SALMON, SUCKERS AND SORROW: RURAL CLEANSING UNDER THE SHADOW OF THE ENDANGERED SPECIES ACT

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I. INTRODUCTION

In Klamath Falls, Oregon, thousands of acres of fields lie fallow, blowing away with the wind. Severe drought over the past decade has transformed the landscape into an area reminiscent of the Dust Bowl during the Great Depression. Family farms that have grown alfalfa, oats, and the primary cash crop, potatoes, are being lost to these intolerable conditions with the blowing winds and scorching sun. Unlike the Joads of Oklahoma[1], these modern-day Okies of Southern Oregon and Northern California, the two areas that constitute the Klamath Basin, can irrigate their arid fields with the Klamath Project, a federal irrigation project. Yet the irrigation channels remain dry, and another small harvest awaits the suffering farmers who face their strongest opposition in the Federal Government, which shut off the gates of the Klamath Project in April of 2001 to protect the coho salmon and sucker fish.

The Federal Government remains at a standoff with the suffering farmers. On one side farmers are desperately seeking water for their dying crops with a minority of case law supporting their dire cause. On the other side, environmentalists are vowing to protect any and all endangered animals at all costs with the support of the Endangered Species Act and case law interpreting this crucial regulation. The question sought to be answered in this note is whether the farmers of the Klamath Basin can find any legal support to open the floodgates and defend themselves against the abuse of environmental protection legislation.

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1. *See generally* JOHN STEINBECK, THE GRAPES OF WRATH (Viking Press 1972) (1939).

II. BASIC OVERVIEW OF WESTERN WATER LAW AND THE PRIOR APPROPRIATION DOCTRINE

Water rights in the United States have developed in a regional pattern according to the unique needs and resources of each state. Acquisition by capture has played a formative role in the ownership and development of water rights.[2] In the Eastern United States where water is more abundant, each owner of land along a water source, or riparian land, has an inchoate right to the use of water subject to the rights of other riparians.[3] The amount of water to which each riparian is entitled varies with availability, thus, in times of scarcity or drought, all riparians must reduce their consumption proportionately.[4] Surface water east of the 100th meridian is generally sufficient to support agriculture without irrigation.[5] This proportional system is possible because water is plentiful, true drought conditions are uncommon, and pro rata reductions do not create a significant hardship.[6] However, riparian rights take "little or no account of the relative productivity of the land the water services, encourage the development of uneconomical 'bowling-alley' parcels of land perpendicular to the banks of a stream, and ration poorly when stream levels are low."[7]

Compare the riparian system of the Eastern United States to the Western United States, where the doctrine of prior appropriation applies.[8] The low ratio of surface water streams to land in the West made riparian rights a poor means to allocate water.[9] Under the prior application doctrine, "the person who first appropriates (captures) water and puts it to reasonable and beneficial use has a right superior to later appropriators," or the classic "first in time, first in right" theory.[10] Although water belongs to the first person to put it to beneficial use, the right exists only to the exact quantity used and only as long as the use continues.[11] Prior appropriation also has its flaws, including premature development, excessive diversion, and "it also rations poorly when supplies dwindle periodi-

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2. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 38-39 (4th ed. 1998).
3. *See id*.
4. Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735, 739 (2000).
5. *Id*. at 738.
6. *Id*. at 739.
7. DUKEMINIER & KRIER, *supra* note 2, at 39.
8. *See* Bricker & Filippi, *supra* note 4, at 739.
9. *See* DUKEMINIER & KRIER, *supra* note 2, at 39.
10. *Id*.
11. Bricker & Filippi, *supra* note 4, at 739.

cally."[12] In times of shortage or drought, senior users take their full measure of water first, ensuring that senior farmers can still produce crops.[13] If no more water is available, junior users are prevented from using the water and have no alternative but to watch their fields dry and crops die.[14]

A. *Water Rights in Oregon*

Oregon law subscribes to the prior appropriation theory of water control, providing that, "all water within the state from all sources of water supply belongs to the public."[15] Water may be appropriated for beneficial use, which Oregon law defines as "the basis, the measure and the limit of all right to the use of water."[16] Water users are not allowed to waste water, but Oregon has narrowly defined "waste" so that even very inefficient water users are entitled to the full measure of their water rights if their water use is supported by custom.[17] The Oregon Water Resources Department, through the Water Resources Commission, administers the water rights in the state's eighteen water districts, appointing one watermaster to regulate each district.[18] Although Oregon law protects in-stream water rights within the prior appropriation system, any water that remains in the stream, but is not part of a certified in-stream right, is available for use by appropriators – even if the extra water is left in-stream by a senior appropriator pursuant to the Endangered Species Act.[19]

B. *California Water Law*

California also follows the prior appropriation theory of water rights, as the title to water always remains with the State.[20] Section 102 of the California Water Code states that "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in

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12. DUKEMINIER & KRIER, *supra* note 2, at 39.
13. Bricker & Filippi, *supra* note 4, at 739.
14. *Id*.
15. *Id*. at 740 (citing OR. REV. STAT. § 537.110 (1999)).
16. *Id*. (citing OR. REV. STAT. § 540.610(1) (1999)).
17. *Id*.
18. *Id*.
19. *Id*.
20. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318 (2001).

the manner provided by law."[21] The right to the water's use is transferred by permit from the State Water Resources Control Board ("SWRCB") to the Department of Water Resources, and then by contract to the farmers, who then possess an "exclusive use of the prescribed quantities of water."[22] The "right remains in place until formally changed by administrative process;" thus, the farmer's "contract[ual] right[s] in the water's use [are] superior to all competing interests."[23] Yet, the law in California specifically informs users that the State will not be held liable for shortages due to drought or other causes beyond its control.[24]

III. HISTORY AND DESCRIPTION OF THE KLAMATH PROJECT

Southern Oregon, including Klamath Falls, and Northern California receive irrigation from the Klamath Project, a series of federal dams and reservoirs.[25] Established in 1907 under the Reclamation Act of 1902, the Klamath Project covers territory in Klamath County, Oregon, and Siskiyou and Modoc Counties in northern California.[26] In accordance with Oregon laws, the United States appropriated all available water rights in the Klamath River, Lost River, and their tributaries, to construct a series of water diversion projects.[27] Cities in Oregon depending upon the Klamath Project include Klamath Falls, Merrill, Bonanza, and Malin, while Tulelake represents northern California as part of the project.[28] Seven of the project's dams and reservoirs are located in Oregon, and the remaining three lie south of the Oregon border.[29] The Bureau of Reclamation and the Bureau of Land Management maintain the Klamath Project, which for nearly a century has assisted farmers who originally migrated to the West to find a home in the fertile valleys of Southern Oregon and Northern California.[30] The

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21. CAL. WATER CODE § 102 (West 1971 & Supp. 2003).
22. *Tulare Lake Basin Water Storage Dist*., 49 Fed. Cl. at 318.
23. *Id*.
24. *See id*. at 315.
25. *See* ERIC A. STENE, U.S. DEPARTMENT OF THE INTERIOR, THE KLAMATH PROJECT (1994), *at* http://www.usbr.gov/dataweb/html/klamathh.html.
26. Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1209 (9th Cir. 1999).
27. Stene, *supra* note 25.
28. *Id*.
29. *Id*.
30. *Id*.

increase in agriculture led to increased demand for irrigation and the construction of the Klamath Project.[31]

IV. THE BEGINNING OF THE KLAMATH FALLS SAGA

A. The Early Days of the Relationship Between the Government and Farmers (1988-91)

The battle for farmers' lives along the Klamath Project began in 1988, when the Environmental Protection Agency added the Lost River sucker and shortnose sucker fish to the endangered species list due to a decline in the species population resulting from a fragmentation of aquatic habitat through damming, flow diversion, and decreased water quality.[32] According to the Endangered Species Act of 1973 ("ESA"), the Bureau of Reclamation must not engage in any action that is likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of the critical habitat of an endangered or threatened species.[33] The coho salmon of Southern Oregon and Northern California joined the sucker fish as "threatened" under the ESA in 1997 as a result of habitat degradation resulting from water diversions.[34] Two years later, the Klamath River, from Iron Gate Dam to the Pacific Ocean, was designated as a "critical habitat."[35]

At first, the relationship between dependent farmers and the federal government worked reasonably well, as the Bureau of Reclamation tried to balance the needs of both fish and farmers.[36] Early efforts in the balancing act included

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31. *Id*.

32. *See* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Shortnose Sucker and the Lost River Sucker, 53 Fed. Reg. 27,130, 27,131-32 (July 18, 1988) (to be codified at 50 C.F.R. pt. 17).

33. Endangered Species Act of 1973, 16 U.S.C. § 1536(a)(2) (2000).

34. *See* Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,592 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227).

35. *See* Designated Critical Habitat; Central California Coast and Southern Oregon/Northern California Coasts Coho Salmon, 64 Fed. Reg. 24,049, 24,059 (May 5, 1999) (to be codified at 50 C.F.R. pt. 226).

36. *See* Kimberley A. Strassel, Editorial, *Rural Cleansing*, WALL ST. J., July 26, 2001, at A14.

programs to promote water conservation and tight control over water flows.[37] The tense, but workable relationship began to evaporate in 1991, when the Klamath Basin suffered the first of many droughts to strike the region during the 1990s.[38] The Fish and Wildlife Service ("FWS") noted that the Bureau of Reclamation might need to do more for the sucker fish during the drought.[39] Within two months of the beginning of the drought, the Oregon Natural Resources Council ("ONRC"), an aggressive state environmental group, announced it would initiate a lawsuit against the Bureau of Reclamation for failure to protect the fish.[40] The philosophy of the ONRC was that farmers should never have settled in the dry Klamath Valley and that they put undue stress on the land.[41] These early lawsuits were not immediately successful because the FWS "continued to revise its opinions as to what the fish needed, and in part because of the farmers' undeniable water rights" under the Project.[42] Yet, in April, 2001, the ONRC, along with other environmental groups, fishermen, and Native American tribes, successfully won another lawsuit against the Bureau of Reclamation, and a federal judge "ordered an unwilling Interior Department to shut the water off."[43]

B. *Results of the Shutoff on the Project Farming Community*

The protection of the sucker fish and coho salmon by depriving farmers of irrigation water has had a devastating effect on the local agricultural economy. The farming community lost $250 million in 2001, with a drop in the average value of an acre of farm property in the Klamath Basin from $2,500 to $35 an acre.[44] Family farms are being destroyed as second and third generation farmers find it necessary to take odd jobs to supplement lost income.[45] Road and municipal projects are struggling as property tax revenues continue to drop with the price per acre of farmland, and local businesses are suffering financially.[46] Sev-

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37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *See* Michael Milstein, *Raising Crops Instead of a Fuss in a Dry Summer Filled with Chaos, These Klamath Basin Farmers and Workers Don't Seek or Want Attention: All They Need is Water*, THE OREGONIAN, Sept. 9, 2001, at A19.
46. *See* Strassel, *supra* note 36, at A14.

enty-five percent of the Klamath wetlands have been destroyed, entire lakes drained, and the killing or driving off the various species of wildlife in search of water.[47]

Two final results from the April shutoff are driving the Klamath Basin farmers in their recent lawsuits against the federal government. First, the ONRC made an offer last July to purchase the drying farmland for $4,000 an acre, making it more likely the owners will sell only to the government, receiving a mere pittance for the loss of their livelihoods and future.[48] Finally, the sucker fish and coho salmon are not improving according to studies from independent biologists, who have concluded that the fish need more water.[49]

Desperate farmers have turned to violence to save their lives. Since the April 2001 shutoff, Klamath Basin farmers have forcibly opened the headgates four times in a last-ditch attempt to irrigate their lands by climbing over the six-foot chain-link fence protecting the headgates.[50] To prevent any injuries, the Bureau of Reclamation has opened the fence surrounding the floodgate, allowing the farmers to set up a protest area filled with lawn chairs and barbecues.[51] Bill Moore, who farms 760 acres near Merrill along the Project, is frustrated with the government and took matters into his own hands by climbing the fence.[52] "I got disgusted," he said, "I thought this was our only chance. There isn't a critter, bug, fish or any form of life that isn't endangered somewhere."[53]

V. A DISCUSSION OF THE ENDANGERED SPECIES ACT

The addition of two sucker fish to the Endangered Species List sparked the "farmers versus fish" battle, and the addition of the coho salmon ignited the heated protests. As *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), made clear, "the Endangered Species Act provides potentially powerful protections" that "extend only to species that have been listed as 'endangered' or

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47. *See* Letter to the Editor from Steve Pedery, Outreach Director, WaterWatch of Oregon, WALL ST. J., June 5, 2001, at A27; *see also* Strassel, *supra* note 36, at A14.

48. *See* Strassel, *supra* note 36, at A14.

49. *Id*.

50. *See* Jeff Barnard, *Irrigation Project Spurs Protests*, ASSOCIATED PRESS, Aug. 29, 2001, *available at* 2001 WL 26777987.

51. *See id*.

52. *See id*.

53. *Id*.

'threatened'. . . ."[54] The Secretary of the Interior adds species to the list, as the Act itself distinguishes the two classifications. A threatened species is defined as any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.[55] An endangered species is defined as any species that is in "danger of extinction throughout all or a significant portion of its range . . . [as] determined by the Secretary of the Interior," with the exception of insects.[56]

Critical habitat represents another crucial term in listing endangered and threatened species. The ESA defines critical habitat as the specific areas within a geographical area occupied by the species at the time the species are listed under section 1533 of the Act, on which are found features "(I) essential to the conservation of the species and (II) which may require special management considerations or protection."[57] The ESA also defines critical habitats as "specific areas outside the geographical area occupied [by the threatened or endangered species] at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary [of the Interior] that such areas are essential for the conservation of the species."[58] "A critical habitat may be established for those species now listed as threatened or endangered for which no critical habitat has . . . been established" before under section 1532(5)(A).[59] "[C]ritical habitats shall not include the entire geographical area which can be occupied by the threatened or endangered species" unless the Secretary of Interior determines the circumstances.[60] Thus, one can see that listing a species triggers a "requirement to designate critical habitat[s] . . . to afford [the] listed species the protections against federal actions that jeopardize them, and against private or public actions that 'take' them."[61]

To conserve the critical habitat of the sucker fish and coho salmon, the government may use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."[62] Approved methods

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54. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 934 (3d ed. 2000).
55. *See* 16 U.S.C. § 1532 (2000).
56. *Id*. § 1532(6).
57. *Id*. § 1532(5)(A)(i).
58. *Id*. § 1532(5)(A)(ii).
59. *Id*. § 1532(5)(B).
60. *Id*. § 1532(5)(C).
61. PERCIVAL ET AL., *supra* note 54, at 934.
62. 16 U.S.C. § 1532(3) (2000).

under section 1532 include "research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be relieved, [the government] may include regulated taking."[63] Private individuals, such as the ONRC, and the state or federal government may bring a petition to list a species as endangered or threatened.[64] The Klamath Falls farmers face a stiff statutory challenge that strongly favors the ONRC and the FWS.

A. *Of Section 1533 and Saving Suckers and Salmon*

Section 1533 of the ESA describes guidelines for determining whether a species is threatened or endangered. The Secretary of the Interior determines whether the species deserves to join the Endangered Species List from a list of the following statutory factors: "(A) The present or threatened destruction, modification, or curtailment of [the species'] habitat or range; (B) Overutilization [of the habitat or range] for commercial, recreational, scientific or educational purposes; (C) Disease or Predation; (D) The inadequacy of existing regulatory mechanisms; (E) Other natural or manmade factors affecting its continued existence."[65]

The Secretary of the Interior makes all determinations based upon the factors from a "basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into account . . . efforts being made by any State . . . to protect such species."[66] The Secretary will consider any species that have been "designated as requiring protection from unrestricted commerce by any foreign nation," or any species that is "identified as in danger of extinction, or likely to become [extinct] within the foreseeable future, by any State agency . . . responsible for the conservation of fish or wildlife or plants."[67] "The Secretary [will also] designate [the] critical habitat, and make revisions . . . after [considering] the economic impact, and any other relevant impact, of specifying a particular area as [a] critical habitat."[68] Upon adding

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63. *Id*.
64. *See id*. § 1532(13); *see also* Bricker & Filippi, *supra* note 4, at 741.
65. 16 U.S.C. § 1533(a)(1) (2000).
66. *Id*. § 1533(b)(1)(A) (stating that the Secretary will consider whether the State has used predator control, protection of habitat or food supply, or other conservation practices within the State's jurisdiction).
67. *Id*. § 1533(b)(1)(B).
68. *Id*. § 1533(b)(2).

a species to the list, the Secretary shall "once every five years" conduct "a review of all species included [on the] list" and determine "whether any such species should (i) be removed from [the] list; or (ii) be changed in status from an endangered species to a threatened species; or (iii) be changed in status from a threatened to an endangered species."[69]

For protective regulations, the Secretary shall issue regulations for the conservation of the endangered and threatened species as well as develop and implement recovery plans for the conservation and survival of the endangered and threatened species.[70] The recovery plans are designed to "give priority to those endangered species or threatened species . . . that are most likely to benefit from [the recovery] plans, [especially] those species that are, or may be, in conflict with construction or other development projects or . . . economic activity."[71] The recovery plans also incorporate "a description of such site-specific management actions [that are] necessary to achieve . . . the conservation and survival of the species."[72] The Secretary can also "procure the services of appropriate public and private agencies and institutions" to carry out the recovery plans.[73]

Finally, "the Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all [endangered and threatened] species which have recovered to the point at which the measures . . . are no longer necessary and which . . . have been removed from either of the lists."[74] While environmentalists have received their wish to return Oregon to its primeval form, Klamath Basin farmers must wait until 2003 and 2004 for another possible chance to remove the sucker fish and the coho salmon, respectfully, from the list and return to normal irrigation for their dying fields.[75] As of November 1999, the Secretary of the Interior and the Secretary of Commerce responsible for listing marine species under the National Marine Fisheries

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69. *Id*. § 1533(c)(2).
70. *See id*. §§ 1533(d), 1533(f).
71. *Id*. § 1533(f)(1)(A).
72. *Id*. § 1533(f)(1)(B).
73. *Id*. § 1533(f)(2).
74. *Id*. § 1533(g)(1).
75. *See* Press Release, The National Endangered Species Act Reform Coalition, Restoring Balance to the ESA (Sept. 20, 2001) (stating that "the Senate Commerce, Justice, State and the Judiciary FY 2002 Appropriations Bill" mandates the National Marine Fisheries Service and the Fish and Wildlife Service to review joint regulations concerning the ESA. The agencies are to report back by April 2003), *available at* http://www.nesarc.org/news9.htm.

Service (NMFS) listed 1,779 species.[76] "Of these, 1,201 [species of animals and plants] were found in the United States: 935 listed as endangered . . . and 266 threatened . . . ."[77] California had the second highest number of species listed with 259, while Oregon had 35 on the list.[78]

The first case in our analysis of the ESA involves a group of private citizens who believed that a species dwelling in the surrounding forest of Washington deserved protection from the lumber industry. In May of 1988 almost two dozen environmental groups sued the Secretary of the Interior and the U.S. Fish and Wildlife Service for failure to list the northern spotted owl as an endangered species.[79] Two years later the FWS published a final rule confirming the northern spotted owl as a threatened species but expressly deferred designation of critical habitat for the spotted owl on the grounds that the habitat was not determinable.[80] In *Northern Spotted Owl v. Lujan*, the court held that while "more extensive habitat may be essential to maintain the species over the long term, critical habitat only includes the minimum amount of habitat needed to avoid short-term jeopardy or habitat in need of immediate intervention."[81] "When the critical habitat is not determinable at the time of the final listing rule, the Secretary [of the Interior] is authorized up to twelve additional months to complete the designation."[82] By considering the "best scientific data available" in identifying geographic areas containing the physical and biological features essential to the conservation of the species, and the probable economic or other impacts on human activities resulting from the critical habitat designation, the Secretary has a difficult decision to make barring an extraordinary circumstance to allow for more than twelve months to designate a species.[83]

The Klamath Falls farmers must realize that by including the term "determinable" in § 4(b)(6)(C), Congress recognizes the difficulty in determining the

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76. *See generally* Species Information, U.S. Fish and Wildlife Service, *at http://endangered.fws.gov/wildlife.html#Species* (last visited Jan. 15, 2004); *see also* 50 C.F.R. §§ 17.11-17.12 (2002).

77. PERCIVAL ET AL., *supra* note 54, at 935; *see generally,* 50 C.F.R. §§ 17.11-17.12 (2002).

78. *See* PERCIVAL ET AL., *supra* note 54, at 936 (referencing Figure 8.2).

79. *See e.g.* N. Spotted Owl v. Lujan, 758 F. Supp. 621, 623 (W.D. Wash. 1991); *see also* N. Spotted Owl v. Hodel, 716 F. Supp. 479, 479 (W.D. Wash. 1988) (reporting the resolution of the case in 1998).

80. *See Lujan*, 758 F. Supp. at 623.

81. *Id*.

82. *See id.* (citing 16 U.S.C. § 1533(b)(6)(C) (2000)).

83. *See id.*

most appropriate critical habitat within the statutory time frame.[84] Where "biology relating to the status of the species is clear, it should not be denied the protection of the Act because of the inability of the Secretary to complete the work necessary to designate critical habitat."[85] Statutory pressure squarely rests on the Secretary to analyze the best biological and economic data available, and the Klamath farmers should recognize that the listing of the coho salmon and the sucker fish may not have been on the best available data. The farmers want to avoid arguing that the listing decision was hastily crafted or uninformed, as Congress has provided under § 4(a)(3)(B) the power for periodic revisions to critical habitat plans.[86] The listing decision has remained for the region now for nearly fourteen years. Another key difference between the Northern Spotted Owl and the coho salmon involves the FWS's simultaneous listing and its determination of the salmon's habitat. In *Lujan*, the court held the simultaneous listing and determination of critical habitat as the proper procedure under the ESA.[87]

Environmentalists rely heavily on the listing procedure of § 1533 to protect species, in which Congress forces the Secretary of the Interior to publish within the twelve-month time extension.[88] The Secretary may be challenged by environmentalists and other private citizen groups for not making a prudent designation.[89] "A designation of critical habitat is not prudent when . . . (i) the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or (ii) [s]uch designation of critical habitat would not be beneficial to the species."[90] Farmers in the Klamath Basin dispute may argue that (1) the designation of a species has increased the likelihood of illegal taking and vandalism; (2) little benefit has resulted from designation because the fish are located in public streams irrigated by the federal government; and/or (3) designation of the basin

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84. *See id.* at 626.

85. *See id.* (citing H.R. REP. No. 567, at 19-20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2819-20).

86. *See id.* (citing 16 U.S.C. § 1533(a)(3)(B) (2000)).

87. *See id.*

88. 16 U.S.C. § 1533(b)(3)(B) (2000).

89. *See* 50 C.F.R. § 424.12(a)(1) (2002) (explaining that designations of critical habitat are not prudent when certain situations exist); *see also* Administrative Procedure Act, 5 U.S.C. § 702 (2000) (stating that persons suffering legal wrong as result of agency action are entitled to judicial review).

90. 50 C.F.R. § 424.12(a)(1) (2002).

as a critical habitat has not increased the EPA and ESA precautions the government takes in its administration of the Klamath Project.[91]

This is the argument posed by the private citizens' groups in *Conservation Council for Hawai'i v. Babbitt*, a 1998 federal district court case from Hawaii involving the listing of 245 species of endangered or threatened plants.[92] The FWS may successfully argue that fish, like plants, "cannot take measures to avoid human contact," and that a single floodgate opening in the basin could cause the extinction of the coho salmon and sucker fish.[93] However, environmentalists rely on the court's analysis in that "even if no federal activity currently occurs [at the basin], there may be such activity in the future, and there is no assurance that the FWS would designate a critical habitat at [a later] time or that [the future] designation would be timely."[94] This holds true for private lands as well. Finally, in designating the Klamath Basin as a critical habitat for the coho salmon and sucker fish, the public, as well as state and local governments, are educated and afforded the opportunity to participate in the designation by receiving notice through publication in the Federal Register and the local newspaper.[95] This procedure does not occur under § 7 of the Endangered Species Act.[96]

VI. LISTING DECISIONS THAT TRIGGER THE CRITICAL HABITAT AND PROTECTION IN THE COURTS

Many cases against the FWS, the EPA, and the Secretary of the Interior arose after the listing of a species under the Endangered Species Act. Both *Lujan* and *Conservation Council for Hawai'i* were brought by private citizen groups that were angry with the listing or non-listing of a species and the consequential designation of a critical habitat to protect the newly-protected plant or animal.[97] Citizens with an economic stake in the listing decision, such as the lumberjacks of the northern spotted owl cases or the potato farmers of the Klamath Basin,

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91. *See* Conservation Council for Hawai'i v. Babbitt, 2 F. Supp. 2d 1280, 1283-86 (D. Hawaii 1998) (holding that the FWS failed to establish a rational basis for not designating a critical habitat of 245 species of plants on private lands).

92. *Id*. at 1280.

93. *See id*. at 1283-85.

94. *Id*. at 1286.

95. *See* 16 U.S.C. § 1533(b)(5) (2000).

96. *See Conservation Council for Hawai'i*, 2 F. Supp. 2d at 1288.

97. *See* Conservation Council for Hawai'i v. Babbitt, 24 F. Supp. 2d 1074, 1075 (D. Hawaii 1998); *see also* N. Spotted Owl v. Lujan, 758 F. Supp. 621, 621 (W.D. Wash. 1991).

strongly believe that the ESA favors environmental crusades more than socio-economic causes.[98] Environmental groups are more likely to possess the financial ability to call upon experts who provide scientific and economic analysis of the impact of listing a species.[99] However, the overall goal of a listing decision case is whether the FWS can clearly articulate the risk of extinction that faces the species, along with the burden of providing expert analysis and the grounds upon which the agency acted.[100]

In *Northern Spotted Owl v. Hodel*, the first of two federal district court cases in Washington involving the northern spotted owl, private citizens and conservation organizations petitioned under § 4(b)(3) of the ESA to list the northern spotted owl as endangered.[101] The citizens brought their challenge under the 1982 amendments to the ESA, which allows the Secretary of the Interior to determine whether any species has become endangered or threatened due to habitat destruction, over-utilization, disease, predation, or other natural or manmade factors.[102] The spotted owl's remaining habitat is in an area used for the harvesting of lumber,[103] much like the coho salmon and sucker fish's remaining habitat is used for irrigation. Despite expert testimony and scientific evidence from the plaintiffs, the FWS failed to initially list the spotted owl.[104] The district court held that the FWS had acted in an arbitrary and capricious manner in failing to list the spotted owl and its habitat as critical.[105] The "arbitrary and capricious" standard is narrow and presumes the agency action is valid, but it does not shield the FWS from an in-depth review, so there is no rubber stamp to the ESA's listing of an endangered species.[106] The FWS failed to present any analysis of the risk of extinction, including any expert analysis of alternatives to establishing a

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98. *See generally* Milstein, *supra* note 45, at A19.

99. *See generally* Strassel, *supra* note 36, at A14 (referring to environmentalists suing or lobbying the government into declaring rural areas off-limits to people who live and work there. Their tools include the ESA and local preservation laws. Most home owners do not have a source of income to keep up with the environmentalists).

100. *See* N. Spotted Owl v. Hodel, 716 F. Supp. 479, 481-83 (W.D. Wash. 1998).

101. *See id.* at 480.

102. *See* 16 U.S.C. § 1533(a)(1) (2000).

103. *See Hodel*, 716 F. Supp. at 480.

104. *See id.*

105. *See id.* at 481-83 (stating that under the Administrative Procedure Act (APA), agency action is arbitrary and capricious where the agency has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'").

106. *See id.* at 481-82.

critical habitat.[107] Clearly, the FWS or the EPA must proceed with care in determining whether to list a species, for environmentalists and other concerned citizen groups will have the right to challenge these agencies and their decisions.

Coho salmon have been at the center of attention in another federal case in Oregon. In *Oregon Natural Resources Council v. Daley*, environmental organizations brought an action against the NMFS for not listing an evolutionary significant unit (ESU) of coho salmon along the Oregon Coast as a threatened species.[108] Evidence before the court described the coho salmon as having suffered from "several long-standing, human-induced factors . . . that serve to exacerbate the adverse effects of natural environmental variability from such factors as drought, floods, and poor ocean conditions."[109] Logging, road building, grazing, stream channeling, water withdrawals and unscreened diversions for irrigation were blamed for the decline of the species according to the ONRC.[110] One of the key arguments against the non-listing of the ESU is that the NMFS made the decision based on political concerns, not biological data as the ESA requires.[111] The court held that the Oregon Coastal Salmon Restoration Initiative Plan (OCSRI), a state environmental law relying on future and voluntary measures to protect the endangered salmon, could not force the listing of the species based upon future and voluntary measures and refused "to tie the fate of the Oregon Coast ESU to the whim of politics and promises of future state conservation" that may never happen.[112] Private landowners may take note of this decision in analyzing whether a state has a similar environmental protection program or legislation designed to protect wildlife or plants, but a plain language interpretation of the provisions may reveal voluntary and future support. The desired result: a court reverses an agency's listing decision based upon the arbitrary and capricious standard.

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107. *See id*. at 482.

108. *See* 6 F. Supp. 2d 1139, 1142-1143 (D. Or. 1998) (stating that an ESU population must be "substantially reproductively isolated from other nonspecific population units," and it must "represent an important component in the evolutionary legacy of the biological species.") (citing Endangered and Threatened Species; Threatened Status for Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon, 62 Fed. Reg. 24,588, 24,592 (May 6, 1997) (to be codified at 50 C.F.R. pt. 227)).

109. *Id*. at 1146 (discussing human-induced factors included habitat degradation, harvest, water diversions, and artificial propagation of salmon).

110. *See id*.

111. *See id*. at 1150.

112. *See id*. at 1158.

If the FWS refused to consider the relevant factors, the reviewing court may overturn the listing decision as "arbitrary [and] capricious, an abuse of discretion, or otherwise not in accordance with law."[113] In *Carlton v. Babbitt*, environmental organizations and individuals successfully challenged the FWSs 1991 decision to not reclassify a small subpopulation of the grizzly bear living in the Cabinet/Yaak and Selkirk ecosystems in the northern United States.[114] The petitioners argued that the supplemental findings made by the FWS with respect to the Selkirk population which determined that the population was stable and could sustain the current levels of human-caused mortality at a rate of four percent; the current regulatory initiatives in the United States and Canada were adequate to forestall the population's decline; the size of the populations were sustainable; and Canadian policies and cooperation justified reliance by the FWS on the Canadian portion of the Selkirk populations in evaluating its health, were arbitrary, capricious and violated the ESA.[115] Recall the five factors mentioned earlier in our discussion of the ESA that the FWS is required to review in making listing decisions.[116] The petitioning parties successfully analyzed the four findings of the FWS by proving that the usage of statistics did not "account for demographic, genetic, or other problems that can be dramatically amplified" in the small grizzly bear population. In addition the petitioners argue that the FWS "ignored known mortalities and used an inappropriate benchmark for sustainability," failed to support its findings that the Selkirk population is viable, and failed to "make findings regarding the present or threatened destruction of the Canadian habitat" and its effects on the Selkirk subpopulations.[117] For an environmental group or a private citizens group, the focus of the litigation should involve whether the FWS failed to follow proper procedure in classifying a species and whether the agency failed to analyze the best scientific evidence available for the five factors under § 1533(a)(1).

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113. Carlton v. Babbitt, 26 F. Supp. 2d 102, 106, 112 (D.C. Cir. 1998) (noting that the district court held that the FWS decision not to reclassify the grizzly bear from threatened to endangered in the Selkirk and Cabinet/Yaak regions was arbitrary and capricious due to the FWS's failure to consider several relevant factors, including the small size of the subpopulation).

114. *See id.*

115. *See id.* at 105-06.

116. *See* 16 U.S.C. § 1533(a)(1) (2000); *see also Carlton*, 26 F. Supp. 2d at 105.

117. *Carlton*, 26 F. Supp. 2d at 110-12 (holding that much of the findings by the FWS were not based on existing scientific evidence, and as such the decision not to reclassify the grizzly bear from threatened to endangered was arbitrary and capricious.).

VII. THE IMPACT OF *TENNESSEE VALLEY AUTHORITY V. HILL* ON SECTION 7 OF THE ENDANGERED SPECIES ACT

A. *A Brief Analysis and Explanation of Section 7*

Section 7 of the ESA is the most powerful piece of legislation that the ONRC can call upon to accord endangered and threatened species protection from the Klamath Project. It "provides for review of all federal actions that may affect endangered species . . . ."[118] Subsection (a)(1) "directs agencies to use their authorities to further the purposes of the ESA by carrying out affirmative programs to conserve listed species," and subsection (a)(2) "prohibits those actions that are found to 'jeopardize' the existence of any [of these] species."[119] Activities may include not only those that are "undertaken directly by federal agencies," such as irrigation of the Klamath Basin, "but also nonfederal actions that involve federal authorization or assistance . . . ."[120] In short, § 7 allows the FWS to protect threatened and endangered species, whatever the cost, against government agencies and private citizens, and the ESA owes its power to *Tennessee Valley Authority v. Hill*.[121]

B. *A Factual Description of the Case and the Similarities and Differences with Klamath Falls*

Shortly after the ESA's passage in 1973, the Secretary of the Interior was petitioned by environmental groups to list a small fish known as the snail darter as an endangered species.[122] The Secretary of the Interior listed the snail darter as endangered after determining that the species apparently lived only in the portion of the Little Tennessee River that would be completely flooded by the creation of a reservoir resulting from the construction of the Tellico Dam.[123] The listing de-

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118. PERCIVAL ET AL., *supra* note 54, at 938.
119. *Id*.
120. *Id*.
121. 437 U.S. 153 (1978).

122. *See id*.
123. *Id*. *See also id*. at 157 (stating that the Tellico Dam and Reservoir Project was designed to stimulate shoreline development, generate sufficient electric current to heat 20,000 homes, and provide flatwater recreation and flood control. In short, it was similar to the Klamath

cision came at the time the multimillion-dollar dam project was nearing completion, but, pursuant to Section 7, the Secretary declared "all Federal agencies must take such action as is necessary to ensure that actions authorized, funded, or carried out by them did not result in the destruction or modification of this critical habitat area."[124]

Environmental groups and local citizens brought their action under the ESA to enjoin the Tennessee Valley Authority ("TVA") from completing the dam after the TVA failed to consider alternatives to damming the Little Tennessee.[125] Scientific data presented to the Secretary indicated that the snail darter lived only in the swifter portions of shoals over clean gravel substrate in the cool, low-turbidity water.[126] The TVA conducted a search of relocation sites that would have sustained the fish, culminating in the experimental transplantation of a number of snail darters to a nearby river.[127] On the basis of the evidence and the legislative intent of Section 7, the district court refused a permanent injunction when it found that the reservoir would result in the adverse modification or complete destruction of the snail darter's critical habitat, making it highly probable that the continued existence of the snail darter was jeopardized.[128] Considering that the dam was started seven years before the ESA was enacted, that the dam was eighty percent complete, and that seventy-eight million dollars had already been expended, along with the fact that Congress continued to appropriate for the dam with full awareness of the snail darter problem, the district court held that it would be an absurd result under § 7 to require a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered the day before the scheduled construction began.[129] However, the court of appeals disagreed and granted a permanent injunction to prevent all activities incident to the Tellico Project which may destroy or modify the critical habitat, and that only when Congress exempted Tellico from compliance with the ESA, or

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Basin Project).

124. *Id*. at 153.

125. *See id*. at 158.

126. *Id*. at 162.

127. *Id*.

128. *See id*. at 165-66 (stating that "once a federal project was shown to jeopardize an endangered species, a court of equity is compelled to issue an injunction restraining violation of the Endangered Species Act.").

129. *See id*. at 166-67.

when the snail darter was deleted from the list of endangered species, or its critical habitat materially redefined, would the injunction be lifted.[130]

The Supreme Court held that the ESA prohibited completion of the dam, where operation of the dam would either eradicate the endangered snail darter population, or destroy its critical habitat, even though the dam was virtually completed and even though Congress continued to appropriate large sums of public money to the project even after Congressional appropriations committees were apprised of the project's apparent impact upon the snail darter.[131] Chief Justice Burger's analysis focused on the premise that the operation of the Tellico Dam would "either eradicate the known population of snail darters or destroy their critical habitat"[132] — a similar analysis for the coho salmon and sucker fish of Klamath Falls. The Court reiterated the district court's position that the decisions of the Secretary must be approved, and that according to a plain interpretation of the language, history and structure of § 7, Congress intended for endangered species to "be afforded the highest of priorities."[133] Burger quoted a House Report on the ESA which supported the protection of endangered plant and animal species: "Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?"[134] If this is true of two bottom-feeding fish that reside in irrigation channels is something Klamath Falls farmers may ask the government as their fields disappear.

However, the Court recognized that virtually all dealings with endangered species — takings, possession, transportation, and sale — were prohibited except in extremely narrow circumstances.[135] The plain intent of the ESA "was to halt and reverse the trend toward species extinction, whatever the cost," in literally every section of the statute.[136] Agencies are to use all methods and procedures that are necessary to preserve endangered species.[137] Finally, the Court recognizes that Congress was aware of certain hardship exemptions to combat the statute's broad sweep, and that under the maxim *expressio unius est exclusio*

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130. *See id*. at 168.
131. *Id*. at 172.
132. *Id*. at 171.
133. *Id*. at 174.
134. *Id*. at 178 (quoting from H.R. REP. NO. 93-412, at 4-5 (1973)).
135. *Id*. at 180; *see also* 16 U.S.C. §§ 1538(a)(1)(D), 1539(b) (2000).
136. *Tenn. Valley Auth*., 437 U.S. at 184.
137. *See* 16 U.S.C. § 1531(c) (2000).

alterius, the Court presumed that those were the only hardship cases Congress intended to exempt.[138]

While *Tennessee Valley Authority* presents the strongest case for the environmentalists in the protection of threatened and endangered species, adversely affected citizens found a stronger defense in the dissent of Justice Powell than in the exceptions listed in the ESA. Powell believed that the majority opinion would cast a long shadow over the operation of important projects that served the vital needs of society and national defense.[139] He believed that "[Section] 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered," which would produce an absurd result as the district court held.[140] Under the majority's reasoning, Powell believed the actions an agency would be prohibited from carrying out would include the continued operation of such projects, with the only precondition to destroying the usefulness of the most important federal projects in our country by the Secretary's finding of a "newly discovered species of water spider or amoeba."[141] This final statement seems to represent a decade of hostility that the Klamath Falls farmers present to both environmentalists and the FWS.

C. *The Hardship Exemptions of the ESA*

The hardship exceptions that Chief Justice Burger alluded to in *Tennessee Valley Authority* may apply to an older government project, like the Klamath Project, and any other large public works that preceded the ESA.[142] The farmers in *Tennessee Valley Authority*, like the lumberjacks of *Lujan* and the farmers of Klamath Falls, have the opportunity to prove undue economic hardship would result from the listing of the species as threatened or endangered.[143] Three factors the Secretary considers for a hardship exemption may include:

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138. *See id*. § 1539(b); *see also Tenn. Valley Auth*., 437 U.S. at 188.

139. *Tenn. Valley Auth*., 437 U.S. at 195-96 (Powell, J., dissenting).

140. *Id*. at 196 (Powell, J., dissenting).

141. *Id*. at 203-04 (Powell, J., dissenting).

142. *See* 16 U.S.C. § 1539(b)(1) (2000) ("If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 . . . will cause undue economic hardship to such person under the contract, the Secretary . . . may exempt such person from [the Endangered Species Act]").

143. *See id*. § 1539(g) (stating that in a hardship exemption petition, the petitioning party

> *1. A "substantial economic loss resulting from inability . . . to perform [their contract]* with respect to the species of fish and wildlife" before the publication in the Federal Register;[144] or
>
> 2. A "substantial economic loss to persons who . . . derived a substantial portion of their income from the lawful taking of any listed species" for the year prior to the notice of consideration of such species;[145] or
>
> 3. "[C]urtailment of subsistence taking . . . by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes."[146]

The exemption will last no "more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary."[147] The one-year period for those species endangered prior to December 28, 1973, shall expire in accordance with § 668cc-3 of the ESA, and no exemptions may be granted for importation or exportation of a specimen used in commercial activities.[148] While the proof of a substantial loss surrounds the Klamath Project in the number of failing farms and decrease in crop production, the old legal axiom seemingly holds true that economic proof alone is not enough to post an exemption or change the listing. In following the American Procedural Act ("APA") and ESA, the FWS has provided the public notice in the Federal Register and possibly local newspapers, and in consideration of the best scientific and economic data on the record, then the environmentalists have a strong case in their support of doing whatever it takes to protect an endangered or threatened species.

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has "the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation").

144. *Id*. § 1539(b)(2)(A) (emphasis added).
145. *Id*. § 1539(b)(2)(B).
146. *See id*. § 1539(b)(2)(C).
147. *Id*. § 1539(b)(1)(A).
148. *See id*. § 1539(b)(1)(B)-(C).

VIII. WHERE DO THE KLAMATH FALLS FARMERS GO FROM HERE IN THE WAKE OF *TENNESSEE VALLEY AUTHORITY V. HILL* AND THE ESA?

The final portion of this analysis deals with a group of selected cases that may possess the most important strategies in defending private land against the ESA. Listing challenges and hardship exemptions are two methods of challenging the ESA, but there is one strategy left for a party who feels aggrieved by the listing of a species. This claim concerns both the substantive and procedural provisions of the ESA. Meanwhile, President George W. Bush has proposed major changes to the ESA that may affect the future of all disclaimed farmers and property owners. The final cases listed in this note will further discuss those substantive and procedural provisions in relation to takings, the final approach to challenging the endangered species regulations.

A. *Process of Ensuring Compliance with the Substantive Provisions of the ESA by the FWS*

The ESA prohibits the taking or importing of endangered species "and requires federal agencies to ensure that their actions are not 'likely to jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [critical] habitat of such species'."[149] The ESA prescribes a three-step process to ensure compliance with its substantive provisions by federal agencies.[150] First, an agency proposing to take an action must inquire of the FWS whether any threatened or endangered species "may be present" in the area of the proposed action.[151] Second, if the answer is affirmative, the agency must prepare a biological assessment to determine whether such species will likely be affected by the action, and the assessment may be part of an environmental impact statement or environmental assessment.[152] Finally, if the assessment determines that a threatened or endangered species is likely to be affected, the agency must formally consult with the FWS, resulting in a biological opinion issued by the FWS.[153] If the biological opinion concludes that the proposed action would jeopardize the species or destroy or adversely modify critical habitat, then the action may not go forward unless the FWS can suggest an alter-

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149. *Id*. § 1536(a)(2); PERCIVAL ET AL., *supra*, note 54, at 939.
150. *See* 16 U.S.C. § 1536(c) (2000).
151. *Id*. § 1536(c)(1).
152. *See id*.
153. *See id*. § 1536(a)(2)–(b).

native that avoids jeopardy, destruction, or adverse modification.[154] If the opinion concludes that the action will not violate the Act, the FWS may still require measures to minimize its impact.[155]

The Ninth Circuit held that *Tennessee Valley Authority* applies only to substantive violations of the ESA.[156] However, in *Thomas v. Peterson*, the Ninth Circuit reversed the district court's decision declining to enjoin construction of a county road and timber sales when the Forest Service failed to prepare an assessment prior to its decision to build the Jersey Jack Road, knowing that the road and timber harvesting would adversely affect the endangered Rocky Mountain Gray Wolf.[157] Failure to prepare a biological assessment for a project in an area in which it has been determined that an endangered species may be represented cannot be considered a *de minimis* violation of the ESA.[158]

B. *Ensuring Compliance With Procedural Provisions of the ESA*

The procedural requirements of the ESA require agencies to assess the effect on endangered species of projects in areas where such species may be present.[159] Failure to prepare a biological assessment is comparable to a failure to prepare an environmental impact statement.[160] The procedural requirements call for a systematic determination of the effects of a federal project on endangered species.[161] The substantive provisions of the ESA "justify *more* stringent enforcement of its procedural requirements because the procedural requirements are designed to ensure compliance with the substantive provisions."[162] *Tennessee Valley Authority* reminds the FWS that "if a project is allowed to proceed without substantial compliance" with the procedural requirements of the ESA, "there can be no assurance that a violation of the ESAs substantive provisions will not result."[163]

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154. *See id*. § 1536(b)(3)(A).
155. *See id*. § 1536(b)(4)(ii)-(iii).
156. *See* Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).
157. *See* Thomas v. Peterson, 753 F.2d 754, 755-56 (9th Cir. 1985) (stating affidavits by the Forest Service do not constitute a substitute for the preparation of the biological assessment).
158. *See id*. at 763.
159. *See* 16 U.S.C. § 1536(c) (2000).
160. PERCIVAL ET AL., *supra* note 54, at 940.
161. *Id*. at 940-41.
162. *Id*. at 940.
163. *Id*. at 941.

With this in mind, consider the case of *Palila v. Hawai'i Department of Land & Natural Resources*, a Ninth Circuit case involving the removal of all sheep and goats from a habitat of the endangered Palila bird, which totally depended upon the woodlands.[164] The sheep harmed the critical habitat of the Palila by eating the mamane woodland and causing habitat degradation that could result in extinction of the species.[165] A factual similarity with the Klamath Falls case involves the Secretary's interpretation of "harm" involving not only direct physical injury from the irrigation, but also the potential harm via habitat modification.[166] Although the sheep grazed on state-owned land, not privately-owned land as in Klamath Falls, that does not prohibit the analysis of whether the federal government has involved itself in a taking of land.

A taking of private land by the government is the strongest, and likely the ultimate argument, that a private landowner can muster against a government agency acting under the ESA. "Tak[ing] is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[167] Environmentalists view the threat to the coho salmon and sucker fish like the farmers viewed the sheep in *Palila* – that the irrigation of area fields is destroying or taking the habitat. However, the data mentioned in Section I of this argument points toward the failure of regenerating the fish populations in the Klamath Falls Basin. While the lands in *Palila* were state-owned, the lands no longer receiving the contracted irrigation may result in a government taking of state water rights under both Oregon and California law, which represents a stronger argument than bias, economic hardship, or failure of procedure under the APA.

If the farmers hope to regain their irrigation rights, then they should consider attacking a federal agency instead of a state agency. Knowing that the FWS and Department of Reclamation manage the Klamath Project, the farmers may argue that the two departments must consider the customs and traditions of the western farmer. This was a successful argument for the Klamath and Yurok Tribes, who hold fishing and water treaty rights in the Klamath River Basin, that the Department of Reclamation is obligated to protect the tribal resources of the sucker fish and coho salmon.[168] On top of the customs and traditions that the

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164. *See* Palila v. Hawai'i Dep't of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1998).
165. *See id.*
166. *See id.* at 1108.
167. *See id.*
168. *See* Kandra v. United States, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001).

western farmer has developed over the last century, the court must consider the public interest in "whether the balance of public interest weighs in favor of granting or denying the injunctive relief sought."[169] No one questions the fact that the farmers, and subsequently the communities, that depend on the irrigation will continue to suffer severe economic depression from the irrigation shutoff, leading to loss of income, inability to pay debts, potential loss of land and equipment, and immeasurable harm to their way of living, including losses in revenues and the additional burden on social services.[170] Remember, courts will balance the hardships of the affected parties against the harm to the sucker fish and coho salmon, those who rely on the fish, and the public interest, and *Tennessee Valley Authority* makes it clear that the balance is always struck in favor of providing an endangered species the highest of priorities.[171] Instead of arguing economic harm or a lifestyle loss to invoke standing by themselves, farmers should focus on the primary impact on the air, water, soil, and the waterfowl and wildlife in the basin.[172] The farmers should attack the FWS for failing to consider the best scientific and commercial data available in their listing decision, with the burden of proving that the agency has not identified relevant data or alternatives to meet the needs of the Klamath River Basin.[173]

Finally, the agencies and environmentalists need to double check whether the aggrieved parties have a contractual right to the use of water that may result in a Fifth Amendment taking. The Oregon and California codes each have provisions that explicitly provide the state will not be held liable for shortages of water due to drought or other causes beyond its control.[174] The farmers need to remember that the mere frustration of a contracted right by lawful government action is not a taking.[175] "A physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] posses-

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169. *See id*. at 1200.

170. *See id*.

171. *See id*. at 1201. *See also id*. at 1211 (stating that while the court sympathizes with the farmers, the courts are bound by oath to uphold the law. The ESA requires the "protection of suckers and salmon as endangered and threatened species," even if the farmers "disagree with the manner in which the fish are protected or believe that they inequitably bear the burden of such protection").

172. *See id*. at 1203.

173. *See id*. at 1206.

174. *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 315, 315 (2001).

175. *See id*. at 317.

sion'."[176] "No matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the court] require[s] compensation."[177] By preventing the farmers from using water from the Klamath Project, the government deprived the farmers of the entire value of their contracted right, immediately and directly subtracting from the owner's full enjoyment of the property and limiting the exploitation of the land.[178] Unlike other property, where use restrictions may limit some of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value.[179] The FWS and Department of Reclamation may argue that the farmers' contracts are subject to the common law principles of nuisance as well as the public trust doctrine and the doctrine of reasonable use.[180] In short, the farmers need to rely on the contracts with their respective state water agencies and the doctrines of physical taking to prove damages by the federal government in shutting off the irrigation to their fields.

Tying into the takings argument is a Commerce Clause argument. Consider the dissent from *Gibbs v. Babbit*,[181] a Fourth Circuit decision involving the taking of private land by the release of the red wolf into the wild: "The Fish and Wildlife Service . . . promulgated a regulation that prohibit[ed] private landowners from shooting, wounding, killing, trapping, or otherwise harming . . . the red wolf, even when the wolves [were] on the private landowners' property and threatening their crops and livestock."[182] The government also granted an exception to the regulation by "allowing a property owner – even on his own property – to kill a wolf if the wolf is about to kill the property owner" or his family.[183] The issue for the dissent was whether the regulation exceeded Congress' power under the Commerce Clause.[184]

"The majority sustain[ed] the Fish and Wildlife's regulation unhesitatingly on the ground that the taking of the [forty-one] red wolves that might occur as property owners attempt to protect themselves and their families, their property, their crops, and their livestock from these wolves, will have a 'substantial

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176. *See id*. at 318 (quoting Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).
177. *Id*. (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).
178. *See id*.
179. *See id*.
180. *See id*. at 320.
181. 214 F.3d 483 (4th Cir. 2000).
182. *Id*. at 506 (Luttig, J., dissenting).
183. *Id*. (Luttig, J., dissenting).
184. *See id*. (Luttig, J., dissenting).

effect' on interstate commerce."[185] The substantial effect on interstate commerce is comprised of the interstate commercial industry of tourism, the "interstate market" of "scientific research," the anticipated resurrection of interstate trade in fur pelts, and the actual help a red wolf provides to the farmers by killing any animals that destroy their crops.[186] The dissent argued that the killing of all forty-one of the estimated red wolves that live on private property in North Carolina would not constitute an economic activity under the recent Supreme Court holdings of *U.S. v. Lopez* and *U.S. v. Morrison*.[187] Even assuming that such is an economic activity, the taking of red wolves on private property is not an activity that has a substantial effect on interstate commerce, nor is it an economic activity qualifying for Commerce Clause protection.[188]

The dissent concluded by reminding the Fourth Circuit that the court had not addressed Congress' power over either the channels of interstate commerce, or whether the activity is interstate in character in the case before them.[189] To the contrary and to the cases cited in this note, courts are confronted in decisions under the ESA with an administrative agency regulation of an activity that implicates a handful of animals in a small region of a state.[190] Aggrieved parties may want to rely on *Lopez* and *Morrison* in establishing an argument that the taking of the water from the irrigation channels of the Klamath Project damages their privately owned lands. However, the farmers are not facing a similar regulation like that in *Gibbs*, nor is the argument about how the taking of their water violated interstate commerce.

C. *Proposals to Change the ESA by the Bush Administration (2001)*

The Klamath Falls farmers may have found a sympathetic ear in the White House.[191] New Secretary of the Interior, Gale Norton, has vocally opposed the current ESA, and a Bush aide has compared litigation under the current regu-

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185. *Id*. (Luttig, J., dissenting).
186. *Id*. at 506-07 (Luttig, J., dissenting).
187. *Id*. at 507 (Luttig, J., dissenting) (citing United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000)).
188. *See id*. at 508 (Luttig, J., dissenting).
189. *See id*. (Luttig, J., dissenting).
190. *Id*. (Luttig, J., dissenting).
191. *See* Wendy Williams, *Identifying Critical Habitat in the Halls of Congress*, 51 BIOSCIENCE 432, 432 (June 2001) (stating that Norton has called the Endangered Species Act unconstitutional).

lation to an "emergency room overflowing with patients," with judges and lawyers making the critical decisions.[192] Current criticism to the Act also alleges that aggressive litigation has forced bureaucrats to take environmental biologists' advice and protect threatened plants and animals.[193] David Smith, a top economic aide for environmental policy, stated that the administration favors "beefing up the level of economic analysis" when federal officials designate critical habitat, which could make it easier for development of all sorts and balance the interests of protecting the environment and promoting economic growth.[194] Smith concentrated on the western states, where "just about every major land and water management decision or action involves an endangered species."[195]

In April 2001, the Bush Administration unveiled its proposed budget, which would provide the FWS $8.47 million to comply with the court orders that resulted from citizen and environmental organizations' lawsuits against the FWS for the listing of threatened or endangered species and the designation of critical habitat.[196] Another proposal would suspend the mandatory timelines for listing and designations, allowing Secretary Norton to decide on any court orders that might cross her desk when the money disappears.[197] This amendment was struck down by the House on June 7, 2001, but it illustrates the fears of the Bush Administration of lawsuits filed by nonprofit organizations that have forced the FWS to rush to identify critical habitat without adequate survey data.[198]

In February 2002, the National Academy of Sciences ("NAS") released a study arguing that the Klamath Basin designation was based on flawed science, and that there was "no sound scientific basis" that high levels of water would protect the sucker fish and coho salmon.[199] Secretary Norton has asked for review of the initial studies conducted by the FWS and NMFS, and for results of the review to be reported soon.[200] Utah Representative James V. Hansen, Chairman of the House Resources Committee, has had enough of the devastating ef-

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192. Mitch Tobin, *Species Act May be in for Changes*, THE ARIZ. DAILY STAR, Nov. 10, 2001, at A1 (comments by David Smith, a top presidential aid for environmental policy).

193. *Id*.

194. *Id*.

195. *Id*.

196. Williams, *supra* note 190, at 432.

197. *Id*.

198. *See id*. (discussing remarks made by the former Secretary of the Interior, Bruce Babbitt, regarding the position of the Bush Administration on the Endangered Species Act).

199. Audrey Hudson, *NAS Challenges Water-Ban Reasons; Says Bad Science Worsened Drought*, THE WASH. TIMES, Feb. 5, 2002, at A3.

200. *See id*.

fects of the ESA and stated the "[NAS Report] is one more nail in the coffin of [the ESA]. The ESA has become a wrecking ball in this country, devastating dreams, careers, personal finances, and regional economies."[201]

IX. CONCLUSION

The plight of the Klamath Falls farmer has not escaped the notice of the legal community. The ESA provides environmentalists and government administrative agencies like the Fish and Wildlife Service the power to do whatever it takes to protect a threatened or endangered species when activities may jeopardize or lead to the species extinction. The Supreme Court in *Tennessee Valley Authority v. Hill* supports this defense, and it remains the strongest tool in the environmentalists' toolbox of protective measures. In short, the farmers face an uphill battle before them in regaining their water.

However, it is not all bad news for the downtrodden farmers of the Klamath Basin. By arguing that their contractual rights to water have been extinguished without just compensation, the farmers may have a stronger case than arguing pure sympathy and economic hardship. Tipping the balance of interests against the threatened or endangered species towards the plight of the farmer will likely not work when considering the interpretation of the ESA since *Tennessee Valley Authority* and its progeny. Analyzing the substantive and procedural provisions of the ESA by making an APA claim allows the farmers to prove that the ESA did not consider the most relevant scientific and economic data available before the government agency. Finally, if the Klamath Basin agricultural community argues for a physical taking of its land or its water, enclosing its argument by arguing the irrigation channels serve as instruments of interstate commerce, then the farmers may possess their strongest argument. Our courts may remember that they do not want to see another group of Okies roam across the country in search of work as their fields disappear with the drifting winds of the west.[202]

X. EPILOGUE

Several events have transpired within the past year between the decision to open the Klamath gates and the publication of this note. In March 2002, President George W. Bush formed the Klamath River Basin Federal Working

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201. *See id.*

202. *See generally* STEINBECK, supra note 1.

Group, a Cabinet-level advisory group chaired by Secretary of the Interior Gale Norton, to determine how best to balance the water needs in the Klamath River Basin between agricultural and environmental interests.[203] The President views the Klamath Basin as "the leading demonstration of his administration's approach to resolving stubborn environmental disputes by clearing bureaucratic obstacles" for the emergence of local solutions.[204] The group was to study the problems of the region over the next eighteen months.[205] Meanwhile, tribal, governmental, and academic biologists attacked the NAS study that found no scientific justification for the withholding of water from Klamath Basin farmers, arguing that the study itself had no sound scientific basis,[206] but that they would assist with the NAS in gathering information for the March 2003 final report.[207] This argument could be troublesome for the federal government, as the NAS study was rushed to publication in time for the 2002 irrigation season.[208] Typically, federal biologists spend months weighing how water releases for irrigation will affect endangered species, but with the short amount of time available the water releases were signed off rather quickly.[209]

Environmentalists warned as early as April 2002 that giving farmers as much water as they may need might mean there would not be enough for fish or wildlife.[210] In late April 2002, commercial fishermen joined with environmental

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203. *Panel to Mull Klamath Water Issues*, AP ONLINE, Mar. 1, 2002, *available at* 2002 WL 14996331 (stating the standing members on the committee include Agriculture Secretary Ann Veneman, Commerce Secretary Don Evans, and the chairman of the Council on Environmental Quality, James Connaughton, and that the goal of the group is to provide advice on "immediate and long-term actions necessary" to ensure ample and clean water supplies in the river basin by addressing the concerns of farmers, ranchers, fishermen, Native American tribes, and other groups affected by these conditions"). *See also* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1240I, 116 Stat. 134, 257-58 (allocating farmers in the Klamath Basin who suffered from the lack of water $50 million in federal aid).

204. *See* Michael Milstein, *Klamath Solutions Originate in Basin*, THE OREGONIAN, Apr. 3, 2002, at A1 (discussing two local models as possible national models for dealing with the Klamath Basin).

205. *Panel to Mull Klamath Water Issues*, *supra* note 201.

206. *See* Jeff Barnard, *Biologists Blast Norton-Linked Panel's Findings on Klamath*, COLUMBIAN, Mar. 8, 2002, at C2.

207. Barnard, *supra* note 204, at C2 (stating that opinions from biology specialists on the long-term environmental impacts of water releases were due on June 1, 2002). *See also* John Enders, *Oregon Farmers Rejoice at Water's Release: Conservationists, Tribes Blast Bush, Say Fish Threatened*, BOSTON GLOBE, Mar. 30, 2002, at A2.

208. Milstein, *supra* note 202, at A1.

209. *Id*.

210. Enders, *supra* note 205, at A2.

groups and Native American tribes in filing a suit against the federal government to enjoin sending more water downstream for the salmon,[211] but on May 3, 2002 Federal Judge Saundra Armstrong rejected the suit by the group.[212] In early June 2002, the Bureau of Reclamation argued that the new irrigation plans imposed steep demands for the future of the Klamath Basin.[213] These words and decisions are indeed prophetic in light of another drought that struck the Klamath area during the summer of 2002, as the year turned dry, forcing the Bureau of Reclamation to reduce releases from the lake into the Klamath River while attempting to maintain irrigation to the newly-jubilant farmers.[214]

By the fall of 2002, environmentalists, commercial fishermen, and Native American tribes were again up in arms with the federal government, as thousands of adult, migrating salmon died in the lower Klamath Basin, one of the worst die-offs in recent memory to the residents of the area. The die-off led to another lawsuit against the Bureau of Reclamation.[215] The California Department of Fish and Game concluded that it was the fault of the Bush Administration for the record deaths, and that if more water is diverted to the farmers, there is a substantial risk that fish kills, like the one that occurred in the fall of 2002, will become a regular occurrence.[216] As the farmers in the Klamath Basin await the federal decision in March 2003 that essentially decides whether farmers and fish can

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211. Deborah Schoch, *Hard Times on the Lower Klamath Conflict*, L.A. TIMES, May 3, 2002, at A1; *see also* Press Release, Earthjustice, Fishermen's Lawsuit Seeks Water for Salmon in Klamath Basin (Apr. 24, 2002) *available at* http://www.earthjustice.org/news/press.html (last visited Apr. 15, 2003).

212. Schoch, *supra* note 209.

213. *See Agencies at Odds over Klamath Water*, COLUMBIAN, June 5, 2002, at C5.

214. *See* Jonathan Brinckman, *Klamath Water Supply Shrinks*, OREGONIAN, July 12, 2002, at A1 (discussing the reduction of flows for the coho salmon and how farmers had to take the toll of the heat and lowered irrigation). Twenty-five percent less water was flowing from the Klamath River Basin in 2002 than 2001 according to federal experts. Michael Milstein, *Dead Fish Tied to Policy Flaws*, OREGONIAN, Sept. 24, 2002, at A1.

215. *See* Milstein, *supra* note 212, at A1 (reporting that coho salmon, chinook, and steelhead salmon carcasses by the thousands were spread over thirty miles of river according to reports from the California Dep't of Fish and Game). *See also* Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation, Civ. No. C02-2006 (N.D. Cal. Sept. 25, 2002) (first amended complaint), *available at* http://www.earthjustice.org/news/documents/KlamathComplaint92602.pdf (blaming the practices of the federal government on the deaths of these species of fish).

216. *See* Paul Rogers, *Salmon Kills Blamed on Altered U.S. Water Policy*, SAN DIEGO UNION-TRIB., Jan. 6, 2003, at A4 (noting that the Bush Administration stated there was not enough science to conclude what killed the fish).

live together, these recent events will determine whether the farmers can struggle upstream or go belly-up in the Klamath Basin.