

ONE FISH, TWO FISH, MORE FISH, NO WATER: GRANTING AN EXEMPTION UNDER THE ENDANGERED SPECIES ACT DUE TO ECONOMIC WOES IN THE CENTRAL VALLEY OF CALIFORNIA

I. INTRODUCTION

Water is the life blood of all species that occupy this earth. Water quenches thirst, provides the means necessary to create food, and, for some species, water is necessary to breathe. Water is the most valuable of all natural resources that man consumes.¹ Unfortunately, disputes can arise between humans with an ever-growing realization that water as a resource is limited, and sometimes conflicts arise between man and the plant species and the animal species with which we share this valuable resource.² While humans can voice their demands and needs related to water allocation, other species are not, by nature, given a voice to express their conflicting demands.³

Congress provided such a voice through the enactment of the Endangered Species Act of 1973 (“ESA”), with the realization that various plant and animal species had been rendered extinct as a consequence of human activity.⁴ The ESA provides a mechanism for government agen-

¹ See Deborah Zabarenko, *As Climate Changes, is Water the New Oil?*, REUTERS, Mar. 22, 2009, available at <http://www.reuters.com/article/latestCrisis/idUSN21529713>.

² See Alana Semuels, *Despair Flows as Fields Go Dry and Unemployment Rises*, L.A. TIMES, July 6, 2009, available at <http://www.latimes.com/business/la-fi-dought6-2009jul06,0,3172131.story> (statement of Tom Stefanopoulos, owner of Stamoules Produce) (“We taught the entire world how to grow crops, [b]ut this is the first time we’ve had to compete with fish.”) (Statement of C. Mark Rockwell, California representative of the Endangered Species Coalition) (“There really isn’t enough water to go around, particularly in a drought year.”) (Statement of Juliet Christian-Smith, a senior research associate at the Pacific Institute) (“Fights will probably escalate in the face of global warming.”)

³ See 16 U.S.C. § 1540 (e)–(g) (2009) (provides for who can enforce the provisions of the ESA, with no authority granted to animals to bring a cause of action under the ESA).

⁴ 16 U.S.C. § 1531(a)(1).

cies empowered with a mission of stewardship of the natural world or even private citizens to speak on behalf of species that find themselves imperiled by human activity.⁵ Federal agencies are required under the ESA to conduct any agency action in a manner that “. . . is not likely to jeopardize the continued existence of any endangered species⁶ or threatened species⁷. . . .”⁸ Californians would come to understand the full breadth of this no jeopardy mandate, when a small and relatively unknown fish, fittingly named the delta smelt, would find itself as the paramount reason for federal action that ultimately led to a reduced water supply to California’s Central Valley farmers.⁹

The ESA provides for an option of last resort when the federal or private action required to protect an endangered species causes undue hardship on those asked to bear the burden of species protection.¹⁰ The exemption process is outlined in Section 7(h) of the ESA.¹¹ This provision has only been used six times since the inception of the exemption process in 1978,¹² which highlights the government’s reluctance to use the provision and the difficulty in meeting the requisite standard of review.¹³

This Comment will discuss the delta smelt rulings and the economic and social impact of these rulings on rural agriculturally-dependent

⁵ See 16 U.S.C. § 1531(b); see also 16 U.S.C. § 1540(g) (defines citizen suits as “any person may commence suit on his own behalf to enjoin any person, including the United States and any other government instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority of thereof.”)

⁶ 16 U.S.C. § 1532(6) (defines endangered species as “any species which is in danger of extinction through all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provision of this chapter would present an overwhelming and overriding risk to man”).

⁷ 16 U.S.C. § 1532(6) (defines threatened species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”).

⁸ 16 U.S.C. § 1536(a)(2) (defines agency action as any action authorized, funded, or carried out by such agency).

⁹ See John Ellis, *State Explores Legal Course After Fresno Delta Decision*, THE FRESNO BEE, Sep. 5, 2007, available at <http://www.fresnobee.com/local/crime/v-print/story/129636.html> [hereinafter Ellis I].

¹⁰ See 16 U.S.C. § 1536 (h).

¹¹ *Id.*

¹² There have been only a few applications for exemption filed which include: Gray-rocks dam, thirteen timber sales by the BLM, Tellico Dam, Pittston oil refinery in Maine which was dismissed as premature, and two others unnamed that were withdrawn before Committee consideration. PAMELA BALDWIN, THE ENDANGERED SPECIES ACT: CONSIDERATION OF ECONOMIC FACTORS (Congressional Research Services Apr. 15, 2009) 9.

¹³ See *id.*

communities within the Central Valley. Based on the economic and social hardship of rural communities within the Central Valley, this Comment will then analyze whether an exemption under the ESA can and should be implemented to allow expanded water exports out of the Sacramento Delta.

II. ENDANGERED SPECIES ACT AND THE CENTRAL VALLEY

A. *The Fish, The Courts, and The Farmland*

A decision rendered in May 2007 by Judge Oliver Wanger, presiding out of the United States District Court for the Eastern District of California, propelled a tiny fish to notoriety among those residing in California.¹⁴ In *Natural Res. Def. Council v. Kempthorne*, 506 F.Supp.2d 322, 322-387 (E.D. Cal. 2007), a coalition of environmental groups challenged a 2005 Biological Opinion¹⁵ (“BiOp”) issued by Fish and Wildlife Service (“FWS”) which found that water export activities by the Central Valley Project¹⁶ (“CVP”) and the State Water Project¹⁷ (“SWP”) posed “no jeopardy” to delta smelt.¹⁸ The basis for this challenge was that the “no jeopardy” finding was arbitrary and capricious and was a violation of the ESA because it did not use the best scientific data available.¹⁹ Plaintiff environmentalists argued that the 2005 BiOp did not contain measures to adequately protect the delta smelt from being harmed or killed by the operation of pumps²⁰ under the control of CVP and SWP.²¹

The Court’s opinion found the pumping activity of the CVP and SWP to have a harmful effect on the delta smelt.²² This activity was found to

¹⁴ See generally *Natural Res. Defense Council v. Kempthorne* (*Natural Res. Def. Council I*), 506 F.Supp.2d 322, 322-387 (E.D. Cal. 2007).

¹⁵ U.S. Bureau of Reclamation, Bureau of Reclamation.gov Glossary, <http://www.usbr.gov/library/glossary/#B> (last visited Jan. 7, 2010) (defining a Biological Opinion as a report by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) stating an opinion as to whether a Federal action is likely to jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of critical habitat).

¹⁶ DAVID SUNDING ET AL., ECONOMIC IMPACTS OF REDUCED DELTA EXPORTS RESULTING FROM THE WANGER INTERIM ORDER FOR DELTA SMELT I (Berkeley Economic Consulting Dec. 8, 2009), available at http://repositories.cdlib.org/are_ucb/1083.

¹⁷ *Id.*

¹⁸ *Natural Res. Def. Council I*, 506 F.Supp.2d at 328.

¹⁹ *Id.* at 360.

²⁰ The pumps are used to facilitate water exports out of the delta to other regions of California. This activity would harm the delta smelt by a process called entrainment. *Id.* at 350-352.

²¹ *Id.*

²² *Id.* at 387.

put a listed species in peril and was thus not in compliance with the ESA.²³ The Court remanded the 2005 BiOp to the FWS to prepare and release a new BiOp²⁴ for the delta smelt which would call for much more aggressive measures to protect the current population of delta smelt from further harm and to improve the fish's natural habitat.²⁵

In 2008, the FWS prepared a new BiOp that was more in line with the judicial requirements imposed in *Natural Res. Def. Council v. Kempthorne*, No. 1:05-cv-01207 OWW (GSA), slip op. 41, 45 (E.D. Cal. Dec. 14, 2009).²⁶ FWS found that far too many delta smelt were being entrained while the pumps were in operation.²⁷ The excessive entrainment of the delta smelt was found to be a harmful taking of a listed species which was in violation of Section (7)(a)(2) of the ESA²⁸ as the CVP and SWP water pumping activity was defined as agency action.²⁹ The effect of the ruling and the new BiOp was polarizing,³⁰ with Governor Arnold Schwarzenegger condemning the federal action by stating that the set of rules imposed by the new BiOp "puts fish above the needs of millions of Californians."³¹ Environmentalists heralded the decision as a way to bring to light California's ineffective water management system.³² At the

²³ *Id.*

²⁴ *Natural Res. Def. Council v. Kempthorne (Natural Res Def. Council II)*, No. 1:05-cv-01207 OWW (GSA), slip op. 41, 45 (E.D. Cal. Dec. 14, 2009).

²⁵ FWS' BiOp differs from the 2005 BiOp by analyzing the effects the operation of CWP and SWP on the delta smelt by using a life-cycle model. See FISH AND WILDLIFE SERVICE, U.S. DEPT. OF THE INTERIOR, REF. NO. 81420-2008-F-1481-5, FORMAL ENDANGERED SPECIES ACT CONSULTATION ON THE PROPOSED COORDINATED OPERATIONS OF THE CENTRAL VALLEY PROJECT (CVP) AND STATE WATER PROJECT (SWP) 203 (2008). Cf. *Natural Res. Def. Council I*, 506 F.Supp.2d at 387 (describing the operative BiOp as inadequate because FWS recognized the delta smelt as increasingly in jeopardy).

²⁶ *Natural Res. Def. Council v. Kempthorne (Natural Res Def. Council II)*, No. 1:05-cv-01207 OWW (GSA), slip op. 40 (E.D. Cal. Dec. 14, 2009). The BiOp called for reductions in water exports to both metropolitan and industrial users located in Southern California and agricultural users located on the west side of the Central Valley. Central Valley Delta water users were most concerned with the revised water export schedule that called for water exports for agricultural use to be 10% to 0% of historical allocations in years of extremely low rainfall. FISH AND WILDLIFE SERVICE, *supra* note 25, at 39.

²⁷ FISH AND WILDLIFE SERVICE, *supra* note 25, at 197.

²⁸ 16 U.S.C. § 1536(a)(2) (2009).

²⁹ See FISH AND WILDLIFE SERVICE, *supra* note 25, at i.

³⁰ See Semuels, *supra* note 2.

³¹ John Ellis, *Valley Faces More Cuts in Water Deliveries: Plan to Save Fish Would Drop Delta Water Delivery*, THE FRESNO BEE, June 4, 2009 available at <http://www.fresnobee.com/local/crim/story/1451724.html> [hereinafter Ellis II].

³² See Semuels, *supra* note 2. (Juliet Christian-Smith, a senior research associate at the Pacific Institute statement) ("We have a new climate reality, and our old structure for allocating water will not work in the future, [f]ish are just one sign of an ecosystem that's collapsing").

heart of Judge Wanger's controversial ruling and the new FWS BiOp was a judicial history of interpreting the ESA in strict adherence to the goal of species protection, whatever the cost.³³

B. *Delta Smelt Decision's Impact on the Valley*

The aftermath of *Natural Res. Def. Council*, and the subsequent BiOp, was an outcry that the court had put fish before people.³⁴ In response to cutbacks in the available water from CVP and SWP, Central Valley farmers began to institute reactive measures such as water transfers, crop changes, ground water pumping, land fallowing,³⁵ and, in extreme circumstances, abandonment of fertile farm land.³⁶ These changes in the farmers' practices caused certain economic and non-economic consequences. Economic losses for agricultural related activity in the Central Valley are estimated to be \$2.2 billion in crop and other losses.³⁷ Such losses are partly based on the estimates that 300,000 to 400,000 acres of useable farmland that were left unplanted.³⁸ This is a staggering number

³³ *Natural Res. Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 360 (E.D. Cal. 2007) (citing 16 U.S.C.A § 1536(a)(2)). See also Brian E. Gray, Comment, *The Endangered Species Act: Reform or Refutation?*, HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 5 (2007).

³⁴ California Governor Arnold Schwarzenegger committing on the rules set forth by federal regulators stating that it "puts fish above the needs of millions of California . . ." Ellis II, *supra* note 31.

³⁵ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 504 (David B. Guralnik et al. eds., Prentice Hall Press., 2nd College ed. 1986) (defining fallowing as the plowing of the land to be left idle or left uncultivated).

³⁶ SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, SUPPLEMENTAL SUPPORT DOCUMENTATION FOR CEQA APPLICATION SUBMITTED TO THE CALIFORNIA RESOURCES AGENCY & THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY 3 (July 6, 2009); Chris Collins, *Life in Mendota, California, Where Jobless Rate is 41 percent*, THE FRESNO BEE, Mar. 30, 2009 available at <http://www.mcclatchydc.com/226/story/65076.html>.

³⁷ The reduction in local tax revenue as a result of the losses in both agricultural revenue and jobs further exacerbate the strain on government funded public service programs as demand for these services increase. Officials in the city of Mendota reported that crime has doubled within the small community. *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-cv-00407-OWW-DLB, 2009 WL 1575169 *8-11 (E.D. Cal. May 29, 2009); Jesse McKinely, *Drought Adds to Hardship in California*, N.Y. TIMES, Feb. 22, 2009 available at <http://www.nytimes.com/2009/02/22/us/22mendota.html>. Hunger has also increased in these rural communities, reflected in an increased demand on local food banks. The increased demand in people seeking public assistance is principally caused by a lack of stable income. In June 2009, the local food bank gave out 1.6 million pounds of food, its largest month ever. See also Marc Benjamin, *Drought Relief Fresno Co. Gets \$4m in Food Aid*, THE FRESNO BEE, July 27, 2009 available at <http://www.fresnobee.com/1072/story/1562251.html>; Semuels, *supra* note 2.

³⁸ McKinely, *supra* note 37.

that leads to less production, increased unemployment, and higher prices for consumers.³⁹ Hardest hit are rural, agricultural dependent communities within the Central Valley.⁴⁰ Mendota, a small agricultural community on the west side of the Central Valley, has become the face of the plight that rural communities across the west side of Central California are currently experiencing.⁴¹ These hardships are not contained solely in pure economic terms; there are other societal costs.⁴² Even non-agriculturally-based businesses are closing, either due to the weight of local economic depression or business owners are relocating to communities that are less impacted by water reduction.⁴³ Many rural communities are wilting from a lack of water, and eventually small rural communities across California will become just as desolate as the arid patches of farm land that encompass these communities.⁴⁴

III. LIMITS ON THE ENDANGERED SPECIES ACT

The ESA was enacted with the purpose of preserving the natural world for current and future generations.⁴⁵ Under the ESA, Federal agencies are required to conduct any agency action in a manner that “is not likely

³⁹ All aspects of the agricultural industry are impacted, with estimates of job losses within the Central Valley ranging from 60,000 to 80,000. Richard E. Howitt et al., *Agricultural and Resource Economics Update: Economic Impacts of Reduction in Delta Exports on the Central Valley Agriculture*, Giannini Foundation of Agricultural Economics University of California Vol. 12 No. 3 Jan.-Feb. 2009 at 2.

⁴⁰ See Semuels, *supra* note 2.

⁴¹ Unemployment levels for Mendota at 38.8%, Huron at 35.5%, San Joaquin at 34.9%, Firebaugh at 26.1%, and Kerman at 19.4%: compared to the unemployment rate of Fresno County at 15.4% and California’s statewide unemployment rate at 11%. See SAN LUIS & DELTA-MENDOTA AUTHORITY, *supra* note 36, at 4; Semuels, *supra* note 2.

⁴² Agriculturally dependent communities are experiencing an exodus of people who are leaving to find more reliable work in townships that are less affected by the ebb and flow of farm labor. Consequently, many school districts are experiencing an increase in withdrawal rates of students as families are forced to uproot. Ms. Salbin, mayor of Firebaugh, said “. . . the schools in the rural areas around Firebaugh are losing significant state funding as every child that leaves results in a \$5,000 loss in annual income to the schools.” Children face an unstable lifestyle where many families are forced to share a single family house, or they are forced into a kind of nomadic lifestyle. This unstable home life negatively impacts educational progress of affected school children. See *San Luis & Delta-Mendota Water Auth.*, 2009 WL 1575169, at *11; Ken McLaughlin, *With little water coming, small tow faces extinction*, The Mercury News, May 14, 2009 <http://www.mercurynews.com/fdcp?1248715848371>. Those who remain in the community are further impacted by this exodus of families, because a loss of students translates into a loss of funding for local schools. See also McKinely, *supra* note 37.

⁴³ See McLaughlin, *supra* note 42.

⁴⁴ See *id.*

⁴⁵ See § 16 U.S.C 1531(a) (2009).

to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."⁴⁶ In 1978, five years after Congress enacted the ESA, the United States Supreme Court would provide judicial authority behind what appeared to most as purely idealistic language with the Court's decision in *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279 (Jun. 15, 1978).⁴⁷ In *Tenn. Valley Auth.*, a dispute arose when the Tellico Dam Project, a federally funded regional development project nearing completion, was found to threaten the continued existence of a two-inch fish, the snail darter.⁴⁸ Despite the fact that the project threatened a listed species, and thus was in violation of the ESA, Congress continued to fund the Tellico Dam Project and authorized further development of the project.⁴⁹ Proponents of the project were convinced that the Court would not interfere with a project that was so near completion and consumed such a substantial amount of public funds.⁵⁰

In *Tenn. Valley Auth.*, the United States Supreme Court empowered the ESA to impose obligations that are in addition to, and have priority over, other federal agency obligations.⁵¹ The Court's interpretation of the ESA was based on the plain language of the statute and its legislative intent.⁵² The Court found that "the legislative history undergirding [Section] 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "to give endangered species priority over the primary missions of federal agencies."⁵³ *Tenn. Valley Auth.* was the paramount decision involving the ESA and spurred Congress to re-evaluate the provi-

⁴⁶ 16 U.S.C. § 1536(a)(2).

⁴⁷ See Derek Weller, Comment, *Limiting the Scope of the Endangered Species Act*, HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 390, 390 (1999).

⁴⁸ Tennessee Valley Authority was the federal agency responsible for the project that the plaintiff environmentalist filed suit against. Patrick A. Parenteau, *The Exemption Process and the "God Squad"*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 131, 131 (Donald C. Baur and William Robert Irvin ed., 2002).

⁴⁹ See *id.* at 131-132.

⁵⁰ See *id.* at 132.

⁵¹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). See also Weller, *supra* note 47, at 309-310.

⁵² The United States Supreme Court concluded, "One would be hard pressed to find a statutory provision whose terms were any plainer than in [Section] 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies to insure that actions authorized, funded or carried out by them 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." *Tenn. Valley Auth.*, 437 U.S. at 173; Weller, *supra* note 47, at 310.

⁵³ *Tenn. Valley Auth.*, 437 U.S. at 180; Weller, *supra* note 47, at 309.

sion.⁵⁴ A resolution between those in Congress who wanted abolishment of the ESA and those who sought to preserve the ESA lead to the establishment of the exemption procedure describe in Section 7.⁵⁵

IV. THE EXEMPTION PROCESS

A. *Evaluation for Exemption*

The exemption process is governed by Section 7 of the ESA.⁵⁶ All applications for exemption must satisfy a threshold review by the Secretary of the Interior.⁵⁷ If the Secretary determines that the application has met each of the requisite threshold review requirements, he or she must submit a report to the Endangered Species Committee⁵⁸ ("ESC") discussing the four exemption criteria outlined in Section 7(h).⁵⁹ To grant an exemption, the ESC must find that all four of the exemption criteria have

⁵⁴ See Parenteau, *supra* note 48, at 132.

⁵⁵ *Id.* at 132-133.

⁵⁶ See generally 16 U.S.C. § 1536 (2009).

⁵⁷ Three independent criteria must be met by the agency for which exemption is requested, to satisfy this threshold review. The agency must have: 1) carried out the consultation responsibilities in good faith and made reasonable and responsible efforts to develop modifications or reasonable prudent alternatives; 2) conducted a biological assessment; and 3) refrained from making any irreversible or irretrievable commitment of resources. In addition to a review by the Secretary of the Interior, an application for exemption must also be reviewed by the Secretary of State to insure that the exemption, if granted would not run afoul of any international treaties or obligations. 16 U.S.C. § 1536(g)(B)(3). See also Parenteau, *supra* note 48, at 135-136.

⁵⁸ The ESC is a seven member panel comprised of six cabinet level members, with a seventh member appointed by the President. The six cabinet level members are of heads of various federal agencies that are most likely to be involved in actions that conflict with threatened or endangered species which include: the Secretary of Agriculture, Secretary of the Army, the Chairman of the Council of Economic Advisors, the Administrator of the Environmental Protection Agency, Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration. The seventh and final member of the ESC is a presidentially-appointed individual based on recommendations from the Governor, or Governors, of the affected state, or states impacted by whatever action is the subject matter of the exemption request. 16 U.S.C. § 1536(e). See also Parenteau, *supra* note 48, at 133.

⁵⁹ The four exemption criteria are: 1) there are no reasonable and prudent alternatives; 2) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or critical habit, and such action is in the public interest; 3) the action is of regional or national significance; and 4) neither the federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources. 16 U.S.C. § 1536(h). See also Parenteau, *supra* note 48, at 138.

been met.⁶⁰ Once granted, exemption status is considered permanent with respect to all endangered or threatened species that may present an impediment for the agency action at issue.⁶¹ Thus, an exemption is granted for all species, not just the species that is of immediate concern.⁶² Due to the nature of the life and death consequences of any decision rendered by the ESC, it has been dubbed the “God Squad.”⁶³

B. *The Exemption Criteria*

1. There are No Reasonable and Prudent Alternatives

In determining whether or not there are no reasonable and prudent alternatives, the ESC is required to look beyond alternatives that are within the jurisdictional authority of the agency requesting exemption and to look at all feasible alternatives that allow for the agency to accomplish its activity while preserving the species and its habitat.⁶⁴ Congress was clear that this process was to evaluate more than alternatives considered during the initial consultation and resulting BiOp.⁶⁵ Only the alternatives which are both technically capable of being constructed and financially prudent to implement will be considered as valid alternatives.⁶⁶

2. The Benefits of the Agency Action Must Clearly Outweigh the Benefits of Alternative Course of Action, and Action Must Be in the Public’s Interest

The ESC must evaluate whether the benefits of the agency action⁶⁷ prior to the limitations imposed due to compliance with ESA clearly outweigh the benefits of any reasonable and prudent alternatives⁶⁸ identified under the first criteria.⁶⁹ This analysis is a three-step process.⁷⁰

⁶⁰ 16 U.S.C. § 1536(h). *See also* EUGENE H. BUCK ET AL., *THE ENDANGERED SPECIES ACT (ESA) IN THE 111TH CONGRESS: CONFLICTING VALUES AND DIFFICULT CHOICES* 5 (Congressional Research Services Feb. 25, 2009).

⁶¹ 16 U.S.C. § 1536(h)(2)(A).

⁶² *Id.*

⁶³ Parenteau, *supra* note 48, at 133.

⁶⁴ *Id.* at 138.

⁶⁵ H.R. REP. NO. 95-1804, at 20 (1978), *reprinted* U.S.C.C.A.N. 9484, 9487 (Conf. Rep).

⁶⁶ *Id.*

⁶⁷ 16 U.S.C. § 1536(a)(2) (2009).

⁶⁸ “The committee notes that the amendment requires the committee to balance the benefits associated with the agency action against the benefits associated with alternative courses of action.” H.R. REP. NO. 95-1804, at 20.

⁶⁹ *See* H.R. REP. NO. 95-1804, at 20.

⁷⁰ Parenteau, *supra* note 48, at 138.

First, the benefits of proposed agency action seeking exemption and benefits of any of the alternative actions are evaluated.⁷¹ This includes a sophisticated analysis comparing the economic and non-economic considerations of the agency action from which the exemption is sought against the benefits of an alternative action that would protect the species.⁷² Ecological and economic considerations are among the benefits considered.⁷³ Congress was clear that this analysis does not pit the species against the project.⁷⁴ Short-term benefits of resource allocation must be balanced against the long-term benefits of resource conservation and costs such as resource depletion or loss of biodiversity.⁷⁵ Second, the benefits of granting the exemption must clearly out-weigh alternatives that would not further endanger the listed species.⁷⁶ This creates a high standard of review, with the ESC deferring to the species when it is a close call.⁷⁷ Finally, the agency action must be in the public's interest; it must affect some interest, right, or duty of the community at large in which the public would perceive as positive.⁷⁸

3. National or Regional Significance

National or regional significance requires the ESC to find the agency action has an impact on the national or regional scale, indicating Congress' intent that exemption should only be granted when there is a substantial impact on a large portion of the populace.⁷⁹ While not clearly defined on a geographic scale, Congress expressed that regional significance is not intended to refer merely to a project that affects more than one state.⁸⁰

⁷¹ H.R. REP. NO. 95-1804, at 20. *See also* Parenteau, *supra* note 48, at 139.

⁷² H.R. REP. NO. 95-1804, at 20. *See also* Parenteau, *supra* note 48, at 139.

⁷³ H.R. REP. NO. 95-1804, at 20.

⁷⁴ Examples of such economic considerations include: cost impacts on consumers, federal, state, and local governments; effect on employment; effect on commercial and recreational fishing; effect on tourism; and effect on the water supply. Ecological considerations include: value of the species as part of a greater degree of bio-diversity; the impact on the ecosystem if the species is eliminated; and the overall benefit of the species habitat. *Id.* *See also* Parenteau, *supra* note 48, at 138.

⁷⁵ Parenteau, *supra* note 48, at 139.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ H.R. REP. NO. 95-1804, at 20. *See also* Parenteau, *supra* note 48, at 139.

⁷⁹ H.R. REP. NO. 95-1804, at 20.

⁸⁰ An example of something that is regionally significant is any agency action affecting the Port of Sacramento, in California. *Id.*

4. No Irreversible or Irretrievable Commitment of Resources

The requirement that the applicant for exemption make no irreversible or irretrievable commitment of resources prevents a federal agency from committing resources in an attempt to circumvent requirements imposed on the agency due to a finding that unaltered agency action would likely jeopardize a listed endangered or threatened species.⁸¹ An example of agency action that constitutes irreversible or irretrievable commitment of resources would be the negotiation and renewal of a forty-year water delivery contract.⁸²

V. PRIOR EXEMPTION DECISIONS

A. *Tellico Dam Project*

The first two projects to be evaluated under the newly created exemption provision were the *Tellico* dam and *Grayrocks* dam projects.⁸³ Both projects were evaluated simultaneously.⁸⁴ Before deciding the fate of both the *Tellico* dam and *Grayrocks* dam projects, Congress instructed the ESC to not consider the issue of regional significance because Congress had explicitly stated prior to the decision that the regional significance of both projects was obvious.⁸⁵

In the *Tellico* Dam Project decision, the ESC quickly ruled and denied the petition for exemption.⁸⁶ Following the United States Supreme Court's decision that upheld the determination that the *Tellico* project threatened the critical habitat of the snail darter, the Tennessee Valley Authority ("TVA") published a report that delineated two alternatives to complete the dam project,⁸⁷ the Reservoir Development⁸⁸ and River De-

⁸¹ 16 U.S.C. § 1536(d) (2009).

⁸² *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1127-1128 (9th Cir. 1998) (holding that the Bureau of Reclamation violated the ESA provision of making irreversible or irretrievable commitment of resources by renewing contracts to supply water from the dam unit under the Bureau's jurisdiction prior to completing an endangered species consultation.)

⁸³ H.R. REP. NO. 95-1804, at 25.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Parenteau, *supra* note 48, at 144.

⁸⁷ H.R. REP. NO. 95-1804, at 25.

⁸⁸ The Reservoir Development plan called for the completion of the project as originally authorized by Congress without the slightest modification. Press Release, Dep't of the Interior, Endangered Species Committee Completes Report on Grayrocks and Tellico (Feb 8, 1977) available at <http://www.fws.gov/news/historic/1979/19790208.pdf>.

velopment options.⁸⁹ A benefit-to-cost analysis found that the economic benefit of the two plans was comparable.⁹⁰

The ESC denied the exemption on the basis that the benefits of the Reservoir Development plan did not clearly outweigh the benefits of River Development option.⁹¹ The ESC found that the River Development option provided a reasonable and prudent alternative to completing the project as originally planned.⁹² All seven members of the ESC unanimously voted to deny the *Tellico* project an exemption because of the existence of this prudent and reasonable alternative.⁹³

B. Grayrocks

The *Grayrocks* decision was an unnecessary exercise of the ESC's discretionary power that provided little guidance for future decisions on whether to grant an exemption.⁹⁴ The ESC was asked to decide whether or not to grant an exemption for the construction of a dam and reservoir to store water from the Laramie River in Wyoming for a 1,500 megawatts coal-fired electric generating power plant.⁹⁵ The project was being built in an area designated by FWS as the critical habitat for the Whooping Crane.⁹⁶

Prior to the ESC's decision, a mutually agreeable settlement was reached between the plaintiff's several conservation organizations and defendant's various federal agencies.⁹⁷ The ESC granted an exemption

⁸⁹ The River Development option provided for a partial removal of the dam to let the river run free, where it would base future economic development in the area on a free-flowing river. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ The committee further chastised the project by stating that although it was nearly completed, the added cost to complete the project outweighed any conceivable benefits. However, the project would continue to completion through the use of congressional riders that allowed Congress to circumvent the prohibitions of the ESA. Press Release, Dep't of the Interior, *supra* note 88. See also Parenteau, *supra* note 48, at 144.

⁹⁴ See Parenteau, *supra* note 48, at 146.

⁹⁵ Press Release, Dep't of the Interior, *supra* note 88; Parenteau, *supra* note 48, at 145.

⁹⁶ FWS determined that operation of the dam would result in abnormally low river flows that could result in the area being unsuitable for the cranes because of a change in surrounding vegetation. Due to this anticipated harm to the Whooping Crane as a listed species, the Grayrocks dam project violated the no taking provision of the ESA. Press Release, Dep't of the Interior, *supra* note 88; Parenteau, *supra* note 48, at 145.

⁹⁷ The settlement would call for specific actions which included: limiting the maximum annual water use by the Grayrocks Project; obtaining firm agreement to release a set amount of water from the reservoir during different periods through the year; replacing water withdrawn by a nearby irrigation district which is subject to adjustment; and estab-

for the *Grayrocks* project on the condition that the mitigation actions were adopted and faithfully carried out.⁹⁸ The provisions of the settlement eliminated any appreciable harm the project would have on the cranes' critical habitat.⁹⁹ With the basis for the petition for exemption no longer present, the ESC decision to grant exemption to the project was rendered moot.¹⁰⁰ This decision was meaningless because the power of the ESC to grant an exemption is predicated on the belief that no compromise can be reached between the demands of species preservation and the affected human interest, which is completely absent in the *Grayrocks* decision.¹⁰¹

C. Northern Spotted Owl

In the *Northern Spotted Owl* decision, the ESC evaluated forty-four timber sales located in Oregon for exemption.¹⁰² The ESC disqualified eleven of the forty-four timber sales because a reasonable and prudent alternative existed due to the close proximity and comparability of other land that could be used for timber sales that would not place the Spotted Owl in jeopardy.¹⁰³ Of the remaining thirteen timber sales, the ESC found that the benefits of conducting the sales were significantly greater than the benefits of not conducting the sales.¹⁰⁴ These remaining timber sales were found to be in the public's interest because these sales would provide important benefits in terms of county revenue and continued employment in the affected regions.¹⁰⁵

In regards to regional significance, the ESC reviewed the proposed exempt sales in those counties that had a higher dependency on timber jobs in comparison to non-timber employment, county-wide unemployment, and the relative reliance on county budgets on timber sales revenue.¹⁰⁶

lishing a \$7.5 million trust fund for the maintenance and enhancement of the cranes' critical habit. See Press Release, Dep't of the Interior, *supra* note 88; Parenteau, *supra* note 48, at 145.

⁹⁸ See Press Release, Dep't of the Interior, *supra* note 88.

⁹⁹ Parenteau, *supra* note 48, at 146.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² Endangered Species Committee Decision, 60 Fed. Reg. 23,405, 23,406 (Endangered Species Comm. June 3, 1992)

¹⁰³ The ESC found that these eleven timber sales would not be granted an exception. *Id.*

¹⁰⁴ *Id.* at 23,407.

¹⁰⁵ *Id.*

¹⁰⁶ To determine regional significance, the committee weighed the relative impact the loss of timber sales would have economically on a particular county against relative impact on the Northern Spotted owl or its habitat. Counties with low economic impact or high impact to the Northern Spotted Owl were found not to be regional significant. *Id.*

The ESC found that sales had regional significance if the economic effects had, at a minimum, county-wide impact on at least two counties.¹⁰⁷ The ESC found that the impact on exempting thirteen timber sales on a number of counties in Oregon qualified as regionally significant.¹⁰⁸ Finally, the ESC found that the Bureau of Land Management (“BLM”), the agency responsible for conducting the timber sales, had not made any irreversible or irretrievable commitment of resources.¹⁰⁹ The ESC ruled five to two to grant an exemption to thirteen out of the forty-four proposed timber sales;¹¹⁰ however, this decision was clouded by allegations of political impropriety.¹¹¹ Ultimately, the BLM withdrew the application for exemption upon the arrival of a new administration and with it a new Secretary of the Interior.¹¹²

D. *The Black Box that is the Exemption Process*

Since its inception in 1978, the exemption process has only been invoked in the three previously discussed decisions.¹¹³ No clear precedent exists regarding the true factors weighed when granting an exemption or the analytical process the ESC utilizes.¹¹⁴ This limited decision history, combined with the political controversy, shroud the exemption process in an aura of mystery.¹¹⁵

¹⁰⁷ *Id.*

¹⁰⁸ Endangered Species Committee Decision, 60 Fed. Reg. at 23,407.

¹⁰⁹ Out of the forty-four timber sales that exemption was originally requested for, the committee found that only thirteen of the timber sales satisfied all four exemption criteria; therefore, an exemption was granted solely for these thirteen timber sales. *Id.*

¹¹⁰ *Id.*

¹¹¹ Allegations raised included severe defects in the Secretary of the Interior’s finding that the application satisfied a threshold review; the granting an exemption of only a limited number timber sales land; the ESC improperly evaluated that the project was of regional or national significance; and the ESC decision was in violation of the process outlined by the ESA due to ex parte communication with the Secretary of the Interior and White House. See John Lowe Weston, Comment, *The Endangered Species Committee and the Northern Spotted Owl: Did the “Cod Squad” Play God?*, 7 Admin L.J. Am U. 779, 796-814; see also Parenteau, *supra* note 48, at 147-151.

¹¹² Parenteau, *supra* note 48, at 150-151.

¹¹³ BALDWIN, *supra* note 12, at 8; Parenteau, *supra* note 48, at 143-144.

¹¹⁴ See Parenteau, *supra* note 48, at 144-151; Weston, *supra* note 111, at 796-814.

¹¹⁵ To date only the Grayrocks Dam project in Wyoming has been the only exemption granted and carried out. See EUGENE H. BUCK ET AL., THE ENDANGERED SPECIES ACT (ESA) IN THE 111TH CONGRESS: CONFLICTING VALUES AND DIFFICULT CHOICES 5-6 (Congressional Research Services Feb. 25, 2009).

VI. DELTA SMELT EXEMPTION

A. *Application and Threshold Review*

There is a growing outcry from those in the Central Valley affected by the commandments of ESA for the Governor to exercise his statutorily granted authority to call upon the Secretary of the Interior to convene the God Squad.¹¹⁶ Ultimately, the determination of the ESC hinges on whether the extent of human hardship has eclipsed the belief that the species in question is worth preserving.¹¹⁷ Assuming the threshold review had been met, it would then fall on the Secretary of the Interior to accept the application and convene the ESC.¹¹⁸ The following analysis is a theoretical application of the ESA exemption process to the difficult issues surrounding the consequences of the delta smelt decision.

B. *Evaluation Under the Four Exemption Criteria*

1. No Reasonable and Prudent Alternative

A number of potential alternative actions exist which have the potential to increase water exports without harming the delta smelt.¹¹⁹ A limited number of these alternatives include increased ground water pumping by individuals,¹²⁰ increased reservoir storage,¹²¹ and implementation of the two-gate system.¹²²

In response to a lack of access to water exports out of the Delta, farmers may begin to drill new group water wells to supplement their water

¹¹⁶ Press Release, Pacific Legal Foundation, PLF's "Save our Water" Petition Is Submitted; More than 12,000 Signers Call for the ESA "God Squad" to Convene to Address California's Water Emergency (Aug. 19, 2009) available at <http://community.pacificalegal.org/Page.aspx?dip=995>.

¹¹⁷ See 16 U.S.C. § 1536 (2009); Parenteau, *supra* note 48, at 133.

¹¹⁸ See 16 U.S.C. § 1536 (g)(B)(4) .

¹¹⁹ See Memorandum from the State of Cal. Dept. of Water Res. on the 2 – Gate Project A Pilot Demonstration Project to Improve Protection of At-Risk Species in the South Delta (Aug. 2009) (on file with author) available at <http://www.water.ca.gov/deltainit/docs/TwoGatesProject.pdf>; see also E.J. Schultz, *Legislative Hearings on State's Water Crisis Begin*, THE FRESNO BEE, Aug. 19, 2009 available at <http://www.fresnobee.com/1072/story/1602595.html>; see also Sunding et. al., *supra* note 16, at 28.

¹²⁰ See Sunding et. al., *supra* note 23, at 28.

¹²¹ See Kelly Zito, *Water interests argue new state dam proposals*, S.F. CHRON., Sept. 29, 2009, at A1 available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/29/MNRO19SUMN.DTL>.

¹²² See State of Cal. Dept. of Water Res., *supra* note 119.

supply.¹²³ West side farmers are spending millions of dollars digging wells to supplement reductions in water delivered from the Delta region.¹²⁴ Accessible ground water contains a higher salinity level,¹²⁵ making it toxic to many types of crops and not completely feasible for agricultural use.¹²⁶ One such farmer pleaded that “[p]utting our well water on almond trees is like giving them chemotherapy. [I]t will fry them.”¹²⁷ Ground water pumping can also lead to subsidence that can cause irreversible damage to surface property and infrastructure.¹²⁸ Individual farmers would be required to bear the burden of the cost and maintenance of such wells.¹²⁹ Many farmers will leave their fields abandoned because they cannot absorb the extra cost, or those who can absorb the extra cost will likely pass this added burden along to consumers, thus increasing the cost of food.¹³⁰

Ground water pumping would not be a reasonable and prudent alternative because of the high salinity levels in ground water, the added cost to individual farmers, and threat of subsidence. This is distinguishable from the *Tellico* decision where the River Development option allowed for the preservation of the natural habitat with the potential to adequately achieve the goals of the dam project.¹³¹

Increasing California’s above ground water storage capacity is another possible alternative, one that has become a prominent hot button political issue.¹³² By expanding California’s reservoir system through new dam construction, more water could be captured and held during wet years so that it is available in drought years.¹³³ Such a system would reduce Central Valley farmers’ dependency on Delta water exports.¹³⁴ However, the

¹²³ Sunding et. al., *supra* note 16, at 36.

¹²⁴ McLaughlin, *supra* note 42.

¹²⁵ See *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-cv-00407-OWW-DLB, 2009 WL 1575169 *5 (E.D. Cal. May 29, 2009).

¹²⁶ *Id.*; McLaughlin, *supra* note 42.

¹²⁷ The quoted farmer only gave his first name of Corbun. McLaughlin, *supra* note 42.

¹²⁸ An overdraft of aquifers can have potential long term impacts on water quality, and cause infrastructure damage due to the collapse of roads and irreparable damage to canals. Sunding et. al., *supra* note 16, at 31; SAN LUIS & DELTA-MENDOTA AUTHORITY, *supra* note 36, at 3.

¹²⁹ See Sunding et. al., *supra* note 16, at 31.

¹³⁰ See *id.* at 31-32.

¹³¹ Press Release, Dep’t of the Interior, *supra* note 88.

¹³² “Projects under consideration are: the expansion of Los Vaqueros Reservoir in Contra Costa County, the Temperance Flat Dam on the San Joaquin River above Friant Dam, and Sites Reservoir, which would flood the Antelope Valley in Colusa County”. See Zito, *supra* note 121.

¹³³ See *id.*

¹³⁴ See *id.*

availability of water under such a system is dependent on a sufficient amount of rainfall and snow pack levels.¹³⁵ California is in the grip of severe drought, which might be an indication that the world is experiencing a dramatic change in environmental conditions.¹³⁶ Politically, such an expansive water supply program may be difficult to implement given the level of impact a dam has on an ecosystem and the high cost of such a project in light of the severe budget crisis.¹³⁷

The proposed dam option is dissimilar to the *Grayrocks* decision because the settlement agreement in *Grayrocks* provided only positives¹³⁸ for both of the competing parties.¹³⁹ A new dam for the Central Valley would provide glaring negatives¹⁴⁰ along with the benefits of increased water storage.¹⁴¹ Increasing California's reservoir storage capacity would not be a reasonable and prudent alternative because the state would trade the environmental and political dilemma that surround the current water crisis¹⁴² for a number of entirely new controversies that the proposed construction of a new dam would create.¹⁴³

The two-gate system calls for the construction of a second barrier or screen near the pump stations that would prevent delta smelt from being pulled into the pumps¹⁴⁴ and potentially eliminate harm to the delta smelt while the pumps remain active.¹⁴⁵ Out of the proposed alternatives, the two-gate system could feasibly be implemented relatively quickly.¹⁴⁶ Unusually low inflows of water from snowpack run off and severe drought conditions are major factors that have led to the curtailment of

¹³⁵ See Schultz, *supra* note 119.

¹³⁶ See Schultz, *supra* note 119; see also Zito, *supra* note 121.

¹³⁷ See Schultz, *supra* note 119; see also Zito, *supra* note 121.

¹³⁸ The settlement in *Grayrocks* allowed the agency action to continue while providing sufficient protection for the cranes' critical habitat. Press Release, Dep't of the Interior, *supra* note 88.

¹³⁹ *Id.*

¹⁴⁰ A dam is financially demanding on the state of California and it will dramatically alter the surrounding ecosystem. See Zito, *supra* note 121.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See Schultz, *supra* note 119; see also Zito, *supra* note 121. (Peter Gleick, president of Oakland's Pacific Institute statement) (" [proposed dam projects] simply isn't worth the economic, environmental and political cost. ").

¹⁴⁴ State of Cal. Dept. of Water Res., *supra* note 119.

¹⁴⁵ See *id.*

¹⁴⁶ "The 2-gate project could be operational as early as December 2009." See Letter from Dave Cogdill, California state Senator, to Don Koch, Director, Dept. of Fish and Game, Lester Snow, Director, Dept. of Water Resources (Jun. 12, 2009) (on file with author) available at <http://cssrc.us/web/14/news.aspx?id=6270>.

water exports out of the Delta.¹⁴⁷ Although the two-gate system may prevent the physical destruction of delta smelt, it may not solve the larger issue of protecting the critical habitat of the smelt. The current estimated price tag for the two-gate project is \$30 million.¹⁴⁸ It may be not economically feasible currently to implement such a program because the State of California finds itself in a substantial financial short-fall.¹⁴⁹

Despite the potential budgetary concerns, the two-gate system presents a reasonable and prudent alternative by eliminating the threat of entrainment and theoretically restoring significant water exports to Central Valley farmers.¹⁵⁰ This is similar to the *Tellico* decision, where the ESC found the River Development option to be a reasonable and prudent alternative because it would have garnered the benefits of the dam project while providing water for the snail darter's critical habitat.¹⁵¹ Out of all the proposed alternatives, the two-gate system provides the necessary protection as well as a manageable price tag and time table.¹⁵²

2. Benefits of the Action Must Clearly Outweigh the Benefits of Alternative Courses of Action and the Action Must Be in the Public Interest

The two competing alternatives are a return to pre-restriction pump levels without any modification to the Delta pumping system and the two-gate system. The benefits of a return to pre-restriction pumping levels without any modifications must be found to clearly outweigh the benefits of the two-gate system. These benefits include reducing unemployment through the creation of more agriculturally related jobs;¹⁵³ increasing local and state revenue;¹⁵⁴ lowering food prices;¹⁵⁵ increasing the water supply in Southern California for municipal or industrial usage;¹⁵⁶ and improving the quality of life for those impacted by current reduction

¹⁴⁷ FISH AND WILDLIFE SERVICE, *supra* note 25, at 38.

¹⁴⁸ State of Cal. Dept. of Water Res., *supra* note 119.

¹⁴⁹ See Claire Suddath, *Spotlight: California's Budget Crisis*, TIME, July 27, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1910985,00.html>.

¹⁵⁰ See State of Cal. Dept. of Water Res., *supra* note 119.

¹⁵¹ Press Release, Dep't of the Interior, *supra* note 88.

¹⁵² See Letter from Dave Cogdill to Don Koch, Lester Snow, *supra* note 146; see also State of Cal. Dept. of Water Res., *supra* note 119.

¹⁵³ See Tim Sheehan, *Valley's Ag, Water Economics a Conundrum*, THE FRESNO BEE, June 28, 2009 available at <http://www.fresnobee.com/local/story/15013.html>.

¹⁵⁴ Howitt et al., *supra* note 39, at 2.

¹⁵⁵ See Proclamation from Arnold Schwarzenegger, Office of Governor of the State of California, State of Emergency – Water Shortage 1 (Feb. 27, 2009) available at <http://gov.ca.gov/index.php?proclamation/11557/>.

¹⁵⁶ See Sunding et. al., *supra* note 16, at 36.

of available water.¹⁵⁷ Conversely, the benefits of the two-gate system are that it preserves the delta smelt while theoretically providing near-full water exports to Central Valley farmers.

One of the critical concerns during this current economic crisis for both farmers and farm laborers is the ability to maintain their livelihood. Returning water exports from out of the delta to their pre-restriction levels would reduce the amount of abandoned and fallowed farmland and increase the demand for farm labor.¹⁵⁸ This would have a ripple effect, creating jobs in the fields, the packing house, and distribution centers, thus tempering the abnormally high level of unemployment that rural communities currently face.¹⁵⁹ Farm laborers are generally low-skilled and low-wage earners who are less able to cope with sudden loss of employment.¹⁶⁰ For many farm laborers, their only recourse is the return of Delta water that will restore lost agriculturally-based jobs.¹⁶¹ This increase in farm production would create more revenue at the local, state and national levels.¹⁶² With projected losses in the agricultural sector of the Central Valley approaching \$2 billion,¹⁶³ the restoration of such revenue sources is desperately needed.¹⁶⁴ An increase in agricultural jobs and revenue would spur an increase in non-agricultural economic activity within agriculturally dependent communities,¹⁶⁵ resulting in an increase in jobs and rejuvenating the financial situation within these rural communities.¹⁶⁶ Crime rates would begin to decrease¹⁶⁷ within these communities with an increase in available jobs and economic growth.¹⁶⁸ An

¹⁵⁷ See Semuels, *supra* note 2.

¹⁵⁸ Farmers on the east side of the Central Valley are experiencing an increase in productivity and an increase in demand for farm labor because east side farmers are a lot less dependent on water from the delta. This is an example that Central Valley farmers and the surrounding rural communities can thrive if more water is made available. See Sheehan, *supra* note 153.

¹⁵⁹ See *id.*

¹⁶⁰ Howitt et al., *supra* note 39, at 2.

¹⁶¹ See *id.*; see also Sheehan, *supra* note 153.

¹⁶² See Howitt et al., *supra* note 39, at 2; see also Schwarzenegger, *supra* note 155.

¹⁶³ Howitt et al., *supra* note 39, at 2.

¹⁶⁴ Schwarzenegger, *supra* note 155.

¹⁶⁵ "In the past year, a third of Firebaugh's downtown business have closed." See McLaughlin, *supra* note 42. *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ "Officials in the city of Mendota reported that crime has doubled within the small community. Fresno County District Attorney Elizabeth Egan said that the spike [in crime] is tied to the water crisis." See KGPE – CBS TV 47 News: *Crime Rates Increase, as Water Shortages Persist* (High Plains Broadcasting June 25, 2009) available at http://www.cbs47.tv/news/local/story/Crime-Rates-Increase-As-Water-Shortages-Persist/5EYfCYX1302_XZocrfJKpA.csp.

¹⁶⁸ See *id.*

increase in water supply would translate to an overall improvement in the standard of living for these affected rural communities.¹⁶⁹ Increased agricultural production would result in the recapturing of \$2.8 billion of the revenue lost due to water restrictions.¹⁷⁰ An increase in state and local tax revenue is desperately needed as both the people and state grapple with budgetary concerns.¹⁷¹ An increase in tax revenue could support increased spending in schools, health programs, and safety.¹⁷² Issues of public safety also include providing the necessary water for fire protection and consumption for residential users in the southern portion of the state.¹⁷³

Improvement in the economies of local communities and the state as a whole are matters of public interest. An increase in available water would lead to more production and lower food prices for the public.¹⁷⁴ The public interest is further served by the creation of jobs;¹⁷⁵ improvements in the standard of living; an increase in tax revenue to serve public assistance programs; support of the needs of southern California water users;¹⁷⁶ and further economic recovery across the state and throughout the nation.¹⁷⁷

Implementation of the two-gate system can provide all of the previously enumerated benefits that pre-restriction pumping activity could provide with the added benefit of eliminating harm to the delta smelt.¹⁷⁸ This would create parity between both alternatives. One major assumption in this analysis is that the only limiting factor on pumping water, under the current system, is that this process traps and kills the delta smelt.¹⁷⁹ The two-gate system could protect the fish from harm without any appreciable loss in water export out of the Delta.¹⁸⁰ The cost to implement the two-gate system is manageable and would not be significant enough to tip the balance in favor of pre-restriction pumping activity.¹⁸¹

¹⁶⁹ See Schwarzenegger, *supra* note 155.

¹⁷⁰ Howitt et al., *supra* note 39, at 2.

¹⁷¹ See *id.*; see also McKinley, *supra* note 37 (statement of Jose A. Ramirez, the city Manager of Firebaugh) ("a half-dozen businesses in its commercial core had closed, decimating the tax base . . .")

¹⁷² See Schwarzenegger, *supra* note 155.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Sheehan, *supra* note 153.

¹⁷⁶ See Sunding et. al., *supra* note 16, at 36.

¹⁷⁷ See *id.*

¹⁷⁸ See State of Cal. Dept. of Water Res., *supra* note 119.

¹⁷⁹ See FISH AND WILDLIFE SERVICE, *supra* note 25, at 202.

¹⁸⁰ See State of Cal. Dept. of Water Res., *supra* note 119.

¹⁸¹ See *id.*

This is indistinguishable from the *Tellico* decision where the Reservoir Development option did not clearly outweigh the River Development because the river option allowed for the benefits of the project, while at same time providing free flowing water for the snail darters' habitat.¹⁸² The benefits of restoring the pre-restriction pumping levels out of the Delta would clearly not outweigh the benefits of the two-gate system.

3. Action Must be of National or Regional Significance

Reduction in Delta water allotments to CVP and SWP water users has become in an economic and social crisis of regional significance extending as far north as the San Francisco Bay area and as far south as the Los Angeles basin.¹⁸³ Hardest hit are the agricultural users in the Central Valley and rural communities that are dependent on Delta water, who have seen their water allocation reduced almost to zero.¹⁸⁴ Multiple counties across the west side of the Central Valley have been adversely impacted by the restrictions on Delta water allocation.¹⁸⁵ This has even greater regional significance than the *Northern Spotted Owl* decision, where the ESC found the potential negative economic impact restrictions on logging within the Northern Spotted Owl's critical habitat would have on a small number of counties within Oregon to be of regionally significance.¹⁸⁶

The restrictions imposed by the delta smelt ruling have a far wider impact, not only threatening numerous counties across the Central Valley, but also the urban water supply for the Bay area and Southern California counties.¹⁸⁷ This is similar to *Tellico* and *Grayrocks* where Congress determined that a reservoir for a regional development plan and a reservoir to facilitate a 1,500 megawatt power plant, respectively, were of regional significance.¹⁸⁸ The disastrous effect the federal water restrictions have had across California would qualify as action that is of regional significance.

Regardless of whether regional significance has been met, the adverse impact water restrictions have had on the Central Valley has produced

¹⁸² Press Release, Dep't of the Interior, *supra* note 88.

¹⁸³ Sunding et. al., *supra* note 16, at 36.

¹⁸⁴ FISH AND WILDLIFE SERVICE, *supra* note 25, at 39.

¹⁸⁵ See Howitt et al., *supra* note 39, at 2.

¹⁸⁶ Endangered Species Committee Decision, 60 Fed. Reg. 23,405, 23,407 (Endangered Species Comm. June 3, 1992).

¹⁸⁷ Sunding et. al., *supra* note 16, at 36.

¹⁸⁸ H.R. REP. NO. 95-1804, at 25 (1978), *reprinted* U.S.C.C.A.N. 9484, 9487 (Conf. Rep); See also Press Release, Dep't of the Interior, *supra* note 88.

nationwide consequences.¹⁸⁹ Long called the bread basket of the world, the Central Valley supplies the majority of produce for domestic and exported food.¹⁹⁰ Less productivity due to less available water, land fallowing, and complete abandonment of usable farmland will have a negative impact on available food supply leading to increases in food prices for American families.¹⁹¹ As Central Valley farmers continue to leave fields unplanted, the United States will become even more dependent on foreign imports to sustain the national food supply.¹⁹² Although the plight of the Central Valley farmers appears to be only a regional concern, an increase in food prices and a reliance on foreign imports propels the Delta water crisis to that of national significance.

The current Delta water crisis is even more significant, due to its national impact,¹⁹³ than the *Northern Spotted Owl*, *Tellico*, or *Grayrocks* decisions that rested solely on the regional impact of these projects.¹⁹⁴ The national significance criteria would be met by the impact the federal water restrictions have on the national food supply.¹⁹⁵

4. No Irreversible or Irretrievable Commitment of Resources

The CVP and SWP have not made any irreversible or irretrievable commitment of resources by complying with Judge Wanger's interim order enjoining further pump operation that are contrary to the reasonable and prudent alternatives with the 2008 BiOp.¹⁹⁶ CVP and SWP have not entered into long term contracts with various Delta water interest holders which would grant contractually-secured water allotments con-

¹⁸⁹ See Tracie Cone and Garance Burke, *Agric. Secretary Assesses Calif. Water Problems*, ASSOCIATED PRESS, Aug. 26, 2009, available at <http://www.fresnobee.com/state/story/116696.html>.

¹⁹⁰ See *id.* (Senator Dianne Feinstein statement) ("We are the largest agricultural state in the union and if agriculture can't function here, it means more and more of our food will be brought in from other countries.")

¹⁹¹ Jim Christie, *Clafi. Gov Declares Water Emergency in Farm Area*, REUTERS, July 12, 2008, available at <http://www.reuters.com/article/idUSN1238864020080612>; Schwarzenegger, *supra* note 155.

¹⁹² See Cone and Burke, *supra* note 189.

¹⁹³ See *id.*

¹⁹⁴ H.R. REP. NO. 95-1804, at 25 (1978), reprinted U.S.C.C.A.N. 9484, 9487 (Conf. Rep.); Endangered Species Committee Decision, 60 Fed. Reg. 23,405, 23,406 (Endangered Species Comm. June 3, 1992).

¹⁹⁵ See Cone and Burke, *supra* note 189.

¹⁹⁶ See Memorandum from Donald R. Glaser, Regional Director, Bureau of Reclamation, on BiOp for Delta Smelt to Regional Director, Region 8, U.S. Fish and Wildlife Service (Dec. 15, 2008), available at <http://www.fws.gov/sacramento/es/documents/08-12-15%20Memo%20BOR%20Receipt%20of%20BO.pdf>.

trary to the requirements of reduction of reducing water exports.¹⁹⁷ This is contradictory to the *Tellico* decision where the TVA continued with its construction efforts even after the project had been found to threaten the snail darter.¹⁹⁸ Here CVP and SWP did not take such unilateral action and faithfully adhered to the new pumping schedule outlined in the 2008 BiOp.¹⁹⁹ CVP and SWP have not engaged in irreversible or irretrievable commitment of resources.

VII. CAN AND SHOULD AN EXEMPTION BE GRANTED

A. *Can an Exemption be Granted?*

1. A High Standard of Review

To be granted an exemption, a petition for exemption must satisfy all four exemption criteria. The exemption petition for the delta smelt would fail to meet two of the exemption criteria. First, the two-gate system would provide a reasonable and prudent alternative.²⁰⁰ Second, the benefits of restoring the water exports to pre-restriction levels without any modification would not clearly outweigh the benefits of the two-gate system, as this alternative would also provide protection to the delta smelt.²⁰¹ An increase in water exports out of the Delta would have regional significance because it would help alleviate some of the negative economic and social impact on rural communities throughout the Central Valley.²⁰² This issue is also of national significance because any reduction in west side agricultural production would unfavorably impact the national food supply and cause an increase in food prices.²⁰³ Finally, CWP and SWP refrained from making any irreversible or irretrievable commitment of resources by obediently following the restricted water pumping schedule in the current BiOp.²⁰⁴ The ESA presents a very high standard for any applicant for exemption to satisfy, where the failure to

¹⁹⁷ See ENVIRONMENTAL, LAND & RESOURCE DEPT, CLIENT ALERT: DELTA WATER SUPPLIES TO TWO-THIRDS OF ALL CALIFORNIANS MAY BE RESTRICTED BY ENDANGERED SPECIES ACT INJECTION 4 (Latham & Watkins LLP Jan. 8, 2008), available at <http://www.lw.com/Resources.aspx?page=ClientAlertDetail&publication=2075>.

¹⁹⁸ Parenteau, *supra* note 48, at 131-132.

¹⁹⁹ See FISH AND WILDLIFE SERVICE, *surpa* note 25, at 39.

²⁰⁰ See *supra* Part VI.B.1.

²⁰¹ See *supra* Part VI.B.2.

²⁰² See *supra* Part VI.B.3.

²⁰³ See *id.*

²⁰⁴ See *supra* Part VI.B.4.

satisfy two of the exemption criteria would mandate that the ESC cannot grant an exemption.²⁰⁵

2. What is a Reasonable and Prudent Alternative?

It is hard to deny or ignore the human suffering caused by the delta smelt water restrictions within the rural communities in the Central Valley.²⁰⁶ City and county officials are faced with unemployment levels that exceed national averages,²⁰⁷ local economies and even small towns are withering like the crops that surround these small towns,²⁰⁸ and the lines of the hungry grow each day.²⁰⁹ Those in favor of an exemption argue that the need for water is immediate and that a promise of water within an uncertain time frame, dictated by the operational schedule of the two-gate system, is unacceptable in light of the current suffering.²¹⁰ The current despair felt by residents within the Central Valley is nothing like the circumstances *Tellico* decision, where dam project under evaluation was for proposed future benefits to a community²¹¹ because the proposed application for exemption would rectify catastrophic harm that is currently suffered due to the strict adherence to the ESA.²¹² From this point of view, the two-gate system is an unreasonable alternative that is incapable of providing an adequate solution to the current Delta water crisis.

West side farmers are further confronted with the predicament that they must rely solely on water exports out of the Sacramento Delta and are not as fortunate as their brethren on the east side of the valley who are less dependent on Delta water exports.²¹³ Any proposal that would provide for greater water exports out of the Delta would likely be challenged because the Delta region has become a battleground in a continuous conflict between environmental ideology and basic human needs.²¹⁴ Once operational, the two-gate system may not ultimately result in restoration of the water exports to the Central Valley farmers. Even if the problem of entrainment is solved, all it takes is the discovery of the next species to be adversely impacted by pumping activity to once again shut

²⁰⁵ 16 U.S.C. § 1536 (h)(1) (2009).

²⁰⁶ See Semuels, *supra* note 2.

²⁰⁷ See *id.*

²⁰⁸ See McLaughlin, *supra* note 42.

²⁰⁹ See Benjamin, *supra* note 37.

²¹⁰ See Schwarzenegger, *supra* note 155; see also Semuels, *supra* note 2.

²¹¹ See Press Release, Dep't of the Interior, *supra* note 88.

²¹² *Natural Res. Defense Council v. Kempthorne*, 506 F.Supp.2d 322, 322-387 (E.D. Cal. 2007) (citing 16 U.S.C. § 1536(a)(2)).

²¹³ See Sheelhan, *supra* note 153.

²¹⁴ See Semuels, *supra* note 2.

off the pumps.²¹⁵ Any alternatives that would only provide protection to the delta smelt without addressing the greater impact on the Delta region ecosystem may be ineffective in solving the current water crisis.²¹⁶ This is comparable to the *Northern Spotted Owl* decision where no feasible alternative timber sales areas were found near exempted timber sales areas²¹⁷ because, for most west side farmers, there are no alternative sources of water other than Delta water to irrigate their fields.²¹⁸ Absolution from an unending cycle of farmer-versus-species can only be found in the granting of an exemption for CVP and SWP pumping activity because an exemption would be permanent and would also be effective against current and future species in conflict with this activity.²¹⁹

Under an analysis where the two-gate system is found not to be a reasonable and prudent alternative, the ESC may determine that human suffering outweighs the need of species protection. The ESC may find that all four criteria for exemption have been met where an exemption can be granted.²²⁰

B. Should an Exemption be Granted?

1. Other Voices in Opposition to an Exemption

Regardless of whether the legal standard under the ESA exemption provisions has been met, perhaps a better question to ask is, should an exemption be granted? Restoring water export allotments out of the Delta to pre-restriction levels is not an issue isolated solely to the west side of the Central Valley.²²¹ Nor is it a question of fish versus farm,²²²

²¹⁵ *Pacific Coast Fed'n of Fisherman's Ass'n v. Gutierrez*, 606 F.Supp.2d 1122, 1127, 1191 (E.D. Cal. 2008). (holding that a 2004 BiOp by U.S. National Marine Fisheries Services that assessed the potential adverse impacts of ongoing CVP and SWP operations on salmon species and the agency's no jeopardy conclusions were unsupported, and that it did not use the best scientific data available. Therefore, it was in violation of the ESA.)

²¹⁶ See Semuels, *supra* note 2.

²¹⁷ Endangered Species Committee Decision, 60 Fed. Reg. 23,405, 23,406 (Endangered Species Comm. June 3, 1992)

²¹⁸ See Semuels, *supra* note 2.

²¹⁹ 16 U.S.C. § 1536(h)(2)(A) (2009).

²²⁰ See 16 U.S.C. § 1536(h); See also Parenteau, *supra* note 48, at 138.

²²¹ See National Oceanic and Atmospheric Administration Northwest Regional Office – Salmon Fishery 2008 *Economic Analysis of the West Coast Salmon Fishery*, <http://www.nwr.noaa.gov/Salmon-Harvest-Hatcheries/Salmon-Fishery-Management/upload/WC-slmn-econ-analysis.pdf>; see also Press Release, Natural Resource Defense Fund Media Center, Conversations Threaten to Sue Feds, Appeal to State for Emergency Action as Delta Smelt Spiral to Extinction, <http://www.nrdc.org/media/2007/070524c.asp>.

²²² See Press Release, Natural Resource Defense Fund Media Center, *supra* note 221.

but has far reaching ramifications outside the Central Valley.²²³ One of these competing interests would be the restoration of salmon fisheries along the northern California and Oregon coasts.²²⁴ Commercial fisherman in the region suffered two consecutive years of restricted fishing of Pacific salmon.²²⁵ One of the major contributing factors to the decline in Pacific salmon population is water pumping activity within the Delta region.²²⁶ Revenue losses in commercial fishing due to restrictions on fishing were \$22 million in 2008.²²⁷ Salmon fishing is also an important economic staple to coastal fishing communities by supporting jobs related to recreational fishing excursions.²²⁸ Due to the impact on commercial and recreational fishing, the total projected economic loss to those that depend on salmon fishing in 2008 was \$60 million.²²⁹ The true impact on fishing-dependent communities is unknown due to the conservative nature of these estimates, which fail to include losses incurred by those who provide equipment, repair and service, and businesses that sell commercial or recreational boats.²³⁰ Salmon fishermen argue that the water issues of the Delta do not pit people against fish, but rather man against man as more water for Central Valley farmers means less work for coastal fishermen.²³¹ This is distinguishable from the *Grayrocks* decision where the settlement allowed for both of the interested parties to have their needs effectively met.²³² There can be no such compromise in the Delta water dispute because giving to the farmers would result in taking from the fishermen.

²²³ See Pacific Coast Fed'n of Fisherman's Ass'n v. Gutierrez, 606 F.Supp.2d 1122, 1127, 1147-1152 (E.D. Cal. 2008).

²²⁴ *Id.*

²²⁵ See Mike Taugher, *New Restrictions Placed on Delta Water*, CONTRA COSTA TIMES, Jun. 4, 2009, available at MercuryNews.com <http://www.mercurynews.com/fdep?1248934337884>.

²²⁶ See Ellis II, *supra* note 31; see also Press Release, Pacific Fishery Management Council, Record Low Salmon Fisheries Adopted (Apr. 10, 2008), available at http://www.pcouncil.org/newsreleases/PFMC_FINAL_PressRel.pdf.

²²⁷ This was a ninety percent decline from the five year average. National Oceanic and Atmospheric Administration Northwest Regional Office, *supra* note 221.

²²⁸ The collapse in Salmon fisheries is estimated to result in a \$24 million loss in revenue from recreational fishing activity. *Id.*

²²⁹ *Id.*

²³⁰ The collapse of Pacific Salmon fisheries is estimated to cost California \$279 million this year due to restrictions on commercial and recreational fishing. *Id.* See also George Hostetter, *Interior Secretary Salazar Hears Water Plea*, THE FRESNO BEE, Jun. 28, 2009 available at <http://www.fresnobee.com/local/story/1501969.html>.

²³¹ See Ellis II, *supra* note 31.

²³² Press Release, Dep't of the Interior, *supra* note 88.

Environmentalists argue that the survival of the delta smelt has greater ramifications than just the preservation of bio-diversity because the delta smelt serves as an indicator species which provides a reference point for the general health of the Delta region ecosystem.²³³ The extinction of the delta smelt would be the harbinger of a greater collapse of the ecosystem of the Sacramento Delta region.²³⁴ It is argued that the economic and environmental impact of such a cataclysmic collapse of this diverse ecosystem would be incalculable.²³⁵ This is indistinguishable from the *Tellico* decision where the proposed dam would have annihilated the snail darter²³⁶ because the current pumping operations presented here pose the same specter of total annihilation of the delta smelt. Opponents, who favor increased water pumping, argue that it is unknown what is killing the delta smelt, with possible causes being non-native predatory species,²³⁷ changes in food supply,²³⁸ or toxic contaminants.²³⁹ Entrainment may not be the real problem, and continued restrictions on Delta pumping may not prevent a decline in the delta smelt population.²⁴⁰

2. Recommendation

Whether an exemption should be granted is a complex issue with the hardships of all those affected by this debate being equally relevant. A better perspective is to take a step back from the emotionally-charged aura that encompasses the delta smelt dilemma and consider the spirit of the ESA. With its enactment in 1973, the ESA was the manifestation of change in the collective American consciousness away from environmental exploitation with reckless abandon to a greater understanding of a responsibility of stewardship of the natural world around us, and recognition of the fact that as citizens of the world, the actions of one nation affects all others.²⁴¹ The purpose of the exemption process was to provide a means to limit the oppressive force that may fall on certain por-

²³³ CENTER FOR BIOLOGICAL DIVERSITY ET AL., EMERGENCY PETITION TO LIST THE DELTA SMELT (*Hypomesus transpacificus*) AS AN ENDANGERED SPECIES UNDER THE ENDANGERED SPECIES ACT, iv (Mar. 8, 2006) available at http://www.biologicaldiversity.org/species/fish/Delta_smelt/pdfs/ds-endangered-petition-3-8-06.pdf; Press Release, Natural Resource Defense Fund Media Center, *supra* note 221.

²³⁴ See Press Release, Natural Resource Defense Fund Media Center, *supra* note 221.

²³⁵ See *id.*

²³⁶ Press Release, Dep't of the Interior, *supra* note 88.

²³⁷ See H. BUCK ET AL., *supra* note 115, at 17.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *supra* Part III.

tions of the population due to the enforcement of this noble goal.²⁴² An exemption does not operate as an end around the basic fundamental principal of the ESA, that species preservation must be given higher regard than in generations past.²⁴³ Solving California's current water crisis requires a solution created through cooperation among all interested parties, not an escalating adversarial conflict that the granting of an exemption would foster. For these aforementioned reasons and on the basis of historical precedent regarding a reluctance to grant an exemption, an exemption should not be granted.

VIII. CONCLUSION

Invocation of the God Squad is viewed as an option of last resort, where ESA demands an applicant for exemption to meet a very high standard of review. For those negatively impacted by the federally mandated water restrictions on the allocation of Delta water, the God Squad will not be able to provide salvation.²⁴⁴ The application for exemption would fail because of two criteria: there is a reasonable and prudent alternative, and the benefits of the agency action do not clearly outweigh the benefits of an alternative course of action that would preserve the species.²⁴⁵ If just one of the exemption criteria is not met, the ESA demands that the request for exemption must be denied.²⁴⁶

Issues as complex as those raised by the delta smelt should not only be confined to a strict and cold legal determination, but the moral considerations should also be given weight. Suffering incurred by rural communities and their residents is considerable and undeniable,²⁴⁷ where the granting of exemption would be bring relief now when it is so desperately needed.²⁴⁸ Farmers and rural communities are not the only parties' impacted; salmon fisherman and other interests groups have also been negatively affected by the pumping activity of the Delta.²⁴⁹ It would not be fair to callously disregard their needs by granting an exemption to serve water users who draw from water exported out of the Delta. The sins of California's long history of neglecting its antiquated water distribution

²⁴² See *supra* Part VI.A.

²⁴³ See *supra* Part III.

²⁴⁴ See *supra* Part VII.A.1.

²⁴⁵ See *id.*

²⁴⁶ See *supra* Part IV.A.

²⁴⁷ See *supra* Part II.B.

²⁴⁸ See *supra* Part IV.A.

²⁴⁹ See *supra* Part VII.B.1.

system created this current crisis,²⁵⁰ and it will take years of cooperation by all parties to adequately solve this growing water crisis. An exemption is not the proper mechanism to alleviate the current water crisis because this process breeds political and social division. California's current water crisis demands all impacted parties work together to achieve a truly sustainable solution.²⁵¹

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²⁵⁰ See Semuels, *supra* note 2.

²⁵¹ On November 9, 2009, California Governor Arnold Schwarzenegger signed an ambitious new piece of water legislation with the goal of rectifying the current water crisis in California and to prevent a future water catastrophe. The water bill is a comprehensive water package that is a plan comprised of four policy bills and an \$11.14 billion bond. Senate Bill No. 1 establishes the framework to achieve the co-equal goals of providing a more reliable water supply to California and restoring and enhancing the Delta ecosystem. To achieve these goals, the bill creates the Delta Stewardship Council, consisting of seven members with diverse expertise providing a broad statewide perspective. It also establishes the Sacramento-San Joaquin Delta Conservancy to implement ecosystem restoration activities within the Delta. The bill also provides funding to the Two-Gates Fish Protection Demonstration Program by apportioning funds from Proposition 84. Senate Bill No. 6 requires that local agencies monitor the elevation of their groundwater basins to help better manage the resource during both normal water years and drought conditions. Senate Bill No. 7 creates a framework for the future planning and actions by urban and agricultural water suppliers to reduce California's water use. The bill requires the development of agricultural water management plans and requires urban water agencies to reduce state wide per capita water consumption 20% by 2020. Senate Bill No. 8 improves accounting of the location and amounts of water being diverted by recasting and revising exemptions from the water diversion reporting requirements under current law. This bill also distributes existing bond funds for various activities to benefit the Delta ecosystem and secure the reliability of the state's water supply. The final part of the comprehensive water package is the Safe, Clean, and Reliable Drinking Water Supply Act of 2010, which is an \$11.14 billion bond. The bond would provide funding for California's aging water infrastructure and for projects and programs to address the ecosystem and water supply issues in California. The bond is comprised of seven categories, including drought relief, water supply reliability, Delta sustainability, statewide water system operational improvement, conservation and watershed protection, groundwater protection and water quality, and water recycling and water conservation. Cal. Dept. of Water Res., *2009 Comprehensive Water Package*, Nov. 2009, available at <http://gov.ca.gov/issue/water-supply>. The water bond will be up for public approval on the ballot in November elections in 2010. Robert Rodriguez, *Millerton Lake a backdrop for water bond-signing*, THE FRESNO BEE, Nov. 9, 2009, available at <http://www.fresnobee.com/local/1704528.html>.