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The War over the Delta Smelt: Balancing the Endangered Species Act with the Human Interest

CASE NOTE

THE WAR OVER THE DELTA SMELT: BALANCING THE ENDANGERED SPECIES ACT WITH THE HUMAN INTEREST

LILLIE PARKER

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I. INTRODUCTION

The Central Valley Project (“CVP”) and State Water Projects (“SWP”) (collectively “the Projects”) are two of the largest and most important water projects in the United States.¹ Combined, the projects supply water to more than twenty million agricultural and domestic consumers in central and southern California.² The estuary at the confluence of the San Francisco Bay and Sacramento-San Joaquin Delta (“Bay Delta”), the source of the water for the Projects, also serves as the sole habitat of the Delta Smelt, a threatened species under the Endangered Species Act (“ESA”).³

San Luis & Delta-Mendota Water Authority v. Jewell is the latest chapter in the “continuing war over protection of the Delta Smelt.”⁴ In 2005 the Bureau of Reclamation (“Reclamation”) requested a Biological Opinion (“Bi-

1. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014).

2. *Id.*

3. *Id.*

4. *Id.* at 591.

Op”) from the United States Fish and Wildlife Service (“FWS”) to determine whether continued operation of the Projects would jeopardize the Delta Smelt.⁵ In 2008 the FWS released the final BiOp, a four hundred-page opinion concluding that continued operation of the Projects would threaten the Delta Smelt and proposing reasonable and prudent alternatives (“RPAs”) as required by the ESA.⁶ The plaintiff-appellees (“Appellees”), a group of water districts, water contractors, and agricultural interests, brought suit to prevent the implementation of the BiOp and its RPAs.⁷ The United States District Court for the Eastern District of California (“district court”) found the 2008 BiOp arbitrary and capricious.⁸

On appeal, the Ninth Circuit Court of Appeals (“Court”) reviewed the district court’s findings to determine (i) whether the FWS’s findings were arbitrary and capricious under the ESA; (ii) whether the FWS violated the National Environmental Policy Act (“NEPA”) by not completing an Environmental Impact Statement (“EIS”); and (iii) whether Reclamation complied with NEPA in implementing the FWS’s BiOp. The Court held that (i) the BiOp was not arbitrary and capricious; (ii) NEPA did not require FWS to prepare an EIS in conjunction with the BiOp; and (iii) Reclamation’s provisional adoption and implementation of the BiOp triggered its obligation to comply with NEPA.

San Luis & Delta-Mendota Water Authority serves as a recent example of the challenges water users and federal agencies face in trying to both satisfy appropriated water rights and protect endangered species. Focusing on the Court’s discussion of the proper standard of review, and its analysis in regard to whether the BiOp was arbitrary and capricious, this Case Note examines the ESA’s ability to affect water rights and allocation under the ESA policy, first articulated in *Tennessee Valley Authority v. Hill*,⁹ that endangered species receive the highest priority in relation to an agency project.

II. BACKGROUND

The mild climate, abundant natural resources, and scenic beauty attracted settlers to California.¹⁰ However, early farmers experienced difficulty growing crops in the arid conditions and quickly realized the need for a reliable water source, including water storage, delivery, and protection from periodic floods.¹¹ Though farmers were in dire need of this water infrastructure, miners were the first to truly harness California’s water resources.¹² In order to sluice gold, miners developed hundreds of miles of flumes and ditches to divert the

5. *Id.* at 592.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173–74 (1978).

10. *The Central Valley Project*, U.S. BUREAU OF RECLAMATION (Jan. 3, 2014), <http://www.usbr.gov/mp/cvp/>.

11. *Id.*

12. *History of the California State Water Project*, DEPARTMENT OF WATER RESOURCES, <http://www.water.ca.gov/swp/history.cfm> (last visited Oct. 7, 2014).

necessary water.¹³ When gold became scarce, the miners turned to farming and converted the infrastructure to serve irrigation purposes.¹⁴ As California's population grew and its cities developed, local infrastructure developed to bring water to booming metropolitan areas.¹⁵

A. THE CENTRAL VALLEY PROJECT

Lieutenant Robert B. Marshall of the United State Geological Survey first proposed the idea of a statewide water development project in 1919.¹⁶ The proposal involved transporting water from the Sacramento River system to the San Joaquin Valley, and then transporting the water over the Tehachapi Mountains into southern California.¹⁷ In 1931, State Engineer Edward Hyatt introduced a report, titled "State Water Plan," which identified the necessary infrastructure and cost.¹⁸ In order to implement and authorize the plan, the state legislature passed the Central Valley Act of 1933,¹⁹ and voters thereafter authorized a \$170 million bond to carry out the project. But the Great Depression forced construction of the CVP to halt.²⁰ The federal government took over the project and provided the necessary funds in 1935, and continues to oversee CVP operations through Reclamation today.²¹ The CVP now consists of twenty-two reservoirs with a total capacity of eleven million acre-feet, which provide water to irrigate three million acres of farmland and to meet the needs of nearly two million customers.²²

B. THE STATE WATER PROJECT

While the CVP provided water infrastructure for farmers, municipalities, and flood control, it proved inadequate to meet the needs of a growing population.²³ Following World War II, California experienced a population boom, and water officials soon realized that local water supplies would not be enough to meet growing needs.²⁴ Consequently, in 1945 the state legislature authorized an investigation of statewide water resources.²⁵ The Division of Water Resources, predecessor to the Department of Water Resources, conducted the investigation and produced three bulletins that laid out the plans for developing a SWP.²⁶

In 1959 the California legislature approved the SWP, and in 1960 voters

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *The Central Valley Project*, *supra* note 10.

22. *California State Water Project and the Central Valley Project*, DEPARTMENT OF WATER RESOURCES, <http://www.water.ca.gov/swp/cvp.cfm> (last visited Oct. 31, 2014).

23. *History of the California State Water Project*, *supra* note 12.

24. *Id.*

25. *Id.*

26. *Id.*

approved bonds for its construction through the Burns-Porter Act.²⁷ Today, the SWP consists of twenty-two dams and over seven hundred miles of pipeline, employed to distribute water to twenty-nine urban and agricultural water suppliers in northern California, the San Francisco Bay area, the San Joaquin Valley, the Central Coast, and southern California.²⁸ In addition to the pipeline, the SWP also boasts “thirty-four storage facilities, reservoirs, and lakes, twenty pumping plants, four pumping-generating plants, and five hydroelectric power plants.”²⁹ Seventy percent of the transported water serves urban users, with the remaining thirty percent serving agricultural uses.³⁰ The SWP provides water to approximately two-thirds of California’s population—roughly twenty-five million individuals—and seven hundred and fifty thousand acres of agricultural land.³¹

III. STATEMENT OF THE CASE

Section 7 of the ESA applies to all “municipal water supplies with a federal nexus.”³² Section 7 requires federal agencies to consult with the FWS or National Marine Fisheries Service to ensure that any “actions they authorize, fund or carry out [are] not likely to jeopardize the continued existence” of any threatened or endangered species.³³ Pursuant to its obligations under the ESA and Section 7, the present case began when Reclamation sought a BiOp from the FWS as part of its long-term operation of the CVP and its coordinated operations of the SWP.³⁴ The FWS issued a BiOp in 2005, concluding that operation of the Projects would not have an adverse effect on the Delta Smelt.³⁵ The Natural Resources Defense Council challenged the FWS’s conclusion, and the district court found the 2005 BiOp arbitrary and capricious.³⁶ In 2007, the district court conducted an extensive evidentiary hearing and subsequently issued an “interim remedial order [concerning] . . . the effects on the delta smelt of negative flows in the Old and Middle River” (“OMR”).³⁷ The district court ordered the FWS to complete a new BiOp in nine months. That deadline was later extended to a year.³⁸

The FWS issued the new BiOp on the deadline, December 15, 2008. In the words of the Court, “[i]n stark contrast to the 2005 BiOp, the 2008 BiOp

27. *The Big Water Projects in California*, CALIFORNIA WATER IMPACT NETWORK, <https://www.c-win.org/big-water-projects-california.html> (last visited Oct. 31, 2014).

28. *The State Water Project*, DEPARTMENT OF WATER RESOURCES, <http://www.water.ca.gov/swp/index.cfm> (last visited Oct. 31, 2014).

29. *Id.*

30. *Id.*

31. *Id.*

32. Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361, 380 (2001).

33. Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 17 (1995) (quoting 16 U.S.C. § 1536(a)(2) (1985)).

34. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 597 (9th Cir. 2014).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

concluded that the 'coordinated operations of the CVP and SWP . . . jeopardize the continued existence of the Delta Smelt."³⁹ The FWS made five findings of fact regarding the Delta Smelt: (i) diversions of water from the Delta have increased since the SWP began joint operations with the CVP; (ii) the Delta Smelt is currently at its lowest population since monitoring began; (iii) the proposed SWP/CVP operations are likely to reduce inflows to the Delta as upstream water demands increase; (iv) other baseline stressors, like contaminants, microcystis, aquatic macrophytes, and invasive species, will continue to adversely affect the Delta Smelt; and (v) "the Delta Smelt will need a more abundant adult population, an increase in the quality and quantity of spawning, rearing, and migratory habitat, a reduction in contaminants and pollutants, a reduction in exposure to disease and toxic algal blooms, and a reduction in entrainment at water-diversion facilities in the Bay-Delta."⁴⁰

The FWS also provided six RPAs: (i) protect the adult Delta Smelt life stage by controlling OMR flows during the vulnerable December-to-May time period; (ii) protect larval and juvenile Delta Smelt by limiting OMR flows, following the completion of the first RPA, when the Bay Delta water temperatures reach 12 degrees Celsius or when a spent female smelt is detected in trawls or in the salvage facilities; (iii) improve smelt habitat by increasing Bay Delta outflow during the fall; (iv) restore habitat in the Bay Delta and Suisun Marsh by establishing a program to create or restore intertidal and associated subtidal habitat; (v) monitor and report on the implementation and success of the RPAs, and determine possible improvements.⁴¹

A. STANDARD OF REVIEW

Claims under the ESA and NEPA are reviewed under the standards of the Administrative Procedure Act ("APA").⁴² Section 706(2) of the APA states that an agency action must be upheld unless "it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."⁴³ To determine if the standard of Section 706(2) is met, a reviewing court "must consider whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment."⁴⁴

A reviewing court must also recognize that the standard of review is highly deferential, and an agency's decision is "entitled to a presumption of regularity."⁴⁵ The highly deferential standard requires courts to uphold agency findings even if "the evidence is susceptible of more than one rational interpretation."⁴⁶

39. *Id.*

40. *Id.* at 598

41. *Id.* at 598-99.

42. *Id.* at 601.

43. *See* 5 U.S.C. § 706(2)(A).

44. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 601 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

45. *Id.*

46. *Id.* (quoting *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)).

B. THE DISTRICT COURT FAILED TO GIVE PROPER DEFERENCE TO THE FWS'S SCIENTIFIC DETERMINATIONS

The district court heard five objections to the 2008 BiOp. The first four dealt with the scientific methods the FWS employed and their subsequent conclusions. On appeal, the Court held that the district court, in reviewing these agency decisions, overstepped its bounds and failed to apply the proper level of deference.⁴⁷

First, the 2008 BiOp concluded that reducing OMR flows increased the entrainment risk of delta smelt in the pumping operations.⁴⁸ In order to mitigate this effect, the BiOp recommended strict pumping limits based on OMR flows.⁴⁹ However, as the Court noted, the “OMR flow limit ha[d] a great practical significance, not merely to the delta smelt but to Californians, as it represent[ed] the ultimate limit on the amount of water available to sustain California’s millions of urban and agricultural users.”⁵⁰

The FWS partially based this determination “on the number of delta smelt salvaged from the fish screening facilities.”⁵¹ The Appellees argued that the FWS erroneously relied on raw salvage figures as compared to normalized salvage figures, adjusted for variations in the annual smelt population.⁵² Therefore, according to the Appellees, “[a]ny apparent relationship between OMR flows and smelt salvage . . . may actually be a relationship between smelt population size and smelt salvage.”⁵³ The district court agreed and found the analysis relying on raw salvage figures to be arbitrary and capricious and not the result of the best available science, stating that “the use of normalized salvage data rather than gross salvage data is the standard accepted scientific methodology among professionals in the fields of fisheries biology/management.”⁵⁴

In reviewing the district court’s conclusion, the Court noted that it was uncontroverted that “the FWS could have done more in determining OMR flow limits.”⁵⁵ However, the Court afforded the highest deference to the FWS because it had to choose “between various scientific models” to make its determination.⁵⁶ The Court recognized that the FWS was facing measurement uncertainty and a smelt population with a threatened existence.⁵⁷ Given these factors, the Court held that the FWS’s choice of which scientific tools to use was within its discretion, and “that an agency may choose to ‘counteract the uncertainties’ . . . by ‘overestimating known parameters without being unreasonable.’”⁵⁸

47. *Id.* at 593.

48. *Id.* at 606.

49. *Id.*

50. *Id.* at 607.

51. *Id.*

52. *Id.*

53. *Id.*

54. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 889 (E.D. Cal. 2010).

55. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 608.

56. *Id.* at 610.

57. *Id.*

58. *Id.* (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

Second, the district court found that the BiOp's reliance on two different models, CALSIM II and DAYFLOW, to predict the location of X2 (the point in the Bay Delta where the salinity is less than two parts per thousand) introduced bias requiring a corrective calibration or an explanation.⁵⁹ The Court recognized that a comparison between these two models came with limitations, but that the use of the two models together, even without further calibration, was not arbitrary and capricious.⁶⁰ Contrary to the district court, the Court held that the highest deference must be given to the FWS's decision to use these models, because it was a "scientific determination" requiring a higher level of technical expertise.⁶¹ While the CLASIM II and DAYFLOW comparison may have contained flaws, the Court had little choice but to defer to the agency in deciding which flawed model to rely upon.⁶² Therefore, the Court disagreed with the district court and held that the FWS did not act arbitrarily and capriciously in relying on the CLASIM II and DAYFLOW models to predict the location of X2.⁶³

Third, the district court found the BiOp did not explain why different data sets were used to calculate the incidental take statement ("ITS") for juvenile and adult smelt or why these limits were calculated using an average of the previous years' smelt salvage.⁶⁴ The Court disagreed, stating that the ITS adequately explained the use of the chosen data.⁶⁵ The BiOp explained that the selected years from the historical record "best approximate expected salvage," and that the data set was large "because juvenile smelt 'are less demographically significant than adults.'"⁶⁶ The Court held that the FWS's decision to use a more conservative data set is "exactly the sort that we afford agencies discretion to make."⁶⁷ The Court also addressed FWS's use of an average cumulative salvage index to create the Concern Level.⁶⁸ According to the Court, the use of an average counteracts the uncertainties in overestimating known parameters and that the use of such data deserves substantial deference.⁶⁹ In applying this deference, the Court held that the ITS was not arbitrary and capricious because it included an adequate explanation and support for its determination.⁷⁰

Finally, the district court found that the BiOp did not adequately support its conclusion that the Projects' operations will affect the Delta Smelt by limiting food supply, increasing pollution and contaminants, and increasing the detrimental impact of other stressors.⁷¹ The BiOp had determined that the Projects would present a threat to the Delta Smelt's already-limited food sup-

59. *Id.* at 618.

60. *Id.*

61. *Id.*

62. *Id.* at 620.

63. *Id.* at 621.

64. *Id.* at 625.

65. *Id.*

66. *Id.* at 626.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 625.

71. *Id.* at 627.

ply.⁷² However, the FWS omitted the statistical analysis that supported this conclusion.⁷³ While the district court took issue with this omission, the Court held that such action was responsible science and not an attempt to hide evidence.⁷⁴ The Court noted that an independent peer review panel agreed with the FWS's "conceptual model and with the justification of its elements," but recommended removing the statistical analysis because "the figures meant to support this analysis [were] not convincing."⁷⁵ The Court would not find error in the FWS following the recommendations of the peer review.⁷⁶ Further, the Court noted that nothing in the ESA required the FWS to conduct the "particular study the peer review panel thought inadequately supported by the data."⁷⁷ Thus, the Court concluded that no evidence indicated the FWS was attempting to hide evidence.⁷⁸

The BiOp also explored the Projects' impact on water contamination, and concluded that water contamination from the Projects would adversely affect the Delta Smelt population.⁷⁹ The district court took issue with this conclusion because it was "not clear how the BiOp or any other document in the record link[ed] the impacts of contaminants to Project Operations."⁸⁰ The Court disagreed.⁸¹ The Court recognized, and the BiOp admitted, that science is not advanced enough to understand the complicated ecosystem interactions in the Bay Delta.⁸² However, the Court held that "the fact that science must advance further before the complicated ecosystem interactions in the [Bay Delta] are fully understood does not necessarily mean that the FWS failed to rely on the best available science."⁸³

The Court then considered the BiOp's conclusions regarding other stressors affecting the Delta Smelt. The district court found that FWS (i) failed to consider whether striped bass predation was significant; (ii) did not discuss "connecting 'seasonal flushing flows . . . the natural frequency of upstream and downstream movement of the [lower salinity zone] and length-en[ed] upstream shifts of the [lower salinity zone]' to the presence of any aquatic macrophyte"; and (iii) made no connection between continued Projects operation and microcystis."⁸⁴ The Court stated that it would not review "with a fine-toothed comb" the studies the FWS relied on, that the FWS drew rational conclusions from the best available science, and that the Court would not deter agencies from recognizing the limitations of science or their

72. *Id.* 628.

73. *Id.*

74. *Id.* at 629.

75. *Id.* at 628.

76. *Id.* at 629.

77. *Id.*

78. *Id.*

79. *Id.*

80. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 942 (E.D. Cal. 2010).

81. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 629.

82. *Id.*

83. *Id.*

84. *Salazar*, 760 F. Supp. 2d at 934-36.

knowledge.⁸⁵ The Court found that the BiOp's analysis of the connection between the Projects and other stressors was sufficiently clear and thorough, based on the best available science, and not arbitrary or capricious.⁸⁶

C. THE DISTRICT COURT MISINTERPRETED THE NON-JEOPARDY FACTORS

The FWS's regulations define RPAs as alternative actions identified during formal consultation [1] that can be implemented in a manner consistent with the intended purpose of the action, [2] that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, [3] that is economically and technologically feasible, and [4] that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.⁸⁷

Elements one through three are commonly referred to as the "non-jeopardy" factors.⁸⁸ The FWS Consultation Handbook states that "[i]f certain alternatives are available that would avoid jeopardy and adverse modification, but such alternatives fail to meet one of the other three elements in the definition of 'reasonable and prudent alternative,' the Services should document the alternative in the biological opinion to show it was considered during the formal consultation process."⁸⁹ The district court interpreted this to mean that FWS regulations "required the FWS to engage in a record exposition of the non-jeopardy factors."⁹⁰ The district court also stated that the "APA requires, and the public is entitled under the law to receive, some exposition in the record of why the agency concluded . . . that all four regulatory requirements for a valid RPA were satisfied."⁹¹ Accordingly, the district court determined that the FWS failed to sufficiently consider the non-jeopardy factors when it drafted the RPAs, in violation of both its own regulations and the APA.⁹²

The Court disagreed.⁹³ First, the Court held that this conclusion misread the ESA and its implementing regulations.⁹⁴ While the Court acknowledged that the FWS regulation requires documentation when an RPA fails to meet a non-jeopardy factor, the Court "fail[ed] to see anywhere that the FWS has required itself to provide an explanation of the non-jeopardy factors when it lays out an RPA."⁹⁵ Similarly, the Court held that while the FWS "must insure that the RPA does not jeopardize the species or its habitat," the ESA does not re-

85. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 632.

86. *Id.* at 630.

87. *Id.* at 634 (quoting 50 C.F.R. § 402.02).

88. *Id.*

89. U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT CONSULTATION HANDBOOK 4-41 (1998) available at www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.

90. *Id.* at 635.

91. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 956-57 (E.D. Cal. 2010).

92. *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 635.

93. *Id.*

94. *Id.*

95. *Id.* at 635-36.

quire “that the FWS address the remaining three non-jeopardy factors.”⁹⁶

The Court also found that the district court misinterpreted the third non-jeopardy factor.⁹⁷ The district court “faulted the FWS for not accounting for the cost of ‘interdict[ing] the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for their water supply.’”⁹⁸ The Court held, however, that under the ESA, the FWS must only consider if the proposed alternative is financially and technologically possible.⁹⁹ The purpose of this consideration is to determine “whether the RPA ‘can be taken by the Federal agency . . . in implementing the agency action,’ not to whether restricting CVP activities will affect its consumers.”¹⁰⁰

The Court determined that the record showed the RPAs were consistent with the purpose of the underlying action: the continued operation of the Projects “to divert, store, redivert, and convey CVP and SWP . . . water” without jeopardizing the Delta Smelt.¹⁰¹ The Court stressed that the “economic and technological feasibility” of an alternative does not include the economic impacts of Reclamation being unable to continue its CVP operations.¹⁰² Specifically, the FWS is not “responsible for balancing the life of the delta smelt against the impact of restrictions on CVP/SWP operations.”¹⁰³ Rather, “the FWS’s duty is to opine on the viability of the smelt and ‘to halt and reverse the trend toward species extinction, *whatever the cost.*”¹⁰⁴

IV. ANALYSIS: THE HIGHEST PRIORITY POLICY: HERE TO STAY

The Court’s holding in *San Luis & Delta-Mendota Water Authority* reaffirmed the highest priority policy of the ESA first established in *Tennessee Valley Authority v. Hill* (“*TVA*”).¹⁰⁵ In *TVA*, the United States Supreme Court held that, in passing the ESA, Congress had afforded the highest of priorities to endangered species, and that “the plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”¹⁰⁶ As a result, the Supreme Court held that the ESA prevents courts from balancing the loss of a benefit to humans over the “incalculable” value of endangered species.¹⁰⁷

In this case, the district court accused the FWS of “‘show[ing] no inclination to fully and honestly address water supply needs beyond the species,’ even as it ‘interdict[s] the water supply for domestic human consumption and agricultural use for over twenty million people who depend on the Projects for

96. *Id.* at 636.

97. *Id.*

98. *Id.* (quoting *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 957 (E.D. Cal. 2010)).

99. *Id.* at 636 (citations omitted).

100. *Id.* at 637 (quoting 16 U.S.C. § 1536(b)(3)(A)).

101. *Id.*

102. *Id.*

103. *Id.*

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

105. *Id.* at 593 (quoting *Tennessee Valley Authority*, 437 U.S. at 187 (1978)).

106. *Tennessee Valley Authority*, 437 U.S. at 184.

107. *Id.* at 187–88; *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 593.

their water supply.”¹⁰⁸ The Court recognized these enormous ramifications, but concluded that the outcome was unavoidable and “the consequences were prescribed when Congress determined that ‘these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.’”¹⁰⁹ The Court held that it could not “balance the smelt’s interests against the interests of the citizens of California.”¹¹⁰ Consequently, it could reach no other conclusion concerning the survival of the Delta Smelt and the allocation of California’s water resources.¹¹¹

The CVP’s continued operation is considered “[t]he nation’s hottest endangered species conflict today.”¹¹² California is suffering from drought conditions for the third year in a row,¹¹³ and the state estimates that implementing the RPAs contained in the 2008 BiOP resulted in the loss of seven hundred thousand acre-feet of water supply in the winter of 2012-2013 alone.¹¹⁴

The San Joaquin Valley agricultural interests (“the Orchards”) characterized the Court’s holding as “another example of the anti-human bias of *TVA v. Hill* and its staggering assertion that species protection takes absolute precedence over all other considerations,” and urged the United States Supreme Court to use the opportunity to overturn *TVA*’s highest priority policy.¹¹⁵ The Orchards argued that the Court’s decision undermines Congress’s subsequent efforts to avoid the impacts currently facing the San Joaquin agricultural community.¹¹⁶ According to the Orchards, Congress created the RPA framework in an effort “to temper [*TVA*]’s radicalism and insensitivity to human and economic costs,” and authorizing the FWS “to ignore those same costs when formulating so-called [RPAs] effectively nullifies Congress’s legislative judgment.”¹¹⁷

The Orchards also argued that an RPA cannot be reasonable and prudent if “no thought has been given to the potentially disastrous economic consequences of its implementation.”¹¹⁸ Yet, they argue, the Court’s holding does not require the FWS to consider “the economic consequences of its modifications to a proposed project” even though the consultation process creates

108. *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 592 (quoting *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 956-57 (E.D. Cal. 2010)).

109. *Id.* at 593 (quoting 16 U.S.C. § 1531(a)(3)).

110. *Id.*

111. *Id.*

112. Reed Benson, *Avoiding Jeopardy, Without the Question: Recovery Implementation Programs for Endangered Species in Western River Basins*, 2 MICH. J. ENVTL. & ADMIN. L. 473, 475 (2013).

113. Ed Royce, *California Families v. the Delta Smelt*, ORANGE COUNTY REG. (Dec. 10, 2014), <http://www.ocregister.com/articles/california-644826-water-house.html>.

114. Petition for Writ of Certiorari at 3, *Stewart & Jasper Orchards v. Jewell*, No. 14-377, 2014 WL 4948941 (U.S. Sept. 30, 2014) [hereinafter *Orchard Petition*] (citing CAL. NATURAL RES. AGENCY, QUESTIONS AND ANSWERS ABOUT WATER DIVERSIONS AND DELTA SMELT PROTECTIONS 2 (Feb. 12, 2013) available at http://resources.ca.gov/docs/Smelt_QandA.pdf).

115. *Amid Drought, California Farmers Petition Supreme Court Over Water Rights: Stewart & Jasper Orchards v. Jewell*, 22 No. 9 WESTLAW JOURNAL ANTITRUST 24, 1-2 (2014).

116. *Orchard Petition*, *supra* note 114, at 33.

117. *Id.*; see also Petition for Writ of Certiorari at 30, *State Water Contractors v. Jewell*, No. 14-402, 2014 WL 5017959 (U.S. Oct. 6, 2014).

118. *Orchard Petition*, *supra* note 114, at 18.

“enormous leverage and influence over species-affecting projects.”¹¹⁹ Accordingly, the petition concludes, the Court’s decision violates prior Supreme Court precedent prohibiting the FWS from, “zealously but unintelligently pursu[ing] [its] environmental objectives’ through ‘uneconomic . . . jeopardy determinations.’”¹²⁰

V. CONCLUSION

The ESA has significant ability to affect not only endangered species, but also the water supply on which western states rely. Much of the tension between the ESA and human water needs is found in the large operational differences of the ESA and western water law.¹²¹ The prior appropriation system, designed to put water to a beneficial use, does not always mesh with the ESA’s water right limitations “for the purpose of maintaining adequate flows for listed species.”¹²² As evidenced by *San Luis Delta-Mendota Water Authority*, this “regulatory overlay” of the ESA creates great uncertainty for western water users, especially those who receive water from a federal project.¹²³

Recently, there has been a greater emphasis on avoiding litigation and using a collaborative process to negotiate solutions for water supply issues involving the ESA.¹²⁴ If the ongoing litigation over the Delta Smelt has taught us anything, it’s that water users, water managers, and federal agencies need to work together to implement collaborative measures and find innovative methods to meet the water needs of both humans and the environment.

119. *Id.* at 17.

120. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). Recently, the Supreme Court consolidated the Orchards’ petition with one filed by the various water districts and water contractors, and denied certiorari. 135 S. Ct. 948 (U.S. Jan. 12, 2015) (No. 14-377); 135 S. Ct. 950 (U.S. Jan. 12, 2015) (No. 14-402).

121. Benson, *supra* note 112, at 491.

122. *Id.*

123. *Id.* at 491, 534.

124. Doremus, *supra* note 32, at 403.