on the argument, developed by the Attorney General in the Mono Basin Creek cases, that the public trust interest in fisheries should be protected wherever a fishery might be located. The parties requested that the court depublish its opinion and issue a new opinion.

The Third District court subsequently depublished its opinion, but a new opinion has not been released. It remains to be seen whether the appellate courts will agree with the Mono County Superior Court and extend the public trust doctrine's applicability. Such an extension would not only apply to Concow Reservoir, but to places such as the Salton Sea.

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Central Valley Water Allocations: The Wildlife Perspective

by Melissa Thorme

INTRODUCTION

Historically, California's Central Valley wetlands covered four million acres and supported a wide variety of wildlife including tule elk, mule deer, pronghorn antelope, grizzly bears, and an unimaginable abundance of waterfowl. California Senate Committee on Natural Resources and Wildlife, *Sliding Toward Extinction: The State of California's Natural Heritage, 1987* 59 (Nov. 1987) [hereafter Senate Committee, *Sliding Toward Extinction*]. Over the last 200 years, levee and dam construction changed the valley's natural hydrological systems by drying up streams and decreasing flooding. Because the valley's wetlands began to receive reduced natural flows and flood waters, the wetlands shrank. These changes permitted landowners to convert expansive areas from wetlands to farmlands. By 1978, the Central Valley wetlands covered about four percent of their original area. *Id.* at 60.

State and federal governments established wildlife refuges to preserve the rapidly shrinking wetlands and their inhabitants. Ten refuges were established in the Central Valley. The ten refuges currently face serious threats from inadequate water supplies and contamination of existing supplies by salts, pesticides, and natural elements such as selenium and boron. Declining amounts of high quality water directly affects wetlands wildlife populations, represents hunting and fishing recreational losses, and poses a long-term threat to the Pacific Flyway waterfowl that winter in California. Senate Committee, *Sliding Toward Extinction*, at 60. In 1987, migratory bird population levels dropped from the 1976-1985 average of 7.4 million birds to only 2.5 million birds. *Id.* at 60.

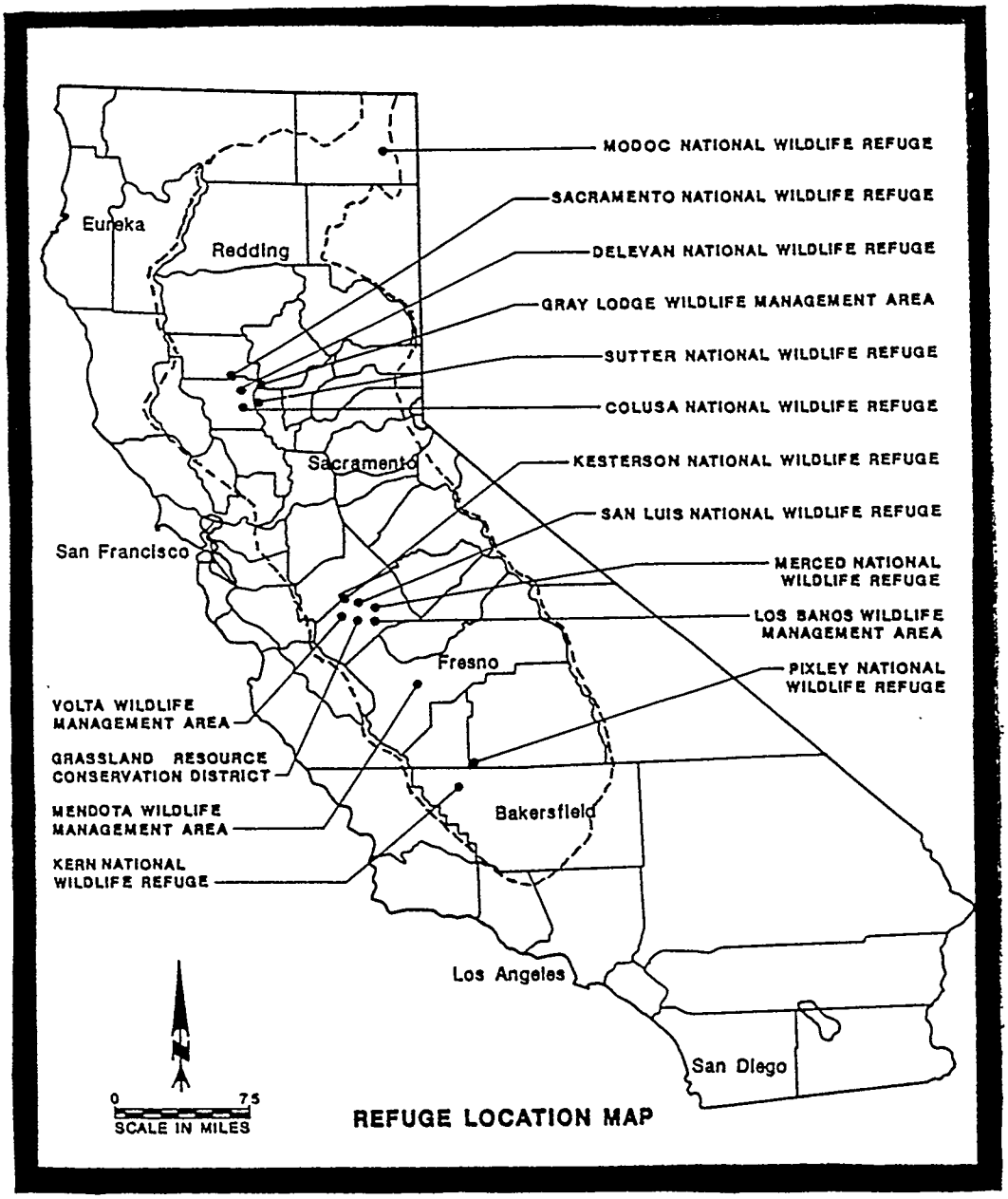
The Central Valley's wetlands wildlife refuges need a dependable water supply to lessen adjacent land uses' impacts which decrease surface and groundwater availability. Most wetland areas now lack a secure annual water source other than rainfall and must depend on year-by-year water purchases and/or water diversions from any available source. *Id.* at 65. Currently, the Central Valley Project (CVP) has approximately one million acre feet of water available for marketing and distribution. The Regional Director of the Bureau of Reclamation's Mid-Pacific Region stated that the Bureau will reserve twenty five percent of this uncommitted water supply from contracting pending completion of a study on federal, state and private wildlife refuges and wetlands' water needs in the Central Valley. Department of the Interior, *Interior Lifts CVP Contracting Moratorium*, News Release No.

MP-88-45 (Nov. 16, 1988). Unfortunately, no guarantee of a permanent water allocation exists for refuges located within the CVP's boundaries. (See Refuge Location Map). Such a water allocation would aid in the restoration of California's historic wetland areas. The water allocation would also act as a mitigation measure for the CVP's original dam and levee construction projects that allowed the extensive conversion of valley wetlands to farmlands. Interview with Richard Spotts, Defenders of Wildlife (Nov. 18, 1988).

THE PROBLEM

The United States Secretary of the Interior (Secretary) has proposed establishing a water marketing and allocation system to sell surplus, uncommitted water contained in the CVP's San Luis unit. The proposed water allocation project raises many questions. One such question asks whether any surplus water actually exists. If we assume the surplus water's existence, then another question arises: must the Secretary weigh wildlife interests in local wetland refuge areas when distributing the surplus water?

This article will discuss the three different bodies of law that provide guidelines for and impose duties upon the Secretary in regards to this issue: California state law, federal case law, and federal statutory law. California state law defines water's "beneficial use" as including the preservation and enhancement of wildlife resources. Federal case law grants the Secretary power to provide wildlife with water on federally reserved public lands such as national wildlife refuges. Federal statutes, such as the Endangered Species Act, declare a federal policy that agencies should not jeopardize endangered wildlife's existence. Through a detailed discussion of these



laws, this article shows that the Secretary must consider allocating some of the surplus CVP water to the Central Valley's wetland habitats.

DISCUSSION

I. California Statutory and Case Law

Although the CVP is a federally-implemented project, California state law still plays an important role in deciding whether the Secretary must consider wildlife interests when allocating surplus water. Prior case law requires the federal government to consult state procedures and weigh state substantive law when designing federal water policy. *U.S. v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (1983).

Some federal water and wildlife statutes attempt to work in coordination with state statutes. The National Wildlife Refuge System Administration Act states that "nothing in this act shall constitute an express or implied claim or denial on the part of the federal government as to exemption from state water law." 16 U.S.C. §§ 668(dd), 669(ee) (1982). The Endangered Species Act imposes upon the Secretary a weak duty of cooperation with state law. 16 U.S.C. § 1531(c)(2) (1982). In the ESA, Congress states that federal agencies must cooperate with state and local agencies to resolve water resource issues in concert with endangered species' conservation. *Id.* The Fish and Wildlife Conservation Act of 1980 claims that nothing within the Act "shall be construed as affecting the authority, jurisdiction, or responsibility of the states to manage, control, or regulate fish and resident wildlife under state law." 16 U.S.C. § 2909 (1980). Finally, under the National Forest Organic Act, the Forest Service must obtain the water necessary to maintain fish and wildlife habitats pursuant to state law. Dunning, *State Equitable Apportionment of Western Water Resources*, 66 Neb. L. Rev. 76, 117 (1987).

Scrutiny of the water allocation issue under state law begins with the CVP authorization statutes. The California Water Code sets forth the state policy regarding fish and wildlife affected by state water project construction. This policy requires that state agencies construct water conservation and regulation facilities in a manner consistent with fish and wildlife enhancement and preservation. Cal. Water Code § 11900 (West Supp. 1981). To prove this statute's application, one could argue that establishing a water marketing and allocation system falls within the statute's definition of "construction of a state water project."

Under state law, when the state water board determines the amount of water available for appropriation, the board must take into account, whenever in the public interest, the amount of water required for fish and wildlife preservation. Cal. Water Code § 1243 (West Supp. 1981). Courts have not yet determined whether this duty applies to federal officials as well. Case law holds that protection of a state's natural resources (*eg.* wildlife) does serve a public interest, and such protection constitutes a reasonable exercise of the police power. *Tulare Irrigation Dist. v. Lindsay-Stratmore Irrigation Dist.*, 3 Cal.2d 489, 529 (1935). But the reasonableness of the police power's use depends on the importance of the public interest protected and the necessity of the action taken. *Morshead v. California Water Quality Control Board*, 45 Cal. App. 3d 442, 449 (1975). The California legislature, however, declared wildlife preservation necessary for the general public health and welfare. Cal. Water Code § 11900 (West Supp. 1981). Therefore, the Secretary should act within the public interest to preserve fish and wildlife when constructing water projects and allocating surplus water.

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The California Water Code advocates denial of water diversion permit applications if the diversions's environmental consequences significantly conflict with the environmental policy enumerated in the California Environmental Quality Act (CEQA). Cal. Water Code § 13000 (West 1971). For each water appropriation permit application, the Department of Fish and Game recommends the "amounts of water, if any, required for the preservation and enhancement of fish and wildlife resources." Cal. Water Code § 1243 (West 1971). Other interested parties may protest a permit application and provide relevant information about the water body's instream needs. Cal. Water Code §§ 1330, 1331 (West 1971).

Many viewpoints, including those of the California legislature and judiciary, exist on the issue of minimum stream flows and instream river uses. An increased awareness of environmental deterioration and fish and wildlife resource depletion prompted the California legislature to include instream uses with other "beneficial uses" of water. Cal. Water Code §§ 1243, 1243.5, 13050(f) (West Supp. 1981). One commentator interprets these statutes to permit application review on a case-by-case basis subject to a balancing test. Bennion, *New Protection for California Instream Water Uses*, 3 Stanford Envt. Annual 58, 60 (1980-81). Therefore, this approach guarantees no permanent protection of instream uses and establishes no minimum flow requirements. *See id.* Another commentator states that California specifically authorizes state agencies to set minimum

stream flows for public interest reasons, including fish and wildlife preservation. Weis, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on the Western Water Fight*, 15 Hastings Con. L.Q. 125,142 (1987) [hereafter *Progress Report*].

While law review articles propose differing statutory interpretations, the California judiciary has so far refused to recognize "instream appropriations" which leave water in its natural state. *California Trout, Inc. v. State Water Resources Control Board*, 90 Cal. App. 3d 816, 820 (1979). California courts continue to require some physical control or diversion of water in order to constitute a beneficial use. This result occurs because California courts do not legally recognize minimum instream flow appropriations. *See Cal. Trout, supra*; *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590 (1979). These and similar holdings therefore preclude state appropriative permits for federal uses such as fish and wildlife preservation since instream uses require that the water remain in its natural state. Weis, *Progress Report*, 15 Hastings Con. L.Q. 125, 142 (1987).

This case law seems to contradict the language of the California Water Code itself. *But see County of Trinity v. Andrus*, 438 F. Supp. 1368 (1977). The Water Code states that the Department of Water Resources "shall not directly nor indirectly deprive a watershed or area where water originates, or an immediately adjacent area which can be conveniently supplied with water, of the prior right to all the water reasonably required to adequately supply the beneficial needs of the watershed or area." Cal. Water Code § 11460 (West 1971). Since California Water Code § 1243 states that enhancement of fish and wildlife constitutes a beneficial use, the water board should not withhold water from this use solely because it requires an instream appropriation with no physical control or diversion of water.

II. Federal Case Law

The federal reserved water rights doctrine constitutes the most important federal doctrine with respect to CVP surplus water allocation. The federal reserved water rights doctrine allows the federal government to claim water rights on any land reserved for a specific purpose. *Cappaert v. United States*, 426 U.S. 128, 138-142 (1976). The federal government acquires these water rights by withdrawing certain lands from the public domain. *Id.* Because this is a federal doctrine, California water law does not apply. *Id.* at 145. Therefore, federal water claims in wilderness areas could usurp state claims to the same water under the constitutional doctrine of preemption. Weis, *Progress Report*, 15 Hastings Con. L.Q. 125, 127 (1987). The Constitution's Commerce and Property Clauses also authorize the federal government to reserve water for federal lands. U.S. Const. art. I, § 8, cl. 3 & art. IV, § 3, cl. 2; *Cappaert*, at 138.

The federal reserved water rights doctrine began in 1908 when the U.S. Supreme Court held that land set aside for Fort Belknap Indian Reservation included an implied reservation of sufficient water to satisfy the Indians' needs. *Winters v. United States*,

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207 U.S. 564 (1908). The Court reasoned that Congress must have intended to reserve water simultaneously with the land, because without the water, the arid land would be virtually useless to the Indians. *Id.* at 576.

Following this landmark decision, many originally thought the "Winters doctrine" only applied to Indian reservations. Weis, *Progress Report*, 15 Hastings Con. L.Q. 125, 127 (1987). But in 1955, the Supreme Court indicated that the doctrine also applied to other federal lands. *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955). Then in 1963, the Court expressly extended the doctrine to include national recreation areas, wildlife refuges, and national forests. *Arizona v. California*, 373 U.S. 546,601 (1963).

Cappaert v. United States, 426 U.S. 128 (1976) constitutes one of the most important cases involving federal reserved water rights. In *Cappaert*, the U.S. Supreme Court held that when the President created Devil's Hole National Monument, he also reserved water rights in any unappropriated, appurtenant water sufficient to maintain the underground pool's water level, to preserve its scientific value, and to preserve its inhabitants, the endangered Devil's Hole pupfish. The Court held that the presidential proclamation establishing the monument expressed an intention to reserve unappropriated water. The holding stated that the U.S. could protect its water from others' subsequent diversions of surface or groundwater. *Cappaert*, at 128. Subsequently, courts have extended the doctrine

to include national parks, waterholes, and mineral hot springs. *U.S. v. Denver*, 656 P.2d 1 (Colo. 1982).

Courts have applied the Winters doctrine in situations where the reservation of land would seem meaningless without water rights to use on the land. In *United States v. New Mexico*, 438 U.S. 696 (1978) the Supreme Court carefully examined both the asserted water right and the specific purposes for the land's reservation. The Court concluded that without the water, the reserve's purposes would be entirely defeated. *U.S. v. New Mexico*, at 700. This case, however, limits the doctrine's extent to the "primary purpose" of the reserved land. The court must interpret the relevant statute and find, either explicitly or implicitly, the land reservation's "primary purpose." Therefore, unless wildlife preservation falls within the initial land reservation's "primary purpose," federal agencies would find it impossible to utilize this doctrine to reserve water for wildlife.

The amount of water which federal agencies can reserve equals the amount necessary to accomplish the reservation's purposes. *Cappaert*, at 139. In addition, federal reserved water rights can arise without any physical appropriation or beneficial use if the proponent can prove that fulfillment of the reserved land's purposes require instream flows. *Sierra Club v. Lyng*, 661 F. Supp. 1490, 1494 (1987); *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (1983). Therefore, use of the federal reserved water rights doctrine may help to overcome California's legal interpretation that forbids "instream appropriations." The doctrine may secure water rights for the federally reserved wildlife refuges within the CVP area if water proves necessary to achieve the reserved lands' primary purposes. If federal reserved water rights apply to these CVP lands, then federal agencies could reserve enough water to provide for fish and wildlife protection and enhancement on any reserved lands in the San Luis unit of the CVP.

Yet a problem still remains. Federal reserved rights generally only apply to water flowing naturally across the reserved lands. In this situation, however, the surplus CVP water does not flow naturally across the federally reserved lands. Rather, the surplus water constitutes water that the CVP controls somewhere else. Therefore, for the federal reserved water rights doctrine to apply to the surplus CVP water, courts would have to extend the doctrine's application. This may prove a difficult task.

III. Federal Statutory Law

Many different federal statutes provide guidance when determining the scope of the Secretary's duties in providing water for Central Valley wetlands and wildlife. For clarity and convenience, I will discuss each of these statutes individually.

A. Migratory Bird Treaty Act

The Migratory Bird Treaty Act of 1918 (MBTA) protects the water rights needed to "conserve and protect migratory birds in accordance with treaty obligations." 16 U.S.C. § 715(i). The Secretary must make available the use of water, land, or other interests for wildlife conservation purposes when these interests prove necessary to carry out the national migratory bird management program. 16 U.S.C. § 663(b). The Secretary administers the MBTA's rules and regulations on the lands acquired or reserved pursuant to the Act. 16 U.S.C. § 715(i). If waters in such areas are not expressly acquired, the federal reserved water rights doctrine may become necessary.

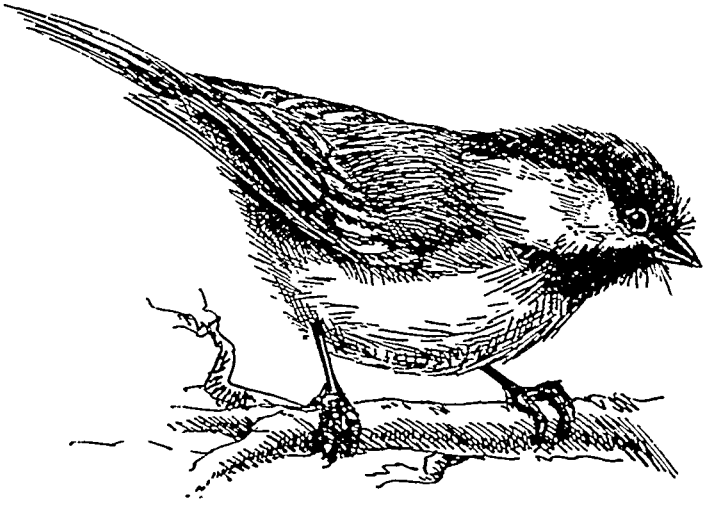
Following the MBTA's enactment in 1918, several CVP-related statutes demonstrate the intent to use CVP water for California fish and wildlife protection and enhancement. One CVP reauthorization statute states, "[t]he entire CVP ... is reauthorized and declared to be for the purposes set forth ... and also for the use of the waters for fish and wildlife purposes." 16 U.S.C. § 695(d). The reauthorization statute authorizes the Secretary to operate and maintain water projects in waterfowl management areas and refuges owned and operated by either California or the United States. The statute also authorizes the Secretary to provide CVP water for wildlife management purposes. 16 U.S.C. § 695(e).

Under the statute, the Secretary may also contract to deliver water for waterfowl purposes. If and when available, the Secretary shall deliver water from the CVP to the contracting entity (*ie.* wildlife refuge). 16 U.S.C. § 695(i). Restrictive covenants require that public agencies use the CVP lands only for waterfowl and wildlife habitat conservation -- or other uses mutually agreed upon by the agencies and the U.S. Fish and Wildlife Service. 16 U.S.C. § 695(d). In spite of these provisions, the statute remains subject to California water law, and therefore, guarantees no water allocation. 16 U.S.C. § 695(j).

The Water Bank Act (WBA) adds a degree of protection to the water rights necessary for waterfowl preservation. The WBA states, "Congress finds that it is in the public interest to preserve, restore, and improve wetlands of the Nation, and thereby conserve surface waters to preserve and improve habitat for migratory waterfowl and other wildlife resources." 16 U.S.C. § 1301.

B. Endangered Species Act

The Endangered Species Act (ESA) declares the Congressional policy regarding endangered



species. The ESA, which directs the Secretary to conserve threatened and endangered species, ensures that the federal government does not undertake actions that jeopardize endangered species' existence. 16 U.S.C. § 1536(a)(2); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (1984). Federal agencies must take all measures necessary to prevent harming endangered species, regardless of cost. *Roosevelt-Campobello International Park v. EPA*, 684 F.2d 1041, 1048 (1982). The Act directs the Secretary to actively pursue a species conservation policy and requires the Secretary to give highest priority to preservation of threatened and endangered species. *Carson-Truckee*, at 262.

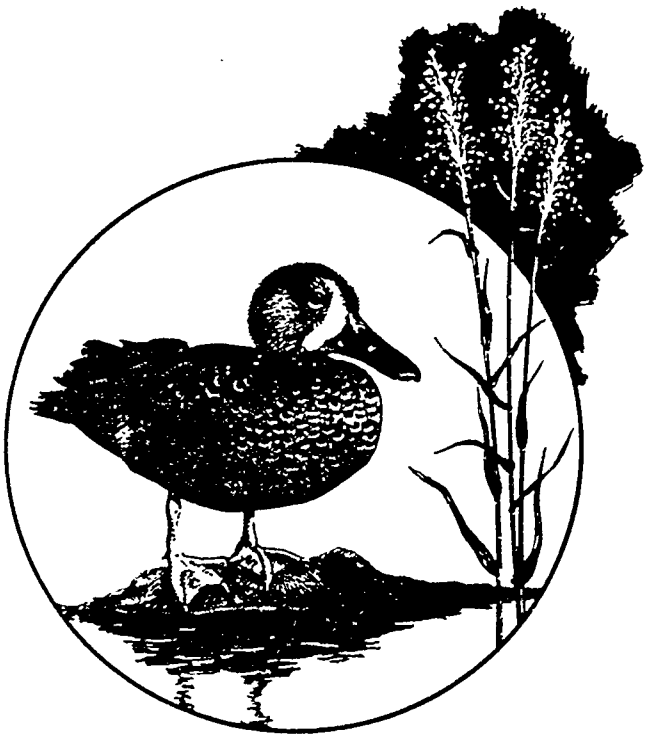
The ESA also requires that federal agencies cooperate with state and local agencies to resolve water resource issues connected with endangered species conservation. 16 U.S.C. § 1531(c)(2) (Supp. 1982). Under the Act, no obligation exists for the Secretary to sell water solely for municipal and industrial purposes simply because those purposes constitute the only present uses for which reimbursement can be obtained. 43 U.S.C. §§ 614(a)-(c), 615(b); *Carson-Truckee*, at 269. In addition, if the Secretary fails to consider wildlife needs before executing water sale contracts, then an injunction to stop such water sales may become necessary. The ESA prohibits courts from considering the hardship an injunction may impose on a particular water project when the project may destroy endangered species habitat. 16 U.S.C. §§ 1531-1543; *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (1987).

To utilize the ESA, the proponent must locate and identify one or more endangered species in the area. The proponent must then prove that the species requires either the area itself or some feature of the area for continued survival. Identification of an endangered species triggers substantial procedural requirements for federal agencies and the Secretary. To begin with, the ESA imposes a duty on federal agencies to consult with the U.S. Fish and Wildlife Service in order to ensure that the proposed project complies with the Act. Federal agencies must also initiate such consultation whenever new information reveals that agency action may affect a listed species or critical habitat in a manner, or to an extent, not previously considered. 50 C.F.R.§ 402.16(b); *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (1987).

The Endangered Species Act contains many substantive mandates, unlike the legislative suggestions or policy statements contained in other federal statutes. One of the most powerful mandates in the ESA requires the Secretary and all federal agencies to utilize any method or procedure necessary to preserve and prevent further loss of an endangered species. *Roosevelt-Campobello*, at 1048. The Secretary must do far more than merely avoid elimination of the endangered species; he must bring the species back from the brink of extinction so that it can be removed from the protected classification. 16 U.S.C. § 1536(a)(2); *Carson-Truckee Water Conserv. Dist. v. Watt*, 549 F. Supp.704, 709 (1982).

This mandate has withstood substantial judicial review and provides strong legal ammunition. But, to prevail in an injunction proceeding, the proponent must present evidence that the subject area has endangered species residing, or at least utilizing the water, within its boundaries. The evidence must also show that these species may be jeopardized by the proposed water marketing and allocation system. The burden of showing that the proposed action would have a "prohibited effect" on either the endangered species or their critical habitat rests on the party asserting the ESA violation. *Thomas v. Peterson*, 589 F.Supp. 1139, 1149 (1984). Under the ESA's definition of harm, "prohibited effects" significantly modify or degrade wildlife habitat, resulting in actual injury to the species. This definition includes activities that significantly impair essential behavioral patterns and that produce an actual negative impact or injury to an endangered species, threatening its continued existence or recovery. *Palila v. Hawaii Dept. of Land & Natural Resources*, 649 F.Supp. 1070, 1075 (1986).

The ESA could prove quite beneficial in the CVP situation. The CVP's ten wildlife refuges contain many endangered and threatened species, such as the bald eagle and the peregrine falcon. These species rely on the instream flows for their continued survival. All of the species require drinking water, and many species require aquatic animals and vegetation for sustenance. A lack of water degrades the quality of wetland habitats and could threaten the existence of resident wildlife, including any endangered species. An allocation of the CVP surplus water would help to conserve the refuges' endangered and threatened species and prevent negative impacts and behavioral



impairments. Therefore, since the Secretary's mandate under the ESA requires him to preserve endangered species utilizing all possible means, the Secretary must consider giving at least some of the CVP surplus water to areas that contain threatened and endangered species.

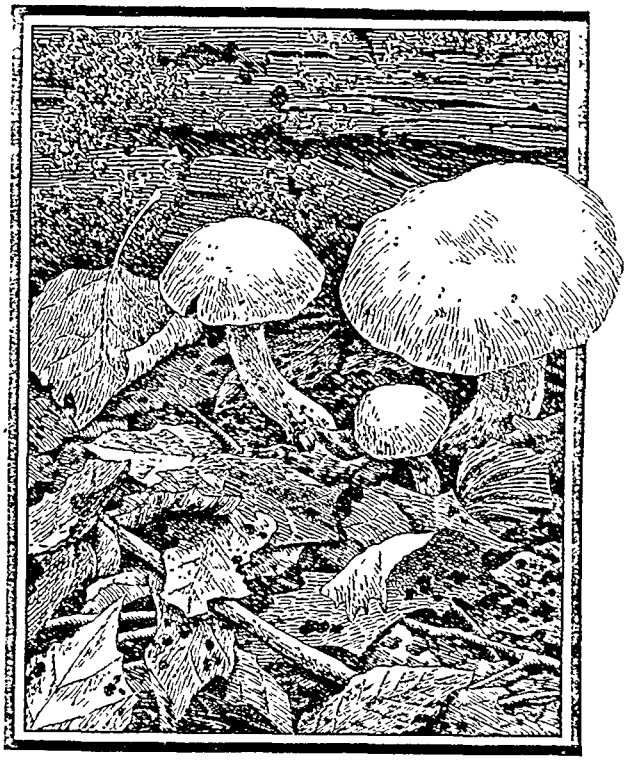
C. National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires that all federal agencies prepare a detailed environmental impact statement (EIS) discussing the impacts of every proposed major federal action significantly affecting the human environment. 42 U.S.C.§ 4332(2)(c); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F. 2d 346, 350 (1972). Legislative proposals and appropriations can constitute major federal actions just as federal projects can. A complete EIS must contain more than a catalog of environmental facts. An agency must fully explain its course of inquiry, its analysis, and its reasoning. The mere fact that a federal agency reports to Congress regarding fish and wildlife interests during the agency's project planning stage cannot render sufficient an EIS that fails to make a complete evaluation of the project's alternatives. Nothing less than a complete EIS can serve the statute's important purposes of providing the public with necessary information and guaranteeing that federal agencies consider all relevant information before making decisions which impact the environment. *EDF v. Froehlke*, at 350. The EIS provides a means for publicising the agency decision making process. Once published, an EIS becomes subject to critical evaluation by those outside the agency, including the public and the courts. Public and judicial review evaluates the agency's procedural decision making to determine if it complies with NEPA. 42 U.S.C. § 4332(2)(c); *EDF v. Froehlke*, at 351.

In the CVP situation, if the Secretary's draft EIS does not specifically address the proposed water allocation system's impacts on the fish and wildlife resources in the CVP area, a judicial review of the agency's decision making process would be in order. Once the agency has complied with all of NEPA's procedural hurdles, however, the courts will perform little substantive review. This occurs because courts grant agency decisions wide discretion. The only exception involves arbitrary and capricious decisions and abuse of agency discretion. The Administrative Procedure Act permits judicial review to determine whether the Secretary acted arbitrarily and capriciously and abused his discretion. 5 U.S.C. §§ 701-706. For example, such judicial review occurred when a federal district court determined whether the Secretary abused his discretion when managing the water resources in the Trinity River Division of the CVP during the 1976-77 drought. *County of Trinity v. Andrus*, 438 F.Supp. 1368 (1977).

D. National Wildlife Refuge System Administration Act

Ten national wildlife refuges exist within the Central Valley Project's boundaries. (See Refuge Location Map). These wildlife refuges shelter many

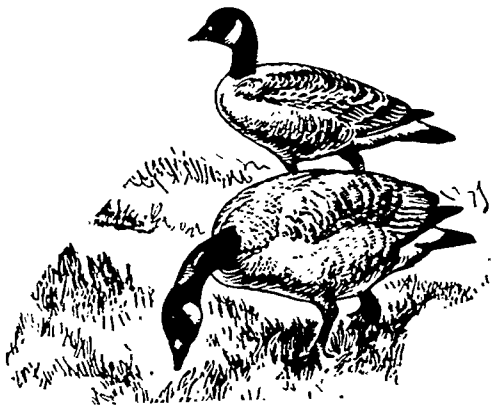


species of animals and birds including Swainson's hawk, Greater Sandhill crane, San Joaquin kit fox, Tipton kangaroo rat, and wintering swans, ducks, and geese. Many plant species, such as the Delta tule pea, coyote thistle, and California hibiscus, also gain sanctuary within the refuges. Interview with Richard Spotts, Defenders of Wildlife (Nov. 18, 1988).

The National Wildlife Refuge System Administration Act protects wildlife refuge areas by stating that "no person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System." 16 U.S.C. § 668(dd)(c). Government officials, such as the Secretary or his agents, may be included within the definition of "person" contained in § 668(dd)(c). The United States's property interest includes preserving wetland areas in an essentially natural state. *United States v. Vesterso*, 828 F.2d 1234, 1241 (8th Cir. 1987). Natural wetlands require a reliable source of water. Failure to provide water to refuge areas would definitely disturb, if not seriously injure, the natural growth of the entire ecosystem. An allocation of water from the CVP would help to return the Central Valley's wetlands to their natural state.

E. Fish and Wildlife Conservation Act

In the Fish and Wildlife Conservation Act, Congress declares that fish and wildlife provide ecological, aesthetic, cultural, recreational, economic, and scientific value to the nation. 16 U.S.C. § 2901(a)(1). "The improvement, conservation, and management of fish and wildlife, particularly nongame species, will assist in restoring and maintaining fish and wildlife, and in assuring a productive and more aesthetically pleasing environment for all citizens." 16 U.S.C. § 2901(a)(2).



Congress encourages all federal departments and agencies to utilize their statutory and administrative authority to the maximum extent practicable to promote conservation of nongame fish and wildlife and their habitats. 16 U.S.C. § 2901(b)(2). Although this Act contains no mandate for specific agency action, it represents a good account of Congressional policy, which may or may not prove persuasive to the Secretary in the CVP situation.

F. Fish and Wildlife Coordination Act

Thie Fish and Wildlife Coordination Act recognizes the contribution of wildlife to our nation's resources and the increasing public interest in wildlife resources. The Act also states that wildlife conservation should receive equal consideration when interrelated with water resource development programs. 16 U.S.C. § 661. The Act imposes on the Secretary a duty to consult with other agencies and a duty to consider proposed water projects' wildlife aspects. Whenever a federal agency proposes or authorizes the control or modification of any water body or stream's water, the agency shall first consult with the U.S. Fish and Wildlife Service. 16 U.S.C. § 662(a). The impounding, diverting, or controlling of water requires preventing damage to wildlife resources and also requires providing for wildlife resource improvement with any water resource development. 16 U.S.C. § 662(a).

The Secretary should make reports and recommendations regarding proposed water allocation projects to determine the possible damage to wildlife resources and the means and measures that should be adopted to prevent the loss or damage to such wildlife resources. 16 U.S.C. § 662(b). "These findings shall be made an integral part of any report prepared or submitted to Congress or any other agency having the authority (1) to authorize the construction of water development projects, or (2) to approve a report on the modification or supplementation of plans for previously authorized projects." 16 U.S.C. § 662(b). The Secretary's recommendations should be as specific as practicable with respect to features recommended for wildlife conservation and development. The Secretary's recommendations shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. 16 U.S.C. § 662(b). Any report submitted to Congress that supports authorization of a new project which controls or uses water must include an estimation of wildlife benefits or losses. 16 U.S.C. § 662(f).

The Secretary's project plan shall include justifiable means to obtain maximum overall benefits for wildlife purposes. 16 U.S.C. § 662(b). "Provided, that such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for (1) land acquisition, (2) facilities recommended for water resource projects, (3) modification of the project, and (4) modification of project operations. These costs shall not include the operation of wildlife facilities. 16 U.S.C. § 662(d). The statute imposes a duty upon the Secretary to take wildlife issues into account when planning a project, such as the CVP water marketing and allocation system. Case law mandates that "the wildlife conservation aspect of the project must be explored and evaluated." *Udall v. Fed. Power Commission*, 387 U.S. 428, 443 (1967).

CONCLUSION

Assistant Secretary of the Interior for Water and Science, James W. Ziglar, announced on November 16, 1988 that the department had lifted the moratorium on long-term water contracts for the Central Valley Project. He noted that no contracts could actually be executed until completion of the contracts' environmental reviews. He stated that the three draft EISs, addressing water marketing in each of the Central Valley's major river basins -- the Sacramento River, the American River, and the San Joaquin Valley -- should become public in December 1988, with the final EIS issued in late 1989. Ziglar also noted that Congress prohibited federal agencies from executing long-term CVP water contracts until May 1, 1989. Department of Interior, *Interior Lifts CVP Contracting Moratorium*, News Release No. MP-88-45 (Nov. 16, 1988).

Conservation organizations expect that they will need to provide input to correct any discrepancies or deficiencies in the water allocation policy for wildlife interests before the Department of Interior drafts the final EISs. Achieving this goal may require a lawsuit to enjoin further agency action until the court completes judicial review of the three EISs and the Secretary's decisions.

Three possible approaches exist when litigating a case such as the one at issue here. First, the proponent could bring a suit under California state law. California water law defines instream uses and enhancement and preservation of wildlife resources as beneficial uses. Yet California courts fail to recognize instream appropriations as legal appropriations without some physical control or diversion of the water. This legal interpretation could prove detrimental to a lawsuit that advocates the maintenance of certain minimum instream flows into the CVP wetlands.

A second approach rests on the judicial doctrine of federal reserved water rights. The *Winters* doctrine

advocates the maintenance of federal water rights on lands within the public domain. The amount of water reserved equals the amount necessary to accomplish the reserved land's primary purpose. In other words, any portions of the CVP wetlands that reside upon federal reserved lands might contain implied water rights. The success of the implied water rights argument depends on each particular reservation's language and timing relative to other water appropriations. The federal government needs to identify and quantify the extent of these water rights to insure that the wildlife resources upon these lands receive adequate protection.

Finally, the proponent could seek a remedy under the numerous federal statutes. These statutes impose varying degrees of duties upon the Secretary. Generally, the Secretary must consult with other agencies during the project planning process to resolve water resource issues in concert with the Congressional policy for protection and enhancement of fish and wildlife. The Secretary also must protect endangered species at any cost and must prepare a detailed EIS that completely investigates and evaluates the alternatives available to mitigate harm to fish and wildlife. Any recommendation by the Secretary shall contain specific plans for conservation and development and shall describe any potential damage to wildlife caused by the project. Most importantly, the Secretary must take fish and wildlife issues into account when planning a water project, such as the proposed water marketing system for California's CVP.

In all likelihood, the courts will answer the question of whether the Secretary must consider wildlife interests when distributing surplus CVP water with a "yes." In other words, the Secretary must consider wetland wildlife needs when distributing water under the proposed CVP water allocation project. Therefore, the only remaining question asks exactly how much water must the Secretary reserve for distribution to enhance fish and wildlife resources on Central Valley wetlands? We can only wait and see.

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