accepted and used in takings jurisprudence. The *Penn Central* test focuses on three main elements: the economic impact of the regulation, the interference with investment-backed expectations, and the character of the government action. The economic impact has to do with the degree to which the regulation has restricted the ability of the owner to use his or her property for some economic return. Investment-backed expectations have to do with the restriction of future uses that the property owner had intended to undertake. Such uses might include the development of a parcel of land. However, the property owner must demonstrate that a reasonable, meaningful effort to use the property in such a way. This might include plans or permits for development that were frustrated by a new regulation (Eagle 2007).

The underlying principle behind both the economic impact and investment-backed expectation requirements is that the use of property that was restricted or denied by the regulation would have been permissible if there was no restriction. If the use of property would otherwise result in a nuisance, a regulation prohibiting that use would not be a taking because such a use would not be permissible in the first place. Essentially, there is no right to use property in such a manner that creates a nuisance; thus the prohibition of that use cannot be a taking because no right to that use ever existed (Burling 2002). The meaning and use of the “character of the government action” requirement is somewhat unclear. Meltz (2005) considers

the “character” to be the intention of the action, and possibly the foreseeable or expected effects of the regulation.

Another test was devised in *Agins v. City of Tiburon* (1980), consisting of two parts. The court determined that a taking has occurred if the regulation “does not substantially advance legitimate state interests...or denies the owner economically viable use of his land” (Burling 2002). A clarification was made in regards to the first prong of the *Agins* test in the decision of *Lingle v. Chevron U.S.A. Inc.* (2005). Here, the Supreme Court determined that the “substantially advances” requirement does not derive from the Takings Clause, but the Due Process Clause (*Lingle* 2005). The implication of this decision is that even if a regulation is legitimate in accordance with due process and all other procedural requirements, it may still constitute a taking of property. The second prong of the *Agins* test, considering the economically viable use of property, aligns closely with the first two requirements of the *Penn Central* test: the economic impact and investment-backed expectation requirements. All of these elements use the frustration of the economic value of the property as a way to measure the restriction of the right to use the property.

*Lucas v. South Carolina Coastal Commission* (1992) used the economic consideration to determine that a categorical taking had occurred. Justice Scalia wrote in the opinion of the court that “[the court has] found categorical treatment appropriate...where a regulation denies all economically beneficial or productive use of land” (*Lucas* 1992). In this case, a regulation prohibited the development of property within a certain distance of the shoreline. A previous regulation placed a boundary line on the ocean side of Lucas’s property. After he purchased two parcels with the intention of building houses, the regulation was changed, placing the boundary line on the inland side of his property. This placed the entirety of both parcels within the

restricted development zone. Parcels with existing homes located adjacent to Lucas's parcels within the restricted area were not affected because they had already been developed. The effect of the regulation prohibited any development of Lucas's land. A state trial court concluded that the regulation left his land valueless. Justice Scalia expressed that "when 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" (*Lucas* 1992). The denial of one hundred percent of the economically beneficial or productive use of property will almost certainly be considered a taking, as noted by Burling (2002).

Burling (2002) goes on to assert that when the restriction of all economically viable use of property is determined to be a categorical taking, no further inquiry is required. There is no need to consider other elements required of the *Penn Central* or any other test; it is evident that the right of the owner to use that property has been completely denied. This is congruent with the determination of a taking due to physical occupation. A per se taking caused by a physical occupation of property and a categorical taking caused by the total prohibition of all economically beneficial use of the property need not be balanced with any other factors, and would require compensation.

While a complete denial of the use of property will likely result in a categorical taking, denial of less than one hundred percent of the economically viable use will not. However, this does not mean a taking of property has not occurred. The court may find a partial taking by using the criteria set forth in the *Penn Central* balancing test. The economic uses denied will be compared to those still available, considering the economic impact, investment-backed expectations, and character of the government action. When a partial taking is being examined, the courts must consider the "parcel as a whole." The concept of the parcel as a whole was

implied in Justice Brennan's *Penn Central* opinion, where he stated "'Taking' jurisprudence does not divide a single parcel into discrete segments...[the] Court focuses rather...on the...extent of the interference with rights in the parcel as a whole..." (*Penn Central* 1972). Medena (1992) observes that this requirement does not limit the inquiry to simply the affected portion of the property, but requires examination of all relevant property held by the owner. For instance, if a landowner had a spread of one thousand acres, and was prohibited by regulation from developing a ten-acre shopping center, the court's inquiry would cover all one thousand acres, not just the ten acres where development is prohibited.

In some cases, a regulation is enacted that impacts the use of property but is later amended or rescinded to allow for the use that was restricted while the original regulation was enforced. The Supreme Court explored whether the Just Compensation Clause requires the government to pay for "temporary" regulatory takings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987). In this case, a county ordinance was enacted to prohibit construction in a flood-prone area, eliminating all use of the plaintiff's property. In his opinion for the Supreme Court, Chief Justice Rehnquist wrote that "invalidation of the ordinance without payment of fair value for the use of the property during [the affected] period of time would be a constitutionally insufficient remedy" (*First English* 1987). Chief Justice Rehnquist determined that compensation is required from the moment a taking has occurred, and so long as such regulation continues to affect a taking. The temporary nature of the regulation affects the amount of compensation required by the Constitution, rather than the determination of whether a taking has occurred (Dwyer et al. 1995).

## Endangered Species Act

The Endangered Species Act (ESA) is one of the most rigid environmental laws in the United States. Littleworth and Garner (2007) state that the purposes of the ESA are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such ...species...” (16 U.S.C. §1531(c)(1)). In the case *Tennessee Valley Authority v. Hill* (1978), the Supreme Court stated that the “plain intent of Congress...was to halt and reverse the trend toward species extinction, whatever the cost.” To be “endangered” means a species is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. §1532(6)), while “threatened” means a species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. §1532(20)) (Herson and Lucks 2008).

According to Littleworth and Garner (2007), the law prohibits any person from taking a listed species (16 U.S.C. §1538(a)(1)), which is defined broadly by the statute and other regulations. This prohibition applies to private individuals and entities, as well as federal, state, and local governmental entities. It is important that the term “taking” or “take” used in regards to the ESA not be confused with the term as it is used in regards to the Fifth Amendment. The ESA defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct” (16 U.S.C. §1532(19)). Through regulation, the term “harm” has been defined to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering” (50 C.F.R. §17.3). This definition of harm was affirmed by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great*

*Oregon* (1995). The law requires a species' critical habitat be designated once that species is listed. "Critical habitat" is a formally designated specific geographic area that contains those physical or biological features essential to the conservation of a listed species and may require special management or protection (Herson and Lucks 2008). Critical habitat does not have to be occupied by the species at the time of listing, but contains those characteristics desirable to the species. The designation of critical habitat must be made on the basis of the best available scientific data, as well as probable economic and other impacts.

The level of protection varies slightly between endangered and threatened species, but, for the most part, once a species is listed in either category, it is given nearly absolute protection with limited exceptions. The federal agencies charged with enforcement of the ESA are the U.S. Fish & Wildlife Service (USFWS) and the National Oceanographic & Atmospheric Administration Fisheries Service (NOAA Fisheries). The USFWS is an agency in the Department of the Interior, and has jurisdiction and permitting authority under the ESA over terrestrial wildlife, freshwater fish, and some marine species. NOAA Fisheries is an agency in the Department of Commerce, and has jurisdiction and permitting authority under the ESA over marine species, including anadromous fish species such as salmon and steelhead (Herson and Lucks 2008).

Section Seven of the ESA requires federal agencies to consult with USFWS or NOAA Fisheries to insure that an agency action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (*ESA §7(a)(2); 16 U.S.C. §1536(a)(2)*) (Meltz 2005). "Action" is defined by ESA regulations as all activities or programs of any kind authorized, funded, or carried out by federal agencies (*50 C.F.R. §402.02*). Among other things, an action may include the granting of licenses, contracts,

leases, easements, rights-of-way, permits, or grants-in-aid; or activities directly or indirectly causing modifications to the land, water, or air. The United States Court of Appeals for the Ninth Circuit decision of *Gifford-Pinchot Task Force v. United States Fish and Wildlife Service* (2004) found that an action is likely to “jeopardize” the continued existence of a species if there is a reasonable expectation that the action will directly or indirectly appreciably reduce the likelihood of either the survival or recovery of a listed species (Littleworth and Garner 2007). This is a slight variation from the definition expressed in ESA regulation *50 C.F.R. §402.02*.

The consultation process required by Section Seven may begin with an informal consultation between the action agency, the federal agency that plans to undertake a proposed action, and the consulting agency, USFWS or NOAA Fisheries. The informal consultation determines whether or not a proposed action is likely to adversely affect listed species or critical habitat (*50 C.F.R. §402.13(a)*). If both agencies agree that the proposed action is not likely to have an adverse affect, then no further consultation is required. However, if it is determined that the proposed action is to likely have an adverse affect, a formal consultation is required (*50 C.F.R. §§402.14(a) and (b)*) (Littleworth and Garner 2007).

At the conclusion of a formal consultation, the consulting agency issues a biological opinion that identifies the potential effects of the action agency’s proposed action on listed species or critical habitat (*16 U.S.C. §1536(b)(3)(A)*). A “no jeopardy” opinion is issued if the consulting agency finds that the proposed action is not likely to jeopardize the continued existence, or destroy or adversely modify the critical habitat of a protected species (*50 C.F.R. §402.14(h)(3)*). When a “jeopardy” opinion is issued, the consulting agency must include “reasonable and prudent alternatives” to the proposed action that would avoid the adverse effects identified in the formal consultation process (*16 U.S.C. §1536(b)(3); 50 C.F.R. §402.14(h)(3)*)

(Littleworth and Garner 2007). The action agency may adopt one of the alternatives identified in the biological opinion and proceed with the project or activity in such a way that would not jeopardize the species (*50 C.F.R. §402.15(a)*). The biological opinion outlines the terms and conditions required for the execution of the proposed action, which may include measures to mitigate expected harms, as well as incidental take limits. The incidental take limit allows for the taking of a protected species up to the number specified by the permit. While the consultation process is underway, before a biological opinion is issued, action agencies are prohibited from making “irreversible or irretrievable” commitments of resources to the proposed action that has the effect of foreclosing the development of reasonable and prudent alternatives to the action (*16 U.S.C. §1536(d)*). Littleworth and Garner (2007) maintain that this requirement is intended to allow the agency decision making process to remain flexible throughout consultation, and to ensure a project will not be stopped because consultation requirements are not met.

The ESA provides for civil and criminal penalties for violations of the Act. Criminal penalties include fines of up to \$50,000 per violation or a year imprisonment for knowingly violating the take provisions, and fines of up to \$25,000 per violation for all other knowing violations or up to six months imprisonment (*16 U.S.C. §1540(b)*). Civil penalties can be required in addition to criminal penalties, and include fines of up to \$25,000 per violation for knowingly violating the ESA, and fines up to \$500 per violation for inadvertent violations of the Act (*16 U.S.C. §1540(a)*) (Herson and Lucks 2008). The ESA also authorizes injunctions for violations of any portion of the Act. The Law Enforcement Division of USFWS and NOAA Fisheries are the primary enforcers of the ESA; however, citizen suits may be brought to enjoin violations of the ESA or to compel the enforcing agencies to enforce the Act. Citizen are authorized to bring lawsuits under *16 U.S.C. §1540(g)(1)*, which allows for “any person to

commence a civil suit on his or her own behalf...to enjoin any person, including the United States and any other governmental instrumentality or agency...alleged to be in violation of any provision of [the ESA]” (Littleworth and Garner 2007).

### Central Valley Project and State Water Project

The Central Valley Project (CVP) and the State Water Project (SWP) are two major components of California’s complex water delivery system. These two projects capture and store surface runoff in a number of reservoirs, and transport it throughout the state for a variety of purposes using natural and man-made waterways. The CVP was intended to be a state funded project as the initial part of the State Water Plan, but was taken over by the federal government during the Great Depression due to a lack of state funding. The CVP was authorized for construction by the Department of the Interior and is owned and operated by the U.S. Bureau of Reclamation (USBR), an agency within the Department. The CVP was made subject to reclamation laws, providing that the dams and reservoirs be used for river regulation, improvement of navigation, and flood control, irrigation and domestic uses, and power (Littleworth and Garner 2007). Construction began in 1937 and was largely completed in 1951, although construction of additional CVP facilities continued into the 1990’s. The CVP encompasses nearly the entire length of the Central Valley, from the Cascade Mountains near Redding in the northern Sacramento Valley, to the Tehachapi Mountains near Bakersfield in the southern San Joaquin Valley some four hundred miles away. Approximately nine million acre-feet of water is managed by the CVP, which is comprised of twenty dams and reservoirs, eleven power plants, and five hundred miles of canals. Seven million acre-feet is delivered annually for

agricultural, urban, and wildlife uses. The five million acre-feet delivered for farms is enough to irrigate three million acres of farmland, approximately one-third of agriculture land in California. The CVP delivers about 600,000 acre-feet for municipal and industrial uses, enough for one million homes, and generates 5.6 billion kilowatt hours of electricity, enough to meet the needs of two million people (Herson and Lucks 2008).

The SWP was authorized by the California Water Resources Development Bond Act, also called the Burns-Porter Act, in 1959, and approved by the voters in 1960 to issue \$1.75 billion in general obligation bonds (Herson and Lucks 2008). The SWP is operated by the California Department of Water Resources (DWR). It was designed to help meet future water needs by providing supplemental surface water for urban uses to support the growing population of southern California and irrigation uses in the Central Valley to prevent groundwater overdraft. Twenty-two dams and reservoirs store SWP runoff, which is delivered through many miles of canals, including the 444 mile California Aqueduct, which runs from the Delta through the San Joaquin Valley and over the Tehachapi Mountains into Southern California. The San Luis Reservoir, an off-stream storage facility near Los Banos, is a joint-use facility for both the SWP and CVP, as is the stretch of the California Aqueduct from the San Luis Reservoir to Kettleman City. The SWP has the capacity to deliver 4.2 million acre-feet of water, however, deliveries average 2.8 million acre-feet. About thirty percent of SWP water is used for irrigation, mostly in the San Joaquin Valley, and seventy percent for residential, municipal, and industrial uses in southern California and the Bay Area (Water Education Foundation 2008).

USBR and the DWR were issued permits by the state authority that is now the State Water Resources Control Board (SWRCB) for appropriative water rights for their respective projects over a period of year (U.S. Bureau of Reclamation 1978). These rights are subject to

California water law. Under California's system of prior appropriations, users are issued licenses or permits for a specific quantity of water to be diverted from a watercourse and put to a beneficial use. The users that gained their water rights first are considered senior appropriators, while those who acquired their rights more recently hold junior rights. In times of drought, junior appropriators are the first to bear the burdens of shortage. Senior rights holders will not be deprived of their allotment until all rights junior to theirs have been. All water in California is subject to Article X, Section 2, of the California Constitution, which requires the reasonable and beneficial use of water (Water Education Foundation 2005).

The water rights to CVP water are held by the USBR. Some 250 contractors receive water from the CVP. USBR holds contracts with these parties to deliver specified quantities of water from the Project. The contractors may be individuals or water districts, such as Westlands Water District, the largest irrigation district in the nation, located in the western San Joaquin Valley (Water Education Foundation 2005). Westlands and other such organizations, which contract with USBR for water deliveries, hold contracts with users within their jurisdiction for the delivery of specific amounts of water. In the case of Westlands, these users are farmers who put the water to the required beneficial use. This water is delivered to the user through distribution laterals maintained by the District. DWR delivers water to twenty-nine public agency contractors, the largest of which is the Metropolitan Water District of Southern California (Littleworth and Garner 2007). In much the same way that the federal contractors operate, the state contractors distribute the project water to users within their jurisdiction. Like USBR and the CVP, the DWR holds the SWP water rights, but is not the user of the water.

The contracts between the government agencies and the federal and state contractors provide for deliveries of specific amounts of project water. They also provide for repayment of

the costs of the projects. SWP contractors pay for the entire cost of their share of the project, including interest. In this regard, water users pay for the cost of water storage and conveyance elements of the project, and power customers are responsible for portions of the project related to power generation. Elements related to flood control and wildlife enhancement are paid by the federal and state governments. Likewise, the CVP users pay for the water and power related portions of their project. Flood control, wildlife enhancement, and recreation are not reimbursable. This means that roughly eighty to eighty-five percent of CVP costs are reimbursable from users (U.S. Bureau of Reclamation 1978). These costs are still being repaid (Water Education Foundation 2008).

In general, the CVP and SWP distribute surface water from the north to water users in the south. At the heart of both systems is the Delta, where the Sacramento and San Joaquin Rivers converge and flow into the San Francisco Bay and out to the Pacific Ocean. The CVP and SWP storage facilities release water that flows down the Sacramento River to the Delta. Diversions are made along the way and from the Delta for users in the Sacramento Valley and Bay Area. From the Clifton Court Forebay, a water regulating reservoir in the Delta, water is exported from the Delta to users in the San Joaquin Valley and southern California. The CVP's C.W. "Bill" Jones Pumping Plant lifts water out of the Delta into the Delta-Mendota Canal. The Canal flows south along the west side of the valley to the San Luis Reservoir and its related facilities for storage, and then moves east across the valley towards the San Joaquin River, ending at the Mendota Pool. This water replaces supplies to San Joaquin River water users that have been disrupted by diversions made upriver at the Friant Dam for the Friant-Kern Canal, which services CVP users in the eastern and southern San Joaquin Valley. The SWP's Harvey O. Banks Pumping Plant pumps water into the California Aqueduct. It follows the path of the

Delta-Mendota Canal to the San Luis Reservoir for storage, and then continues south through the valley and into southern California. The Aqueduct services both CVP and SWP users in the western San Joaquin Valley from the San Luis Reservoir until Kettleman City, after which water is delivered to SWP users in the southern San Joaquin Valley and southern California (Littleworth and Garner 2007).

## CHAPTER THREE

### METHODOLOGY

#### Procedure for Data Collection

A claimant believing he or she has suffered a taking of property will present evidence to the court supporting that position at each step of the inquiry. The court determines the facts of the case based on the evidence presented, and applies the facts to the takings analysis. The evidence that the claimant presents to the court will support the claims that a property right exists, a regulation has affected the property, and the property was so impacted that a per se taking, a categorical taking, or a partial *Penn Central* taking has occurred.

Before the claimant begins compiling evidence to present to the court, an investigation of the situation must first take place. This investigation is much less detailed than an investigation that gathers evidence for a takings claim brought in court, but it does identify the necessary components of the claim that direct the second, more detailed investigation. Essentially, the initial investigation examines the situation to determine if there is a reasonable connection between a particular impact, a government action, and an effect on property, which is most likely observed as an economic impact. Due to the nature of this investigation, the starting point for this process is the ending point of the court's inquiry. An economic impact observed by the property owner is the factor that will initiate a takings inquiry. The cause of the economic

impact must be linked to a government action, the regulation. From this point, it must be established that the regulation did affect the rights of the property owner, which resulted in the economic impact that initiated the process.

In the case of the California Water Crisis, the components sought by the initial investigation have been identified by numerous news articles, press releases, and reports related to the situation published since the beginning of the water crisis. These publications include San Joaquin Valley area and agriculture industry newspapers, specifically the Fresno Bee and California Farm Bureau's Ag Alert, press releases from organizations associated with the water crisis and government agencies at the county, state, and national level, and related economic, scientific, and use reports prepared by many of those same entities.

The components identified by the various publications will be used to conduct a detailed investigation of the water crisis as it applies to Westlands Water District, the subject of the case study. Westlands Water District is an irrigation district that covers 600,000 acres of farmland in western Fresno and Kings Counties. The District provides water deliveries from the CVP to approximately six hundred farms, which produce over sixty commodities for an annual production of over \$1 billion. Approximately fifty thousand people live in and around Westlands. Many of these people work for Westlands farmers or for businesses directly associated with farming (Westlands 2001). Many of the communities hardest hit by the economic devastation of the California Water Crisis are located in Westlands.

## Procedure for Data Analysis

The components of the initial investigation identified for Westlands Water District must be applied to the standards for takings inquiries set by the courts. In a regulatory takings inquiry, the court must consider the property rights affected, and determine if the claimant has a right to the property. If no right exists, there is no taking. If it is found that a regulation has had an impact on the claimant's property rights, the type of taking can be derived from this. It is likely, though not guaranteed, that a denial of the right of exclusion will result in a physical occupation taking per se. It is also likely, though not guaranteed, that a complete denial of the right to use property, depriving the owner of all economically beneficial use of the property, will result in a categorical taking. No further inquiry is necessary regarding the degree to which the property has been affected; it is considered a total frustration of property rights resulting in a taking of property. If there is less than a complete denial of the right to use property, a partial taking may be found using the *Penn Central* test. This test considers the economic impact of the regulation, the interference with investment-backed expectations, and the character of the government action applied to the parcel as a whole. The permanent or temporary nature of the taking should be considered for determining the appropriate amount of compensation to be paid to the affected property owner.

Because the court system uses prior cases as precedents to direct its decisions, it is only fitting to use as a guide cases involving similarly situated instances. The principles and reasoning the courts have used to apply the law and takings doctrine to prior cases would likely apply to any similarly situated set of facts. This allows for comparisons to be made between the relevant facts of those cases and the Westlands Water District case study, which can indicate

how the court will decide a takings case based on the facts of the case study. The most appropriate cases to consider would be recent takings claims involving components similar to those identified by the initial investigation. Such cases can be found in the published general jurisdiction opinions of the United States Court of Federal Claims, the court where takings claims are filed, as well as decisions from the trial and appellate court systems of California and the United States.

### Assumptions

To seek compensation for a taking, a claimant must file an inverse condemnation suit in the Court of Federal Claims. This court and the other courts have dismissed numerous cases on the grounds that the case is not yet ripe, meaning it is not yet fit to be heard by the court. To achieve ripeness, the claim must be at a point where it is appropriate for the court to decide on the facts. This means the government agency involved has issued a final opinion after all reasonable and prudent alternatives have been considered, and the regulatory appeals process has concluded. Without a final opinion, the elements of the case may change. For instance, the agency may grant a permit for an activity that was previously prohibited. Ripeness ensures that the situation presented will not change, allowing the court to determine the set of facts of the case and apply its takings inquiry to that set of facts. It must be assumed that this case has achieved ripeness, making it appropriate to come before the court. A final decision by the agency would, therefore, result in the same conditions identified by the initial investigation.

## Limitations

The takings inquiry will be limited to a single case study, rather than an examination of the entire situation. This is in an effort to narrow the focus of the examination to a more manageable degree. Westlands Water District will be the case study examined, and is intended to be representative of all similarly situated parties. However, considering the court's requirement for conducting ad hoc, factual inquiries when determining takings, it must be recognized that each situation is unique and will likely have a different set of facts associated with it. While Westlands is intended to be representative of the California Water Crisis as a whole and the parties affected by it, the Westlands situation and associated facts may not be consistent with other water districts. The Westlands Water District provides irrigation water from the CVP to farmers on the west side of the San Joaquin Valley, which may distinguish the conditions of this case from cases involving non-agricultural users, as well as SWP users. For this reason, Westlands can be used only as a limited example of the larger situation. The findings of this examination will be only applicable to this case. Other cases can be applied through the same process to determine results for those situations.

## CHAPTER FOUR

### DEVELOPMENT OF THE STUDY

#### Analysis

##### The California Water Crisis

The California Water Crisis is the result of a combination of natural drought conditions and court imposed restrictions on water exports from the Delta. Three consecutive dry years have depleted reservoirs around the state. Decreased precipitation and snowpack in the Sierra Nevada Mountains has led to decreased runoff in most of the major watersheds of the state. As a result, reservoir levels have dropped significantly. This prompted Governor Schwarzenegger to declare a statewide drought in June of 2008 (*E.O. S-06-08*). The past three water years have been listed as dry or critically dry, leading to greater uncertainty about the state's water supply (Osugi 2010).

Hydrologic information is categorized by water years, which begin October 1. For instance, Water Year 2010 began on October 1, 2009, and will end on September 30, 2010. Statewide precipitation was sixty-three percent of average in 2007, seventy-two percent of average in 2008, and seventy-six percent of average in 2009 (Osugi 2010). At the end of Water Year 2009, the state's reservoirs were at eighty percent of average storage, which is roughly

forty-six percent of capacity. Key reservoir units were much lower. Because of the low reservoir levels at the end of the water year, carry-over to the next year is much less than in normal situations, underscoring the lack of water available for use.

*California's Drought Update* was released April 30, 2010, and provides detailed information about the state's water situation through April 2010. The winter and spring of Water Year 2010 have been much wetter than the years immediately prior. Precipitation as of March 2010 was ninety-five percent of average. As of April 22, 2010, statewide reservoir storage was up to ninety-four percent of average (Osugi 2010). The Sierra Nevada snowpack was measured at 143% of average on April 30, 2010, in the last snow survey of the year conducted by DWR (Weiser 2010). However, there is a hesitancy to declare the drought over, despite the abundant snowpack, because officials remain uncertain about how much water will runoff into rivers and be captured in reservoirs. As of March 2010 the runoff stood at just sixty-six percent of average (Osugi 2010).

California's water supply was further jeopardized by the 2007 decision of *Natural Resource Defense Council v. Kempthorne* (2007). The lawsuit was brought by a number of environmental groups in federal court challenging the legality of a biological opinion that supports the operation of the CVP and SWP in the Delta (Campbell 2007). The CVP and SWP are coordinately operated by the USBR and the DWR, pursuant to a series of Coordinated Operating Agreements between the two agencies. The Long-Term Central Valley Project and State Water Project Operations Criteria and Plan (OCAP) outlines the changing operations of the two projects in light of several factors. Among the changes in operations covered by the OCAP were increased rates of water exports from the Delta at the Banks and Jones Pumping Plants. Because the operation of the Projects would likely affect protected species in the Delta, Section

Seven consultation was required by the ESA. One such protected species is the Delta smelt, which is listed as threatened under the ESA. This tiny fish can be drawn into the pumping facilities and killed, as well as other effects related to water flows and pumping. The USFWS issued a biological opinion on the OCAP in 2004, followed by a revised biological opinion in 2005. The biological opinion concluded that the operations of the Projects would not jeopardize the continued existence of the Delta smelt or adversely modify its critical habitat, which authorized the operation of the pumping facilities and set Delta smelt take limits (*NRDC v. Kempthorne* 2007).

The environmental groups sued the Department of the Interior and USFWS on the grounds that the findings of the biological opinion were arbitrary and capricious and contrary to law under the Administrative Procedures Act. Several parties joined the lawsuit as defendant-interveners, including DWR, California Farm Bureau Federation, State Water Contractors, and a number of water agencies and irrigation districts, including Westlands Water District. The court ruled in favor of the plaintiffs, stating the “no jeopardy” finding was arbitrary, capricious, and contrary to law. Judge Wanger determined the biological opinion was unlawful and inadequate for several reasons: it does not provide a reasonable degree of certainty that mitigation actions will take place, it fails to utilize the best available scientific information by not addressing data related to Delta smelt abundance and the issue of climate change, it fails to consider recent species abundance and jeopardy when setting take limits, and it does not adequately consider impacts to critical habitat (*NRDC v. Kempthorne* 2007).

The invalidation of the biological opinion resulted in a drastic decrease in the rate of project pumping from the Delta. On May 31, 2007, USBR announced its intentions to reduce pumping to the minimum level required to maintain human health and safety, while DWR

completely stopped pumping operations from its facilities (U.S. Fish & Wildlife Service 2007). These measures were undertaken to prevent the take of Delta smelt at the pumps, which is not authorized in the absence of a valid biological opinion. A new biological opinion was issued by USFWS on December 15, 2008, which included reasonable and prudent alternatives to the proposed operations. These provisions maintain certain pumping restriction to protect the Delta smelt (U.S. Fish & Wildlife Service 2008). Additionally, a 2008 lawsuit involving many of the same parties invalidated the biological opinion issued by NOAA Fisheries for project operations affecting salmon and steelhead (Campbell 2008). Whether ordered by the court or voluntarily enacted by USBR or DWR, steps taken to protect threatened fish species have significantly affected CVP and SWP operations.

The combined effect of the court decisions and the drought have crippled California's water supply. *California Drought Response Fact Sheet*, published in September of 2009 by USBR, reports 1.6 million acre-feet of water that could have been exported south of the Delta were lost that year due to drought conditions and 500,000 acre-feet of water were lost due to Delta pumping restrictions to protect fish (U.S. Department of the Interior 2009). DWR estimates that agency restrictions on Delta pumping will reduce water deliveries by 600,000 acre-feet in 2010 (Department of Water Resources 2010 (B)). Water deliveries to contractors for both projects have declined substantially, especially agricultural users. USBR and DWR projected water allocations for contractors are reported throughout the winter and spring. These projections may be updated as hydrologic conditions change. USBR's *Summary of Water Supply Allocations* reports the water allocations for contractors in terms of percent of contracted amounts. Allocations for Water Year 2007 were one hundred percent for agricultural contractors north of the Delta, but only fifty percent for agricultural contractors south of the Delta. These

allocations were an increase from the earlier projection of thirty-five percent for agricultural contractors north and south of the Delta (U.S. Bureau of Reclamation 2010). In 2008, allocations for agricultural contractors were ultimately *decreased* by five percent to forty percent of the contracted amount for contractors north and south of the Delta. Initial allocations for agricultural contractors in 2009 were zero percent of contracted amounts. Allocations for contractors north of the Delta were increased to forty percent, but contractors south of the Delta were only allocated ten percent of their contracted amounts. The Department of the Interior announced on April 15, 2010, that agricultural contractors south of the Delta will receive thirty percent of contracted amounts for Water Year 2010, which is an increase from the five percent allocation that was announced in February (Rodriguez 2010). The allocation was increased to forty percent three weeks later (Grossi 2010).

SWP allocations for Water Year 2007 were sixty percent of contracted amounts (Department of Water Resources 2007). Allocations for contractors in 2008 were thirty-five percent of contracted amounts. DWR cited dry conditions and the court orders to protect fish species in the Delta for the allocated amounts, estimating that allocations would be fifty percent in the absence of the court imposed restrictions (Department of Water Resources 2008). The initial allocation for 2009 was set at fifteen percent of contracted amounts, but was later increased to forty percent (Department of Water Resources 2009). Only five percent of contracted amounts was initially projected by DWR for 2010 SWP deliveries, but this allocation was increased to forty-five percent on May 20, 2010 (Department of Water Resources 2010 (A)). The limited deliveries of CVP and SWP water have led to the devastating economic effects in the San Joaquin Valley, and compromised the reliability of the water supply for over three million acres of farmland and twenty-five million Californians.

## Case Study of the Westlands Water District

At issue in this case study is enforcement of the ESA. Provisions of this law, evidenced by federal court orders and requirements of biological opinions, have been causing USBR to drastically curtailed water exports from the Delta since 2007. The steps taken by USBR to protect the fish are the type of government action that may result in a taking of property. There is no question that the ESA strives to achieve a legitimate public purpose. It has been established that the Supreme Court's interpretation of "public use" is synonymous with "public purpose." This law, therefore, fits the criteria of "public use" set forth in the Fifth Amendment.

An article from the July 8, 2009, issue of the California Farm Bureau Federation publication Ag Alert reported losses of \$1.4 billion due to water shortages in the San Joaquin Valley (Miller 2009). This figure was derived from projections by agriculture commissioners in Fresno, Kern, Kings, Madera, and Tulare counties. The article also reported the fallowing of over 500,000 acres in the five counties. In 2007 and 2008, nearly 100,000 acres were fallowed in Westlands Water District each year. That number increased to a staggering 242,000 acres in 2009, which is roughly forty percent of the entire district. The District expects 170,000 acres to remain idle in 2010 (Westlands Water District 2010). Land left idle and the reported losses to the agriculture industry are the indicators of possible frustration of property rights that initiate the takings inquiry. Using land for the production of agricultural crops is a legitimate exercise of a property owner's right to use his or her property. Although a number of factors could have contributed to farmers leaving land fallow, in this instance, a shortage of irrigation water is specifically cited.

For farmers in the Westlands Water District, irrigation water is delivered from the CVP. Westlands holds contracts with USBR for the delivery of 1,150,000 acre-feet of water per year. The CVP allocations for Westlands for 2007, 2008, 2009, and 2010 were fifty percent, forty percent, ten percent, and forty percent, respectively. Deliveries for those years were 629,520 acre-feet in 2007, 332,547 acre-feet in 2008, and 195,716 acre-feet in 2009 (Westlands Water District 2010). Deliveries for 2010 will likely be similar to those in 2008. The ten percent allocation in 2009 is the lowest allocation in the District's history.

The Delta pumping restrictions and the reduced deliveries of project water are the result of compliance with federal law. However, in this instance, the ESA does not impose any restrictions on the ability of farmers to use their land. Here, enforcement of the ESA has, through the court rulings and biological opinions, resulted in limited water exports from the Delta. Some farmers continue to grow crops using an increased amount of groundwater. The practice of growing crops on their land is still an acceptable exercise of the property owner's rights to use their property. Enforcement of the ESA has done nothing to frustrate those rights. In this scenario, the government action has merely interfered with the availability of a production input. The actual use of that input on the land is still allowed. Because the government action at issue does not restrict the use of the land, there is no taking of property in regards to land use.

But land is not the only property at play in this scenario. Water rights are real property rights. *California Water Code §102* states: "All water within the State is property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." The California Supreme Court wrote in the case of *Eddy v. Simpson* (1853) that "the right of property in water is usufructuary, and consists not so much in the fluid itself as the advantage of its use" (*Eddy v. Simpson* 1853). The court described usufructuary rights in

terms of a stream flowing across a parcel of land. The land owner does not own the water flowing in the channel, but has the right to reasonably use the water as it passes across the land. Simply put, the property interest in water is the right to use that water. A California Appellate Court noted that once rights to use water are acquired, they become vested property rights. As such, they cannot be infringed by others, or taken by government action without due process and just compensation (*United States v. State Water Resource Control Board* 1986).

It is established that California law requires a water right for the diversion and use of water. It is also established that the right to water is usufructuary, and a real property interest. Government actions related to the ESA have interfered with CVP water deliveries to federal contractors. However, the appropriative rights to the project water are held by USBR, which in turn contracts with other entities to use the water. The question now becomes whether or not a taking can occur under these circumstances.

The Court of Federal Claims case of *Tulare Lake Basin Water Storage District v. United States* (2001) provides some guidance to this case study. This case was brought against the United States government by state water contractors. The contractors must bring such a suit, as opposed to the farmers who use the water, because of the decision in *Orff v. United States* (2005), which found the end-users were not intended third party beneficiaries to the water contracts USBR held with Westlands, meaning they did not have standing to bring a lawsuit against the federal government. The District, which is a contracting party, does have standing to bring such a suit. Therefore, a takings claim must be brought by Westlands Water District, not the farmers who are ultimately deprived of water.

The contractors in the *Tulare Lake* case claimed their property was taken when the government took steps to protect fish living in the Delta, restricting their contractual rights to use

project water from 1992 to 1994. The elements of the *Tulare Lake* case are very similar to any inverse condemnation suit that Westlands might bring. A distinct difference between the *Tulare Lake* case and a potential Westlands case is the fact that the plaintiffs in *Tulare Lake* were state contractors that receive water from the SWP, while Westlands is a federal contractor that receives water from the CVP. The court considered a number of issues in this case, among them whether the contractors had a real property interest based on their water contracts.

The court determined that the contractors had an identifiable interest in a stipulated volume of water. This is derived from the quantity set forth in the terms of the SWRCB permits for the use of water. The title to water always remains with the State, but the right to the water's use is transferable, first by permit to DRW, and then by contract to the end-users. The contracts between the contractors and DWR confer on the contractors a right to the exclusive use of prescribed quantities of water. The permits held by DWR allow for the diversion of water from the Delta, but DWR must contract with other entities for that water to be put to a beneficial use. Additionally, the court recognized the contractors' rights in the water's use as superior to all competing interest, which they deemed a sufficiently matured property interest. Therefore, the real property interest in water, the right to use the water, was passed along to the contractors. The contractual agreements between USBR and Westlands provide for a similar transfer of use rights, establishing the District's real property interest in the use of the water delivered from the CVP.

After determining that the state contractors had a property interest in the water, the *Tulare Lake* court considered the nature of the alleged taking. The court found a taking per se resulting from a physical occupation of the property had occurred. Several cases were cited in the opinion in which the government acquired plaintiffs' water rights so the government could

use the water for its own purposes. The court concluded that restrictions placed on water diversions and deliveries for the protection of fish species amounted to the same type of taking. The government's actions to protect the fish required the exclusive possession of the contractors' water-use rights. Because the right in water is usufructuary, a restriction on use completely frustrates the water right itself. The court determined the government substituted itself as the beneficiary of the contractual rights to the water by limiting the contractors' ability to use an amount of water to which they would otherwise be entitled.

The court's final consideration was whether the contractors owned the property for which they sought compensation. The government asserted that the loss of water was non-compensable due to background principles of state law which places limits on the title to the property transferred to the contractors by their contracts with DWR. There can be no property right in a use that is not permissible by law. The government argued that the contractors' use of the water that would be received from full contract deliveries would violate the Public Trust Doctrine, the Doctrine of Reasonable Use, and Nuisance Law, due to the harm such diversion and use of water would cause to fish. The court did not agree, and found no issue with the proposed use by the contractors. Therefore, there is a legitimate right to use in the title of the property which was transferred by DWR to the state contractors. Westlands would expect the same determination of a legitimate right to the use of the water, extending to the District ownership of the water rights via the contracts it holds with USBR.

The *Tulare Lake* case was ruled a taking of property by the Court of Federal Claims, but a case brought by Westlands Water District cannot expect the same results. A case of this nature brought by Westlands against the federal government would not be found to be a taking. The reason for this is outlined in the *Tulare Lake* decision, and differentiates that case from a

potential Westlands case. In *Tulare Lake*, the government argued that the contractors were only entitled to water that was made available to DWR for delivery. A clause in the state contracts, Paragraph 18(f), exempts the State and its agents from liability for “any damage, direct or indirect, arising from shortages in the amount of water to be made available for delivery to the Agency under this contract caused by drought...or any other cause beyond its control” (*Tulare Lake* 2001). The government cited *O’Neill v. United States* (1995) in support of this position.

*O’Neill* was a breach of contract case brought in federal court by water users within Westlands Water District to require the federal government to deliver the full contractual amount of the water (*O’Neill v. United States* 1995). The government was found to be insulated from liability because of a clause in the federal contract similar to that of the state contracts. The *Tulare Lake* court noted the clause in the federal contracts was applicable to the federal government, insulating them from liability, but the state contract was applicable only to the State of California and its agents, not the federal government defendants in that case. If a party separate from the State of California limits the water available to DWR for delivery, such as the United States government, that party may be held liable for the shortage. This determination is an important aspect of the *Tulare Lake* case, establishing that the state contractors have fully formed contractual rights, with the exception of the liability clause.

In a case brought by Westlands, the federal government would cite the *O’Neill* decision as a defense against liability. Article 12(b) of the Long-term Renewal Contract between the United States and Westlands Water District states: “If there is a Condition of Shortage because of errors in physical operation of the Project, drought, other physical causes beyond the control of the Contracting Officer or actions taken by the Contracting Officer to meet legal obligations then...no liability shall accrue against the United States or any of its officers, agents, or

employees for any damage, direct or indirect, arising therefrom” (U.S. Bureau of Reclamation 2006). Unlike the scenario of the *Tulare Lake* case, in which the federal government had no protection from liability, the clause in the federal contract would explicitly insulate the federal government from any liability of shortage in a similar claim brought by any federal contractor, including Westlands Water District. This contractual exception limits Westlands’ right to the water in such a situation. The contract does not confer upon the District ownership of the right to the use of water not delivered by USBR during times of shortage that result from restrictions imposed by the United States government. For this reason, the reductions in water deliveries to Westlands Water district due to enforcement of the ESA will not result in a compensable taking of property.

## CHAPTER FIVE

### SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

#### Summary

In the presented case study, the reductions in water deliveries from the Delta due to enforcement of the Endangered Species Act do not constitute a regulatory taking. There exists a real property interest in the use of water, which is transferred from USBR to the federal contractors via the CVP water contracts. However, Article 12(b) of the Long-term Renewal Contract between the United States and Westlands Water District insulates the federal government from liability of shortages. Westlands cannot expect the use of water that the United States government does not make available for delivery, and therefore has no ownership of the usufructuary rights to water not delivered. Under these circumstances, there is no ownership of the property, and therefore cannot be a taking. The District is not entitled to compensation.

#### Conclusions

The Court of Federal Claims will rule in favor of the federal government in a takings claim brought by the Westlands Water District. The requirement for ownership necessary for a taking to occur is not satisfied. Knowing that such a claim would not be upheld by the court, it is

not in the best interest of the District to pursue this route. The same is true for any other federal contractor whose contract with USBR contains a clause that insulates the federal government from liability. However, this may not be the case for state contractors. Just as the court ruled in the *Tulare Lake* case, the DWR contracts insulated the state government from liability, but not the federal government. In this case study, the federal government, by the actions of USBR, USFWS, and NOAA Fisheries, is responsible for the reductions in water deliveries. If no provision in the state contracts insulates the federal government from liability of shortages, cases brought by state contractors may be decided in their favor, based on the findings of the *Tulare Lake* case. For federal contractors like Westlands, alternatives to takings claims must be considered.

### Recommendations

The purpose of a takings investigation is to determine whether or not property owners are entitled to compensation as required by the Fifth Amendment. Compensation could provide some degree of financial relief for farmers affected by the California Water Crisis. But the determination that no taking has occurred nullifies the possibility of financial relief for farmers. However, a different type of relief is more desirable to more than just farmers. Having water available for irrigating crops would bring hundreds of thousands of acres of fallowed ground back into production, provide jobs for thousands of farm workers, and greatly benefit local economies. Restoring normal levels of water deliveries for CVP and SWP users has been the primary goal of agricultural and municipal interests since 2007, but the larger goal is a long-term solution to provide a reliable water supply for all competing demands.

The ESA is one of the strongest environmental laws in the nation because of its inflexibility when protected species are affected. In the case *Tennessee Valley Authority v. Hill* (1978), the Supreme Court stated that the “plain intent of Congress...was to halt and reverse the trend toward species extinction, whatever the cost.” At issue were a seemingly insignificant fish called the snail darter and the construction of the Tellico Dam. Construction of the dam would threaten the continued existence of the species. Even though \$78 million had already been spent on construction, the court ruled that the dam could not be completed. This was the first major challenge to the ESA, and showed the absolute nature of the law.

Currently, the fight over California water is taking place in federal court rooms. Lawsuits have been filed by a variety of interested parties arguing all angles on the issue. The biological opinions that affect CVP and SWP operations were invalidated because of lawsuits brought by environmental groups. Armies of lawyers for environmental, agricultural and municipal interests have fought almost non-stop over water issues for decades. The effects legal action will have on water deliveries are not known. What is certain is there will continue to be lawsuits filed almost every time a new biological opinion, government action, court ruling or any other significant event related to the operations of the CVP and SWP and protected species occurs.

A May 18, 2010, decision by Judge Wanger found that government officials must consider the needs of humans when setting pumping limits and that the science behind NOAA Fisheries’ biological opinion did not prove that pumping from the Delta imperiled salmon. He lifted the restrictions on Delta pumping related to the salmon one week later (Ellis 2010 (A)). On May 27, 2010, he handed down a similar ruling related to the Delta smelt (Ellis 2010 (B)). These decisions will likely be challenged by the government and environmental parties involved in the lawsuits.

One party may prevail over the other in each court decision, but long-term solutions to California's water woes will not come from a judge's order. The staggering number of lawsuits that have been filed over the issue in the past decades proves that no real progress can be made in court. In his keynote address to the Madera County Farm Bureau Water Conference in February 2010, Judge Wanger, speaking as a private citizen, said, "The one place where there can be no solution is in the courts" (Adler 2010). The courts do not make laws, they interpret and apply laws. The inflexible nature of the ESA is reflected in the court rulings, resulting in truly win-lose outcomes. But considering the continuous stream of lawsuits and the uncertainty of their results, no one really wins. Court room victories are usually short lived, and do little to achieve long-term goals. The issue must be solved outside of federal courts.

The biological opinions issued by USFWS and NOAA Fisheries that cover CVP and SWP operations are the real tools that restrict pumping in the Delta, not court orders as some might think. Making changes to the biological opinions and the acceptable operations of the projects could provide a means to acquiring more water for farmers. There are several issues with this option. First, the biological opinions are supposed to be based on the best available scientific and commercial data. These agency decisions cannot be manipulated to benefit one party over another. Priority must be given to the protection of the species, and the biological opinions must support that position. Along those same lines, when agency decisions are arbitrary, capricious, or contrary to law, or if it is suspected that they are, it is likely a lawsuit will be filed to have the decision invalidated. This is what happened to the Delta smelt biological opinion in 2007. Another reason why reliance on a favorable biological opinion is not an effective strategy is because these decisions must be reexamined as conditions change. The conditions that affect the current situation will almost certainly change, as they have changed

before. Unknown future conditions and how various factors may affect species make for uncertain predictions about the future water supply. If long-term reliability is the goal, this is not the right approach.

There is one possible approach given the current ESA. In response to the *Tennessee Valley Authority* ruling, Congress amended the ESA. Congress created the Endangered Species Committee, also known as the “God Squad.” The committee has the authority to grant exemptions to Section Seven when “irresolvable conflicts” between species and human activity arise (Weston 1993). The God Squad is chaired by the Secretary of the Interior, and includes as members the Secretaries of Agriculture and the Army, the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, the Chairman of the Council of Economic Advisors, and one representative from the affected state, who is appointed by the President (*16 U.S.C. §1536(e)(3)*). An exemption can be granted with the approval of five of the seven members of the committee. The committee must determine, among other criteria, that the action being considered for exemption is of regional or national significance, the benefits of the action clearly outweigh the benefits of alternative courses of action, and it is in the public interest (*16 U.S.C. §1536(h)(1)(A)*).

An exemption is the only recourse allowed by the ESA that may provide relief to the California Water Crisis. The exemption would allow CVP and SWP to operate the Delta pumps regardless of the affects to the Delta smelt or salmon or any other protected species, even if such actions result in the extinction of the species. It should be noted that an exemption is required for each protected species covered by USFWS and NOAA Fisheries biological opinions related to CVP and SWP operations.

A petition was presented to Governor Schwarzenegger in 2009 calling on him to request that federal officials convene the God Squad (Richardson 2009). This will likely not happen. Since it was added to the ESA, the God Squad has been called only a handful of times. One can argue that the conflicts surrounding the California Water Crisis between humans and protected species are exactly what the God Squad provision of the ESA was designed to address, but the political consequences associated with convening the committee are too great for state and federal officials. It is unlikely that elected or appointed officials will risk the backlash of environmental interests to even call the committee to meet. Even if the God Squad is convened, it is still very unlikely that an exemption will be granted. Additionally, problems may arise in the future concerning other species, and this process would have to be undertaken again. This can hardly be considered a viable option.

Congress does have the power to pass laws that would provide farmers with irrigation water. Congressman Devin Nunes, a Republican who represents California's 21<sup>st</sup> Congressional District located in the San Joaquin Valley, has introduced legislation to enact a temporary waiver of the ESA as it relates to the pumping restrictions (Nunes 2009). This type of action would be similar to a Congressional action taken in 2003 to ensure water availability to the city of Albuquerque, New Mexico. Under this course of action, Congress would specifically identify an action as exempt from certain provisions of the ESA, in much the same way as the God Squad would. An act of Congress eventually allowed for the completion of the Tellico Dam when the God Squad did not grant an exemption. But Nunes' bill, the Turn on the Pumps Act, has been met with strong opposition from environmental interests and members of the Democratic Party, which currently controls Congress. Despite his efforts, Congressman Nunes does not have the support to pass his bill given the current political climate.

Across the aisle, U.S. Senator Diane Feinstein, a Democrat from California, considered adding an amendment to an unrelated bill that would mandate water deliveries of forty percent to project water users (Doyle and Schultz 2010). She abandoned that effort when the Department of the Interior updated the annual water allocation. If she had pursued her efforts, Senator Feinstein would have been faced with a difficult battle with members of her own party. This shows the contentious nature of water and the environment.

Congressman Nunes' and Senator Feinstein's bills would provide immediate relief to farmers and other water users. However, the relief would be short-term. The issue would likely have to be revisited in the near future. Neither bill guarantees long-term reliability of the water supply. Furthermore, acts of Congress such as these would do little to address the larger problem: the inflexibility of the ESA. This problem extends far beyond the California Water Crisis, and has affected individuals, businesses, governments, and economic interests since the passage of the ESA. Reform of the ESA as a whole would be the only way to provide long-term solutions to human-species conflicts. The environmental community supports the strict requirements of the ESA, but often human beings and their livelihoods are harmed because the ESA is only concerned about species preservation. There is no consideration for the needs of humans or economic impacts under the current ESA. Provisions that allow, or require, USFWS and NOAA Fisheries to consider the impacts on humans, communities, and the economy when making decisions concerning protected species would strive to lessen the impacts the ESA has on those interests.

Additionally, because the ESA necessarily requires restrictions of land use to protect species and their habitat, property owners view them as liabilities rather than assets. Finding a protected species on one's land is a major concern for property owners, causing them to take

steps to discourage and exclude species from their land. Discovery of a protected species is viewed as a penalty, and property owners have a greater incentive to eliminate potential habitat for species. This brings property interests and species preservation into direct conflict. Providing incentives for property owners to promote species habitat, and compensating affected property owners would ensure protection from economic damages associated with use restrictions and enhance the critical habitat necessary for species preservation and recovery.

Adjusting the incentives for property owners to preserve rather than eliminate species habitat and requiring the consideration of human needs are two much needed reforms to the ESA. But ESA reform, like many other contentious issues, has the public divided, politicians and special interests fighting, and no foreseeable compromise. Reforms like those suggested would play a part in improving the perception some have of the ESA. Much work is needed from the environmental, business, scientific, and political players to achieve this goal. However, reforming the ESA is necessary to resolve the present conflict between people and species. ESA reform is necessary to prevent future disasters like the California Water Crisis.

The marvel of California's water system has been its ability to move large quantities of water from areas of abundance to areas of scarcity. This has benefitted the northern region by regulating river flows to prevent flooding, as well as the southern region by providing a vital resource, which has allowed the population and agricultural output of southern and central California to soar. The CVP and SWP were constructed not only to meet the demand for water at the time, but to ensure a reliable water supply for California's future demand. However, there have not been any significant improvements to California's water storage and conveyance infrastructure in decades, while the population has increased substantially. When the last major state-built water storage projects were completed in the late 1970's, California's population was

roughly 22 million. The population today is about 38 million, and that number is expected to increase to 46 million by the year 2030 (Campbell 2008). This will continue to strain an already tight water supply. It is important to seek out methods to conserve water and use what is available more efficiently, but making more water available for residential, agricultural, and environmental uses is equally important. Investments in infrastructure need to be made to provide for current and future needs.

A special session of the California Legislature was called in the fall of 2009 by Governor Schwarzenegger. The purpose of this session was to address the issues surrounding California's water supply and finding long-term solutions to those problems. The *2009 Comprehensive Water Package* was approved by the Legislature and signed by the Governor in November. Consisting of four policy bills and a bond measure, the package is intended to ensure a reliable water supply for future generations and restore the Delta and other ecologically sensitive areas (Department of Water Resources 2009). The first bill concerns governance in the Delta and establishes the Delta Stewardship Council. This group is to develop a Delta Plan focused on the co-equal goals of Delta restoration and water supply reliability. The bill also contains requirements for other governmental entities that affect the Delta, and provides for the furtherance of the co-equal goals. Lastly, this bill appropriates funding for the Two-Gates Fish Protection Demonstration Program, which is a project intended to provide protection for sensitive species and manage the water supply. The second bill requires local agencies to monitor the elevation of groundwater basins in an effort to better manage those resources. The third bill sets a statewide water conservation goal of reducing per capita water consumption twenty percent by 2020. This bill also requires the development of agricultural water management plans and reporting on water efficiency measures. The fourth bill requires reporting

of water diversions and use in the Delta. This bill also appropriates \$546 million for the development of and improvements to Delta management plans and infrastructure.

The final element of the *2009 Comprehensive Water Package* is a bond measure that will be on the November, 2010, ballot for voter approval. The Safe, Clean, and Reliable Drinking Water Supply Act of 2010 is an \$11.14 billion general obligation bond proposal. It would provide funding for infrastructure, projects, and programs to address California's ecosystem and water supply issues. The bond consists of seven categories: drought relief, water supply reliability, Delta sustainability, statewide water system operational improvement, conservation and watershed protection, groundwater protection and water quality, and water recycling and water conservation. These areas in conjunction are intended to provide improvements to California's water system, develop surface and groundwater storage to increase the available water supply, implement conservation and recycling programs, and restore sensitive ecosystems. The combination of the policy bills and the bond measure make the *2009 Comprehensive Water Package* the best option for achieving a long-term solution to provide a reliable water supply for all of California.

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