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## Water Law - The Pump Don't Work Because the Bureau Took the Handle: The United States Bureau of Reclamation's Discretion to Reduce Water Deliveries to Comply with the Endangered Species Act

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## CASE NOTE

### **WATER LAW – The Pump Don't Work Because the Bureau Took the Handle: The United States Bureau of Reclamation's Discretion to Reduce Water Deliveries to Comply With the Endangered Species Act. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).**

#### INTRODUCTION

The Rio Grande silvery minnow, swimming uneasily at the brink of extinction, has been given a fighting chance at survival by a United States Court of Appeals for the Tenth Circuit holding that the Bureau of Reclamation (Bureau) does indeed have the discretion to reduce contract water deliveries to irrigators and municipalities in order to provide enough water to ensure the survival of the endangered silvery minnow.<sup>1</sup> This landmark decision is based on the simple fact that fish need water to survive, yet the extensive and multifaceted litigation leading up to it illustrates the complex issues that come into play when so many water users compete for the increasingly scarce commodity of water in the West. Traditional water users are being called upon to share this invaluable public resource not only with recreational users, but also with the fish and wildlife that need water and wetlands to survive.<sup>2</sup> The inevitable issues that arise are further complicated when the presence of an endangered species is involved. The protections granted to endangered species by the pioneering Endangered Species Act (ESA) are a reflection of Congress' observation that endangered species "are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask."<sup>3</sup>

Under the auspices of the ESA, federal agencies are prohibited from taking certain actions that may jeopardize an endangered species.<sup>4</sup> The Bureau, as a federal agency, operates water projects across the country, its "dams regulat[ing] the flow of water in virtually every major river in the West."<sup>5</sup> The implications of the ESA on the Bureau's water operations are magnified by the fact that many species that rely on habitat affected by these water projects are already listed as threatened or endangered, or are proposed for listing.<sup>6</sup> The fact that endangered species are disappearing at an alarming rate, coupled with the current drought cycle in the West, means that courts will continue to be called upon to interpret when and if the Bureau is bound

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1. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003).
  2. See DAVID GETCHES, *WATER LAW IN A NUTSHELL* 101-02 (1984).
  3. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 178 (1978).
  4. See 16 U.S.C. § 1536(a)(1), (2) (2003).
  5. Brief of Amicus Curiae Trout Unlimited at 5-6, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) (hereinafter referred to as "Brief of Amicus Curiae Trout Unlimited").
  6. *Id.* at 1.

to comply with the ESA.<sup>7</sup> The Tenth Circuit Court's holding not only "decide[s] the fate of the silvery minnow," it will affect all species that rely on habitats downstream from Bureau operations.<sup>8</sup>

Conservation groups brought suit when the Bureau's water operations on the Rio Grande were found to jeopardize the continued existence of the endangered Rio Grande silvery minnow.<sup>9</sup> After a series of suits involving the ESA critical habitat designation process, conservation groups finally sought to compel the Bureau to modify its water operations to make more water available for this endangered species.<sup>10</sup> Traditional water users and the Bureau argued that existing water delivery contracts precluded the use of already appropriated water for the sake of the minnow.<sup>11</sup>

In an initial order, the United States District Court for the District of New Mexico determined that while the Bureau did have the authority to reduce water deliveries, it was unnecessary for them to do so in light of the Bureau's alternative measures to protect the minnow.<sup>12</sup> A dry summer followed the first order, however, and it became apparent that these alternatives were inadequate to ensure the minnow's survival.<sup>13</sup> When the Bureau failed to use its newly recognized authority to reduce water deliveries, conservation groups were forced to seek an emergency injunction.<sup>14</sup> In a second order, the District Court specifically directed the Bureau to reduce water deliveries if necessary to protect the endangered species and its habitat.<sup>15</sup>

On appeal, the Bureau and traditional water users insisted that the language of the water delivery contracts prohibited the Bureau from modifying the deliveries to make water available for the minnow.<sup>16</sup> They reasoned that since the requirements of the ESA only apply to discretionary federal actions, and the contracts preclude such discretion, the Bureau was powerless to reallocate the already committed water.<sup>17</sup> Conservation groups responded that the language of the contracts and the enabling statutes does in

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7. See Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 232-33 (1998) ("While the 'natural' . . . rate of extinction is around three or four species per year, human activity may be wiping out that many *per hour*.").

8. Brief of Amicus Curiae Trout Unlimited at 23-24.

9. See *Rio Grande Silvery Minnow*, 333 F.3d at 1115-18 (summarizing history of the litigation leading up to the appeal).

10. See *id.* at 1117-18.

11. See *id.* at 1127, 1133.

12. See *id.* at 1118.

13. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (memorandum opinion and findings of fact and conclusions of law).

14. See *id.*

15. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (order and partial final judgment).

16. See *Rio Grande Silvery Minnow*, 333 F.3d at 1127, 1131, 1133.

17. See *id.* at 1133

fact authorize the Bureau to reallocate water if necessary to meet its obligations under the ESA.<sup>18</sup> The Tenth Circuit, armed with the national policy of preserving endangered species, affirmed the District Court's ruling that the contracts clearly give the Bureau the authority to reduce water deliveries in order to comply with the ESA.<sup>19</sup>

This case note will examine the obligations created by the ESA and the trend of courts to broadly interpret enabling legislation, water delivery contract terms, and the ESA itself in order to trigger such obligations. The case note will begin with cursory overviews of the prior appropriation doctrine, Bureau water projects, and the ESA. An examination of the case law backdrop against which the instant case was decided will follow, after which the relevant water projects and contracts at issue will be discussed. Then, after an analysis of the instant case, the case note will argue that the case was correctly decided, consider the practical ramifications of the holding, and propose that the decision respects and reinforces both the water laws of the western states and the doctrine of prior appropriation.

## BACKGROUND

### *Prior Appropriation*

It is said early water "law" in the arid and semi-arid West, which developed in the nineteenth-century mining camps, was often enforced at the end of a gun.<sup>20</sup> Though water law is now mandated by legislatures and courts instead of gunslingers, passions can run just as high as they did over a century ago due to the polarizing force of water issues.<sup>21</sup> The early law of the mining camps has evolved into the modern day prior appropriation doc-

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18. See Brief for Appellees at 5, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) (hereinafter referred to as "Brief for Appellees").

19. See *Rio Grande Silvery Minnow*, 333 F.3d at 1138.

20. See Sarah B. Van de Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15,15-16 (2000). The authors noted:

Historically, western water "law" often was characterized by conflict, sometimes violent conflict at that: Perhaps to get into the mood of the waterways one needs to have seen old Amos Judson squat on the headgate with his gun, guarding his water-right toward the end of a dry summer. Amos owned the half of Tule Creek and the other half pertained to the neighboring Greenfields ranch. Years of a "short water crop," that is, when too little snow fell on the high pine ridges, or, falling, melted too early, Amos held that it took all the water that came down to make his half, and maintained it with a Winchester and deadly aim. Jesus Montana, first proprietor of Greenfields . . . contesting the right with him, walked into five of Judson's bullets and his eternal possessions on the same occasion.

*Id.* (citation omitted).

21. *Id.* at 16.

trine, to which all western states subscribe.<sup>22</sup> Historically, the primary objective of prior appropriation was to encourage settlement and economic development of the West by promoting investment in water resource projects.<sup>23</sup> Investment was encouraged because prior appropriation “gave greater security in supply to early users.”<sup>24</sup> The overriding principle of prior appropriation is “first in time is first in right,” meaning early, or “senior,” water users are entitled to have their rights satisfied before any later, or “junior,” water users are allowed to divert any water.<sup>25</sup> Thus, in times of scarcity, a senior water right becomes extremely valuable.<sup>26</sup>

Another important aspect of prior appropriation is the concept of “beneficial use,” which requires that water diverted must be put to beneficial use as defined by each state’s water codes.<sup>27</sup> The requirement of beneficial use also encouraged investment in water projects because it allowed early courts to restrict the worst forms of waste and was believed to “reduce excessive claims so that late comers would have a supply” of water.<sup>28</sup> Beneficial use has always included such traditional uses as irrigation, manufacturing, hydropower, and municipal use, but many states have expanded the list to include instream flows for recreation, fish, and wildlife benefits.<sup>29</sup>

Often described as “the basis, the measure and the limit” of any water right, beneficial use is borne out of the fact that a water right is only the right to use the water that is actually owned by the people of the state; it is not a right to the water itself.<sup>30</sup> Since a water right is based on beneficial use, a water user who fails to exercise a water right for a statutorily deter-

22. See GETCHES, *supra* note 2, at 78. Nine western states subscribe strictly to prior appropriation, while ten others have “hybrid” systems that combine elements of prior appropriation with the riparian doctrine, though prior appropriation elements tend to dominate these “hybrids.” *Id.* at 192.

23. CHARLES J. MEYERS, NATIONAL WATER COMMISSION, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM iv (1971).

24. *Id.*

25. See GETCHES, *supra* note 2, at 80, 104-05.

26. See *id.* at 105 (“[J]uniors must abate their use until everyone senior to them has been served.”).

27. See GETCHES, *supra* note 2, at 80.

28. MEYERS, *supra* note 23, at iv.

29. See, e.g., IDAHO CODE § 42-1501 (1990) (legal authorization for instream flows); ARIZ. REV. STAT. §45-151 (1994) (recreation, wildlife, fish). See also Office of the Attorney General of the State of New Mexico, Opinion No. 98-01, 1998 N.M. AG LEXIS 2 (March 27, 1998), for the following definition of “instream flow”:

The concept of leaving water in a streambed where it is ‘used’ by way of providing aquatic and riparian environments for fish and wildlife and providing for recreational and aesthetic uses. Of necessity, instream use involves free-flowing water in a natural channel rather than diversion of water out of the streambed or impoundment of water behind a dam.

*Id.* at 1.

30. GIVENS PURSLEY LLP, HANDBOOK ON IDAHO WATER LAW 11 (2002).

mined number of years simply loses that right (commonly referred to as the "use it or lose it" principle).<sup>31</sup> Because beneficial use is the measure and the limit of any water right, it follows that the prior appropriation doctrine prohibits the wasting of water, since wasted water, by definition, is water diverted but not put to beneficial use.<sup>32</sup> Theoretically, "water that is legally wasted . . . is not a legitimate part of the water right and can be deleted from the entitlement upon challenge."<sup>33</sup>

### *Federal Water Projects and Contracts*

The Bureau of Reclamation was created by the Reclamation Act of 1902, which was enacted "to encourage the creation of small family farms in the American West."<sup>34</sup> Specifically, the three primary goals of the Reclamation Act were to "create family-sized farms in areas irrigated by federal projects . . . , to secure the wide distribution of the substantial subsidy involved in reclamation projects and [to] limit private speculative gains resulting from the existence of such projects."<sup>35</sup> In furtherance of these goals, the Bureau was to undertake water storage and delivery projects to make irrigation water available for the small family farms west of the 100th Meridian.<sup>36</sup> A century later, these lofty goals have resulted in the operation of 180 water projects in the western states, and a storage capacity of 245 million acre-feet of water in 348 reservoirs, allowing the Bureau to provide water to over 31 million people.<sup>37</sup>

The Bureau stores, releases, diverts, and delivers project water primarily for irrigation use.<sup>38</sup> Traditional water users can access these "publicly-funded facilities capable of capturing and delivering quantities of water greater than would be possible by the users themselves" through contracts between irrigation districts and the federal government.<sup>39</sup> An irrigation dis-

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31. GETCHES, *supra* note 2, at 179.

32. See GETCHES, *supra* note 2, at 81.

33. Janet C. Newman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 928 (1998). Newman observes that though "[e]very western state makes 'beneficial use without waste' the limit of a water right," the nebulous definitions of that concept in state statutes usually require court interpretation. *Id.* at 925. According to Newman's analysis, courts have traditionally been reluctant "to find a particular use to be legally wasteful." *Id.* at 928.

34. Brief of Amicus Curiae Trout Unlimited at 2 (citing Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 366 (1996)).

35. Benson, *supra* note 34, at 365-66 (citing *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 802-03 (9th Cir. 1990)).

36. Brief of Amicus Curiae Trout Unlimited at 2.

37. *Id.* at 3-4 (citations omitted).

38. Benson, *supra* note 34, at 366. Benson defines "project water" as water "diverted, stored, withdrawn, or otherwise taken from its normal course by a reclamation project." *Id.* at 370.

39. Brief of Amicus Curiae Trout Unlimited at 9 (emphasizing that "[b]y virtue of this bargain struck with the U.S., . . . users accept an on-going federal involvement and the atten-

trict acts as an intermediary between the federal government and the ultimate user.<sup>40</sup> After an irrigation district obtains project water pursuant to a contract with the federal government, it then delivers that water to its patrons.<sup>41</sup>

The Bureau enters into two different kinds of contracts with the irrigation districts: the “repayment” contract and the “water service” contract.<sup>42</sup> The repayment contract provides irrigation districts with the right to a quantity of water in exchange for reimbursing the federal government for a percentage of reservoir capital, operation, and maintenance costs.<sup>43</sup> The water service contract requires the irrigation district to pay an agreed rate for annual water deliveries.<sup>44</sup> To differentiate between the two, a repayment contract “is analogous to a mortgage, while the water service contract is more like a lease.”<sup>45</sup> As a result of these many contracts and water projects, “no other single organization or agency influences western water management to the extent that the Bureau does.”<sup>46</sup>

### *Endangered Species Act*

The procedural and substantive provisions of the ESA were enacted in 1973 to fulfill the intent of Congress to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>47</sup> Indeed, the stated purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend.<sup>48</sup> The protections of the ESA are not triggered, however, until a species becomes formally “listed” by the Fish and Wildlife Service (Fish and Wildlife).<sup>49</sup> The ESA defines an “endangered” species as one that is “in danger of extinction throughout all or a significant

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dant legal requirements”). Because eighty-five percent of project water is used for irrigation, this note will focus on irrigation districts, though other water user organizations may enter into similar contracts with the Bureau. See Benson, *supra* note 34, at 371.

40. Benson, *supra* note 34, at 366 n.15.

41. *Id.*

42. *Id.* at 371.

43. *Reclamation Seeks Public Input on Water Contracts* (explaining repayment contracts generally), at <http://www.usbr.gov/pn/news/02new/luckycontract.html> (last visited Nov. 23, 2003). See also 43 U.S.C. § 485h(d) (2003).

44. Benson, *supra* note 34, at 371 (noting that the repayment contract is more common than the water service contract). See also 43 U.S.C. § 485h(e) (2003).

45. Benson, *supra* note 34, at 371.

46. Brief of Amicus Curiae Trout Unlimited at 1.

47. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978).

48. 16 U.S.C. § 1531(b) (2003).

49. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 451 (5th ed. 2002). The authors note the following “annoying quirk” of the ESA: Fish and Wildlife (under the Secretary of the Interior) has jurisdiction over terrestrial, freshwater, and some marine species, while the National Marine Fisheries Service (under the Secretary of Commerce) has jurisdiction over most marine species and anadromous fish. *Id.* at 435. Though the ESA refers to the “Secretary,” for the sake of clarity, only references to Fish and Wildlife will be made in this note.

portion of its range.”<sup>50</sup> To determine if the species is endangered, Fish and Wildlife considers factors such as “the present or threatened destruction [or] modification . . . of its habitat” and “other natural or manmade factors affecting its continued existence.”<sup>51</sup> Once it has found a species is endangered, Fish and Wildlife is authorized to formally list the species.<sup>52</sup>

Concurrent with the determination that a species is endangered, Fish and Wildlife is directed to designate any habitat of the species deemed “critical.”<sup>53</sup> “Critical habitat” is defined by the ESA as areas occupied by the species containing “physical or biological features . . . essential to the conservation of the species.”<sup>54</sup> Once a species has been listed, whether or not accompanied by a critical habitat designation, the consultation requirements of Section 7 are activated in certain situations.<sup>55</sup>

Regulations indicate that Section 7 of the ESA applies to “all actions in which there is discretionary Federal involvement or control” and affirmatively requires federal agencies to conserve endangered or threatened species.<sup>56</sup> Under Section 7, the presence of a listed species triggers a consultation procedure in which the federal action agency must consult with Fish and Wildlife to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of the species” or “result in the destruction or adverse modification” of designated critical habitat.<sup>57</sup> The agencies are further required to rely on only the “best scientific . . . data available” when making the jeopardy determination.<sup>58</sup> After this information is reviewed, Fish and Wildlife issues a Biological Opinion, which contains its determination as to whether or not the proposed action may cause jeopardy.<sup>59</sup> If the Biological Opinion states that jeopardy may result, it must also include “reasonable and prudent” alternatives available to the action agency that will not jeopardize the species.<sup>60</sup> Reasonable and Prudent Alternatives are defined as “alternative actions identified during

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50. 16 U.S.C. § 1532(6) (2003). Threatened species are defined as “likely to become endangered within the foreseeable future.” 16 U.S.C. § 1532(20) (2003). This note will focus solely on “endangered” species.

51. 16 U.S.C. § 1533(a)(1)(A), (E) (2003).

52. See 16 U.S.C. § 1533(c)(1) (2003).

53. 16 U.S.C. § 1533(a)(3)(A) (2003). The critical habitat designation is to be made at the same time as the listing “to the maximum extent prudent and determinable.” 16 U.S.C. § 1533(a)(3) (2003).

54. 16 U.S.C. § 1532(5)(A)(i) (2003). The ESA also includes areas not occupied by the species that are found to be “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii) (2003).

55. See 16 U.S.C. § 1536 (a)(2) (2003).

56. 50 C.F.R. § 402.03 (2003); 16 U.S.C. § 1536(a)(1) (2003).

57. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320, 2002 U.S. Dist. LEXIS 9246, at \*8-9 (D.N.M. April 19, 2002); 16 U.S.C. § 1536(a)(2) (2002).

58. *Id.* at \*9 (summarizing 16 U.S.C. § 1536(a)(2) (2002)).

59. *Id.* (summarizing 16 U.S.C. § 1536(b)(3)(A) (2003)).

60. *Id.* (summarizing 50 C.F.R. § 402.14(h)(3) (2003)).



consultation' that may be implemented in a manner . . . 'consistent with the scope of the Federal agency's legal authority' and that are 'economically and technologically feasible.'"<sup>61</sup>

Additionally, if Fish and Wildlife concludes that the proposed agency action or the Reasonable and Prudent Alternatives will result in the "incidental take" of the species, Fish and Wildlife must indicate measures to minimize the impact on the species.<sup>62</sup> Fish and Wildlife must also issue an Incidental Take Statement, which specifies the conditions under which such a taking may occur without violating the ESA.<sup>63</sup> This Incidental Take Statement immunizes federal agencies from potential prosecution for the "taking" of an endangered species.<sup>64</sup> "Take" means, among other things, "to harm," which is further defined as "significant habitat modification or degradation where it actually kills or injures wildlife."<sup>65</sup> Finally, if the agency action changes and causes an effect to the listed species or critical habitat that was not addressed in the Biological Opinion, or if the amount of "incidental taking" exceeds that specified in the Incidental Take Statement, the action agency must reinitiate consultation "where discretionary Federal involvement or control over the action has been retained or is authorized by law."<sup>66</sup>

#### *Prior Cases Involving the ESA and Federal Water Projects*

Any analysis of federal water projects and their impacts on endangered species must begin with arguably the most famous (some would say infamous) ESA case, *Tennessee Valley Authority v. Hill*, decided almost exactly one quarter of a century before the instant case.<sup>67</sup> The Tennessee Valley Authority (TVA) began constructing the Tellico Dam and Reservoir on the Little Tennessee River in 1967, a full six years before the ESA was passed.<sup>68</sup> The impoundment of water would create a reservoir over 30 miles long and would destroy over 16,000 acres of productive farmland.<sup>69</sup> Conservation groups and concerned citizens brought suit and won an injunction that remained in effect until 1973.<sup>70</sup> A few months prior to the decision dis-

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61. Brief for Appellants at 9-10, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003) (hereinafter referred to as "Brief for Appellants") (summarizing 50 C.F.R. § 402.02 (2003)).

62. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246, at \*9 (citing 16 U.S.C. § 1536(b)(4) (2002)).

63. *Id.*

64. *Id.* (summarizing 16 U.S.C. § 1536(o)(2) (2002)).

65. 16 U.S.C. § 1532(19) (2003); 50 C.F.R. § 17.3 (2003).

66. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246, at \*45 (citing 50 C.F.R. § 402.16 (2002)).

67. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).

68. *Tennessee Valley Authority*, 437 U.S. at 157.

69. *Id.*

solving the injunction, a three-inch perch called a snail darter was discovered in the Little Tennessee River.<sup>71</sup> Four months later, the ESA was enacted.<sup>72</sup> The Secretary listed the snail darter as an endangered species in 1975 and designated part of the Little Tennessee as its critical habitat in 1976.<sup>73</sup>

Meanwhile, Congress consistently appropriated money for the Tellico project, even after holding hearings over the snail darter.<sup>74</sup> Conservation groups brought suit seeking to enjoin completion of the dam and impoundment of the reservoir, claiming that this would violate the ESA by causing the extinction of the snail darter.<sup>75</sup> The United States District Court for the Eastern District of Tennessee agreed that the closure of the dam would likely result in the “complete destruction of the snail darter’s critical habitat” and would thus jeopardize the continued existence of the endangered fish.<sup>76</sup> Despite this finding, however, the District Court found even more relevant the facts that the ESA was enacted several years after construction of the dam had begun, 78 million dollars had already been spent on the dam, and Congress, fully aware of the snail darter, had continued to appropriate money for Tellico project.<sup>77</sup> Thus, the District Court denied relief to the plaintiffs and dismissed the complaint.<sup>78</sup> The United States Court of Appeals for the Sixth Circuit reversed and remanded with instructions to issue a permanent injunction to “remain in effect until Congress . . . exempts Tellico from compliance with the [ESA]” or the snail darter is removed from the list of endangered

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70. *Id.* at 158. The district court dissolved the injunction in late 1973 when TVA’s Environmental Impact Statement (EIS) was finally deemed adequate. *See Environmental Defense Fund v. TVA*, 371 F. Supp. 1004 (E.D. Tenn. 1973). Required by the National Environmental Policy Act (NEPA), an EIS is a lengthy document detailing the impacts the actions will have on the surrounding communities and ecosystems. *See generally* 42 U.S.C. § 4332 (2003).

71. *Tennessee Valley Authority*, 437 U.S. at 158. *See Zygmunt Plater, Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance*, 32 ENVTL. L. 1 (2002). Plater tells the following story:

In October 1974, second-year law student Hank Hill (yes, as in Hill) . . . walked into his environmental law prof’s office and told how a biology professor . . . had just found a small, hitherto-unknown perch, an endangered species, . . . smack in the middle of the Tellico Project; a fish that apparently existed only here because it had been extirpated in every other big river habitat in the Southeast by dams. ‘Do you think that is enough of a topic for a ten-page term paper?’

*Id.* at 11-12.

72. *Tennessee Valley Authority*, 437 U.S. at 159.

73. *Id.* at 161-62.

74. *Id.* at 163-64. At these hearings, TVA stated its position that the ESA did not prohibit an authorized, funded project that was fifty percent finished before the ESA was passed, and seventy to eighty percent complete when the snail darter was listed. *See id.* at 165.

75. *Id.* at 164.

76. *Id.* at 165-66.

77. *Id.* at 166.

78. *Id.*

species.<sup>79</sup> The Sixth Circuit Court rejected TVA's argument that the word "action" was not intended by Congress to encompass ongoing projects, and held that TVA had violated Section 7 of the ESA by failing to ensure that its actions did not jeopardize the snail darter.<sup>80</sup>

On appeal, the United States Supreme Court resoundingly affirmed the Sixth Circuit Court's ruling, stating:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in [Section] 7 of the [ESA]. Its very words affirmatively command all federal agencies 'to insure that [their] actions . . . do not *jeopardize* the continued existence' of an endangered species or '*result in the destruction or modification of habitat of such species*'. . . . This language admits of no exception.<sup>81</sup>

The Court found the legislative history of the ESA was "replete with expressions of concern over the risk that might lie in the loss of *any* endangered species" which resulted in the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."<sup>82</sup> The Court emphasized the all-encompassing nature of the express directives of the ESA with the following statement: "Lest there be any ambiguity . . . , the Act specifically defined 'conserve' as meaning 'to use . . . *all methods and procedures which are necessary* to bring *any endangered species* . . . to the point at which the measures provided pursuant to this chapter are no longer necessary."<sup>83</sup> Indeed, the plain meaning of those words of the ESA betrays the plain intent of Congress: "To halt and reverse the trend toward species extinction, whatever the cost."<sup>84</sup> The Court invoked the importance of the separation of powers by stressing the judiciary's role to interpret laws as written and to enforce the plain meaning of the ESA.<sup>85</sup> The Court held that,

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79. Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1075 (6th Cir. 1977).

80. See *id.* at 1070-73. Following the issuance of the permanent injunction, Congress again appropriated funds for completion of the Tellico project, with the House Appropriation Committee advising TVA to relocate the snail darter so as to permit the project to continue. *Tennessee Valley Authority*, 437 U.S. at 170.

81. *Tennessee Valley Authority*, 437 U.S. at 173 (citations omitted). In one of its opening comments, the Court shows its awareness of the potential irony of the situation: "It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million." *Id.* at 172. Despite this, the Court still concludes that "the explicit provisions of the [ESA] require precisely that result." *Id.* at 173.

82. *Id.* at 177, 180.

83. *Id.* at 180 (citing 16 U.S.C. § 1532 (2) (1978) (current version at 16 U.S.C. § 1532 (3) (2003)).

84. *Id.* at 184.

85. *Id.* at 194.

notwithstanding the near completion of Tellico dam and the annual appropriations by Congress, the ESA prohibited the TVA from impounding the river behind a multi-million dollar dam at the expense of the three-inch snail darter.<sup>86</sup>

Influenced by the press' portrayal of this case as "the story of a trivial little fish discovered at the last moment by cynical environmental extremists who misused the fish and the law to block a huge hydroelectric dam," the public and the industry lobby demanded change.<sup>87</sup> Congress responded swiftly. The 1978 amendments to the ESA created the Endangered Species Committee, popularly styled the "God Squad," and gave it the authority to exempt a federal project from the ESA where no Reasonable and Prudent Alternative exists, where the project is of regional or national significance, or where the economic benefits of that project outweighed the benefits of protecting the endangered species.<sup>88</sup> If the exemption is to apply, however, the federal agency must use "reasonable mitigation and enhancement measures" to minimize the adverse effects of the project.<sup>89</sup> Congress, of course, expected the God Squad to immediately exempt the Tellico dam.<sup>90</sup> However, after the "most searching economic analysis ever given to a federal water project," the tribunal unanimously refused to grant the exemption because completing Tellico dam, even though it was already ninety-five percent constructed, simply did not make economic sense.<sup>91</sup>

Eventually, Congress circumnavigated the God Squad's decision by attaching a rider to the Energy and Water Development Appropriations Act of 1979 that exempted the Tellico dam from the ESA.<sup>92</sup> Though effectively overturned by this site-specific legislation, the decision has not lost its precedential value. The Court has spoken clearly: using "*all methods and procedures which are necessary*," endangered species are to be protected, "whatever the cost."<sup>93</sup> The three United States Court of Appeals for the

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86. See *id.* at 195.

87. Plater, *supra* note 71, at 4.

88. Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 485 (1999) (citing 16 U.S.C. §1536(e) (1994)). The God Squad consists of the Secretaries of the Interior, Agriculture, and Army, the Chairman of the Council of Economic Advisors, the Administrator of the EPA, the Administrator of the National Oceanic and Atmospheric Administration, and one individual from the affected state. See 16 U.S.C. §1536(e)(3) (2003). It is nicknamed the "God Squad" because of its power to decide whether a species will survive or will be extirpated. See GIVENS PURSLEY LLP, *supra* note 30, at 185 n.641.

89. See GETCHES, *supra* note 2, at 374.

90. Petersen, *supra* note 88, at 485-86.

91. Plater, *supra* note 71, at 8-9.

92. Petersen, *supra* note 88, at 486 (citing Energy and Water Development Appropriations Act of 1979, Pub. L. No. 96-69, 93 Stat. 437 (1979)).

93. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978) (citations omitted). The Court observed that the language of the ESA itself "reveals a conscious decision by

Ninth Circuit cases anchoring the instant case echo this mandate by expansively interpreting water contracts to afford the highest protection to endangered species.

In *O'Neill v. United States*, the Ninth Circuit held the terms of the water delivery contract did not obligate the federal government to deliver the full contractual amount of water if such a delivery would not be consistent with the ESA.<sup>94</sup> The terms of the 1963 contract at issue in *O'Neill* contained a Water Shortage Clause and called for the Bureau to deliver 900,000 acre-feet of water to the Westlands Water District as part of the Central Valley Project (CVP) in California.<sup>95</sup> In 1990, the Sacramento River winter-run Chinook salmon was listed under the ESA, and the subsequent Biological Opinion concluded that the Bureau's water operations were likely to jeopardize the salmon.<sup>96</sup> In 1992, the Central Valley Project Improvement Act was enacted to achieve a balance between competing water users and directed the Secretary to allocate 800,000 acre-feet of CVP water for the benefit of fish and wildlife, and to help meet obligations under the ESA.<sup>97</sup> When the Bureau notified irrigators in 1993 that they were only to receive one half of their contractual allotment, the Westlands Water District filed suit.<sup>98</sup> Ironically, the Bureau argued in *O'Neill* that compliance with the ESA and Central Valley Project Improvement Act required it to reduce water deliveries, and the Water Shortage Clause protected it from liability for such a shortage.<sup>99</sup> In fact, the Bureau contended the "drought, or any other causes" language in the contract was "broad and unambiguous and that shortages stemming from mandatory compliance with the ESA and [the Central Valley Project Improvement Act] are shortages resulting from 'any other cause.'"<sup>100</sup>

The Ninth Circuit agreed, noting that there were no express enumerated exceptions to the Water Shortage Clause and that its plain meaning unambiguously absolves the Bureau from liability when the water shortage is caused by a statutory mandate.<sup>101</sup> The court also stated that, under the unmistakable terms doctrine, the contract was "not immune from subsequently enacted statutes."<sup>102</sup> Rather, the contract entered into pursuant to the Recla-

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Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185.

94. *O'Neill v. United States*, 50 F.3d 677, 680 (9th Cir. 1995).

95. *Id.* at 680. The Water Shortage Clause releases the federal government from liability for water shortages due to "errors in operation, drought, or other causes." *Id.* One "acre-foot" of water is enough water to cover one acre to a depth of one foot. It is approximately 326,000 gallons of water. Benson, *supra* note 34, at 364 n.4.

96. *O'Neill*, 50 F.3d at 681.

97. *Id.* (citation omitted).

98. *Id.*

99. *Id.* at 681-82.

100. *Id.* at 682-83.

101. *Id.* at 683, 689.

102. *Id.* at 686.

mation Act of 1902 and "all acts amendatory and supplementary thereto" contemplates future changes in reclamation laws.<sup>103</sup>

Only three years later, in *Natural Resources Defense Council v. Houston*, the Ninth Circuit Court was again confronted with Bureau operations threatening the survival of endangered Chinook salmon, this time on the San Joaquin River.<sup>104</sup> Prior to construction of the Friant dam, the San Joaquin River supported many different fish species and provided surrounding wetlands with fresh water.<sup>105</sup> The impoundment of water behind the dam left dry a stretch of the river, which contributed to the listing of the Chinook salmon as endangered.<sup>106</sup> In the late 1940s, irrigation and water districts entered into 40-year contracts with the Bureau, many of which were renewed by 1992.<sup>107</sup> The renewed contracts contained provisions substantially similar to the previous contracts and were to last another 40 years.<sup>108</sup>

Conservation groups claimed that the Bureau had violated the ESA by renewing its contracts with the districts prior to completing the necessary endangered species consultations.<sup>109</sup> The districts argued that the ESA did not apply to contract renewals because the renewal process was not "agency action."<sup>110</sup> Since the regulation defining agency action gives such examples as "the granting of licenses, contracts, leases, . . . [and] permits," the Ninth Circuit Court easily rejected this argument, stating that "[c]learly, negotiating and executing contracts is 'agency action'" and is therefore subject to the ESA.<sup>111</sup> The districts urged that the Bureau had no discretion to alter the contract terms, especially the amount of water delivered.<sup>112</sup> Again, the Ninth Circuit looked to federal reclamation laws and specific contract terms (i.e., water rights based on amount of "available project water") and concluded that there was discretion available to the Bureau during the negotiating process.<sup>113</sup> Though *Houston* involved Bureau discretion as related to contract renewals, the court defined agency action broadly to include "negotiating and executing" such contracts.<sup>114</sup>

The third case in this Ninth Circuit trilogy, *Klamath Water Users Protective Association v. Patterson*, actually involved a third party benefi-

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103. *Id.*

104. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1123-24 (9th Cir. 1998).

105. *Id.* at 1124.

106. *Id.* at 1123.

107. *Id.*

108. *Id.* at 1124.

109. *Id.*

110. *Id.* at 1125.

111. *Id.* (citing 50 C.F.R. § 402.02 (1998)).

112. *Id.* at 1125.

113. *Id.* at 1126.

114. *Id.* at 1125.

ary contract claim, but its relevance to the instant case is unmistakable.<sup>115</sup> In 1917, the Bureau entered into an agreement under which a hydroelectric company would construct the Link River dam on the Klamath River and then convey it to the United States.<sup>116</sup> In exchange, the Bureau entered into a contract, pursuant to federal reclamation laws, giving the company the right to operate the dam.<sup>117</sup> The Bureau and the hydroelectric company were the only two parties to the contract.<sup>118</sup>

After the coho salmon of the Lower Klamath River was listed as threatened, and two species of sucker fish were listed as endangered, the Bureau sought to alter releases from the Link River dam in order to meet its obligations under the ESA and to satisfy senior Tribal rights.<sup>119</sup> As in *O'Neill*, the Bureau once again believed that the Water Shortage Clause of the contract allowed the Bureau to reduce water deliveries in order to comply with the ESA.<sup>120</sup> Concerned about their contractual water deliveries, irrigators challenged the Bureau's decision and sought to enforce the contract's existing terms by alleging third-party beneficiary status.<sup>121</sup>

The Ninth Circuit summarily rejected the contention that the irrigators were intended beneficiaries, and then proceeded to discuss the "unmistakable intent that [the Bureau] controls the [d]am."<sup>122</sup> Though the Bureau was not operating the dam, the court concluded that the contract terms allowed the Bureau to retain authority over the dam, and "because it remains the owner in fee simple of the [d]am, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the [d]am when necessary to meet the requirements of the ESA, requirements that override the water rights of the irrigators."<sup>123</sup> Thus, the Bureau need not even operate the project works before its duties under the ESA are triggered; mere title to the works grants to the Bureau the requisite authority to comply with the ESA.<sup>124</sup>

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115. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 2000).

116. *Id.* at 1209.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 995 (D. Or. 1998).

121. *Klamath Water Users Protective Ass'n.*, 204 F.3d at 1210. In a brief submitted in the instant case, Appellees note that this third party beneficiary theory was only advanced because the irrigators' water delivery contracts contained the same Water Shortage Clause as the contracts at issue in *O'Neill*, *Houston*, and the instant case. *See* Brief for Appellees at 49.

122. *Klamath Water Users Protective Ass'n.*, 204 F.3d at 1212.

123. *Id.* at 1213. The Ninth Circuit Court noted the District Court's holding that "the [i]rrigator's rights to the water were subservient to the ESA." *Id.* (citing *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 995-96 (D. Or. 1998)).

124. *See id.*

## THE PRINCIPAL CASE

*Relevant Facts*

The two Bureau water projects at issue on the Middle Rio Grande, the San Juan-Chama Project and the Middle Rio Grande Project, are threatening the existence of the endangered silvery minnow.<sup>125</sup> The San Juan-Chama Project was authorized by the San Juan-Chama Project Act of 1962 under the Colorado River Storage Project Act of 1956.<sup>126</sup> The San Juan-Chama Act authorized, among other things, the construction of Heron Dam and Reservoir, the storage facility that is the subject of the controversy here.<sup>127</sup> It directed the Secretary to operate the San Juan-Chama Project for the purpose of furnishing water for traditional uses and “fish and wildlife benefits” and to ensure that the flow of certain tributaries does not fall below levels recommended by the Bureau “for the preservation of fish.”<sup>128</sup> The San Juan-Chama Project “created a trans basin diversion from the Colorado River Basin to the Rio Grande Basin, taking water from the upper tributaries of the San Juan River, a tributary of the Colorado River, and transporting it through a tunnel under the Continental Divide to the Rio Chama, a major tributary of the Rio Grande.”<sup>129</sup> The Bureau appropriated the rights to the water made available by the San Juan-Chama Project and stores the water in Heron Reservoir.<sup>130</sup> In fact, only imported San Juan-Chama Project water may be stored in Heron Reservoir; native water is released to the river below Heron Dam.<sup>131</sup> The overarching purpose behind the San Juan-Chama Project was to replace or offset streamflow depletions in the Middle Rio Grande primarily due to irrigation withdrawals.<sup>132</sup>

In 1963, the Secretary entered into a contract (1963 Repayment Contract) with the City of Albuquerque (City) for the use of water provided by the San Juan-Chama Project.<sup>133</sup> This contract was entered into pursuant

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125. Historically, the silvery minnow was one of the most abundant fishes in the Rio Grande Basin, but dams and dewatering have reduced its habitat to a mere five percent of its known historic range. See *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220, 1223 (10th Cir. 2002).

126. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1122 (10th Cir. 2003) (citations omitted).

127. *Id.* at 1123.

128. *Id.* at 1122-23.

129. *Id.* at 1123. The magnitude of this project is described as “an elaborate system of twenty seven tunnels” which operate to combine the waters of three rivers in the San Juan watershed and send them south and then east into a tunnel eleven feet in diameter and bored 13 miles through the mountains, transporting the water into the Rio Grande. CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN* 222-23 (Island Press 1992).

130. Brief for Appellants at 15.

131. *Rio Grande Silvery Minnow*, 333 F.3d at 1123 n.13.

132. See Brief for Appellees at 72 (citing numerous House and Senate reports showing emphasis of this overriding purpose of the San Juan-Chama Project).

133. *Rio Grande Silvery Minnow*, 333 F.3d at 1123.



to the Federal Reclamation Laws, “*all as amended or supplemented.*”<sup>134</sup> In the 1963 Repayment Contract, the federal government offered a firm yield of “water available for use through the project works” in exchange for the City’s agreement to repay the costs incurred by the United States for constructing the reservoir complex.<sup>135</sup> The annual allotment was qualified by a provision that “during periods of scarcity when the actual available water supply may be less than the estimated firm yield, the City shall share in the available water supply” in accordance with the appropriate ratio.<sup>136</sup> The amount to be repaid by the City did not include the costs allocated to the “fish and wildlife function;” this expense was to be absorbed by the Bureau.<sup>137</sup> The 1963 Repayment Contract provided that “title to all project works . . . ‘shall remain in the United States until otherwise provided by Congress.’”<sup>138</sup> Thus, title would not revert automatically to the City upon full repayment; an act of Congress was also required for this title transfer to occur.<sup>139</sup> The contract included a Water Shortage Clause limiting liability of the United States should there occur, “on account of [drought] or *other causes*, . . . a shortage in the quantity of water available.”<sup>140</sup> Finally, upon full payment of the reimbursable costs, the contract gave the City a “vested right to renew said contract indefinitely . . . so long as a water supply may be available.”<sup>141</sup>

The second project, the Middle Rio Grande Project, was authorized by the Flood Control Acts of 1948 and 1950.<sup>142</sup> It was really a project aimed at rescuing and rehabilitating the Middle Rio Grande Conservancy District (the Irrigation District), a group whose irrigation facilities built in the 1930s were seriously deteriorated by the 1940s, at which time the Irrigation District had become financially insolvent.<sup>143</sup> The Bureau drafted the Middle Rio Grande Project Plan (the Plan), which called for the United States’ acquisition of the Irrigation District’s obligations and cancellation of its indebtedness in exchange for the Irrigation District’s repayment of a portion of the project costs.<sup>144</sup> Under the Plan, the Irrigation District was also to convey “all of its property rights” related to the project works, with the title to be

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134. *Id.* (including the Colorado River Storage Project Act and the San Juan-Chama Project Act in the broad category of “Federal Reclamation Laws”).

135. *Id.*

136. *Id.* at 1124.

137. *Id.* at 1123-24.

138. *Id.* at 1124.

139. *See id.*

140. *Id.*

141. *Id.*

142. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320, 2002 U.S. Dist. LEXIS 9246, at \*49 (D.N.M. April 19, 2002) (citations omitted).

143. *Id.*

144. *Id.*

held by the United States “until Congress otherwise directs.”<sup>145</sup> Thus, the United States would assume ownership of all the Irrigation District’s diversion and storage facilities until the rehabilitation project costs were repaid and Congress transferred title back to the Irrigation District.<sup>146</sup> Under the Plan, the Bureau was to obtain title to the Irrigation District’s existing water rights, but this did not occur.<sup>147</sup>

The Plan was formally set in motion by a 1951 contract (1951 Repayment Contract) between the United States and the Irrigation District, which was entered into pursuant to the Reclamation Act “and acts amendatory thereof and supplementary thereto.”<sup>148</sup> By its terms, the United States was to “construct, rehabilitate, operate, and maintain the Irrigation District project works in exchange for the Irrigation District’s payment of reimbursable construction, operation, and maintenance costs,” as was contemplated by the Plan.<sup>149</sup> The 1951 Repayment Contract specifically reserved the associated water rights to the Irrigation District, so the Bureau never appropriated water rights to native Rio Grande water.<sup>150</sup> An amendment in 1963 to provide supplemental water from the San Juan-Chama Project contained terms similar to those found in the 1951 Repayment Contract: the Water Shortage Clause, clauses authorizing project water for “fish and wildlife benefits,” and a clause “allocating fish and wildlife costs” to the Bureau unless “unusual circumstances” arose to “throw the allocation out of balance.”<sup>151</sup>

In summary, the consequence of these projects and contracts is that the water in the Middle Rio Grande basin is fully appropriated; the City is to receive available water from the San Juan-Chama Project and the Irrigation District receives the benefits of the Middle Rio Grande Project and supplemental water from the San Juan-Chama Project.<sup>152</sup> The San Juan-Chama

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145. *Rio Grande Silvery Minnow*, 333 F.3d at 1125.

146. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246, at \*49-50.

147. *Rio Grande Silvery Minnow*, 333 F.3d at 1125-26.

148. *Id.* at 1126.

149. *Id.*

150. *Id.* The District Court noted that this was an unusual situation; under most reclamation projects, the Bureau does appropriate water rights. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246, at \*50.

151. *Rio Grande Silvery Minnow*, 333 F.3d at 1126-27. Appellees observe that the San Juan-Chama Project “was intended to furnish ‘supplemental’ water to irrigate 81,600 acres . . . [y]et [reports] show an average of only 53,685 acres irrigated in recent years – indicating that this ‘supplemental’ water may not be needed at all to irrigate current acreage.” Brief for Appellees at 45 n.17.

152. Appellees note that up to 2990 acre-feet of Heron Reservoir (San Juan-Chama Project) water has not yet been contracted for, and therefore is available for the minnow “without having any impact whatsoever on contract deliveries.” Brief for Appellees at 79. The Bureau responds that this water is being held by the Bureau for the Taos Pueblo pending the Taos Area Water Rights Settlement and that when that contract is entered into “the entire firm yield of the [San Juan-Chama] Project will be fully committed.” Reply Brief for Appellants at 20,

Project water is to be stored in Heron Reservoir for the City, while the Irrigation District is allowed to divert water provided by the Middle Rio Grande Project and supplemented by the San Juan-Chama Project.<sup>153</sup> The federal government owns no rights to Middle Rio Grande Project water, but either operates, manages, or otherwise retains authority over the facilities of both projects that made the water available in the first place.<sup>154</sup>

### *The District Court*

The plaintiffs in the instant case brought an action in the United States District Court for the District of New Mexico against the Bureau and Fish and Wildlife for violations of the ESA.<sup>155</sup> The suit stems from a June 29, 2001 Biological Opinion issued by Fish and Wildlife which found that the Bureau's river operations on the Middle Rio Grande were "likely to jeopardize the continued existence of the silvery minnow," yet only offered a single Reasonable and Prudent Alternative that Fish and Wildlife believed would avoid jeopardy to the minnow.<sup>156</sup> This Reasonable and Prudent Alternative allowed for the intermittent drying of the San Acacia reach of the Middle Rio Grande, an area in which "over ninety-five percent of the remaining wild silvery minnow population was concentrated."<sup>157</sup> Plaintiff conservation groups alleged Fish and Wildlife failed to use the best scientific data available in formulating the Reasonable and Prudent Alternative, contending that there was "no rational connection between the facts found in the [Biological Opinion] and the . . . conclusion that the minnow will not be jeopardized by the river drying expected and allowed under [the Reasonable and Prudent Alternative]."<sup>158</sup>

In its April 19, 2002 order, the District Court disagreed, noting the Reasonable and Prudent Alternative's "non-water related elements" of habitat restoration and repopulation of the minnow in upstream reaches, in addition to the proposed "spring spawning spike," sought to protect the minnow and ensure its recovery in a year of average precipitation.<sup>159</sup> The District Court emphasized, however, that the "consultation over the silvery minnow is a dynamic, ever-evolving process, and the [Biological Opinion] is not intended to be the final solution to protecting the silvery minnow from ex-

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Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109 (10th Cir. 2003). As the date of this case, however, this 2990 acre-feet was not yet contracted for and would have been available for the silvery minnow. Brief for Appellees at 79.

153. See *Rio Grande Silvery Minnow*, 333 F.3d at 1123, 1126.

154. See *id.* at 1124, 1126.

155. See generally *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320, 2002 U.S. Dist. LEXIS 9246 (D.N.M. April 19, 2002).

156. *Id.* at \*16.

157. *Id.* at \*11, 30.

158. *Id.* at \*29.

159. *Id.* at \*29-33.

tinction. If there is a drought year . . . [Fish and Wildlife] will reinitiate consultation."<sup>160</sup>

Plaintiffs also contended that the Bureau, in its consultations with Fish and Wildlife, should have considered its alternatives to protect the silvery minnow more broadly by limiting water deliveries to various irrigators and municipalities to make more water available to the minnow.<sup>161</sup> The Bureau stated that it had not consulted with Fish and Wildlife about the alternative of reducing water deliveries because it lacked the discretion to do so.<sup>162</sup> In resolving the "hotly contested issue" of agency discretion, the District Court examined the authorizing statutes, applicable regulations, and contract language involved with each of the two federal water projects at issue.<sup>163</sup> The District Court noted that the ESA "only requires consultation if the terms of the contract give the agency discretion to perform the contract in a way to benefit listed species."<sup>164</sup> Adopting an expansive definition of "agency action" to encompass "a broad array of actions, including annual water deliveries under federal projects," the District Court held that the Bureau does have the requisite discretion to alter the amount of water available for traditional users in order to comply with the ESA.<sup>165</sup> Though the Bureau had failed to consult with Fish and Wildlife about the availability of this alternative source of water, the District Court stated this procedural violation of Section 7 of the ESA did not render the Biological Opinion invalid.<sup>166</sup>

Since the plaintiffs did not seek immediate injunctive relief, and Fish and Wildlife had provided an acceptable interim solution to avoid jeopardy to the silvery minnow, the District Court chose to defer ruling on the allegations of substantive violations of the ESA.<sup>167</sup> The court cautioned, however, that these claims "might . . . be appropriate should [p]laintiffs find it necessary to seek injunctive relief in the future."<sup>168</sup> It was specifically noted that the Biological Opinion would last "for only a limited period," with the overall effect of the court's decision being "that *when* the parties go back to the table . . . the annual water deliveries . . . identified as discretionary *will be available* . . . for use in protecting the endangered silvery minnow from extinction."<sup>169</sup> As it turned out, a mere five months after the order was

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160. *Id.* at \*33-34.

161. *Id.* at \*47.

162. *Id.* at \*51.

163. *Id.* at \*48.

164. *Id.* at \*58.

165. *Id.* at \*47-48.

166. *Id.* at \*73-77.

167. *See id.* at \*30-33, 83, 86.

168. *Id.* at \*84.

169. *Id.* at \*78-79 (emphasis added).

released, the plaintiffs were forced to seek an emergency injunction to compel the Bureau to use its discretion to release water for the silvery minnow.<sup>170</sup>

By the early spring of 2002, the low snowpack in the mountains that fed the Rio Grande Basin confirmed the strong possibility of a record drought year.<sup>171</sup> Hence, the Bureau knew or should have known that it would be unable to provide the amount of water for the silvery minnow required by the June 29, 2001 Biological Opinion upheld in the first order, and that it would have to reinitiate consultations with Fish and Wildlife.<sup>172</sup> The Bureau postponed this consultation until August 2002, however, while delivering nearly all of the contracted water to the irrigators and municipalities throughout the summer, despite its authority to reduce such deliveries.<sup>173</sup> Fish and Wildlife determined that the proposal submitted by the Bureau at the end of August, 2002 created jeopardy because it “could allow up to 150 miles of the Middle Rio Grande to dry during the remainder of the 2002.”<sup>174</sup> The Bureau’s delay forced Fish and Wildlife “to issue a hastily prepared [Biological Opinion] on September 12, 2002, that proclaimed jeopardy with no [Reasonable and Prudent Alternative] to avoid the demise of the silvery minnow.”<sup>175</sup>

Since the plaintiffs sought an emergency injunction, the court considered the substantive violations that it had not addressed in the first order. The court began with the premise that it “cannot confirm a Biological Opinion unless it is convinced the agencies relied on the ‘best scientific data available’ and fully considered all available options for avoiding jeopardy.”<sup>176</sup> Because the September 12, 2002 Biological Opinion did not target flows to the San Acacia reach, where ninety-five percent of the remaining silvery minnow lived, and because Fish and Wildlife and the Bureau did not fully consider reducing contracted water deliveries in order to comply with the ESA, the District Court held that the Biological Opinion was arbitrary and capricious.<sup>177</sup> The District Court granted the plaintiffs’ request for

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170. The District Court’s second order was issued in response to the Appellees’ request for emergency injunctive relief. See *Rio Grande Silvery Minnow*, 333 F.3d at 1119.

171. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (memorandum opinion and findings of fact and conclusions of law).

172. *Id.*

173. *Id.* The Bureau states that it requested reinitiation of consultation when it realized it would be unable to meet the flow targets of the June 29, 2001 Biological Opinion with water it leased from willing sellers and water made available by an agreement between the State of New Mexico and the federal government for the benefit of the silvery minnow. Brief for Appellants at 16-17.

174. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (memorandum opinion and findings of fact and conclusions of law).

175. *Id.*

176. *Id.*

177. *Id.* The Bureau states that Fish and Wildlife did, in fact, consider releasing water from Heron Reservoir, but concluded that it was not a Reasonable and Prudent Alternative because it would not leave water for the “spring spawning spike” Fish and Wildlife had

emergency injunctive relief.<sup>178</sup> In the September 23, 2002 order, the District Court directed that “if necessary to meet flow requirements in 2003, [the Bureau] must reduce contract water deliveries under the [San Juan-Chama Project] and/or the [Middle Rio Grande Project], and/or must restrict diversions by [the Irrigation District] under the [Middle Rio Grande Project], consistent with [the Bureau’s] legal authority as determined” in the first order.<sup>179</sup> The cooler, wetter fall of 2002 allowed the Bureau to meet the flow requirements for the remainder of that year without having to release water from Heron Reservoir.<sup>180</sup>

*The United States Court of Appeals for the Tenth Circuit*

In this appeal to the United States Court of Appeals for the Tenth Circuit, the Bureau contended it was constrained by the language of the contracts with the City and the Irrigation District and had no discretion to reduce its water deliveries in order to comply with the ESA.<sup>181</sup> Since Section 7 consultation requirements only “apply to all actions in which there is discretionary Federal involvement or control,” and the contracts do not expressly allow for reduced water deliveries, the Bureau argued it had no authority under the ESA to use appropriated water for the protection of the silvery minnow.<sup>182</sup> According to the Bureau, the Water Shortage Clause in each of the Repayment Contracts refers only to those situations “in which it is ‘impossible’ to deliver fixed contractual water, not to situations in which [the Bureau] creates the shortage for purposes of complying with the ESA.”<sup>183</sup> The latter action, the Bureau argued, would expand its scope of authority, an act

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planned for 2003. See Brief for Appellants at 21. The District Court determined, however, that the “policy of [the Bureau] not to . . . [reduce water deliveries] absent a court order . . . demonstrates that the federal agencies did not fully and meaningfully consult about all possible options . . . to protect the silvery minnow . . .” *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (memorandum opinion and findings of fact and conclusions of law).

178. *Id.*

179. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (order and partial final judgment). The District Court discussed the “God Squad” exemption of the ESA, and noted that the defendants did not petition for such an exemption. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (memorandum opinion and findings of fact and conclusions of law). Since Congress exclusively delegated the power to grant an exemption to the God Squad and not to the federal courts, the federal courts “must continue to apply the ESA as interpreted by the Supreme Court . . . to give the highest priority to protecting endangered species, whatever the cost.” *Id.*

180. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1120 n.10 (10th Cir. 2003). The Bureau was able to meet the flow requirements of the June 29, 2001 Biological Opinion as directed in the second order. *Id.*

181. *Id.* at 1127.

182. *Id.* (citing 50 C.F.R. § 402.03 (2003)).

183. *Id.* The Water Shortage Clauses contain the phrase “on account of [drought] or other causes.”

the ESA clearly does not contemplate.<sup>184</sup> The Bureau reasoned that because the ESA merely directs the use of existing authority, and does not grant new authority, the Bureau has no discretion “to change or ignore its contractual commitments.”<sup>185</sup> The Bureau explained that where an agency has already committed itself by contract, “the ESA cannot act as a mandatory directive that expands the agency’s authority by empowering the agency” to modify those contracts.<sup>186</sup> The Bureau argued that using water already committed is “not consistent with the scope of [the Bureau’s] legal authority” and thus cannot form the basis of a Reasonable and Prudent Alternative.<sup>187</sup>

The Bureau then sought to distinguish the three Ninth Circuit cases upon which the District Court relied: *O’Neill*, *Houston*, and *Klamath*.<sup>188</sup> The Bureau contended those three cases lack precedential value because they involved either subsequently enacted legislation or some other directive that specifically allocated water for fish and wildlife, and there is no such express independent obligation here.<sup>189</sup> Since none of those cases addressed the question of whether the ESA itself imposes a duty to reallocate water, the Bureau insisted the sole question before the court was “whether the [Water Shortage Clause] alone gives it discretion to reduce contract deliveries . . .”<sup>190</sup>

The Tenth Circuit Court, however, “would not channel the inquiry so narrowly, particularly because its predicate is that [the Bureau’s] ESA obligations are fixed solely by the Repayment Contracts.”<sup>191</sup> Rather, the court employed a two-pronged inquiry as to whether the protections guaranteed by the ESA apply: first, there must be “agency action” and second, the agency must have discretionary authority over such action.<sup>192</sup> Since the regulations guiding the ESA state that examples of agency “action” include

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184. *Id.* In support of this argument, the Bureau cites *Am. Forest and Paper Ass’n v. U.S. E.P.A.*, 137 F.3d 291, 299 (5th Cir. 1998) (“The ESA serves not as a font of new authority, but as . . . a directive to agencies to channel their *existing* authority in a particular direction”). *Rio Grande Silvery Minnow*, 333 F.3d at 1127.

185. *Id.* at 1127-28.

186. Brief for Appellants at 31.

187. *Rio Grande Silvery Minnow*, 333 F.3d at 1128. This contention is not specifically addressed by the majority, but is answered by the majority’s determination that reallocating such water actually is within the scope of the Bureau’s legal authority. *See id.* at 1130. This argument is discussed in more detail by the dissent. *See id.* at 1144-45.

188. *Id.* at 1127 (citing *O’Neill v. United States*, 50 F.3d 677 (9th Cir. 1995); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, (9th Cir. 1998); *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000)).

189. *Id.* at 1128. The subsequently enacted legislation in *O’Neill* and *Houston* was the Central Valley Project Improvement Act and the ESA. *Id.* at 1130. The Bureau’s obligations in *Klamath* were actually created by tribal commitments and the ESA. *See Klamath Water Users Protective Ass’n.*, 204 F.3d at 1209.

190. *Rio Grande Silvery Minnow*, 333 F.3d at 1128.

191. *Id.*

192. *See id.* at 1128-29.

“the granting of licenses, contracts, [and] leases,” the court concluded that the Bureau’s execution of the Repayment Contracts are clearly “agency action.”<sup>193</sup> The second prong of the inquiry focused on whether the Repayment Contracts grant the Bureau discretionary authority over their execution.<sup>194</sup> Since both contracts were expressly entered into pursuant to the federal reclamation laws, “all as amended or supplementary thereto,” the court reasoned the contracts “envision applying subsequent legislation in their interpretation.”<sup>195</sup>

By using the fundamental rule of contract interpretation that “plain terms govern,” Bureau discretion can be found in additional provisions considered by the court.<sup>196</sup> The contracts call for the provision of water for fish and wildlife as a beneficial use, and allocate the costs of such fish and wildlife benefits to the Bureau.<sup>197</sup> The contracts contain Water Shortage Clauses limiting liability in case of drought “or other causes” which might affect “the quantity of water *available* from the reservoir,” and the provision that in times of scarcity the non-federal parties will share in the allocation of the available water.<sup>198</sup> When read together, the court explained, these contract provisions establish that the Bureau does have discretion to determine the amount of water available for delivery and in fact “presume [such] discretion in their implementation.”<sup>199</sup> The Tenth Circuit Court concluded the District Court correctly relied upon *O’Neill*, *Houston*, and *Klamath*, because the contracts in those cases contained similar terms.<sup>200</sup>

The Tenth Circuit Court next addressed the arguments put forth by the New Mexico Attorney General, the Office of the State Engineer, and the New Mexico Interstate Stream Commission (collectively referred to as the State). The State contended the District Court’s second order effectively “seiz[es]” the water in Heron Reservoir, thus “irreparably harming its citizens.”<sup>201</sup> The State’s argument was rooted in the proposition that San Juan-Chama Project water, entirely imported from the Colorado River, has no impact on the flows of the Middle Rio Grande.<sup>202</sup> And since it is the lack of native water that results in harm to the minnow, the State reasoned, there is no causal link between imported water and jeopardy to the minnow.<sup>203</sup> Thus,

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193. *Id.* at 1128 (citing 50 C.F.R. § 402.02 (2003)).

194. *See id.* at 1129.

195. *Id.* at 1130.

196. *See id.*

197. *Id.* at 1129.

198. *Id.*

199. *Id.*

200. *See id.* at 1129-30 (referring to *O’Neill v. United States*, 50 F.3d 677 (9th Cir. 1995); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998); *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000)).

201. *Id.* at 1131.

202. *Id.*

203. *Id.*



according to the State, the question is “not whether *imported* water, the . . . use of which in no way harms the minnow, supports injunctive relief,” but whether the ESA requires the Bureau to consult with Fish and Wildlife regarding “seizing water from contractors, an action [the Bureau] did not propose to take.”<sup>204</sup> The State interpreted the “principle purpose” of the Repayment Contracts to be for municipal, domestic and industrial uses, while benefits for fish and wildlife are simply incidental.<sup>205</sup> With this distinction, the State argued, the Water Shortage Clauses should be viewed as “merely boilerplate” provisions intended only “to protect the public purse in the event of the lack of natural flows.”<sup>206</sup>

The Tenth Circuit rejected the State’s contention by noting that diverting San Juan-Chama Project water was a beneficial use under both the enabling San Juan-Chama Act and New Mexico state law.<sup>207</sup> The San Juan-Chama Act made no distinction between primary and incidental benefits and contemplated the use of this project water for fish and wildlife.<sup>208</sup> The San Juan-Chama Act was thus perfectly in line with state law, which affirmed that the release of project water for fish and wildlife benefits is a beneficial use.<sup>209</sup> In fact, the State’s ongoing efforts towards habitat restoration, its agreements with the federal government to store and release water for the minnow, and its convening a workgroup to address this issue illustrated the State’s dedication to preserving the minnow.<sup>210</sup>

The court dismissed the State’s distinction between imported and native water because the Repayment Contracts themselves included “the intent to replace depletions in the Rio Grande Basin.”<sup>211</sup> The Repayment Contracts and the State allow contracting parties to divert San Juan-Chama Project water directly from the Rio Grande or to offset groundwater pump-

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204. *Id.* (internal quotations omitted).

205. *Id.* at 1131-32.

206. *Id.* at 1132.

207. *Id.*

208. *Id.*

209. *Id.* at 1133. *See also* Office of the Attorney General of the State of New Mexico, Opinion No. 98-01, 1998 N.M. AG LEXIS 2, (March 27, 1998), stating:

New Mexico accords a high value to recreation, fish and wildlife, and ecological values associated with riparian and aquatic systems. . . . [T]he New Mexico legislature passed a memorial confirming its desire to preserve river ecosystems and promote the ecological, recreational, and other instream values associated with those ecosystems . . . [therefore] we believe that a court would find these uses to be “beneficial uses” under the [New Mexico] constitution, as long as the uses of water were reasonable and not wasteful.

*Id.* at 8.

210. *Rio Grande Silvery Minnow*, 333 F.3d at 1133.

211. *Id.* at 1132.

ing with Project water.<sup>212</sup> In that sense, the entire Middle Rio Grande diversion system “functions as an interconnected series of dams and reservoirs, transporting . . . [p]roject water” which may then be used to offset depletions.<sup>213</sup> This policy defeated the State’s contention that “it is the lack of native water that results in harm to the silvery minnow,” as the distinction between native and project water does not, in practice, exist.<sup>214</sup> Finally, while the Tenth Circuit Court acknowledged the State’s commitment to protecting its water, it concluded that the District Court took this into consideration when fashioning its remedy.<sup>215</sup>

The Tenth Circuit then addressed the concerns of the City, which contended that although entering into contracts constituted “agency action,” these “pre-ESA contracts cannot trigger expanded consultation duties unrelated to the express terms of the contract.”<sup>216</sup> The City argued that reallocation of the imported water for the survival of the silvery minnow was a wrongful expansion of the Bureau’s authority.<sup>217</sup> The Bureau owns no rights to the water stored in Heron Reservoir; it is this absence of rights which “defeats [the Bureau’s] power to direct the use of the water it stores” to protect the silvery minnow.<sup>218</sup> Contrary to the Bureau’s distinct lack of authority over the water, the City asserted the Repayment Contracts granted the City a “perpetual right” to use the San Juan-Chama Project water and an “exclusive contractual right to its share of the water supply.”<sup>219</sup>

The court rejected the City’s interpretation of the Repayment Contracts, noting instead that the 1963 Repayment Contract clearly states that once the costs payable by the City are paid in full, the City will have a “right to renew said contract *indefinitely* . . . so long as a water supply *may be available*.”<sup>220</sup> “Indefinite, having no exact limits,” the court suggested, “cannot be read to mean continuing forever.”<sup>221</sup> Rather, the court again identified the express terms of the 1963 Repayment Contract under which the Bureau is required to limit water deliveries for “drought or other causes[,] . . . to replace depletions in the Rio Grande Basin,” and to allocate the available water “proportionately during periods of scarcity.”<sup>222</sup> Thus, although the 1963 Repayment Contract gives the City a “permanent right” to the use of

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212. *Id.*

213. *Id.*

214. *Id.* at 1132.

215. *Id.* at 1133.

216. *Id.*

217. *See id.*

218. *Id.* at 1133-34.

219. *Id.* at 1134.

220. *Id.*

221. *Id.*

222. *Id.*

project water after it has paid its obligations to the federal government in full, "that right remains conditioned by these and other contractual terms."<sup>223</sup>

Next, the Tenth Circuit addressed the concerns of the Irrigation District.<sup>224</sup> The Irrigation District's argument mirrored that of the State in that it made the distinction between native and project water.<sup>225</sup> The court summarily dismissed the Irrigation District's claims to title of the project works and its contention that the Bureau cannot reduce water deliveries as a swirling "eddy of details which swallows the inescapable fact that [the Irrigation District] agreed to the federal government's financial rescue, [and its rehabilitation of the Irrigation District's] storage and delivery capabilities, in exchange for the transfer of all [the Irrigation District's] assets and repayment of the costs of the restoration."<sup>226</sup> Even though the Bureau transferred the operations and maintenance of most of the project works to the District in 1974, the 1951 Repayment Contract is clear that title to the works remains in the federal government.<sup>227</sup> The court concluded that the Bureau's obligations under the ESA are determined by neither the distinction between native and project water nor the fact that the Bureau owns no rights to native waters.<sup>228</sup> Rather, "[the Bureau's] retaining authority to manage [Irrigation District] and [San Juan-Chama Project] works triggers its ESA obligations."<sup>229</sup>

According to the court, this conclusion is supported by the additional legislation illustrating congressional intent to support and conserve the natural resources necessarily affected by federal water projects. The court

223. *Id.* at 1134.

224. *Id.* The Irrigation District encompasses over 128,000 acres of irrigable land, half of which is currently irrigated, and manages 238,000 acre-feet of water annually. *Id.* at 1134-35.

225. *See id.* at 1135.

226. *Id.* The court noted that the Irrigation District, to strengthen its claims here, has filed a cross claim to quiet title to the Middle Rio Grande Project works. *Id.* at 1136. Though that claim will remain pending until sixty days after the conclusion of this appeal, the court pointed out that the title issue may be resolved by analyzing the 1951 Repayment Contract and the Middle Rio Grande Project Act, both of which provided that "not simply full repayment but also approval by Congress must predicate the reversion of title to" the Irrigation District. *Id.* *See also* Brief for Appellees at 35 n.12 (observing that of the \$35 million spent by the Bureau on this project, the Irrigation District has repaid \$15 million, "without interest, over a more than forty year period").

227. *Rio Grande Silvery Minnow*, 333 F.3d at 1136. The relevant provision of the 1951 Repayment contract reads as follows:

"Title to all works constructed by the United States under this contract and to all such works as are conveyed to the United States . . . shall . . . be and continue to be vested in the name of the United States until otherwise provided by Congress, notwithstanding the transfer hereafter of any such works to the District for operation and maintenance."

*Id.*

228. *Id.* at 1136.

229. *Id.*

pointed out that three years before passing the San Juan-Chama Act, Congress enacted the Fish and Wildlife Coordination Act, which directed federal agencies involved with water projects, “whenever the waters of any stream . . . are . . . impounded [or] diverted, . . . [to] consult with [Fish and Wildlife] . . . with a view to the conservation of wildlife resources by preventing loss of and damage to such resources.”<sup>230</sup> Similarly, the governor of New Mexico’s application for relief under the Reclamation States Emergency Drought Relief Act, which calls for the Secretary to “make water from Federal Reclamation Projects . . . available . . . for the purposes of protecting or restoring fish and wildlife resources,” illustrated both New Mexico’s and Congress’ commitment to preserving the silvery minnow’s habitat.<sup>231</sup> The court stated that the Irrigation District’s argument, based on the assertion that its native water is “separate, distinct and entirely removed from ‘federal’ reservoirs,” ignores the reality that the water flows only because of the federal rescue of the Irrigation District back in the late 1940’s.<sup>232</sup> As a consequence of that rescue, the silvery minnow is at the brink of extinction.<sup>233</sup> The court logically reasoned that Congress, by enacting these additional laws, has now directed those same federal agencies to alleviate the damage done to the minnow’s habitat.<sup>234</sup>

Finally, the Tenth Circuit Court turned to the concerns of the Rio Chama Acequia Association (RCAA), a privately owned association of twenty-seven irrigation ditches, which claimed that its 1250 acre feet of water from the San Juan-Chama Project sustained a traditional “cultural ecosystem” threatened by the needs of the silvery minnow.<sup>235</sup> RCAA argued its very survival was dependent upon this limited water right and contended the District Court, in crafting the relief of the second order, failed to weigh the cultural and economic hardships its subsistence farmers may suffer.<sup>236</sup> While many of RCAA’s other claims have already been addressed, its contention that the District Court, “by affording endangered species the highest of priorities under [TVA], . . . completely ignored traditional equitable principles” embodies a fundamental issue of endangered species litigation: the balance that must be made between the loss of a species and the potential

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230. *Id.* (citing the Fish and Wildlife Coordination Act, 16 U.S.C. § 662(c) (2003)). The Tenth Circuit also notes that, when the Irrigation District amended the 1951 Repayment Contract to obtain supplemental water from the San Juan-Chama Project, “it necessarily agreed to the reach of FWCA.” *Id.*

231. *Id.* at 1133 (citing the Reclamation States Emergency Drought Relief Act, 43 U.S.C. § 2212 (d) (2003)).

232. *Id.* at 1137.

233. *See id.*

234. *Id.*

235. *Id.* With empathy, the Tenth Circuit Court noted that RCAA has been using this water since 1598, when “[n]on-Indian settlers constructed the ditches” and that “the descendants of these Spanish settlers continue to live in the Rio Chama Valley.” *Id.* at 1137 n.42.

236. *Id.* at 1137.

loss of economic benefits.<sup>237</sup> The court stood firm, however, in its resolve to uphold the Supreme Court's standard from *TVA* for granting injunctive relief under the ESA: "Concededly, this view of the [ESA] will produce results requiring the sacrifice of the anticipated benefits of [Tellico Dam and millions of dollars] . . . . [But it is] beyond doubt that Congress intended endangered species to be afforded the highest of priorities."<sup>238</sup> The Tenth Circuit commended the District Court in its efforts to untangle the web of equitable and legal issues created by the compelling and competing needs of all who depend on the water flowing in the Rio Grande, but noted that it is the "'enduring or permanent nature' of an environmental injury" that tips the balance in favor of the silvery minnow.<sup>239</sup>

### *The Concurrence*

The concurrence agreed that the case devolved to contract interpretation, but wrote separately to highlight the relevance of the unmistakable terms doctrine, a doctrine that was "curiously" ignored in this case.<sup>240</sup> The doctrine proposes that a contract to which the government is a party remains subject to subsequent legislation unless the contract expressly provides in unmistakable terms that it is immune from such legislation.<sup>241</sup> In other words, "[A] silent contract preserves the government's right to modify it by subsequent legislation."<sup>242</sup> To determine if the doctrine applies to a particular government contract, the concurrence identified the following test put forth by four justices of the Supreme Court: "whether enforcement of the contractual obligation alleged would block the exercise" of the government's sovereign power.<sup>243</sup> Under this test, the doctrine clearly applies to the instant

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237. *Id.* (internal quotations omitted).

238. *Id.* (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978)).

239. *Id.* at 1138 (quoting *Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1440 (10th Cir. 1996)).

240. *Id.* at 1138-39 (Seymour, J., concurring). Judge Porfilio joined Judge Seymour's concurring opinion, thus both the main opinion and the concurring opinion are "opinions of the court with panel majorities." *Id.* at 1144 n.3 (Kelly, J., dissenting). In questioning the Bureau's decision to not even address this doctrine, the concurrence suggested that this could be attributed to what one authority describes as the Bureau's historical avoidance of "confrontation and controversy by siding with irrigators, even when that meant ignoring clear requirements of federal law." *Id.* at 1139 n.1 (Seymour, J., concurring) (quoting Benson, *supra* note 34, at 409-10).

241. *See Rio Grande Silvery Minnow*, 333 F.3d at 1139 (Seymour, J., concurring).

242. *Id.* at 1139 (Seymour, J., concurring).

243. *Id.* at 1140 (Seymour, J., concurring) (citing *United States v. Winstar Corp.*, 518 U.S. 839, 879 (1996)). The concurrence distinguishes *Winstar*, in which the doctrine of unmistakable terms did not apply, because there the "plaintiffs sought only damages from the government for its breach of contract, . . . the plaintiffs *did not seek injunctive relief* . . . to prevent the subsequent legislation from applying to their contracts." *Id.* at 1140 (Seymour, J., concurring). The principle opinion in *Winstar* reasoned that the doctrine did not apply since granting the damage award "did not block the exercise of sovereign power because the government remained free to enforce . . . its sovereign authority as embodied in the subsequent legislation." *Id.* at 1140 (Seymour, J., concurring). Two dissenting justices in *Winstar* opined that

case because enforcement of the water delivery contracts without making water available for the silvery minnow “would effectively limit the government’s sovereign authority to enforce the provisions of the ESA.”<sup>244</sup> Certainly, the government has not, in unmistakable terms, waived its authority to impose subsequent environmental laws on these water delivery contracts.<sup>245</sup> The concurrence concludes that, according to the precepts of the unmistakable terms doctrine, the Repayment Contracts are subject to the obligations imposed on the Bureau by the subsequent passage of the ESA.<sup>246</sup>

### *The Dissent*

The dissent countered with equal vigor that the unmistakable terms doctrine does not apply to the instant case. Here, the subsequent legislation at issue – the ESA – is powerless to modify the Repayment Contracts because the ESA applies only to actions in which the Bureau has discretion.<sup>247</sup> Although the government has not waived its right to subject the contracts to subsequent legislation, the dissent contended that the Bureau does not seek to modify the contract terms to comply with the ESA because such enforcement is contingent upon agency discretion, and the Bureau has not retained such discretion.<sup>248</sup> Rather, the Bureau’s “solemn obligation to honor its contracts” directs the Bureau to enforce the contract provisions as demanded by the traditional water users.<sup>249</sup> Of course, this argument is rooted in the premise that there is no agency discretion to comply with the ESA, a premise

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the doctrine should have applied in that case, simply because there was no contract term unmistakably waiving the government’s right to amend the contract by subsequent legislation. *Id.* at 1141 (Seymour, J., concurring). The *Winstar* dissenters argued that the principle opinion and its applicability test had “drastically reduc[ed] the scope of the unmistakable terms doctrine, [and] shroud[ed] the residue with clouds of uncertainty.” *Id.* at 1141 (Seymour, J., concurring) (quoting *Winstar Corp.*, 518 U.S. at 924 (Rehnquist, J., dissenting)). For the analysis of the instant case, however, it is enough to note, as the concurrence does, that under either the principle opinion or the dissent in *Winstar*, the unmistakable terms doctrine would apply here. *Id.* at 1141 (Seymour, J., concurring).

244. *Id.* at 1140 (Seymour, J., concurring).

245. *Id.* (Seymour, J., concurring). Even the dissent agrees that the Repayment Contracts “do not affirmatively provide in unmistakable terms that they will not be subject to subsequent legislation.” *Id.* at 1141 (Seymour, J., concurring).

246. *See id.* at 1140-41. (Seymour, J., concurring).

247. *Id.* at 1149 (Kelly, J., dissenting).

248. *Id.* at 1147-48 (Kelly, J., dissenting). The dissent rejects the concurrence’s suggestion that the Bureau’s failure to discuss the doctrine is due to its bias in favor of irrigators because “there is no evidence whatsoever of this in the record.” *Id.* at 1148 (Kelly, J., dissenting). Rather, the dissent suggests that the reason neither party addressed this doctrine is because “no party thought the court would be so bold as to go where no court has gone before – to declare that the ESA applies even in the absence of pre-existing agency discretion.” *Id.* at 1148 (Kelly, J., dissenting). However, this conclusion is based on the presumption that all parties agreed that there was, in fact, an “absence of pre-existing agency discretion.” Obviously, there was no such consensus among the litigants here.

249. *Id.* at 1148 (Kelly, J., dissenting).

soundly rejected by the majority.<sup>250</sup> The dissent supported its proposition that the Bureau has no discretion to comply with the ESA, and thus no authority to unilaterally reduce its water deliveries, with a comprehensive discussion of the inclusion of “executing” contracts under the rubric of “agency action,” the contract terms, and the federal statutes.<sup>251</sup>

The dissent’s discretion analysis began with the suggestion that if merely executing contracts constitutes “agency action,” then Fish and Wildlife’s obligations to identify Reasonable and Prudent Alternatives has been pre-empted by the District Court’s second order directing the Bureau to reduce water deliveries, which is “tantamount to imposition of a [Reasonable and Prudent Alternative].”<sup>252</sup> The regulations accompanying the ESA, however, are clear that Reasonable and Prudent Alternatives themselves can only identify alternatives that are within the agency’s lawful authority and discretion.<sup>253</sup> Since using the water for the silvery minnow is not within the Bureau’s discretion, the dissent contends, it is not an available “alternative” that can form the basis of a Reasonable and Prudent Alternative.<sup>254</sup> Even so, the dissent rejected the proposition that mere “ongoing federal reservoir or water operations” constitutes “agency action” because such an interpretation “shift[s] the focus entirely onto the actor rather than the character of the action.”<sup>255</sup>

The dissent distinguished *Houston* because there the conclusion that “negotiating and executing” contracts constituted “agency action” applied to contract renewals, whereas the instant case involves “past negotiation and execution.”<sup>256</sup> Even if one were to find that the Bureau was engaged in “agency action” in the instant case, the dissent reasoned it would not be subject to the obligations of the ESA because it is not an action over which there

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250. The concurrence states that this contention “stands the unmistakable terms doctrine on its head” because the dissent is essentially arguing that a contract must “expressly reserve the agency’s discretion to modify its terms, while the . . . doctrine holds, exactly to the contrary, that a silent contract preserves the sovereign’s power to modify by subsequent legislation.” *Id.* at 1141 (Seymour, J., concurring). According to the concurrence, “under the dissent’s view silence negates governmental authority, while under the doctrine silence preserves it.” *Id.* (Seymour, J., concurring).

251. *Rio Grande Silvery Minnow*, 333 F.3d at 1143-45 (Kelly, J., dissenting) (agency action); *id.* at 1145-51 (contract provisions); *id.* at 1153-54 (federal statutes).

252. *Id.* at 1143-44 (Kelly, J., dissenting).

253. *Id.* at 1144 (Kelly, J., dissenting).

254. *Id.* at 1145 (Kelly, J., dissenting). See also Brief for Appellants at 29. The Appellants noted that “the use of project water for endangered species is not an ‘alternative action’ for Section 7 purposes because in signing the water delivery contracts, [the Bureau] relinquished any discretion it might have had to use” the already contracted water for the silvery minnow. *Id.* The Bureau argued that since the use of that water for the silvery minnow is not within the Bureau’s discretion, it could not form the basis of a Reasonable and Prudent Alternative. *Id.*

255. *Rio Grande Silvery Minnow*, 333 F.3d at 1145 (Kelly, J., dissenting).

256. *Id.* at 1144 (Kelly, J., dissenting).

is “discretionary Federal involvement or control.”<sup>257</sup> The dissent concluded that even a broad interpretation of the ESA “does not permit an agency to breach non-discretionary contractual terms,” and focused its analysis on what it refers to as “non-discretionary” contract provisions.<sup>258</sup>

The dissent argued that the “all as amended or supplemented” language of the Repayment Contracts refers only to the authority under which the government entered into the contracts, and does not contemplate contract modifications by the subsequently enacted ESA.<sup>259</sup> Also, the provisions allocating expenses relating to the “fish and wildlife function” to the Bureau do not grant discretion to the Bureau to reallocate contracted water for the benefit of the silvery minnow.<sup>260</sup> Rather, the dissent contended, “the fact that the City and the [Irrigation District] do not have to pay [these costs] suggests that [the Bureau] lacks discretion to make them pay indirectly by unilaterally reallocating their water.”<sup>261</sup>

Similarly, according to the dissent, the Water Shortage Clauses also do not invest the Bureau with authority to reduce water deliveries.<sup>262</sup> Rather, the language of those clauses applies only to water shortages “that are beyond [the Bureau’s] control” or “external to [the Bureau] that are unknown and unpredictable,” and not to shortages created by the Bureau.<sup>263</sup> The dissent contended that such Water Shortage Clauses are exculpatory.<sup>264</sup> They are not affirmative grants of discretion, but are defensive in nature; to interpret them otherwise would “[do] violence to their language and intent.”<sup>265</sup> Likewise, the provision granting the City a “vested right to renew said contract *indefinitely* . . . so long as a water supply may be available” does not give the Bureau discretion to reduce water deliveries.<sup>266</sup> According to the dissent, “indefinitely” means “without specified or assignable limit or end.”<sup>267</sup> Thus, as long as the City is current on its payments, the Bureau is prohibited from reducing its water deliveries.<sup>268</sup> The contract with the Irrigation District has a similar term, allowing a refusal of water where the Irrigation District is in arrears on its payments.<sup>269</sup>

The dissent then addressed the contract term providing that, in times

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257. *Id.* at 1144–45 (Kelly, J., dissenting). See 50 C.F.R. § 402.03 (2003).

258. *Rio Grande Silvery Minnow*, 333 F.3d at 1145 (Kelly, J., dissenting).

259. *Id.* at 1146 (Kelly, J., dissenting).

260. *Id.* at 1150 (Kelly, J., dissenting).

261. *Id.* (Kelly, J., dissenting).

262. *Id.* at 1150–51 (Kelly, J., dissenting).

263. *Id.* (Kelly, J., dissenting).

264. *Id.* at 1151 (Kelly, J., dissenting).

265. *Id.* (Kelly, J., dissenting).

266. *Id.* at 1152 (Kelly, J., dissenting).

267. *Id.* (Kelly, J., dissenting) (citation omitted).

268. *Id.* (Kelly, J., dissenting).

269. *Id.* (Kelly, J., dissenting).



of scarcity when the actual amount of water available may be less than the firm yield, the City or Irrigation District shall share in the appropriate ratio.<sup>270</sup> Again, these provisions relate to water scarcities that were beyond the Bureau's control; there is nothing to suggest "[the Bureau] has discretion to create a shortage" to protect the silvery minnow.<sup>271</sup>

Next, the dissent stated that neither the Fish and Wildlife Coordination Act (FWCA) nor the Reclamation States Emergency Drought Relief Act (RSEDRA) works in favor of granting authority to the Bureau to reduce water deliveries. FWCA does have a provision to modify water operations for wildlife conservation, but it applies only "to projects 'the construction of which has not been substantially completed' on the date of FWCA's enactment" and which include conservation measures as an "integral part" of the project.<sup>272</sup> This project is completed, however, and providing water for the silvery minnow is certainly not an "integral part" of the San Juan-Chama Project.<sup>273</sup> Also, RSEDRA, which authorizes the Secretary to make water from reclamation projects available for fish and wildlife protection, requires the Secretary to take such measures "in a manner consistent with the Secretary's other obligations."<sup>274</sup> The dissent contended that "other obligations" must include "honoring contractual obligations."<sup>275</sup> Though the ESA may be considered such an obligation, it is "dependent upon discretion which is lacking here" and therefore is not imposed on the Secretary.<sup>276</sup>

The dissent next distinguished the Ninth Circuit cases relied upon by the majority, noting first that the Tenth Circuit was, of course, not bound to follow them.<sup>277</sup> The *O'Neill* court determined that the contracts, which were up for renewal, were "subject to future changes in reclamation law," i.e., the Central Valley Project Improvement Act.<sup>278</sup> The Central Valley Project Improvement Act specifically required the Bureau to make water available for fish and wildlife and therefore "mark[ed] a shift in reclamation law."<sup>279</sup> In the instant case, there is no such "future change in reclamation law" because the ESA does not authorize the Bureau to reduce contract deliveries for the

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270. *Id.* (Kelly, J., dissenting).

271. *Id.* (Kelly, J., dissenting). The dissent made the following analogy: The Bureau's "control of water deliveries does not give it power to reallocate . . . water committed by contract any more than a bailee by virtue of possession of bailed property may misdeliver that property for social good." *Id.* at 1152-53 (Kelly, J., dissenting).

272. *Id.* at 1154 (Kelly, J., dissenting) (quoting 16 U.S.C. § 662(c) (2003)).

273. *Id.* (Kelly, J., dissenting). The majority observes, however, that FWCA was enacted three years before passage of the San Juan-Chama Act of 1961. *Id.* at 1136.

274. *Id.* at 1154 (Kelly, J., dissenting) (citing 43 U.S.C. §§ 2212(d), 2242 (2003)).

275. *Id.* (Kelly, J., dissenting).

276. *Id.* (Kelly, J., dissenting).

277. *Id.* at 1156 (Kelly, J., dissenting).

278. *Id.* (Kelly, J., dissenting).

279. *Id.* (Kelly, J., dissenting) (citing *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995)).

benefit of the silvery minnow.<sup>280</sup> The *Houston* court was also confronted with the issue of contract renewals, and its holding that contract renewals constitute agency action have no application to the issue of existing contracts in the instant case.<sup>281</sup> Finally, *Klamath* is readily distinguishable, the dissent asserted, because the Ninth Circuit's central holding that water users were not third party beneficiaries to the contract between the Bureau and a power company is simply not at issue in this case.<sup>282</sup> The *Klamath* court, "interpreting but one of a multitude of Klamath water projects," determined that the Bureau retained authority over that specific project based on specific provisions of the contract.<sup>283</sup> Here, the dissent argued, the Bureau "simply has not retained the same measure of discretion."<sup>284</sup>

In summary, the dissent contended that none of the sources relied upon by the majority invest the Bureau with discretion to unilaterally reduce water deliveries for the benefit of the silvery minnow. The dissent claimed that the majority's interpretation of the Repayment Contracts "renders the contracts somewhat illusory because [the Bureau] will have discretion to modify those rights and duties."<sup>285</sup> The dissent charged that under the majority's reasoning "the ESA, . . . despite the good intentions of its creators, has become a monster."<sup>286</sup>

## ANALYSIS

### *Reactions to the Decision*

Soon after the Tenth Circuit Court affirmed the District Court's ruling that the Bureau does have discretion to reduce water deliveries to comply with its obligations under the ESA, there was a flurry of activity on Capitol Hill, in the press, and in the courtroom. Several members of Congress representing New Mexico have introduced legislation seeking to exempt the San Juan-Chama Project from the ESA, mirroring the response of some members of Congress to the *TVA* decision twenty-five years ago.<sup>287</sup> The mayor of

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280. *Id.* (Kelly, J., dissenting).

281. *Id.* at 1157 (Kelly, J., dissenting) (citing *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998)).

282. *Id.* (Kelly, J., dissenting) (discussing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000)).

283. *Rio Grande Silvery Minnow*, 333 F.3d at 1157 (Kelly, J., dissenting).

284. *Id.* (Kelly, J., dissenting).

285. *Id.* (Kelly, J., dissenting).

286. *Id.* at 1158 (Kelly, J., dissenting).

287. As chairman of the Senate Energy and Water Development Appropriation Subcommittee, Senator Domenici, together with Senator Bingaman, has introduced an amendment to the 2004 Energy and Water Appropriations Bill that would, among other things, prohibit the use of San Juan-Chama water to meet ESA obligations on the Rio Grande and "allow for the federal purchase of privately held water if there is a willing seller." June 20, 2003 News Release of Senator Domenici, at <http://domenici.senate.gov/newscenter/news.cfm> (last visited Nov. 30, 2003). The passage of this proposed legislation, should it occur, will not take away

Albuquerque lamented the success of the “fringe environmental community, which . . . wants to take water from the mouths of our children.”<sup>288</sup> Appellants filed a petition for panel rehearing and rehearing *en banc* in August 2003.<sup>289</sup>

This reaction to the Tenth Circuit Court’s decision perfectly illustrates the divisive, complex, and passionate disputes that arise over water issues in the West. As the drought persists and competition for water increases, the needs of traditional water users will continue to be balanced with the needs of the rivers, and the fish and wildlife that rely on them. By recognizing the silvery minnow not just as a three-inch fish, but as a “measure of the vitality of the Rio Grande ecosystem,” the Tenth Circuit has “tipp[ed] the balance of hardships and public interest in favor of the protected species.”<sup>290</sup> And though the District Court’s order is “a narrowly drawn order addressing carefully limited circumstances,” this holding has the potential to affect Bureau projects throughout the country, and certainly throughout the West.<sup>291</sup>

#### *Why The Effect Of The Decision May Be Widespread*

As already discussed, the Bureau’s objective in its early days was modest: to “encourage the settlement of the American West into small family farms.”<sup>292</sup> Since its birth in 1902, however, Bureau operations have grown to encompass about 180 water projects in the western states, providing water to one in five western farmers.<sup>293</sup> Today, Bureau operations “regulate the flow of water in virtually every major river in the West,” so recognition of the Bureau’s authority to manage its operations in compliance with the federally mandated ESA may have far-reaching effects.<sup>294</sup>

Initially, the federal government was to be reimbursed by water users for much of the construction costs of these massive projects. The original reclamation laws required project beneficiaries to pay off their debt within ten years.<sup>295</sup> In reality, however, water projects are heavily subsidi-

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from the precedential value of this case, however. Such site-specific exemptions do not change the fact that the ESA is still federal law, and as long as a federal agency is involved, that agency is bound to comply with the ESA. Courts bound by the Tenth Circuit Court’s decision must still follow its holding: The Bureau has discretion to reduce water deliveries to meet its obligations under the ESA.

288. *Ruling for Minnow Churns City, State*, ALBUQUERQUE TRIBUNE, June 13, 2003, available at <http://www.abqtrib.com/archives> (last visited Aug. 15, 2003).

289. See Petition for Appellants for Panel Rehearing and Request for Rehearing *en banc*, *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003).

290. *Rio Grande Silvery Minnow*, 333 F.3d at 1138, 1119.

291. *Id.* at 1113-14.

292. Brief of Amicus Curiae Trout Unlimited at 2.

293. *Id.* at 3-4.

294. *Id.* at 5-6.

295. WILKINSON, *supra* note 129, at 249.

dized, with beneficiaries repaying, on average, only sixteen percent of the total construction costs of the water projects.<sup>296</sup> It is this reality that has influenced the Ninth Circuit Court to make the following distinction:

Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation – putting the water to beneficial use upon lands . . . Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law) but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.<sup>297</sup>

This distinction is a reflection of a statement made by the Supreme Court in the 1950's that "beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."<sup>298</sup> Even more succinct is the Court's observation that "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."<sup>299</sup> The Tenth Circuit follows this line of reasoning in the instant case when it concludes that whether the Bureau owns rights to native or imported water is not dispositive.<sup>300</sup> Rather, it is the Bureau's "retaining authority to manage . . . [the project] works [that] triggers its ESA obligations."<sup>301</sup> Thus, the Bureau's responsibility to comply with the ESA is not confined to those cases in which the Bureau has appropriated water rights.<sup>302</sup> The Repayment Contracts and federal statutes have been interpreted to grant the Bureau this authority and discretion based on the Bureau's mere title to the project works.<sup>303</sup>

This expansive reading of the contracts and accompanying federal statutes is critical. For almost every water project, the Bureau enters into water contracts with an irrigation district, which then supplies water to the end user, usually an irrigator.<sup>304</sup> Since irrigators do not have rights to project

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296. Brief of Amicus Curiae Trout Unlimited at 8 (citation omitted).

297. Brief for Appellees at 83 (quoting *Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977)).

298. Brief of Amicus Curiae Trout Unlimited at 9 (quoting *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958)).

299. *Wickard v. Filburn*, 317 U.S. 111, 131(1942).

300. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1136 (10th Cir. 2003).

301. *Id.*

302. *See id.* The Bureau did not appropriate the Irrigation District's water rights in the instant case, yet the Tenth Circuit held that the Bureau was still required to meet its ESA obligations. *Id.*

303. *See id.*

304. *Benson*, *supra* note 34, at 371.

water in the absence of such a contract, the contract “necessarily limit[s] those rights.”<sup>305</sup>

Importantly, the Tenth Circuit Court relied heavily on the Water Shortage Clause to support its conclusion that the Bureau may reduce water deliveries to comply with the ESA, and this same provision is found in most Bureau water contracts.<sup>306</sup> The court’s reasoning defeats the State’s attempts to dismiss this clause as a mere boilerplate attempt to “protect the public purse” in the event of causes beyond the Bureau’s control that may result in a water shortage.<sup>307</sup> Because this clause is frequently found in Bureau contracts, any water project found to be jeopardizing an endangered species may be implicated by the Tenth Circuit’s decision.<sup>308</sup>

*Though Water May Be Released, The “Floodgates” Have Not Been Opened*

Despite the dissent’s exaggerated warning that the ESA is becoming “a monster,” this decision does not give the Bureau free reign to reallocate project water whenever and wherever it pleases.<sup>309</sup> In this sense, it is true that the District Court crafted its relief “in a narrowly drawn order addressing carefully limited circumstances.”<sup>310</sup> The Bureau may only reduce water deliveries if necessary to meet its obligations under the federally mandated ESA.<sup>311</sup>

Certain prerequisites must be met before any water user is affected by this ruling. First, there must be an endangered or threatened species listed under the ESA.<sup>312</sup> The stringent guidelines surrounding the listing process are a testament to the fact that this is not a task taken lightly by the Secretary or Fish and Wildlife.<sup>313</sup> Second, the actions of the Bureau must be found to be jeopardizing a listed species.<sup>314</sup> As the complex litigation leading up to the instant case illustrates, this showing can be a difficult obstacle

305. See *id.* at 397.

306. See *id.* at 399.

307. *Rio Grande Silvery Minnow*, 333 F.3d at 1132.

308. A statistic illustrating the potentially far-reaching effects of this decision is that “as of 1995, 184 species that rely on habitat affected by Bureau operations were either listed or proposed for listing under the ESA.” Brief of Amicus Curiae Trout Unlimited at 1 (citing Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 320-21 (1996)).

309. See *Rio Grande Silvery Minnow*, 333 F.3d at 1158 (Kelly, J., dissenting).

310. *Id.* at 1113-14.

311. See *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (order and partial final judgment).

312. COGGINS ET AL., *supra* note 49, at 451 (noting ESA protections are not triggered until a species is formally listed).

313. See 16 U.S.C. § 1533 (2003).

314. See 50 C.F.R. § 402.13(a) (2003) (providing that once Fish and Wildlife concurs with the agency that the proposed action is “not likely to adversely affect” the listed species, the consultation process is complete).

to overcome.<sup>315</sup> But even if the Bureau's operations are found to be jeopardizing a listed species, Fish and Wildlife will often be able to recommend Reasonable and Prudent Alternatives that will allow the Bureau to proceed with its operations with minor modifications.<sup>316</sup> To be sure, there will be rare cases in which Fish and Wildlife will not be able to suggest acceptable alternatives for the action agency to take.<sup>317</sup> Even in these extreme circumstances, however, the Bureau has yet another option. The Bureau may petition the God Squad for an exemption of their proposed action.<sup>318</sup> If granted, the Bureau would be allowed to proceed with the project as long as the agency used "reasonable mitigation and enhancement measures" to minimize the adverse effects of the project.<sup>319</sup>

Together, these prerequisites ensure that only in the most extreme cases will the end water user be affected by the protections guaranteed by the ESA. In the instant case, the silvery minnow's situation was dire, yet the practical significance of this holding was tempered by the District Court's second order, which directed the Bureau to deliver a small amount of water for the minnow, while still delivering a "reasonable amount" to the water users.<sup>320</sup> Surely this will not result in "tak[ing] water from the mouths of . . .

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315. See *Middle Rio Grande Conservancy District v. Norton*, 294 F.3d 1220 (10th Cir. 2002) (EIS requirement); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1998) (critical habitat designation); *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156 (D.N.M. 2000) (adequacy of critical habitat designation).

316. See 50 C.F.R. § 402.02 (2003) (defining such an alternative as an action "that can be implemented in a manner consistent with the intended purpose of the action . . . [and] that is economically and technically feasible").

317. The following statistics illustrate how often this authority of Fish and Wildlife is invoked to allow federal projects to proceed:

A [Biological Opinion] may have one of three conclusions: no jeopardy; jeopardy with reasonable and prudent alternatives; or jeopardy without such alternatives. A 1992 study . . . showed that more than 90% of formal consultations concluded "no jeopardy;" and that almost all of the "jeopardy" opinions were accompanied by reasonable and prudent alternatives. Of 100,000 consultations over a five year period, only 27 had [Biological Opinions with no reasonable and prudent alternatives].

COGGINS ET AL., *supra* note 49, at 463 (citing U.S. GENERAL ACCOUNTING OFFICE, *ENDANGERED SPECIES ACT: TYPES AND NUMBER OF IMPLEMENTING ACTIONS* (1992)). See also Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 319 (1993) (noting that the GAO study "go[es] far to refute claims that the requirements of the ESA are 'unbalanced' and are seriously limiting American economic growth").

318. For a discussion of the God Squad, see *supra* notes 87-89 and accompanying text.

319. See GETCHES, *supra* note 2, at 374.

320. Brief for Appellees at 2. The Appellees also noted:

[S]aving the silvery minnow will not require large amounts of water indefinitely into the future. Once recovery efforts have proceeded so that the minnow is reestablished in other parts of the river, it will be able to survive the type of river drying that was threatened in 2002. In the meantime, it is critical that the few minnows living in the river be sustained, so

children” in Albuquerque.<sup>321</sup> Readers, politicians, and the public at large must be cautioned to not let such alarmist rhetoric detract from the reasonableness of the Tenth Circuit’s holding.<sup>322</sup>

*The Decision Respects New Mexico Water Law*

Though much has been made of the potential release of water from Heron Reservoir, one must not overlook the importance of the other directive of the District Court’s second order.<sup>323</sup> The second provision of the second order directs that additional water for the minnow may be found by restricting Irrigation District diversions of Middle Rio Grande Project water.<sup>324</sup> This directive reflects an observation made by the District Court in its first order in response to allegations that the Irrigation District was using “more water than reasonably needed for beneficial use.”<sup>325</sup> Plaintiffs claimed the Irrigation District violated two sections of the Reclamation Act, one “limit[ing] the use of federal project water to that reasonably needed for beneficial use, and one “requir[ing] that federal water projects conform with state water law.”<sup>326</sup> The District Court first stated that though “there is some evidence” that the Irrigation District was wasting water, such a determina-

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that they can generate more populations to restock other parts of the Rio Grande as the river’s many habitat improvement projects begin to take hold, and the river regains some of its former vitality.

*Id.* at 6.

321. See *supra* note 288.

322. See Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L. J. 197 (2002). In his analysis of the 2001 Klamath Basin crisis, Professor Benson makes the following point regarding fairness:

To frame the issue simply as “farmers v. [fish]” is to ignore the real human costs of traditional water management in the basin, and the real human benefits that could flow from restoring aquatic ecosystems. To say that the “solution” is simply rolling back the ESA is implicitly to argue, not just that people are more important than fish, but that farmers are more important than other people.

*Id.* at 236-37. This argument highlights a point that is often overlooked or ignored by ESA critics: the fact that for over a century, water laws have “favored irrigation at the expense of all other interests.” *Id.* at 237. It is now time for those other interests to get their “even break.” *Id.* at 238. Unfortunately, Professor Benson’s hope that the Klamath crisis would “hold a valuable lesson for the entire West” was not realized, or at least it was not a lesson learned. *Id.* at 237. Equally unfortunate is the fact that Professor Benson’s prescient warning that “some other basin will become the dreaded ‘next Klamath’” was realized. *Id.* at 238.

323. See Brief for Appellees at 29.

324. *Rio Grande Silvery Minnow v. Keys*, No. CV 99-1320 (D.N.M. September 23, 2002) (order and partial final judgment).

325. *Rio Grande Silvery Minnow v. Keys*, No. 99-1320, 2002 U.S. Dist. LEXIS 9246, at \*53 (D.N.M. April 19, 2002).

326. *Id.* at \*52-53 (referring to 43 U.S.C. §§ 372, 383 (2002)).

tion was outside the scope of the litigation.<sup>327</sup> The court then observed that the Bureau has a statutory duty to determine whether the Irrigation District was wasting water, in violation of the Reclamation Act and New Mexico water law.<sup>328</sup> If the Bureau finds that “excessive” diversions are taking place, this excess “may be a source of water that could be used to help preserve the endangered minnow.”<sup>329</sup>

Thus, the District Court’s second order is perfectly in line with New Mexico water law, in that it should encourage the Irrigation District to adopt conservation measures that will make water available for the benefit of the silvery minnow while still delivering to water users the amount of water reasonably needed for beneficial use.<sup>330</sup> Under this analysis, the doctrine of prior appropriation and New Mexico state law, both prohibiting the waste of water, are not only respected, they are, in a sense, being enforced by the Tenth Circuit’s holding.<sup>331</sup> This decision should not be seen as “taking away” the Irrigation District’s water because the Irrigation District simply had no right to any water beyond its beneficial use requirements.<sup>332</sup> Under the prior appropriation doctrine, beneficial use is “the basis, the measure and the limit” of any water right.<sup>333</sup> It logically follows that “to the extent that water use exceeds beneficial use, there is no water right.”<sup>334</sup>

### *Contract Interpretation*

By interpreting the Repayment Contracts broadly, the Tenth Circuit correctly followed legal precedent by affording endangered species the pro-

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327. *Id.* at \*53. The State Engineer, in a letter to the District, asserted that from 1989 to 1999, the District diverted 11 acre feet per acre irrigated, while 7.2 acre feet of water per acre was deemed “sufficient and non-wasteful.” *Id.* See also Brief for Appellees for an additional statement of the State Engineer that a diversion of 7.2 acre feet “is sufficient to ensure that no farmer in the District will incur any shortage and that all will be able to make beneficial use of the full amounts of water to which they are entitled under New Mexico law, provided, of course, that sufficient river flows exist.” Brief for Appellees at 42.

328. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246 at \*53. New Mexico, like virtually all western states, prohibits the wasting of water. See Brief for Appellees at 39 (citing *State v. McLean*, 308 P.2d 983, 987-89 (N.M. 1957) (concluding “an excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use . . . [as] [w]ater, in this state, is too scarce, and consequently too precious to admit waste”).

329. *Rio Grande Silvery Minnow*, 2002 U.S. Dist. LEXIS 9246 at \*53.

330. A 1987 study by a consulting firm hired by the Bureau found that “an improvement of five percent in system efficiency would salvage up to 70,000 acre feet annually. The costs associated with attaining this efficiency improvement should be minimal.” WILKINSON, *supra* note 129, at 230.

331. For a discussion on prohibitions against wasting water, see *supra* notes 30-33 and accompanying text; see also *supra* note 209.

332. See Brief for Appellees at 44.

333. For a discussion of prior appropriation, see *supra* notes 20-33 and accompanying text.

334. Brief for Appellees at 44. See also GETCHES, *supra* note 2, at 81 (noting that “the right to use water does not include the right to waste it”).



tections guaranteed by the ESA.<sup>335</sup> As with any divisive yet critical issue, policy considerations obviously played a role in the court's decision. It is significant, however, that the court's conclusion rested upon a simple rule of contract interpretation, the rule that "plain terms govern."<sup>336</sup> The court applied this widely accepted rule to its interpretation of the Water Shortage Clause, which barred liability for any water shortages "on account of drought or other causes" which might affect the "amount of water available."<sup>337</sup> The fact that the contracts were entered into pursuant to reclamation laws "all as amended or supplementary thereto" supports the conclusion that it was not only possible that subsequent legislation could impact the contract obligations, but that it was intended to be so, that the contracts (and thus the parties) contemplated future changes in reclamation law.<sup>338</sup> The dissent's argument that this phrase merely identifies "the source of the government's authority to enter into the contracts" weakly defies the "plain terms govern" doctrine.<sup>339</sup> Surely if the parties intended the contract to be governed by only the reclamation laws in effect at the time of the signing they would not have included such a phrase.

Another rule of federal contract interpretation, the doctrine of unmistakable terms, was only briefly noted in the majority opinion, but was discussed at length in the concurrence and addressed by the dissent.<sup>340</sup> The concurrence convincingly argued that this doctrine does apply to the instant case, and reasoned that the contracts were thus modified by the requirements of the ESA.<sup>341</sup> According to the concurrence, the Bureau's discretion would not need to be granted solely by the terms of the existing contracts; with this "modification," the ESA and the contracts themselves would direct the Bureau to provide water for the silvery minnow.<sup>342</sup> Indeed, the "government clearly needs no grant of discretion to exercise its sovereign power."<sup>343</sup>

And though the dissent's lengthy analysis purports to offer a variety of reasons for its rejection of the court's holding, all of these arguments are

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335. This directive was first handed down in *TVA*, and subsequently reaffirmed by a string of cases from the Ninth Circuit. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000); *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, (9th Cir. 1998); *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

336. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1130 (10th Cir. 2003).

337. See *id.* at 1129. By leaving the door open for "other causes" and identifying the amount of water "available," rather than the amount of water "contracted for," the federal government clearly reserved to itself the discretion to determine exactly how much water was, in fact, "available."

338. See *id.* at 1130.

339. See *id.* at 1146 (Kelly, J., dissenting).

340. See *id.* at 1128 n.25; *id.* at 1138-39 (Seymour, J., concurring); *id.* at 1142 (Kelly, J., dissenting).

341. See *id.* at 1139 (Seymour, J., concurring).

342. *Id.* (Seymour, J., concurring).

343. *Id.* at 1141 (Seymour, J., concurring).

based on the single premise that the Bureau does not have discretion to reduce water deliveries.<sup>344</sup> The dissent's rejection of the unmistakable terms doctrine is no exception: the doctrine does not apply because the ESA, the "subsequently enacted legislation," is inapplicable in the absence of discretion.<sup>345</sup> However, the concurrence would counter that such discretion is unnecessary when the doctrine is applied.<sup>346</sup> Nevertheless, it is unclear whether the doctrine, thus applied, affirmatively directs the Bureau to comply with the ESA – regardless of contract terms – or is merely a "background" principle against which the contract terms and enabling statutes must be read. Either way, whether it mandates compliance with the ESA in the absence of Bureau discretion, or is simply another element of the Bureau's authority to comply with the ESA, the doctrine of unmistakable terms clearly supports the holding in this case.<sup>347</sup>

### CONCLUSION

By applying the "plain terms govern" rule of contract interpretation, and giving deference to the congressional intent behind the ESA, the Tenth Circuit has reasonably concluded that the Bureau has discretion to reduce water deliveries to meet its obligations under the ESA. Though the effects of this decision will surely ripple across the West, there are safeguards in place to ensure that the Bureau will not reduce water deliveries with reckless abandon. In fact, in many instances, the Bureau will not need to reduce water deliveries at all.

This decision will be useful as a "back door" approach to encourage states and irrigation districts to incorporate long-overdue conservation measures. Such measures will allow the states to better enforce their own laws and the cornerstone of the prior appropriation doctrine: the prohibition on the wasting of water. As the drought continues, courts will increasingly be called upon to balance the competing needs of traditional water users with the needs of the ecosystems upon which we all rely. The Tenth Circuit Court has responded to the call by tipping that balance in favor of protecting the endangered species, as required by the Supreme Court and Congress. This decision, reflecting Thoreau's wise observation that "in wildness is the preservation of the world," grants not only the silvery minnow and the Rio Grande ecosystem another chance at survival, but will compel the Bureau to

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344. See *id.* at 1144–45 (Kelly, J., dissenting) (Reasonable and Prudent Alternatives); *id.* at 1143–45 (Kelly, J., dissenting) (agency action); *id.* at 1146–51 (Kelly, J., dissenting) (contract provisions); *id.* at 1153–54 (Kelly, J., dissenting) (federal statutes); *id.* at 1156–57 (Kelly, J., dissenting) (distinguishing Ninth Circuit cases).

345. *Id.* at 1149 (Kelly, J., dissenting).

346. *Id.* at 1141 (Seymour, J., concurring).

347. If the Appellant's request for a rehearing is granted, the Tenth Circuit may be able to clarify its position regarding the doctrine of unmistakable terms. If affirmed, this doctrine will serve as a useful tool in any future litigation that may be necessary to compel the Bureau to meet its obligations under the ESA.

manage all of its operations across the West in accordance with the ESA.<sup>348</sup> After over a century of "reclaiming" the West, it is time for the Bureau to update its water operations to reflect the modern needs of the communities and habitats it affects.

BETH RICHARDS

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348. HENRY DAVID THOREAU, *Walking, in THE SELECTED WORKS OF THOREAU 672* (Walter Harding ed., Houghton Mifflin Company 1975).

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