

1-1-2008

# Dams, Duties, and Discretion: Bureau of Reclamation Water Project Operations and the Endangered Species Act

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## Recommended Citation

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# Dams, Duties, and Discretion: Bureau of Reclamation Water Project Operations and the Endangered Species Act

Reed D. Benson\*

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## INTRODUCTION

Nearly thirty years ago, the U.S. Supreme Court decided whether “the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million.”<sup>1</sup> Stunningly, the fish won, because the language, history, and structure of the Endangered Species Act showed “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”<sup>2</sup> The Court acknowledged that this view of the statute would carry substantial economic costs,<sup>3</sup> but was persuaded that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>4</sup> The Court’s decision in *Tennessee Valley Authority (TVA) v. Hill* served notice that the Endangered Species Act (“ESA”) had the power to become one of the nation’s most important environmental laws.

The ESA provision that stopped the dam and saved the snail darter<sup>5</sup> was section 7(a)(2), which commands each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .”<sup>6</sup> The Court stated that this provision “admits of no exception,”<sup>7</sup> and that “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”<sup>8</sup>

1. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172 (1978).

2. *Id.* at 174. The Endangered Species Act is codified at 16 U.S.C. §§ 1531–1544 (2000).

3. *Id.*

4. *Id.* at 184.

5. Ultimately, Tellico Dam was built when Congress ordered its completion despite the ESA. The completion and closing of the dam wiped out the largest known population of snail darters, but the species has not gone extinct. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 801–02 (3d ed. 2004).

6. 16 U.S.C. § 1536(a)(2) (2000). Federal agencies also must ensure that their actions do not “result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” *Id.* The statute does not define “jeopardize the continued existence” as used in § 7(a)(2), but ESA implementing rules define the term to mean “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

7. 437 U.S. at 173.

8. *Id.*

The Supreme Court interpreted that same statutory provision very differently in 2007, when it decided *National Association of Home Builders v. Defenders of Wildlife*.<sup>9</sup> Where *TVA v. Hill* saw plain meaning, *National Association of Home Builders (NAHB)* found a “fundamental ambiguity that is not resolved by that statutory text” of § 7(a)(2);<sup>10</sup> where *TVA v. Hill* saw no exceptions, *NAHB* found it reasonable to limit the application of § 7 to those actions where a federal agency exercises discretionary authority.<sup>11</sup> The *NAHB* decision acknowledged the power of § 7(a)(2), but effectively limited the statute’s reach.<sup>12</sup>

*NAHB* dealt with Clean Water Act (“CWA”) permitting authority;<sup>13</sup> unlike *TVA v. Hill*, the case did not directly decide the fate of one particular dam. But the *NAHB* decision has strong implications for hundreds of dams associated with federal water projects, the operation of which could affect threatened or endangered species. Under the Reclamation program,<sup>14</sup> the federal government built nearly 200 projects in seventeen western states<sup>15</sup> for a variety of purposes, primarily irrigation.<sup>16</sup> Today, the

9. 127 S. Ct. 2518 (2007).

10. *Id.* at 2534. The Court saw ambiguity because it regarded the “no jeopardy” mandate of § 7(a)(2) as conflicting with other statutes that impose requirements on agencies, raising a question of implied repeal.

11. *Id.* at 2534, 2536. In order to avoid the potential for implied repeal of statutory mandates by ESA § 7, the Court upheld an agency rule, 50 C.F.R. § 402.03, which provides that § 7 applies to agency actions where there is discretionary federal involvement or control.

12. The Court characterized *TVA v. Hill* as consistent with the idea that § 7(a)(2) “applies to every *discretionary* agency action—regardless of the expense or burden its application might impose.” *Id.* at 2537, 2531–32 (describing § 7(a)(2) as a “seemingly categorical” legislative command, and as “imperative”).

13. The question in that case was whether the Environmental Protection Agency (“EPA”) must comply with ESA § 7 in deciding whether to grant the State of Arizona’s request for authority to issue pollution discharge permits under Clean Water Act § 402 (33 U.S.C. § 1342). The Court held that § 402 gave EPA no discretion to consider the needs of listed species in making that decision, and so the agency was not required to comply with § 7. *Id.* at 2537–38.

14. Because this article focuses on the Reclamation program, it does not address federal water projects managed by the Army Corps of Engineers or other agencies. These other projects, built and operated for a wide range of purposes including flood control, navigation, hydropower, and recreation, are governed by a set of laws that differs significantly from those that govern Reclamation projects, which generally operate primarily (though not exclusively) for irrigation. *See generally* In re Operation of the Missouri River System Litig., 421 F.3d 618 (8th Cir. 2005) (examining the law governing Corps of Engineers’ operation of federal facilities on the Missouri River for multiple purposes).

15. The seventeen Reclamation states reach from North Dakota to Texas and west to the Pacific Ocean.

16. *See* U.S. DEP’T OF THE INTERIOR, BUREAU OF RECLAMATION, BRIEF HISTORY OF THE

U.S. Bureau of Reclamation (“USBR”)<sup>17</sup> operates these projects to supply water for a variety of purposes, chiefly irrigation of crops and pasture in the arid West. Nearly all of these projects predate the 1973 enactment of the ESA, but courts have held that USBR’s ongoing operation of these projects is a federal agency action requiring compliance with ESA § 7.<sup>18</sup>

The *NAHB* decision bears on the question of whether § 7(a)(2) will continue to apply to the operation of Reclamation projects by USBR.<sup>19</sup> In recent litigation, USBR has argued that it lacks the discretion to operate its projects so as to provide water for endangered species habitats because that water is already legally committed to existing users.<sup>20</sup> By upholding the rule limiting the applicability of § 7 to discretionary federal actions, and by holding that the Environmental Protection Agency (“EPA”) lacked discretion to consider endangered species under CWA § 402, *NAHB* may increase the chances that USBR’s project operations will be classified as the kind of non-discretionary activity that is exempt from § 7 requirements.

*Amicus* briefs filed with the Supreme Court in *NAHB* show that water users were hoping that the Court’s decision in that case would bolster their arguments against the application of § 7 to Reclamation projects. One brief argued that § 7(a)(2) does not override an agency’s prior commitments, including contracts to supply water from federal projects:

Thus, for example, if the Bureau of Reclamation enters into contracts with water users, which obligate the Bureau to deliver water from federal reclamation facilities to the users, the Bureau does not have discretion to reallocate the water for the benefit of endangered species, absent a reservation of authority in the contracts to reallocate the water for this purpose.<sup>21</sup>

BUREAU OF RECLAMATION 3–4, available at <http://www.usbr.gov/history/BRIEFHist.pdf> (last visited Nov. 6, 2007).

17. USBR is part of the Department of the Interior.

18. See *infra* Part I.C and accompanying text.

19. Some projects are operated by water user entities, such as irrigation districts, under an agreement with USBR, but the agency retains final authority over the operations and maintenance of Reclamation projects, including environmental compliance. See U.S. DEP’T OF THE INTERIOR, BUREAU OF RECLAMATION, RECLAMATION MANUAL WTR PO5 (2004), available at <http://www.usbr.gov/recman/wtr/wtr-p05.pdf>.

20. See *infra* notes 221–268 and accompanying text.

21. Brief for Ass’n of California Water Agencies et al. as Amici Curiae Supporting Petitioners at 29, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518

Another *amicus* brief argued that if § 7 applies so broadly as to cover water deliveries from Reclamation projects, it would probably result in “chaos in Western water distribution, resulting in shortages, waste, and misallocation by federal officials who have neither the resources nor the experience to allocate and deliver this life-giving resource to those who put it to beneficial use.”<sup>22</sup>

This article examines the applicability of § 7(a)(2) to USBR’s project operations in the wake of *NAHB*. Part I briefly offers background on Reclamation projects, the ESA, and cases applying § 7 to the operation of these projects. Part II examines the rule limiting the application of § 7 to discretionary agency actions, and reviews caselaw from the Ninth Circuit Court of Appeals applying this rule to federal activities. Part III discusses the Supreme Court’s *NAHB* decision and its implications for the application of § 7 to arguably non-discretionary federal agency actions. Part IV addresses legal and policy issues relating to the ESA and Reclamation projects, and concludes that § 7(a)(2) should continue to apply to USBR’s project operations.

The applicability of § 7 to Reclamation projects is an issue of huge importance for several reasons. First, a great many people rely on these projects for their water supply. USBR supplies water to about 20 percent of farmers in the West, providing for irrigation of close to 10 million acres.<sup>23</sup> Second, the protection of § 7 may be key to the survival and recovery of many species in the West, where large-scale irrigation often places aquatic species in peril.<sup>24</sup> Third, competition for water from Reclamation projects will only grow over time because of ongoing changes in the West’s water supplies and demands caused by factors such as population growth, climate

(2007) (Nos. 06-340, 06-549), 2007 WL 549099.

22. Brief for Kern County Water Agency et al. as Amici Curiae Supporting Petitioners at 9, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (Nos. 06-340, 06-549), 2007 WL 549105.

23. U.S. BUREAU OF RECLAMATION, BUREAU OF RECLAMATION—ABOUT US, <http://www.usbr.gov/main/about/> (last visited Nov. 6, 2007). USBR projects also generate enough hydropower for 6 million homes and provide public water for about 31 million people, *id.*, although more than 80 percent of the water from these projects goes to irrigation. U.S. BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS 3-2 (Feb. 1996).

24. Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 348 (1996) (finding that counties in the West with the greatest amount of irrigated agriculture also have the highest number of endangered fish species).

change, and a growing number of species listed as threatened or endangered.

Moreover, the effect of the ESA on USBR project operations is important nationally, not just in the West. The 2001 Klamath Basin water crisis resulted from the application of § 7 to one of the oldest Reclamation projects.<sup>25</sup> When longtime irrigators faced severe and unprecedented cutbacks in water supplies caused by an extreme drought and the need to protect endangered fish, it caused one of the greatest controversies in the history of the ESA.<sup>26</sup> The following year, when USBR took a narrow view of its § 7 duties<sup>27</sup> and restored full irrigation deliveries from the Klamath Project, salmon perished by the thousands as the Klamath River downstream suffered from low flows and high temperatures.<sup>28</sup> The irrigation cutback and the salmon die-off both attracted national attention,<sup>29</sup> demonstrating how events involving endangered species and water users in the West can have great national significance for the ESA.

## I. BUREAU OF RECLAMATION PROJECTS AND THE ENDANGERED SPECIES ACT

### A. Federal Reclamation Projects

Congress launched the Reclamation program in 1902, authorizing the Interior Secretary to build and operate large-scale projects to irrigate the arid West.<sup>30</sup> Under this program the

25. For a description of Klamath Basin water issues and background on the 2001 water crisis, see Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197 (2002).

26. See Holly Doremus & A. Dan Tarlock, *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 319–27 (2003).

27. See *id.* at 327–33. USBR's ten-year operating plan for the Klamath Project and the Biological Opinion supporting it were ultimately overturned by the courts as providing insufficient protection to threatened coho salmon in the Klamath River below the project. See *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1089 (9th Cir. 2005) (noting that government did not appeal district court's rejection of provision whereby Klamath Project would provide only 57% of necessary flows for salmon, with remaining 43% to come from other sources); *id.* at 1090–91 (rejecting provision allowing delivery of less than full water supplies needed by salmon for the first eight years of the ten-year plan).

28. See Doremus & Tarlock, *supra* note 26, at 334–36.

29. See, e.g., Douglas Jehl, *Cries of 'Save the Suckerfish' Rile Farmers' Political Allies*, N.Y. TIMES, June 20, 2001, at A1; Timothy Egan, *As Thousands of Salmon Die, Fight for River Erupts Again*, N.Y. TIMES, Sept. 28, 2002, at A1.

30. Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered

Reclamation Service (later USBR) built dams, canals, and other facilities, and operated these projects to supply water to small family farms.<sup>31</sup> By the 1990s, the federal government had built nearly 200 Reclamation projects throughout 17 western states, with 347 storage reservoirs, 268 major pumping plants, and over 60,000 miles of water distribution canals, pipelines, and ditches.<sup>32</sup>

Reclamation statutes are of two basic types: first, the 1902 Reclamation Act and later statutes of general applicability that set national policy for the entire USBR program,<sup>33</sup> and second, project-specific statutes that may, for example, authorize the construction of a new project,<sup>34</sup> or address the operation, management and purposes of an existing project.<sup>35</sup> Most USBR projects operate subject to both the general reclamation statutes and those that pertain to a particular project, although Congress may exempt a particular project from one or more features of the general laws.<sup>36</sup> The general statutes establish standard terms and procedures for the entire program; for example, these statutes authorize certain types of contracts for delivery of project water and limit the amount of land that one owner can irrigate with subsidized water. By contrast, project authorizing acts specify such things as the purposes of a particular project or the limits on total acreage irrigated by that project.<sup>37</sup>

USBR manages and supplies water for a variety of uses in addition to irrigation.<sup>38</sup> This water is often called “project water” because it is stored, diverted, or delivered by the facilities of a

sections of 43 U.S.C. from § 371 to § 498).

31. U.S. BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT STATEMENT, ACREAGE LIMITATION AND WATER CONSERVATION RULES AND REGULATIONS 3-2 (Feb. 1996).

32. *Id.*

33. Examples of general reclamation laws after 1902 include § 9 of the 1939 Reclamation Project Act, 43 Stat. 1194 (codified at 43 U.S.C. § 485h), and the 1982 Reclamation Reform Act, Pub. L. No. 97-295, 96 Stat. 1263 (codified as amended at 43 U.S.C. §§ 390aa–390zz-1).

34. *See, e.g.*, Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156 (authorizing the San Luis Unit of the Central Valley Project).

35. The best known example of a statute that addresses various aspects of a pre-existing project is the 1992 Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706 (1992).

36. For example, the Boulder Canyon Project Act exempted recipients of Boulder Canyon Project water from the acreage limitations provided in the general reclamation laws. *See Bryant v. Yellen*, 447 U.S. 352 (1980).

37. *See* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 369–72 (1997).

38. *See supra* note 23 and accompanying text.



federal Reclamation project.<sup>39</sup> The Ninth Circuit Court of Appeals has made it clear that project water is legally distinct from other kinds of water:

A distinction must be recognized between the nature of nonproject water, such as natural flow water, and project water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation—putting the water to beneficial use upon lands. Once the rights are obtained they vest, until abandoned, as appurtenances of the land upon which the water has been put to use. Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. . . . The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix. If such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States.<sup>40</sup>

Irrigators receive Reclamation project water through contracts with USBR.<sup>41</sup> In most cases, USBR contracts with an organization of water users, such as an irrigation district, which in turn delivers project water to individual farms.<sup>42</sup> The most common type of contract is a “repayment contract,” whereby USBR supplies water in return for repayment of a portion of the costs of building, operating, and maintaining a project.<sup>43</sup> USBR also has some “water service contracts,” whereby it provides annual water deliveries for a specified term of years in return for an agreed rate of payment.<sup>44</sup> Each contract also has a variety of additional provisions, some unique to that contract, some common to nearly all contracts.<sup>45</sup> For purposes of this article, one standard term is particularly important: a provision excusing the government from liability if for some reason it is unable to deliver a full supply of water under the contract.<sup>46</sup>

39. Benson, *supra* note 37, at 370–71.

40. *Israel v. Morton*, 549 F.2d 128, 132–33 (9th Cir. 1977); *see also* *Flint v. United States*, 906 F.2d 471, 477 (9th Cir. 1990).

41. Benson, *supra* note 37, at 371.

42. *Id.* at 371, 393.

43. *Id.* at 371.

44. *Id.*

45. *Id.* at 393–401.

46. This type of provision is nearly universal in these contracts, although its wording

One important feature of the Reclamation laws is § 8 of the 1902 Act, which provides that in carrying out the program, the Interior Secretary “shall proceed in conformity with” state laws “relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested rights acquired thereunder . . . .”<sup>47</sup> Thus, in building, operating, and delivering water from its projects, USBR generally must comply with state water laws,<sup>48</sup> although states may not impose conditions on Reclamation projects that would frustrate congressional intent or important federal interests.<sup>49</sup>

## B. The Endangered Species Act and Section 7

Enacted in 1973, the ESA is one of America’s best-known and most important environmental laws.<sup>50</sup> The ESA’s purpose is to conserve endangered and threatened species<sup>51</sup> and the ecosystems on which they depend.<sup>52</sup> Although all federal agencies have ESA duties, the two most responsible for determining the status and needs of imperiled species are the U.S. Fish and Wildlife Service (“FWS”) in the Interior Department, and for oceangoing species such as salmon, the National Marine Fisheries Service (“NMFS”) within the Department of Commerce<sup>53</sup> (together, “the Services”).

Once a species is listed as threatened or endangered,<sup>54</sup> ESA § 9<sup>55</sup>

varies somewhat from contract to contract. *See, e.g.*, *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 535 (most Klamath Project contracts involved in that case have such a provision); *id.* at 536 (indicating that some Klamath Projects do not have the provision); *id.* at 536 n.55 (reviewing other cases involving this type of provision in USBR contracts for other projects).

47. 43 U.S.C. §§ 372, 383.

48. *California v. United States*, 438 U.S. 645, 674–75 (1978).

49. *See United States v. Cal. State Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982).

50. Pub. L. No. 93-205, 81 Stat. 884 (Dec. 28, 1973).

51. 16 U.S.C. § 1532 (2000). The ESA defines an endangered species as one that is “in danger of extinction throughout all or a significant portion of its range,” *id.* § 1532(6), while a threatened species is one that is “likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20). Through rules issued under section 4(d) of the ESA, *id.* § 1533(d), the law typically applies equally to both types of species.

52. 16 U.S.C. § 1531(b) (2000).

53. NMFS is part of the National Oceanic and Atmospheric Administration, and is sometimes called “NOAA Fisheries.”

54. ESA § 4, 16 U.S.C. § 1533 (2000), specifies the process and standards for listing species as endangered or threatened. Listing decisions must be made “solely on the basis of the best scientific and commercial data available” to the FWS or, for oceangoing species, the NMFS. 16 U.S.C. § 1533(b)(1)(A) (2000). In addition, this section requires designation of “critical habitat” for any species at the time it is listed. 16 U.S.C. § 1533(a)(3).

prohibits “taking” any member of a protected species of fish or wildlife.<sup>56</sup> This prohibition applies to “any person,”<sup>57</sup> and the Act defines “person” to include virtually any conceivable entity, including a federal agency.<sup>58</sup> Under the Act, “‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>59</sup> FWS by rule has defined “harm” in this context to include “significant habitat modification or degradation where it actually kills or injures wildlife,”<sup>60</sup> thus bringing some habitat destruction on private lands within the Act’s prohibition of take.<sup>61</sup>

Most important for purposes of this article is § 7,<sup>62</sup> which gives federal agencies additional duties to protect listed species.<sup>63</sup> The key provision is § 7(a)(2),<sup>64</sup> which commands that every federal agency “shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence” of any threatened species, or adversely modify its designated critical habitat.<sup>65</sup> Section 7(a)(2) couples this substantive standard of “no jeopardy” with a mandatory process

55. 16 U.S.C. § 1538 (2000).

56. *Id.* § 1538(a)(1)(B).

57. *Id.* § 1538(a)(1).

58. *Id.* § 1532(13) (2000).

59. *Id.* § 1532(19) (2000).

60. 50 C.F.R. § 17.3.

61. The Supreme Court upheld this rule in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). Under ESA § 10, the Services may issue an incidental take permit to a non-federal entity, allowing legalized “take” of protected species where the take would be “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a) (2000). The applicant for such an incidental take permit must submit a conservation plan, better known as a habitat conservation plan or HCP, describing (among other things) the applicant’s steps to mitigate or minimize take and the funding available for these efforts. 16 U.S.C. § 1539(a)(2)(A) (2000).

62. 16 U.S.C. § 1536 (2000).

63. A federal agency action may incidentally result in take of a member of a listed species, but if the agency has followed the requirements of § 7 with respect to that action, it may receive an “incidental take statement” from the relevant Service that essentially authorizes a certain level of take in connection with that action. *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 790 (9th Cir. 2005).

64. 16 U.S.C. § 1536(a)(2). In addition, § 7(a)(1) directs all agencies affirmatively to use their existing authorities to conserve listed species, 16 U.S.C. § 1536(a)(1), although courts have rarely found an agency to have fallen short of this requirement. *See* J.B. Ruhl, *Section 7(a)(1) of the “New” Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies’ Duty to Conserve Species*, 25 ENVTL. L. 1107, 1126–1137 (1995), and cases cited therein. *But see* *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

65. 16 U.S.C. § 1536(a)(2) (2000).

known as “consultation.”<sup>66</sup> The Ninth Circuit Court of Appeals has explained the consultation triggers and process as follows:

In order to ensure compliance with the Act, the ESA and its implementing regulations require federal agencies (“action agencies”) to consult with the appropriate federal fish and wildlife agency . . . whenever their actions “may affect” an endangered or threatened species. Thus, if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered. If the action agency subsequently determines that its action is “likely to adversely affect” a protected species, it must engage in formal consultation. Formal consultation requires that the consulting agency . . . issue a biological opinion determining whether the action is likely to jeopardize the listed species and describing, if necessary, reasonable and prudent alternatives that will avoid a likelihood of jeopardy. But if the action agency determines that an action is “not likely to adversely affect” the species, it may attempt informal consultation. This does not end the consultation process. The consulting agency must issue a written concurrence in the determination or may suggest modifications that the action agency could take to avoid the likelihood of adverse effects to the listed species. If no such concurrence is reached, the regulations require that formal consultation be undertaken.<sup>67</sup>

If the Service determines that the proposed action may jeopardize the species, it must suggest “reasonable and prudent alternatives” to avoid jeopardy while meeting the purposes of the proposal.<sup>68</sup> If the agency wants to proceed with the proposed action despite a biological opinion (“BO”) finding that the proposed action might jeopardize the species, the agency may seek an exemption from the cabinet-level Endangered Species Committee.<sup>69</sup> The agency must not proceed with the proposed action until consultation is completed.<sup>70</sup>

66. *Id.*

67. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994) (citations omitted).

68. 16 U.S.C. § 1532(b)(3)(A) (2000).

69. *Id.* § 1532(e) (2000) specifies the membership, standards and procedures of the Committee, which is better known as the “God Squad.”

70. “After initiation of consultation . . . the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection 7(a)(2) of this section.” 16 U.S.C. § 1532(d).

Federal courts, especially the Ninth Circuit, have emphasized the importance of federal agency compliance with the ESA's procedural requirements. Section 7 provides for "a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions [i.e. the jeopardy prohibition] will not result. The latter, of course, is impermissible."<sup>71</sup>

### C. USBR's Duties under the Endangered Species Act

Several cases in recent years have defined USBR's responsibilities under ESA § 7. Through these cases, federal courts (primarily the Ninth Circuit) have clarified that USBR must comply with § 7 when its contracting activities or project operations may affect listed species. In *NRDC v. Houston*,<sup>72</sup> environmental plaintiffs challenged the agency's failure to consult before renewing water service contracts with irrigators on the Central Valley Project ("CVP") in California.<sup>73</sup> The Ninth Circuit held that USBR violated its § 7(a)(2) duties by failing to request consultation with NMFS over the effects of contract renewals on salmon protected by the ESA,<sup>74</sup> and upheld the district court's decision to rescind the renewed contracts pending the completion of consultation.<sup>75</sup>

Courts also have held that § 7 requires USBR to consult on the operations of existing projects where water deliveries may adversely affect species protected by the ESA. Perhaps the most significant case on this point is *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*, where the district court held that USBR violated its § 7 duties by not completing consultation on its Klamath Project operations for the year 2000,<sup>76</sup> and essentially

71. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (citing *TVA v. Hill*, 437 U.S. 153, 184-93 (1978)).

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

73. USBR had renewed fourteen water service contracts with irrigation districts and other water user organizations, each for a forty-year period, on terms similar to those of the original contracts. *See id.* at 1123-24.

74. *Id.* at 1126-29 ("The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact.").

75. *Id.* at 1129.

76. 138 F. Supp. 2d 1228, 1247 (N.D. Cal. 2001). The court took a particularly dim view of USBR's failure to consult on its 2000 operations, given that the agency had consulted in

enjoined project water deliveries until consultation was completed for 2001.<sup>77</sup> That consultation, in conjunction with an extreme drought, resulted in a severe cutback in water deliveries to project irrigators, leading to the 2001 “water crisis” in the Klamath Basin.<sup>78</sup>

The Ninth Circuit has stated that USBR’s duties under § 7(a)(2) take priority over its contractual commitments to project water users. In a case involving USBR obligations under both the ESA and the Central Valley Project Improvement Act,<sup>79</sup> the court rejected arguments by water users that USBR breached its contracts by reducing water deliveries during certain dry years.<sup>80</sup> Additionally, in a case involving operational control of the Klamath Project, the Ninth Circuit stated flatly that USBR’s responsibilities under the ESA “override the water rights of the Irrigators.”<sup>81</sup> Within the jurisdiction of the Ninth Circuit, at least, USBR clearly must operate its projects to avoid jeopardy even if that means cutting water deliveries for irrigation and other contracted uses.<sup>82</sup>

Some water users whose deliveries have been reduced because of operating restrictions imposed on Reclamation projects under § 7 have sued the government for damages, claiming a temporary “taking” of their water rights requiring compensation. In *Tulare Lake Basin Water Storage District v. United States*, irrigators argued that ESA restrictions on CVP operations took their water rights by reducing their deliveries from the California State Water Project, which operates in coordination with the federal CVP.<sup>83</sup> The Court

previous years and seemingly recognized the need to consult. *Id.* at 1244–45. The court insinuated that the agency may have acted in bad faith by failing to move forward with the consultation process in 2000. *Id.* at 1246.

77. Pending completion of consultation, the court required USBR to ensure specified Klamath River flows before delivering any project water for irrigation. *Id.* at 1250.

78. For an account of the factors underlying the Klamath Basin dispute and the events leading up to the 2001 crisis, see Benson, *supra* note 25, at 214–28.

79. The CVPIA requires USBR to dedicate 800,000 acre-feet of CVP water per year to fish and wildlife restoration. *See Cent. Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1024 (9th Cir. 2006).

80. *O’Neill v. United States*, 50 F.3d 677, 687 (9th Cir. 1995).

81. *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999). The case focused on whether USBR and the utility Pacificorp had acted properly in modifying their contract for control of a Klamath Project Dam, where the modification had the effect of benefiting listed species but increasing risks to irrigators.

82. *See Pac. Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) (rejecting flows provided for listed salmon in first eight years of USBR ten-year operating plan for the Klamath Project as insufficient to meet ESA obligations).

83. 49 Fed. Cl. 313, 314 (2001).

of Federal Claims agreed, holding that the government was required to compensate the irrigators for water they did not receive in the years 1992–1994.<sup>84</sup>

The successful *Tulare* plaintiffs had water delivery contracts with the State of California,<sup>85</sup> but irrigators who receive water from *federal* projects under contracts with USBR have not yet fared so well in asserting that ESA restrictions have taken their water rights.<sup>86</sup> In a case from the CVP, the Court of Federal Claims found no taking after a full trial, based on its analysis of the statutes, contracts, and facts specific to that case.<sup>87</sup> The Court of Federal Claims reached the same result on very different grounds in a case from the Klamath Project, holding first that the irrigators could pursue their claims only for breach of contract and not for taking of property rights,<sup>88</sup> and later rejecting the contract claims because the enactment of the ESA was a sovereign act which could not give rise to contractual liability for the government.<sup>89</sup>

In certain cases, however, courts have been faced with the threshold question of whether pre-ESA legal obligations require USBR to operate its projects in a way that essentially leaves no room to consider the needs of listed species.<sup>90</sup> This issue has been hotly contested in the *Rio Grande Silvery Minnow* litigation discussed below,<sup>91</sup> with no final resolution as of this writing. The existence or absence of discretion is a key question because of an ESA

84. *Id.* at 319.

85. The facts in *Tulare* were somewhat unique, in that the plaintiffs were affected by ESA restrictions on a federal water project but their contracts were with the State of California. See Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 554–55 (2002). Thus, the irrigators in *Tulare* did not have to overcome a common provision in USBR contracts which excuses the federal government from liability for failure to deliver a full water supply. 49 Fed. Cl. at 321.

86. In a recent case from the Court of Federal Claims, Judge Wiese—who decided *Tulare*—held that ESA restrictions on water deliveries from Reclamation projects must be analyzed as regulatory (not physical) takings, essentially repudiating a crucial element of the *Tulare* takings analysis. *Casitas Mun. Water Dist. v. United States*, 76 Fed. Cl. 100, 106 (2007).

87. *Stockton East Water Dist. v. United States*, 75 Fed. Cl. 321, 324 (2007). Earlier, the Court had denied summary judgment, identifying a number of disputed factual issues. 70 Fed. Cl. 515 (2006).

88. *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 540 (2005).

89. *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677, 685, 695 (2007).

90. See *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (USBR has discretion in renewing CVP water service contracts); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (USBR has no discretion to operate its projects on the Lower Colorado River for the benefit of species existing solely in Mexico).

91. See *infra* Part IV.A.

implementing rule that limits the applicability of § 7 to discretionary agency actions. The following section of this article examines this rule and Ninth Circuit cases applying it to various federal activities.

## II. THE “DISCRETIONARY FEDERAL INVOLVEMENT OR CONTROL” TRIGGER FOR ESA SECTION 7

### A. The “Discretionary” Rule and its Context

ESA § 7(a)(2) requires each federal agency<sup>92</sup> to “insure that any action authorized, funded, or carried out” by the agency is not likely to cause jeopardy to a listed species or adversely affect a designated critical habitat.<sup>93</sup> The statute does not define which (if any) federal activities are not subject to this mandate.<sup>94</sup> The definition of “action” in the ESA implementing regulations sheds little additional light on the subject,<sup>95</sup> but does offer a general list of examples.<sup>96</sup>

Since 1986, however, ESA implementing rules have contained an important limitation, codified at 50 C.F.R. § 402.03: “Section 7 and the requirements of this Part apply to all actions in which there is discretionary federal involvement or control.”<sup>97</sup> Here, again, the rules provide no definition or other language to explain “discretionary federal involvement or control.” Nor does the statute define the terms “discretion” or “discretionary”; to the contrary, neither term even appears in § 7 or in § 3,<sup>98</sup> which

92. This term means “any department, agency, or instrumentality of the United States.” 16 U.S.C. § 1532(7) (2000).

93. 16 U.S.C. § 1536(a)(2) (2000).

94. The ESA defines “Federal agency” broadly, 16 U.S.C. § 1532(7), but does not define “insure,” “action,” “authorized,” “funded,” or “carried out.”

95. “‘Action’ means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or on the high seas.” 50 C.F.R. § 402.02.

96. According to this non-exclusive list, a federal agency would engage in “action” if it promulgated rules, issued a permit or license, entered into a contract or lease, granted an easement or right-of-way, or otherwise did something “directly or indirectly causing modifications to the land, water, or air.” *Id.*

97. 50 C.F.R. § 402.03 contains only this single sentence.

98. 16 U.S.C. §§ 1536, 1532. Black’s Law Dictionary (8th ed. 2004) defines “discretion” to mean “Individual judgment; the power of free decision-making,” and “administrative discretion” to mean “[a] public official’s or agency’s power to exercise judgment in the discharge of its duties.”



contains the ESA's definitions.

Prior to 1986, 50 C.F.R. § 402.03 did not contain the word "discretionary."<sup>99</sup> When the Departments of Interior and Commerce jointly proposed to revise the rules governing implementation of ESA § 7 in 1983,<sup>100</sup> the agencies proposed that § 7 would apply to "all actions in which there is federal involvement or control,"<sup>101</sup> as provided by the then-existing rules.<sup>102</sup> In finalizing the rules, however, the agencies added "discretionary" to the text of § 402.03.<sup>103</sup> The final rulemaking notice is strangely silent on this point.<sup>104</sup>

Thus, even though § 402.03 has included the "discretionary Federal involvement or control" language for over twenty years, the meaning of this phrase has not been very clear—not only because the 1986 rulemaking failed to define the word "discretionary" or explain its insertion, but also because that term has no apparent basis in the ESA itself.<sup>105</sup> It is therefore not surprising that courts have struggled, with somewhat mixed results, to decide whether a particular federal agency action is "discretionary" and therefore subject to the requirements of § 7.

## B. Ninth Circuit Cases Interpreting the "Discretionary" Rule

Since 1995, the Ninth Circuit Court of Appeals has interpreted

99. See 51 Fed. Reg. 19,926 (June 3, 1986) (final rulemaking notice).

100. 48 Fed. Reg. 29,990 (June 29, 1983).

101. *Id.* at 29,999.

102. See Derek Weller, *Limiting the Scope of the Endangered Species Act: Discretionary Federal Involvement or Control under Section 402.03*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 309, 323 (1999).

103. 51 Fed. Reg. 19,926, 19,958 (June 3, 1986).

104. *Id.* at 19,937 (explaining § 402.03 generally but never addressing the addition of "discretionary"). In his dissent in *NAHB*, Justice Stevens argued that because the agencies had failed to explain the new word in their final rulemaking notice, they must not have intended the change to have legal significance: "Clearly, if the Secretary of the Interior meant to limit the pre-existing understanding of the scope of the coverage of § 7(a)(2) by promulgating this regulation, that intent would have been mentioned somewhere in the text of the regulations or in contemporaneous comment about them." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2542 (2007) (Stevens, J., dissenting) (citations omitted).

105. By contrast, there is at least some statutory basis for the ESA implementing rules' requirement that a "reasonable and prudent alternative" be one that can be "implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." 50 C.F.R. § 402.02. Under § 7, if the Secretary issues a jeopardy opinion, he "shall suggest those reasonable and prudent alternatives which . . . can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A) (2000) (emphasis added).

§ 402.03 to exempt certain federal activities from § 7 requirements.<sup>106</sup> In *Sierra Club v. Babbitt (Seneca)*, the Bureau of Land Management (“BLM”) had authorized a logging company to build a road across BLM lands, even though an agency biologist had determined that the proposed logging road could adversely affect the northern spotted owl.<sup>107</sup> BLM believed it was required to approve the road under a 1962 right-of-way agreement, under which Seneca Sawmill could proceed with the road within thirty days of giving notice to BLM unless the agency notified the company that the proposed road did not satisfy one of three specified criteria.<sup>108</sup> Environmental groups sued the Interior Department for approving the road without consultation under § 7 and the agency argued that no consultation was needed because it lacked the authority “to influence Seneca’s actions for the benefit of the threatened spotted owl.”<sup>109</sup> The government contended that it had no authority to stop or alter the road for any reason except the three specified in the 1962 agreement, even though BLM and Seneca had entered into a 1991 stipulation whereby the company agreed to conform its operations to all applicable state and federal environmental standards.<sup>110</sup> A divided panel held that no consultation was required, citing § 402.03 and deferring to the Regional Interior Solicitor’s determination of the agency’s authority.<sup>111</sup> The majority concluded:

[T]he right-of-way agreement was granted prior to the enactment of the ESA *and* there is no further action relevant to the spotted owl that the BLM can take prior to Seneca’s exercise of their contractual

106. The Ninth Circuit is not the only court that has applied § 402.03 in determining an agency’s duty to consult. *See, e.g.,* *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003), discussed *infra* at note 268. This article focuses on the Ninth Circuit because it is the venue for so much ESA litigation, giving it a better developed body of caselaw on this issue than other courts.

107. 65 F.3d 1502, 1506–07 (9th Cir. 1995).

108. Under the agreement, BLM could notify the company that the proposed route for the road was not the most direct, that the road would substantially interfere with existing or planned facilities, or that it would result in excessive soil erosion. *Id.* at 1505.

109. *Id.* at 1508. More specifically, BLM argued that the 1962 right-of-way agreement was the relevant action, and that approving the road under that agreement was not an agency action within the meaning of § 7. *Id.* at 1507.

110. This stipulation gave BLM the right to halt construction or other operations if the company were to violate any of the standards covered in the stipulation. *Id.* at 1506.

111. *Id.* at 1509.

rights. . . . [W]here, as here, the federal agency lacks the discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the species.<sup>112</sup>

The court's decision in *EPIC v. Simpson Timber Co.* was quite similar to the *Seneca* case in many respects, although it dealt with a federal agency's duty to reinitiate consultation under an existing permit.<sup>113</sup> If an agency has already consulted on an ongoing activity, the agency must reinitiate consultation if the activity is having unexpected impacts on listed species or if a new species is listed that may be affected by the activity.<sup>114</sup> However, the rules provide for reinitiating consultation if "discretionary Federal involvement or control over the action has been retained or is authorized by law."<sup>115</sup> The *EPIC* plaintiffs argued that FWS was required to re-consult on the Incidental Take Permit that it had issued Simpson Timber years earlier, because new species had been listed in the area covered by the permit.<sup>116</sup> The key issue was whether FWS had discretionary involvement or control under the existing permit. The majority felt that for this standard to be met, "the permit must reserve to the FWS discretion to act to protect species in addition to the northern spotted owl."<sup>117</sup> One provision seemed to confer exactly this kind of discretion: a commitment by Simpson to submit logging plans that would not only address the specific needs of the spotted owl, but also "modify silvicultural systems as appropriate to ensure compatibility with the habitat requirements of other species found within Simpson's ownership that are considered sensitive by state and federal agencies."<sup>118</sup> The majority somehow read this language as protecting only species

112. *Id.* (emphasis in original). Judge Pregerson dissented, arguing that the Court was too quick to grant deference to the agency's determination of its own authority, and that BLM did retain adequate discretion over the road approval to trigger the requirements of § 7. *Id.* at 1513–14 (Pregerson, J., dissenting).

113. *EPIC v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001).

114. 50 C.F.R. § 402.16.

115. *Id.*

116. *EPIC*, 255 F.3d at 1076 (noting that the permit addressed only the northern spotted owl when it was issued in the early 1990s, and that since then the marbled murrelet and the coho salmon had been listed in the area of Simpson's lands). An incidental take permit authorizes take by a non-federal entity under certain circumstances and subject to certain conditions. *See supra* note 61.

117. *EPIC*, 255 F.3d at 1081 n.6.

118. *See id.* at 1080–81.

(other than the owl) actually listed under the ESA at the time of the permit.<sup>119</sup> Finding no permit provision that gave FWS the requisite discretion,<sup>120</sup> the court held that the agency had no duty to reinitiate consultation.<sup>121</sup>

A few Ninth Circuit cases under § 402.03 are best understood as involving no federal agency action—that is, no program or activity authorized, funded or carried out by a federal agency<sup>122</sup>—rather than an absence of agency discretion. The first such case was *Marbled Murrelet v. Babbitt*, in which plaintiffs challenged FWS’s failure to consult on the issuance of certain letters pertaining to timber companies’ proposed salvage logging on company lands.<sup>123</sup> This proposed logging was governed under California state statutes and rules administered by the California Department of Forestry and Fire Protection (“CDF”).<sup>124</sup> The court held that CDF had regulatory authority over the companies’ logging plans, and that the federal agency role was solely advisory.<sup>125</sup> Although the court indicated at one point that FWS had no duty to consult because it

119. *Id.* at 1081. The court offered no support for reading “sensitive” to mean “threatened or endangered,” despite the fact that the two designations have very different meanings and different legal consequences.

120. In dissent, Judge D.W. Nelson argued that various provisions of the Simpson permit and FWS’ permitting rules, provided more than adequate discretion to trigger § 7, and criticized the majority’s “new requirement that the agency explicitly reserve the right to implement measures to protect new species in the permit.” *Id.* at 1083–85 (D.W. Nelson, J., dissenting).

121. In another case applying § 402.03, the Ninth Circuit held that the Navy was not required to consult on the potential effects of a program to retrofit submarines with a new class of nuclear missiles at a base in Washington, because a Presidential order required the Navy to carry out the program at that base. “[A]ny consultation by the Navy with NMFS regarding the risks of accidental Trident II explosion on the threatened salmon species, if such risks arise solely from the President’s siting decision, would be an exercise in futility.” *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep’t of the Navy*, 383 F.3d 1082, 1092 (9th Cir. 2004). The opinion deals primarily with environmental review requirements under the National Environmental Policy Act, and provides a rather cursory analysis of the discretion issue under the ESA.

122. *See* 16 U.S.C. § 1536(a)(2) (2000), 50 C.F.R. § 402.02 (definition of “action”).

123. *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996).

124. *Id.* at 1071–72.

125. The court concluded that

[FWS] merely provided advice on how the Lumber Companies could avoid a take under section 9 of the ESA. Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party.

*Id.* at 1074.

lacked discretion,<sup>126</sup> it really meant that the agency exercised no control over the activity and therefore took no “action” for purposes of § 7.<sup>127</sup>

Like the *Marbled Murrelet* case, two of the Ninth Circuit’s most recent decisions regarding the applicability of § 7 are best explained by a lack of agency action. In *Western Watersheds Project v. Matejko*, the court held that BLM was not required to consult on long-established rights-of-way for water diversions crossing its lands.<sup>128</sup> And in *California Sportfishing Protection Alliance v. Federal Energy Regulatory Commission*, the court upheld FERC’s refusal to initiate consultation on an existing hydropower project license, even though the project was apparently affecting listed salmon.<sup>129</sup> The license contained a provision allowing FERC to order modifications for the protection of fish.<sup>130</sup> The agency, however, chose not to initiate consultation, arguing that the license was set to expire in four years and that early consultation had already begun on the renewal. The court held that “the reopener provisions do no more than give the agency discretion to decide whether to exercise discretion,” and because FERC had taken no action regarding the project since issuing a license in 1980, it was not required to consult.<sup>131</sup> Thus, *California Sportfishing* means that even where an agency clearly possesses discretionary power, it has no duty to consult unless and until it actually authorizes, funds, or

126. The court stated, e.g., “When an agency lacks the discretion to influence the private action there is no agency action.” *Id.* (citing *Sierra Club v. Babbitt (Seneca)*, 65 F.3d 1502, 1509 (9th Cir. 1995)) (internal quotations omitted).

127. The court noted correctly that § 7 covers any action authorized, funded, or carried out by a federal agency, but then incorrectly stated that “an action is an agency action if there is discretionary Federal involvement or control.” *Id.* at 1073 (citing *Seneca*, 65 F.3d at 1509) (internal quotations omitted). The court thus mistook “discretionary involvement or control” as the test for whether there is an agency action, rather than the test for whether an agency action is subject to § 7. But the court clearly based its decision on the fact that the FWS had no authority over private logging except for its ability to enforce the “take” prohibition of ESA § 9, and that latent authority did not amount to an agency action. *Id.* at 1074.

128. 468 F.3d 1099, 1108 (9th Cir. 2006) (“[E]ven assuming the BLM could have had some type of discretion here to regulate the diversions (beyond a substantial deviation [from the use authorized in the existing right-of-way]), the existence of such discretion without more is not an action triggering a consultation duty.”).

129. 472 F.3d 593, 595 (9th Cir. 2006).

130. “The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate . . . such reasonable modifications of project structures and operation, as may be ordered by [FERC] . . . .” *Id.*

131. *Id.* at 599.

carries out some activity.

Arguments against the applicability of § 7 have not always prevailed, however. In *National Resources Defense Council v. Houston*, plaintiffs argued that USBR was required to consult before renewing certain irrigation districts' forty-year contracts for water service from the CVP.<sup>132</sup> The districts argued that USBR had no discretion to change the terms of the contracts in renewing them, and in particular the quantity of water in the contracts.<sup>133</sup> Federal attorneys opined that the USBR had no discretion to change the quantity of water, but plenty of discretion to alter other contract terms.<sup>134</sup> The court, however, found statutory discretion for USBR to alter even the quantity of water in the renewed contracts: "The federal reclamation laws, which provided the right to renewal, state that the government is to renew the contracts on 'mutually agreeable' terms [and] that water rights are based on the amount of available project water . . . ."<sup>135</sup> It further suggested that a project's *available* water supply could legally be reduced in order to meet ESA requirements.<sup>136</sup> The court concluded that even if the original contracts guaranteed a fixed quantity of water on renewal, USBR had discretion to alter other contract provisions, and "may be able to reduce the amount of water available for sale if necessary to comply with ESA."<sup>137</sup> Thus, the agency was required by § 7 to complete consultation before renewing the contracts.

*Turtle Island Restoration Network v. National Marine Fisheries Service* involved NMFS' issuance of permits for longline fishing vessels to operate off the Pacific coast.<sup>138</sup> Plaintiffs alleged that these operations harmed sea turtles protected by the ESA, and that the agency was required to consult before permitting them. NMFS argued that the High Seas Fishing Compliance Act<sup>139</sup> gave the agency no discretion to impose permit conditions for the benefit of

132. 146 F.3d 1118 (9th Cir. 1998).

133. The districts raised this issue for the first time on appeal, *id.* at 1125 n.3, but apparently the federal government did not participate in this appeal. *Id.* at 1124 n.2, 1125.

134. The government believed it could not change the quantity because of a federal statute, 43 U.S.C. § 485h-1, giving the districts "a first right . . . to a stated share or quantity of the project's water supply." *Id.* at 1126 (quoting Interior Solicitor's opinion).

135. *Id.* at 1126 (citations omitted).

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

137. *Id.*

138. 340 F.3d 969 (9th Cir. 2003).

139. 16 U.S.C. §§ 5501-09 (2000).

sea turtles,<sup>140</sup> and the district court agreed.<sup>141</sup> The appeals court, however, held that the statute clearly gave NMFS broad authority to impose conditions in permitting longline vessels,<sup>142</sup> including conditions that would benefit sea turtles.<sup>143</sup> The appeals court concluded that because the statute gave NMFS discretion “so that the agency *could* condition permits to benefit listed species,” consultation was required.<sup>144</sup>

The Ninth Circuit also rejected the agency’s “no discretion” argument in *Washington Toxics Coalition v. EPA*,<sup>145</sup> involving EPA’s duty to consult on the impacts of pesticides registered by the agency under the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”).<sup>146</sup> Plaintiffs introduced evidence that at least fifty-four registered pesticides were harming salmon protected by the ESA, but EPA argued that FIFRA left it no discretion to consult on the effects of products that it had already approved. The court held that the agency had independent duties under the ESA regardless of whether it was fully complying with FIFRA.<sup>147</sup> In addition, the Ninth Circuit found discretion in FIFRA that would allow EPA to consider the effects of an approved pesticide on listed species: “Pesticide registrations under FIFRA are ongoing and have long-lasting effects even after adoption. EPA retains discretion to alter the registration of pesticides for reasons that include environmental concerns. Therefore, EPA’s regulatory discretion is not limited by FIFRA in any way” that would preclude application of ESA § 7 to registered pesticides.<sup>148</sup>

140. *Turtle Island*, 340 F.3d at 972.

141. *Ctr. for Biological Diversity v. Nat’l Marine Fisheries Service*, No. C-01-1706, 2001 WL 1602707 (N.D. Cal., Nov. 28, 2001).

142. The court emphasized language in the statute giving the agency authority to impose conditions “*necessary and appropriate* to carry out the obligations of the United States under the Agreement, *including but not limited to* the markings of the boat and reporting requirements.” *Turtle Island*, 340 F.3d at 976 (quoting 16 U.S.C. § 5503(d)) (emphasis added by court). The “Agreement” is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. *See id.* at 975–76 (citing 16 U.S.C. § 5501).

143. The court held that the statute was unambiguous on this point, and that the court therefore would not defer to NMFS’ interpretation that it lacked discretion to condition permits for turtle protection. *Id.* at 976.

144. *Id.* at 977 (emphasis in original).

145. *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005).

146. 7 U.S.C. §§ 136–136y (2000).

147. *Washington Toxics*, 413 F.3d 1024, 1030–32. This aspect of the court’s opinion is no longer good law after the Supreme Court’s *NAHB* decision, 127 S. Ct. 2518, 2536 (2007).

148. *Washington Toxics*, 413 F.3d 1024, 1033 (citations omitted). Thus, the court

A few general points emerge from this line of cases on discretionary action. First, the court has determined discretion by parsing the language of the statutes, rules, and permits most directly involved in disputes, with somewhat unpredictable results. For example, the *EPIC* majority found no discretionary power to protect species beyond the spotted owl despite a permit term that seemed to provide that power clearly,<sup>149</sup> whereas the *Turtle Island* court found unambiguous authority to protect sea turtles from a catchall provision of a statutory section dealing primarily with fishing boat markings and reporting requirements.<sup>150</sup> Second, the court has found no discretion in cases where a person has an *existing* permit or approval, and a federal agency either has little or no authority to require changes (e.g. *Seneca*), or has latent discretionary authority but no legal duty to exercise it (e.g. *California Sportfishing*). Third, all of the Ninth Circuit cases have involved an existing or new federal license<sup>151</sup> or agreement involving private activity, and none has involved a federal agency claiming an absence of discretion in implementing its own land management program or operating its own project.

Given the importance of the question of § 7's applicability and the number of Ninth Circuit decisions on this issue, it is not surprising that one of these cases would eventually land in the Supreme Court. Ironically, perhaps, the dispute that brought § 402.03 to the nation's highest court involved another powerful environmental statute: the Clean Water Act.

### III. THE *NAHB* CASE: THE SUPREME COURT INTERPRETS THE "DISCRETIONARY" TRIGGER

#### A. The Dispute and the Ninth Circuit Decision

In 2002, Arizona asked the EPA to delegate authority to the Arizona Department of Environmental Quality ("ADEQ") to issue permits under CWA § 402 for pollution discharges within the state. In the recent past, EPA had consulted under ESA § 7 before

distinguished its earlier decisions in *Seneca* and *Simpson Timber*.

149. See *supra* note 122 and accompanying text.

150. See *infra* note 151 and accompanying text.

151. See 5 U.S.C. § 551(8) (2000) (Administrative Procedure Act definition of "license" as including "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").



delegating § 402 permitting authority to states.<sup>152</sup> This time, however, EPA took the position that it had no discretionary authority to consider endangered species impacts in deciding on Arizona's application. Thus, despite concerns expressed by FWS staff over potential impacts on listed species that might result from delegating the permitting program to ADEQ, EPA maintained that consultation was inappropriate.<sup>153</sup> The issue was elevated to EPA and FWS headquarters, and eventually FWS agreed that although listed species may lose protection when a state takes over § 402 permitting from EPA, this effect results from the requirements of § 402 itself, not from EPA's delegation decision.<sup>154</sup> In the end, FWS issued a BO that essentially adopted EPA's view of the effect of the delegation language of § 402, and EPA then approved Arizona's request.<sup>155</sup>

Environmental plaintiffs challenged EPA's decision, arguing that the agency had violated the ESA by delegating § 402 permitting to ADEQ without adequately considering impacts to listed species.<sup>156</sup> In *Defenders of Wildlife v. EPA*, a divided Ninth Circuit panel held that EPA did indeed have discretionary authority to consider endangered species impacts in making delegation decisions under § 402.<sup>157</sup> In reaching this decision, the court stated that ESA § 7 itself provided an independent grant of authority to protect species, "beyond that conferred by agencies' own governing statutes."<sup>158</sup> The court also read the "discretionary involvement or

152. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 952 n.3 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2518 (2007) ("Every pollution permitting transfer decision since 1993 has involved some form of EPA consultation with FWS regarding endangered species.").

153. Essentially, FWS expressed concerns that listed species might lose protection because ADEQ might begin issuing permits without conditions to protect listed species, contrary to EPA's recent practice. The species involved included the southwestern willow flycatcher, two plant species, and others. *Id.* at 952.

154. *Id.* at 953-54 (quoting from FWS BO on EPA's decision regarding the Arizona application).

155. *Id.* at 954-55, citing 67 Fed. Reg. 79,629 (Dec. 30, 2002) (delegating § 402 program to Arizona).

156. Plaintiffs also argued under the Administrative Procedure Act that EPA's decision was arbitrary and capricious. In addition, they filed a separate suit challenging FWS' BO on the delegation, and the two cases were eventually consolidated. *Id.* at 955.

157. The court noted, as a threshold matter, that an agency must have some authority to take measures to prevent harm to listed species; otherwise, the agency would be forced to choose between violating the prohibitions of ESA § 7 and acting beyond their legal power. *Id.* at 964.

158. *Id.* The court reached this conclusion based on its reading of *TVA v. Hill* (*see supra* notes 1-8 and accompanying text), as well as its analysis of ESA text and legislative history.

control” language of 50 C.F.R. § 402.03 as adding nothing to the statutory language, by which § 7(a)(2) applies to actions authorized, funded or carried out by a federal agency.<sup>159</sup> Based on this reading of the rule, the question for the court was whether EPA’s delegation decision was an agency action, not whether CWA § 402 itself left EPA any discretion to consider listed species in making that decision.<sup>160</sup> The majority concluded that the delegation decision was a federal agency action triggering § 7 requirements, and that the “EPA may have complied with its obligations under the Clean Water Act, but compliance with a complementary statute cannot relieve the EPA of its independent obligations under section 7(a)(2).”<sup>161</sup>

### B. The Supreme Court Decision

The Supreme Court reversed the Ninth Circuit and upheld the government’s position regarding its discretionary authority. The Court began by noting that CWA § 402 dictates that EPA “shall approve” a transfer application that satisfies all nine statutory requirements: “the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.”<sup>162</sup> The Court then noted that the ESA also imposes a mandatory duty on federal agencies, and it characterized the “no jeopardy” command of § 7(a)(2) as adding an additional criterion to the existing list in § 402.<sup>163</sup> Framing the issue as an “implied repeal” of § 402 by the later-enacted ESA, the Court noted that implied repeals are not

The court rejected the reasoning of cases from other courts which had reached the contrary conclusion about the ESA as an independent source of authority to protect species, finding that these cases “do not reflect a full consideration of the text and history of section 7(a)(2).” *Id.* at 970.

159. *Id.* at 967.

160. In reaching this result, the court characterized its earlier cases involving § 402.03 as interpreting that rule to be “coterminous” with ESA § 7(a)(2). *Id.* at 969.

161. *Id.* at 971. In dissent, Judge Thompson disagreed that EPA had discretionary authority, and argued that earlier Ninth Circuit decisions supported that position. *Id.* at 979, 980 (Thompson, J., dissenting). The dissent took the position that in deciding on Arizona’s application, EPA could consider only the nine factors specified in CWA § 402, and that consultation would be an additional requirement inconsistent with the agency’s mandatory duties under the Clean Water Act. *Id.* at 980.

162. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2531 (2007) (citations omitted).

163. *Id.* at 2532 (citing *Defenders of Wildlife v. EPA*, 450 F.3d 394, 404 n.2 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc)).

avored, and it expressed concern that a literal reading of § 7(a)(2) would “partially override every federal statute mandating agency action . . . .”<sup>164</sup> The Court spun this potential conflict between the ESA and other statutes into a “fundamental ambiguity” in the language of § 7(a)(2),<sup>165</sup> and applied *Chevron* deference<sup>166</sup> to the rule providing that § 7 applies to agency actions where there is “discretionary federal involvement or control.”<sup>167</sup> Having thus validated 50 C.F.R. § 402.03, the Court then interpreted the rule more broadly than the Ninth Circuit had below:<sup>168</sup> “§ 7(a)(2)’s no-jeopardy duty covers only discretionary agency actions and does not attach to actions (like the [§ 402] permitting transfer authorization) that the agency is *required* by statute to undertake once certain specified triggering events have occurred.”<sup>169</sup>

In reaching this interpretation of § 7(a)(2), the Court had to minimize the effect of its strongly worded opinion in *TVA v. Hill*.<sup>170</sup> The majority acknowledged that in the snail darter case, the Court had “concluded that ‘the ordinary meaning’ of § 7 of the ESA contained ‘no exemptions’ and reflected a ‘conscious decision by Congress to give endangered species priority over the ‘primary

164. *Id.* at 2532–33.

165. As stated by the majority,

We must therefore read § 7(a)(2) of the ESA against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below. When § 7(a)(2) is read this way, we are left with a fundamental ambiguity that is not resolved by the statutory text. An agency cannot simultaneously obey the differing mandates set forth in § 7(a)(2) of the ESA and § 402(b) of the CWA, and consequently the statutory language—read in light of the canon against implied repeals—does not itself give clear guidance as to which command must give way.

*Id.* at 2534.

166. Under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), unless Congress has clearly expressed its intent on the specific issue before the agency, a reviewing court will defer to an agency’s “reasonable” interpretation of a statute it is responsible for implementing.

167. *NAHB*, 127 S. Ct. at 2534. The Court deemed it reasonable to interpret § 7(a)(2) as applying only to discretionary actions, because “when an agency is *required* to do something by statute, it simply lacks the power to ‘insure’ that such action will not jeopardize endangered species.” *Id.* at 2534–35 (emphasis in original).

168. *Id.* at 2535 (rejecting the Ninth’s Circuit’s interpretation of § 402.03, whereby the rule was “congruent with the statutory reference to actions ‘authorized, funded, or carried out’ by the agency,” and citing 420 F.3d 946, 968).

169. *Id.* at 2536 (emphasis in original).

170. *See supra* notes 1–8 and accompanying text.

missions' of federal agencies.”<sup>171</sup> The *NAHB* Court noted that *TVA v. Hill* was decided years before § 402.03 was adopted, and insisted that the agency action in the snail darter case was discretionary because TVA was not required *by statute* to complete the Tellico Dam.<sup>172</sup> Thus, the Court managed to distinguish *TVA v. Hill*, but never really explained how it found “fundamental ambiguity” in the same statutory provision that had once been so clear. Indeed, the Court had stated in the earlier case, “One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”<sup>173</sup>

The majority completed its analysis by holding that EPA decisions on delegating § 402 permitting programs are non-discretionary actions for purposes of ESA § 7. Having already declared that the CWA imposes a mandatory duty on the EPA to approve a state request if the nine statutory criteria are met, the Court concluded simply that “[n]othing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.”<sup>174</sup> The Court also noted that EPA and the Services had already determined that consultation was not required for these decisions, and since the Services were interpreting their own regulation, that interpretation was entitled to *Auer* deference.<sup>175</sup>

Four justices dissented, arguing that the majority had not attempted to read CWA § 402 and ESA § 7 in a way that would give effect to both statutory provisions.<sup>176</sup> The dissent also argued that under *TVA v. Hill*, § 7(a)(2) applies to any federal agency action, discretionary or mandatory, and that 50 C.F.R. § 402.03 cannot be read as imposing a new, “discretionary” limitation that is inconsistent with the text of the ESA.<sup>177</sup> Finally, the dissent argued

171. *NAHB*, 127 S. Ct. at 2536 (citing *TVA v. Hill*, 437 U.S. 153, 173, 185, 188 (1978)).

172. *Id.* at 2536–37.

173. *TVA*, 437 U.S. at 173.

174. *NAHB*, 127 S. Ct. at 2537.

175. “An agency’s interpretation of the meaning of its own regulations is entitled to deference ‘unless plainly erroneous or inconsistent with the regulation,’ *Auer v. Robbins*, 519 U.S. 452, 461 (1997) . . . , and that deferential standard is plainly met here.” *Id.* at 2537–38.

176. Justice Stevens authored the dissent, joined by Justices Souter, Ginsburg, and Breyer. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. at 2538 (2007) (Stevens, J., dissenting). Justice Breyer authored his own brief dissenting opinion. *Id.* at 2552 (Breyer, J., dissenting). Much of the Stevens dissent was devoted to explaining two different approaches whereby the Court could have given effect to both statutes. *Id.* at 2544–48.

177. *Id.* at 2541–43.

that the EPA's decisions regarding state delegation requests are indeed discretionary, because the statute does give the agency some discretion in deciding whether the nine criteria in § 402 are met. The dissent pointed to no CWA language that would seem to empower the EPA to consider the effects of a permitting transfer on listed species, but argued that even the majority should be willing to apply § 7 to this decision because § 402 did provide the agency *some* discretion.<sup>178</sup>

### C. What *NAHB* Means for Agency Discretion and Section 7 Duties

The *NAHB* case seems likely to raise questions about federal agencies' duty to consult on a wide range of activities. Read broadly, the majority opinion might significantly reduce the reach of ESA § 7(a)(2). Thus, setting aside serious questions about whether the Court's 5-4 decision in the context of CWA § 402 was correct,<sup>179</sup> this subsection attempts to draw some lessons from that decision that should be relevant to other, arguably non-discretionary federal actions.

First, and most obviously, 50 C.F.R. § 402.03 is good law. Despite the clear tension between the statute, which makes § 7 applicable to "any action authorized, funded, or carried out" by a federal agency, and the rule, with its trigger of "discretionary Federal

178. "If we are to take the Court's approach seriously, once *any* discretion has been identified—as it has here—§ 7(a)(2) must apply." *Id.* at 2549 (emphasis in original).

179. The Stevens and Breyer dissents—which combine to exceed Justice Alito's majority opinion in length—raise many of these questions, but the majority opinion is open to dispute on additional grounds. For example, the Court's rationale for declaring ESA § 7(a)(2) ambiguous is tenuous. Essentially, the majority first cast the issue as whether the ESA had impliedly repealed CWA § 402(b), and then stated that a broad reading of § 7(a)(2) would "partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species." *Id.* at 2533. The majority quoted earlier cases stating that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 2534 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000)) (internal quotations omitted). Unlike the usual case where statutory context is used in interpretation, however, the "context" supposedly giving rise to ambiguity in § 7(a)(2) was not other provisions of the same statute or related statutes, but unspecified provisions of *other, unspecified* statutes that could be viewed as conflicting with ESA requirements. The majority simply pointed in the general direction of the U.S. Code, and insisted that because § 7(a)(2) potentially could effect an *en masse* implied repeal of many provisions, "we are left with a fundamental ambiguity that is not resolved by the statutory text." *Id.* And with that, the Court opened up § 7(a)(2) for agency and judicial interpretation, despite its famous statement in *TVA v. Hill* that it would be hard to find a statute written any plainer than ESA § 7. *See supra* notes 1–8 and accompanying text.

involvement or control,”<sup>180</sup> the Court upheld the rule after finding it eligible for *Chevron* deference.<sup>181</sup> The majority also rejected two narrow (and somewhat strained) interpretations of the rule that would have left it with little or no legal effect.<sup>182</sup> Thus, unless and until it is changed by statute or rule,<sup>183</sup> § 402.03 will continue to limit the applicability of § 7 to those actions where a federal agency exercises discretion.

Second, an agency has no discretion under § 402.03 if it is “*required* by statute to take [an action] once certain specified triggering events have occurred.”<sup>184</sup> The emphasis on *required* must not obscure the other elements of a non-discretionary action as specified by the Court: (1) the command must be in a *statute*,<sup>185</sup> (2) the statute must *specify certain prerequisites*, and (3) the statute must direct the agency to take *a particular action* once those prerequisites are met. Under this test, the EPA had no discretion regarding Arizona’s request for § 402 permitting authority: the EPA was required by the CWA itself (not by rule) to determine if the state’s application met nine criteria specified in the statute, and to delegate the authority if it did. Significantly, the majority found that CWA § 402 set forth an exclusive list of criteria for the EPA to consider in making these decisions, and that any additional criterion—in this case, the “no jeopardy to listed species” standard of ESA § 7(a)(2)—would conflict with the statutory mandate.<sup>186</sup>

Third, although the Court stated that “discretion presumes that

180. *See supra* notes 163–69 and accompanying text.

181. *NAHB*, 127 S. Ct. at 2533–35 (finding the statute ambiguous on the issue before the Court, and upholding the agency’s interpretation as reasonable).

182. *Id.* at 2535–36 (rejecting the Ninth Circuit’s view of the rule as being coextensive with the statute, as well as the dissent’s argument that § 402.03 does not limit the applicability of § 7 *only* to discretionary actions).

183. Although the Court noted that § 7(a)(2) would pose a problem of implied repeals if it were not limited to discretionary federal actions, *id.* at 2533, it did not indicate that § 402.03 was the only reasonable interpretation of the statute’s applicability, leaving open the possibility that a future rulemaking could remove the “discretionary federal involvement or control” language and still be eligible for *Chevron* deference. *See Nat’l Cable Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (prior judicial construction of a statute trumps agency construction otherwise entitled to *Chevron* deference only if prior holding is based on unambiguous statutory text).

184. *NAHB*, 127 S. Ct. at 2536 (emphasis original). The court also emphasized *required* at 2534–35 (“[W]hen an agency is *required* to do something by statute, it simply lacks the power to insure that such action will not jeopardize endangered species”).

185. The “implied repeal” issue arises only if an agency faces a conflict between a *statute* and its duties under ESA § 7.

186. *Id.* at 2532–33.

an agency can exercise ‘judgment’ in connection with a particular action,” an agency may exercise judgment without having discretionary involvement or control under § 402.03.<sup>187</sup> The majority acknowledged that the EPA “may exercise some judgment in determining whether a State has demonstrated” that its application for permitting authority satisfies the statutory requirements.<sup>188</sup> By restricting the EPA to deciding whether the nine criteria are met, however, the CWA does not allow the sort of judgment that would subject the agency decision to ESA § 7: “Nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.”<sup>189</sup> Thus, the question is not whether an agency exercises judgment in deciding on a particular action, but whether the statute leaves room for the agency to consider the needs of listed species in making that decision.

Fourth, an administrative decision that a particular agency action involves no discretionary federal involvement or control is entitled to deference from the courts, but only if the decision is made by FWS or NMFS, not the agency taking the action. In *NAHB*, the Court noted that both Services had recently determined that EPA’s decisions on delegating § 402 permitting authority are non-discretionary under § 402.03. The Court accepted the Services’ (rather than the EPA’s) interpretation under *Auer*, whereby courts defer to an agency’s interpretation of its own rules “unless plainly erroneous or inconsistent with the regulation.”<sup>190</sup> If an agency were to claim that one of its activities was non-discretionary under § 402.03, that claim would not receive *Auer* deference because the agency would be interpreting the Services’ rule, not its own.<sup>191</sup>

Fifth, although it refused to follow *TVA v. Hill* in its

187. *Id.* at 2535 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–16 (1971)).

188. *Id.* at 2537.

189. *Id.* In dissent, Justice Stevens argued that the majority failed to follow its own logic when it acknowledged that EPA does exercise some judgment in these decisions, but found that the agency did not have the kind of discretion that would trigger § 7. *Id.* at 2548–49 (Stevens, J., dissenting).

190. *Id.* at 2537–38 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

191. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 257 (denying *Auer* deference to agency that interpreted a regulation that merely restated statutory language because an agency gains “special authority to interpret its own words” when it uses its own expertise and experience to develop a rule). *See also NAHB*, 127 S. Ct. at 2543–44 (Stevens, J., dissenting) (noting that EPA would not be entitled to *Chevron* deference for interpreting the ESA, because the Interior and Commerce Departments administer that statute).

interpretation of ESA § 7(a)(2), the *NAHB* Court did not undercut a key conclusion of that earlier case: that the ESA “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”<sup>192</sup> The majority distinguished *TVA v. Hill* because in the earlier case, the federal agency was not required *by statute* to build the Tellico Dam regardless of its effects on listed species.<sup>193</sup> Despite repeated statements by Congressional appropriators directing TVA to build Tellico Dam in spite of the ESA and the snail darter,<sup>194</sup> the *NAHB* Court deemed that project “discretionary” because these statements were in report language, rather than in statute.<sup>195</sup> Thus, even where Congress has clearly expressed an intent for an agency to do something, it appears that the action is non-discretionary under § 402.03 only if the agency is required to act by statute.

Perhaps surprisingly, *NAHB* is generally consistent with the Ninth Circuit’s approach in cases other than *Defenders of Wildlife v. EPA*.<sup>196</sup> In those cases, the Ninth Circuit generally read § 402.03 as triggering ESA § 7 only for those actions involving agency discretion, and it found that discretion only where the laws governing that action gave the agency some freedom to consider

192. *Tenn. Valley Auth. v. Hill* 437 U.S. 153, 185 (1978).

193. In regard to TVA’s duty to build Tellico Dam, the *NAHB* Court characterized its earlier decision thusly:

Central to the Court’s decision was the conclusion that Congress did not *mandate* that the TVA put the dam into operation; there was no statutory command to that effect; and there was therefore no basis for contending that applying the ESA’s no-jeopardy requirement would implicitly repeal another affirmative congressional directive.

*NAHB*, 127 S. Ct. at 2536–37 (emphasis in original).

194. *See TVA*, 437 U.S. 153, 163–71 (describing statements, primarily by the Appropriations Committees, expressing the belief that the ESA did not apply to the Tellico Project and directing TVA to complete it).

195. The majority even argued that the dissent was wrong in believing that TVA would have had to finish the dam if the snail darter had not been listed under the ESA: “[T]he Acts appropriating funds to the TVA . . . simply did not *require* the agency to use any of the generally appropriated funds to complete the Tellico Dam Project.” *NAHB*, 127 S. Ct. at 2537 n.9 (citing *TVA*, 437 U.S. at 189–93) (emphasis in original). Perhaps only the Supreme Court would view a federal agency as free to disregard clear, specific, repeated directives in Appropriations Committee and conference report language relating to appropriations statutes for the *sole* reason that the directives do not appear in the text of the statutes themselves.

196. *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), *rev’d sub nom.* *National Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007).



listed species in making its decisions.<sup>197</sup> The Ninth Circuit departed from its own precedent in *Defenders of Wildlife v. EPA* by reading the rule as coextensive with the “any action” language of ESA § 7(a)(2),<sup>198</sup> and by holding that EPA had an independent duty to comply with § 7 even if the CWA left the agency no room to consider listed species in deciding on Arizona’s application for permitting authority.<sup>199</sup> Thus, even though the *NAHB* opinion mentions none of the other Ninth Circuit cases, its decision may be viewed as returning the law approximately to where that circuit had brought it before *Defenders*. If anything, by emphasizing that an agency is not subject to § 7(a)(2) if another mandatory *statute* leaves it no discretion to consider the needs of listed species, the Court may have made it more difficult for an agency to claim that rules, contracts or other legal constraints leave it with no discretion under § 402.03.

Nonetheless, *NAHB* undoubtedly will embolden those both inside and outside the federal government who would like to reduce the sweep of ESA § 7. The effects of that case probably will be disputed in many contexts, but one is nearly certain: the operation of federal water projects by the USBR. The next section analyzes the extent to which these operations are, or should be, subject to § 7(a)(2) in light of the *NAHB* decision.

#### IV. USBR’S SECTION 7 DUTIES RELATING TO PROJECT OPERATIONS AFTER *NAHB*

Long before the Supreme Court’s *NAHB* decision, USBR’s discretion was a hot issue in litigation over endangered species and use of Reclamation project water. This section examines how that issue has been addressed in the ongoing *Rio Grande Silvery Minnow* litigation, and then provides legal and policy considerations relevant to USBR’s § 7 duties in operating federal water projects.

197. *See supra* notes 160–161 and accompanying text.

198. *Defenders of Wildlife*, 420 F.3d at 969. Although the court characterized this conclusion as being consistent with its earlier cases, the cases themselves contradict that statement, as they generally interpret § 402.03 less narrowly.

199. *Id.* at 967, 971. On this latter point, the Ninth Circuit had reached the same conclusion in *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005).

### A. Disputing USBR's Discretion: the *Rio Grande Silvery Minnow* Litigation

The legal dispute over the fate of the Rio Grande silvery minnow<sup>200</sup> and water use in New Mexico's "middle" Rio Grande is complex, and several authors have addressed it in detail.<sup>201</sup> The focus of the dispute is a small fish, once abundant throughout much of the Rio Grande watershed but now nearly extinct in the wild because dams, diversion structures, and low flows have altered its river habitat dramatically. By the time the minnow was listed in 1994, FWS believed that the species was located only in a 170-mile reach of the Rio Grande between Cochiti Dam and the headwaters of Elephant Butte Reservoir.<sup>202</sup> Flows in this stretch of the river are heavily influenced by the Middle Rio Grande Conservancy District ("MRGCD"), which diverts water for irrigation of more than 60,000 acres within a 150-mile-long area south of Santa Fe.<sup>203</sup> MRGCD has contracts to receive water from two USBR projects, the Middle Rio Grande Project and the San Juan-Chama Project; several other New Mexico water users, notably the City of Albuquerque, also have San Juan-Chama contracts.<sup>204</sup> Although the silvery minnow litigation has involved a wide range of issues,<sup>205</sup> the case has come down to a dispute over whether USBR has any discretion<sup>206</sup> under these

200. *Hybognathus amarus*.

201. See, e.g., Joan E. Drake, Student Writing, *Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?*, 41 NAT. RESOURCES J. 487 (2001); Sean O'Connor, Comment, *The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 U. COLO. L. REV. 673 (2002); Beth Richards, Case Note, *The Pump Don't Work Because the Bureau Took the Handle: The United States Bureau of Reclamation's Discretion to Reduce Water Deliveries to Comply with the Endangered Species Act*, 4 WYO. L. REV. 113 (2004); Ethan R. Hasenstein, Note, *Frankenstein and Pitbull? Transmogrifying the Endangered Species Act and "Fixing" the San Juan-Chama Project after Rio Grande Silvery Minnow v. Keys*, 34 ENVTL. L. 1247 (2004).

202. Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species, 59 Fed. Reg. 36,988 (July 20, 1994). In listing the species as endangered, FWS also identified other factors for the silvery minnow's decline, including competition from non-native species. *Id.* at 36989.

203. See *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1134 (10<sup>th</sup> Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10<sup>th</sup> Cir. 2004).

204. See *id.* at 1122–27 (discussing these two projects and their associated contracts).

205. See *id.* at 1115–20 (summarizing history through early 2003).

206. At one time, the Corps of Engineers' discretion in operating three dams on the Rio Grande—Abiquiu, Cochiti, and Jemez Canyon—was also in dispute. In contrast to the USBR dams, which are operated almost exclusively for water supply, the Corps dams are primarily flood control facilities. See *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 996–97

contracts and the relevant statutes, such that the two projects must be operated subject to the requirements of ESA § 7.

In the late 1990s, with the silvery minnow continuing to slide toward extinction despite its ESA listing, USBR initiated § 7 consultation on its project operations.<sup>207</sup> In its 1999 biological assessment, however, USBR argued that its operating discretion was limited by its “obligation to meet water orders from users in accordance with contract obligations. In meeting these obligations, [USBR] exercises discretion in how water is stored in system reservoirs and released through federal facilities, but that discretion is narrowed by the contract requirements and delivery schedules.”<sup>208</sup> USBR also argued that its operating discretion was constrained by both project authorizing statutes—“Congress authorized the Middle Rio Grande Project for domestic, municipal, and irrigation purposes only,” not for fish habitat—and general Reclamation laws: “[W]ater can only be stored and released from Reclamation reservoirs for valid beneficial uses, and consequently must be released at a time and in a way to meet water delivery calls.”<sup>209</sup> Thus, even though USBR consulted on its project operations, that consultation was narrowly circumscribed by the agency’s view of its discretion. USBR contended, and FWS agreed,<sup>210</sup> that USBR could not reduce deliveries to users holding contracts for San Juan-Chama Project or Middle Rio Grande Project water, regardless of the ESA.<sup>211</sup>

(D.N.M. 2002). In the first reported *Silvery Minnow* decision, the district court found that statutes provide “rather clear operating criteria” for operating these dams and specify narrow grounds for deviating from these criteria. *Id.* at 996–98. It held that the Corps is therefore not subject to the requirements of ESA § 7. *Id.* at 998–99. The court distinguished the USBR projects, which operate under “more discretionary language” than do the Corps facilities. *Id.* at 997–98. The plaintiffs did not challenge this holding on appeal. *Silvery Minnow*, 333 F.3d at 1115 n.2.

207. *See* Drake, *supra* note 201, at 496–97.

208. Drake, *supra* note 201, at 497–98 (quoting BUREAU OF RECLAMATION, U.S. DEP’T OF THE INTERIOR & ARMY CORPS OF ENGINEERS, U.S. DEP’T OF THE ARMY, PROGRAMMATIC BIOLOGICAL ASSESSMENT OF FEDERAL DISCRETIONARY ACTIONS RELATED TO WATER MANAGEMENT ON THE MIDDLE RIO GRANDE, NEW MEXICO 14 (Oct. 1999)).

209. *Id.*

210. *See* 469 F. Supp. 2d at 998–99 (noting that FWS adopted USBR’s legal position regarding USBR’s limited discretion in operating the projects).

211. Not surprisingly, the users themselves also argued that USBR had no discretion to reduce their water deliveries. *See, e.g.*, Brief for Defendant-Intervenor-Appellant City of Albuquerque at 22–23, *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973 (10<sup>th</sup> Cir. Nov. 18, 2002) (Nos. 02-2254, 02-255, 02-2267, and 02-2304) (arguing that Albuquerque’s

The U.S. District Court for the District of New Mexico (Judge Parker) disagreed, holding that USBR does have sufficient discretion to reduce water deliveries as needed to meet its ESA obligations, and that its consultations on project operations must therefore not exclude that possibility.<sup>212</sup> The court found discretion to reduce Middle Rio Grande Project deliveries primarily in a provision of the 1963 contract between USBR and MRGCD, stating that “in no event shall any liability accrue” against the United States in the event of a shortage of project water caused by “drought and other causes.”<sup>213</sup> The court thought it appropriate to read this provision broadly “because drought and dryness are what affect the continued existence of the silvery minnow.”<sup>214</sup> As for the San-Juan Chama Project, the court held that USBR could consider reallocating water to endangered species based on three provisions of the relevant contracts,<sup>215</sup> and because Congress had authorized this project to supply water for a variety of uses and to provide fish and wildlife benefits in the Rio Grande Valley.<sup>216</sup> Unlike the issue of discretion to reduce Middle Rio Grande Project deliveries, which it had called a close question, the court concluded that USBR clearly had discretion to shift San Juan-Chama Project water to endangered species.<sup>217</sup>

Even though it had lost the battle regarding discretion, the

contract and the project authorizing statute do not allow water to be used for endangered species).

212. *Silvery Minnow*, 469 F. Supp. 2d 973, 998–99.

213. *Id.* at 991–92. The 1963 agreement amended the original 1951 contract between USBR and MRGCD, which provided that the U.S. would not be liable “[s]hould there ever occur a shortage in the quantity of water which normally would be available through and by means of said project . . . .” *Id.* at 991.

214. *Id.* at 994. The court concluded that when these contract terms are viewed “together with BOR’s statutory duty to limit MRGCD’s diversions to amounts reasonably needed for beneficial use, BOR’s discretion becomes even more manifest.” *Id.* The court’s discussion of the beneficial use issue appears at 992.

215. The court described these three provisions as:

(1) a provision that “during periods of scarcity when the actual available water supply may be less than the estimated firm yield,” the contracts “shall share in the available water supply” *pro rata* with other contractors; (2) a clause immunizing BOR from liability for failure to deliver water to the contractors because of “shortages” resulting from “drought and any other causes;” and (3) a provision reducing contractors’ costs to reflect a higher portion of water going to fish and wildlife needs.

*Id.* at 995 (citations to administrative record omitted).

216. *Id.* (citing Act of June 13, 1962, Pub. L. 87-483 (76 Stat. 96)).

217. *Silvery Minnow*, 469 F. Supp. 2d at 994–96.

government had won the war over project operations—temporarily—because Judge Parker’s decision of April 2002 had nonetheless upheld the 2001 BO, which did not provide for reducing project water deliveries to contractors.<sup>218</sup> Thus, the Tenth Circuit dismissed all appeals on the discretion issue in September 2002.<sup>219</sup> In that same month, however, FWS—prompted by USBR and extreme drought conditions in the Rio Grande basin—issued a new BO that allowed the key reach of the river to go dry, potentially wiping out the last wild population of silvery minnows.<sup>220</sup> When the plaintiffs challenged the new BO, Judge Parker chastised USBR for continuing to insist that it lacked discretion to cut project water deliveries to benefit the minnow, and for doing nothing to avert a looming extinction crisis. The court invalidated the new BO, re-stated its earlier holding regarding USBR discretion to reduce water deliveries, and ordered the agency to provide certain minimum flows through 2003.<sup>221</sup> It concluded its order with an unmistakable command: “If necessary to meet flow requirements in 2003, . . . [USBR] must reduce contract deliveries under the San Juan-Chama Project and/or the Middle Rio Grande Project . . . consistent with [USBR’s] legal authority as determined in the Court’s April 12, 2002 Memorandum Opinion and Order.”<sup>222</sup>

218. *Id.* at 999 (“Even though FWS accepted BOR’s erroneous view that it lacked discretion . . . to alter water deliveries to contractors, FWS came up with an interim solution to avoid jeopardy in coordination with all the major players in the middle Rio Grande basin.”). The court observed that the federal agencies had made “a valiant effort to protect the minnow without altering water deliveries to federal contractors,” and had arrived at an interim solution that “may be workable.” *Id.* at 1000. The court noted, however, that in the future, “when the parties go back to the table, either in informal negotiations or in reinitiation of formal consultation, the annual water deliveries that I have identified as discretionary will be available to be considered for use in protecting the endangered silvery minnow from extinction.” *Id.*

219. The court dismissed appeals from the contractors for lack of standing, because they could not show that their water deliveries would actually be reduced as a result of the lower court’s rulings on discretion. The government’s appeals were dismissed because the case was ongoing in the lower court, and the appeal offered no basis for interlocutory appellate jurisdiction. *Rio Grand Silvery Minnow v. Keys*, 46 Fed. Appx. 929, 933, 935 (10th Cir. 2002).

220. *See Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222, 1225–28, 1231–32 (D.N.M. 2002) (noting that USBR had proposed to allow the “all-important” San Acacia reach—home to nearly all of the remaining wild minnows—to dry up, and that “extensive river drying in the San Acacia Reach could result in the extinction of the silvery minnow in the wild”).

221. The court allowed lower flows for the remainder of 2002 than would have been allowed under the 2001 BO. For 2003, the court required USBR to maintain the flows provided in 2001 BO unless and until a new one was issued. *Id.* at 1237–38.

222. *Id.* at 1238.

A divided Tenth Circuit panel affirmed Judge Parker's decision.<sup>223</sup> The majority focused on contract provisions allocating a portion of project costs to fish and wildlife, precluding government liability for water shortages due to drought or other causes, and providing that contracts will share in the shortfall when the "actual available water supply" is less than expected, and concluded:

These clauses, taken together, establish that BOR retained the discretion to determine the "available water" from which allocations would be made, allotments, which, in times of scarcity, might be altered for "other causes," the prevention of jeopardy to an endangered species. The terms of these negotiated contracts, properly read together, presume BOR's discretion in their implementation. Moreover, reading BOR's discretion to manage and deliver "available water" out of the plain language of the Repayment Contracts disconnects them from their congressional authorization.<sup>224</sup>

The court also endorsed the district court's reliance on three Ninth Circuit cases, *O'Neill v. United States*,<sup>225</sup> *NRDC v. Houston*,<sup>226</sup> and *Klamath Water Users Protective Ass'n v. Patterson*,<sup>227</sup> in which the court had held that USBR has authority to allocate project water for endangered species. The government sought to distinguish these cases<sup>228</sup> because they involved a statute unlike any that pertains to the Rio Grande projects,<sup>229</sup> but some of the key contract terms were similar, and the Tenth Circuit identified "general precepts" of the cases which supported its interpretation of the Rio

223. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004).

224. *Id.* at 1129. The court also noted that no contract provision specifies an absolute quantity of water. *Id.* at 1130–31.

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

226. *See supra* notes 72–75 and accompanying text.

227. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).

228. According to the court, USBR sought to distinguish those cases "on the ground that subsequently enacted legislation, the Central Valley Project Improvement Act, expressly allocated project water for fish and wildlife," leaving those cases irrelevant to the Rio Grande projects, for which no such legislation existed. *Silvery Minnow*, 333 F.3d at 1128. The CVPIA was no factor in *Klamath Water Users*.

229. Authorizing statutes for the Middle Rio Grande and San Juan-Chama Projects appeared to play a minor role in the majority's decision regarding USBR discretion, although the court did note various provisions of the project authorizations relating to fish and wildlife. *Silvery Minnow*, 333 F.3d at 1122, 1125.

Grande project contracts.<sup>230</sup>

The two majority judges also produced a “concurring” opinion on the unmistakable terms doctrine of federal contract law.<sup>231</sup> This opinion stated that any contract to which the government is a party “remains subject to the demands of a subsequent exercise of sovereign power unless the contract expressly provides in unmistakable terms that subsequent sovereign acts will not affect it. A silent contract preserves the government’s right to modify it by subsequent legislation.”<sup>232</sup> The concurrence stated that because the USBR contracts have no provisions explicitly immunizing them from future legislation, the unmistakable terms doctrine applies, allowing the ESA to modify the contracts.<sup>233</sup>

Judge Kelly dissented sharply, finding no discretion in any of the contract provisions relied upon by the majority.<sup>234</sup> He also found no discretionary authority in any applicable federal statute, and distinguished the trio of Ninth Circuit cases relied upon by the majority.<sup>235</sup> Finally, Judge Kelly argued that the unmistakable terms doctrine did not operate to allow the ESA to alter these contracts, because § 7 does not even apply in the absence of discretionary

230. According to the court, the three Ninth Circuit cases provide these three applicable principles:

First, under principles of contract interpretation, the plain terms govern. Second, the contracts, written under the reclamation laws, and all “acts amendatory and supplementary thereto,” envision applying subsequent legislation in their interpretation. Finally, the plain terms of the shortage clauses provide the basis for BOR’s retaining discretion to allocate available water to comply with the ESA.

*Id.* at 1130.

231. Judge Porfilio wrote the majority opinion and was joined by Judge Seymour, who wrote the concurring opinion in which Judge Porfilio joined. *Id.* at 1138 (Seymour, J., concurring). Neither opinion explains this curious arrangement. One can only surmise that the judges were reluctant to base their majority opinion on a doctrine—the “unmistakable terms” doctrine of federal contract law—that had been “largely ignored in this litigation,” and not even mentioned in the government’s briefing. *See id.* at 1139 n.1.

232. *Id.* at 1139, citing *United States v. Winstar Corp.*, 518 U.S. 839, 877–78 (1996) (opinion of Souter, J.).

233. *Id.* at 1139.

234. *Id.* at 1145–46 (Kelly, J., dissenting). Judge Kelly devoted much of his dissent to examining specific contract provisions and finding that none provides discretion to reduce water deliveries under the ESA. Most significantly, he concluded that the contract terms shielding the government from liability for water shortages “are defensive in nature, and to interpret them as affirmative grants of discretion to enforce the ESA and reduce contract deliveries in the absence of a shortage does violence to their language and intent.” *Id.* at 1151.

235. *Id.* at 1153–57.

federal power, which the dissent found absent here.<sup>236</sup>

The Tenth Circuit's decision prompted a petition for en banc rehearing, but within months the panel's decision had been vacated as moot.<sup>237</sup> Nonetheless, the case precipitated a flurry of legal activity, including issuance of a new BO for project operations, Congressional enactments immunizing the San-Juan Chama Project from the ESA and the new BO from legal challenge, and settlement of all issues involving the City of Albuquerque.<sup>238</sup> A dispute persists, however, over USBR's discretion to operate the Middle Rio Grande Project to meet ESA requirements.<sup>239</sup> In November 2005, Judge Parker refused to vacate his earlier decisions on USBR discretion regarding that project, and instead entered a final judgment incorporating those decisions as they relate to the Middle Rio Grande Project.<sup>240</sup> As of this writing, the matter is once again up on appeal before the Tenth Circuit; more than five years after Judge Parker first ruled that USBR has discretion to reduce deliveries to water users on the Rio Grande, the matter remains unresolved.<sup>241</sup>

Although the Middle Rio Grande has been ground zero for the legal dispute over USBR project operational discretion, the basic question in the *Silvery Minnow* litigation would be the same at many projects.<sup>242</sup> Briefly stated, the question for any project is whether

236. *Id.* at 1148–49.

237. *See* *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1218, 1222 (10th Cir. 2004). The court found the appeal moot for various reasons, including a subsequent Congressional enactment relating to the San Juan-Chama Project, the effective expiration of Judge Parker's injunction, and favorable climatic conditions that had resulted in better habitat for the minnow. *Id.* at 1219–21.

238. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 1003, 1007, 1011 (D.N.M. 2005), explains these various developments.

239. *Id.* at 1009 (scope of USBR's discretionary authority to operate the Middle Rio Grande Project to benefit the minnow "remains a live and justiciable issue").

240. *Id.* at 1015–16. The court explained that his decision would allow the parties "another opportunity to appeal the important discretion issue as it relates to the MRGP." *Id.* at 1011.

241. *Rio Grande Silvery Minnow v. Keys*, Nos. 05-2399, 06-2020, and 06-2021 (10th Cir. filed Dec. 2005–Jan. 2006).

242. Shortly before the Tenth Circuit's *Silvery Minnow* decision, the U.S. District Court for the District of Columbia decided another case involving USBR project operations, this time on the Lower Colorado River. *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003). In that case, plaintiffs argued that the Interior Department had a duty to consult more broadly on its operation of federal water projects on the Lower Colorado, a stretch of river where the allocation of water is dictated by a unique set of federal statutes, U.S. Supreme Court decrees, interstate agreements, and international treaties known as the "Law of the River." *See id.* at 57–58. Interior argued that it had no duty to consult over the impact



under the reclamation statutes, water rights, and contracts governing the project, USBR has discretion to operate the project to benefit listed species, if that operation could harm traditional project beneficiaries.<sup>243</sup> The Tenth Circuit's vacated opinion in the *Silvery Minnow* case indicates how complex that question can be, and the *NAHB* decision has added another wrinkle to the analysis. With the caveat that each project has its own legal regime, the remainder of this section offers some general observations on this question that will be relevant to most if not all USBR projects.

## B. Legal Considerations Regarding USBR Project Operations and Discretion

### 1. Operating a Water Project is an Inherently Discretionary Activity

Cases applying 50 C.F.R. § 402.03 to a particular federal agency action typically focus intensively on the law applicable to that action, inquiring whether that governing law gives the agency the kind of discretion that would trigger ESA § 7.<sup>244</sup> In the context of USBR project operations, however, it seems appropriate to begin by considering the nature of the activity itself.

Operating a federal water project is highly complex, partly

of its operations on listed species living exclusively in Mexico for two reasons: the Law of the River (especially a Supreme Court decree) prohibited the agency from increasing water deliveries to Mexico, and the agency had no control over the species' habitat in Mexico because water was managed by Mexico once it crossed the border. The court agreed that the agency was not required to consult over its impacts on Mexican species for these reasons, concluding that "it seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water." *Id.* at 69.

243. Although *Defenders of Wildlife v. Norton, id.*, held that Interior lacked discretion to consult on the impacts of its operations on certain listed species, that decision may not translate to other federal water projects because of the unique nature of the Law of the River (especially regarding deliveries to Mexico), plus the fact that the species involved were beyond the territory and control of the United States. Both legally and factually, the *Silvery Minnow* case is far more representative of most USBR projects that may affect a listed species than *Defenders of Wildlife v. Norton*.

244. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2537 (2007) (CWA § 402(b) leaves EPA no discretion to consider listed species in deciding whether to transfer permitting authority to a state); see also *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975–77 (9th Cir. 2003) (High Seas Fishing Compliance Act gives agency discretion to protect sea turtles in issuing permits for fishing vessels.).

because USBR must manage the project to meet an array of legal obligations, such as irrigation, flood control, recreation, power generation, and meeting tribal water needs.<sup>245</sup> Even if the law were relatively simple, however, USBR would face major practical challenges in determining how much water to store and release on any given day in light of uncertainty about available water supplies, demands for water and power, and other variables. Consider the following description of USBR's difficulties in managing Upper Klamath Lake, part of the Klamath Project:

The Bureau of Reclamation must manage water resources carefully in order to meet its competing purposes and obligations. This need to strike a proper balance is particularly challenging because Upper Klamath Lake is relatively shallow and therefore, the Klamath Project's storage capacity is limited. Water levels in the Lake vary from year to year, depending to a significant extent upon the previous winter's snowfall and temperature, and on precipitation conditions during the spring and summer.

In order to prepare Project operation plans, the Bureau of Reclamation relies on the Natural Resources Conservation Service ("NRCS") Streamflow Forecast for key areas in the Upper Klamath Basin. The NRCS forecast period runs from April 1 to the end of the current water year, September 30. NRCS issues its forecasts on a monthly basis, between January and June. The reliability of these forecasts increase [sic] with each month, as the forecast period becomes shorter. Weather changes during the year, however, (for example, due to unusually hot and dry conditions, or unusually rainy conditions) may significantly affect Upper Klamath Lake inflows as well.<sup>246</sup>

Thus, for each of its projects USBR must constantly assess its duties, the available facts, and predictions about the future, make its best decisions in light of these factors, and make changes as circumstances dictate. In short, if a discretionary action is one that

245. *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1231 (N.D. Cal. 2001) (describing USBR's legal duties in managing the Klamath Project, including water supply contracts for irrigation, delivering water to national wildlife refuges, honoring reserved water rights of tribes, protecting tribal trust resources including salmon, and complying with ESA § 7). While not every project is operated for all of these purposes, each is very important to the overall Reclamation program. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, BRIEF HISTORY OF THE BUREAU OF RECLAMATION, <http://www.usbr.gov/history/BRIEFHist.pdf> (last visited Nov. 11, 2007).

246. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 138 F. Supp.2d at 1231 (internal citations omitted).

involves an exercise of judgment,<sup>247</sup> then operating a large, multi-purpose federal water project is about as discretionary as it gets.<sup>248</sup>

For this reason, USBR project operations are very different from the kinds of agency action that courts have held to be non-discretionary under § 402.03, such as transfer of permitting authority from EPA to a state (*NAHB*) or approval of a logging road across public lands under an existing agreement (*Seneca*). Those cases involved a one-time decision by a federal agency in response to a specific request from a non-federal entity, and the only question for the agency was whether that request met an established set of defined criteria. One might say that those non-discretionary actions involved little more than an agency reviewing an application against a prepared checklist and deciding whether to stamp the application “approved” or “disapproved.” Operating a water project, by contrast, is an ongoing, dynamic, multi-factor, forward-looking exercise—an activity that not only allows for agency discretion, but demands it.

## 2. No General Statute Strips USBR of Operating Discretion.

In the *Silvery Minnow* litigation, both the District Court and Tenth Circuit opinions analyzed the discretion issue by combing through the statutes and contracts relevant to two specific Reclamation projects in New Mexico, searching for language that would provide USBR the discretion to reduce water deliveries to existing users in order to preserve the minnow’s last remaining habitat in the Rio Grande.<sup>249</sup> Judge Parker and the Tenth Circuit majority found that discretion, primarily in contract provisions;<sup>250</sup> Judge Kelly, the Tenth Circuit dissenter, emphatically did not.<sup>251</sup> In light of the recent *NAHB* decision, however, it is not clear that any

247. See *NAHB*, 127 S. Ct. at 2535 (agency discretion presumes an exercise of judgment regarding a particular action).

248. As stated by the Ninth Circuit in a recent case involving operation of the vast, multi-faceted Central Valley Project, “[T]he Bureau’s is an extremely difficult task: to operate the country’s largest federal water management project in a manner so as to meet the Bureau’s many obligations. Recognizing this difficulty, Congress granted the Bureau considerable discretion in determining how to meet those obligations.” *Cent. Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1027 (9th Cir. 2006).

249. See *supra* notes 234–235 and accompanying text.

250. See *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 994, 996 (D.N.M. 2002); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1129 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004).

251. *Silvery Minnow*, 333 F.3d 1109, 1145 (Kelly, J., dissenting).

of the judges in *Silvery Minnow* have been asking the right question.

The majority opinion in *NAHB* rests on the conclusion that a federal *statute*, the Clean Water Act, prohibits the EPA from considering the needs of endangered species in deciding whether to delegate permitting authority to a state.<sup>252</sup> The Court interpreted § 402.03 to mean that ESA § 7 does not apply to actions that a statute requires an agency to take. This interpretation, it reasoned, “gives effect to the ESA’s provision, but also comports with the canon against implied repeals because it stays § 7(a)(2)’s mandate where it would effectively override otherwise mandatory statutory duties.”<sup>253</sup> Thus, according to the words and logic of *NAHB*, an agency is free from § 7(a)(2) duties where a federal *statute* imposes a duty that leaves no room for ESA compliance.

No generally applicable statute strips USBR of discretion in operating its projects. To the contrary, the agency has had authority since the original 1902 Reclamation Act “to perform any and all acts and to make such rules and regulations as may be necessary and proper” to implement the statute.<sup>254</sup> The 1902 Act also authorized and directed the Interior Secretary “to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act.”<sup>255</sup> Far from ordering USBR to manage project water in one specific way, these longstanding provisions seem to provide USBR with wide discretion to do what is “necessary and proper” in operating projects.

Some might argue that § 8 of the 1902 Act imposes a mandatory duty on USBR to operate its projects in accordance with state water laws, thus depriving the agency of discretion to consider listed species in project operations (except where state law allows).<sup>256</sup> Even under *California v. United States*, however, USBR must follow state-law requirements only if they are “not inconsistent with

252. *NAHB*, 127 S. Ct. at 2532–33. The Court framed the issue as one of implied repeal, *id.* at 2532–33, and that rationale would apply only if an agency’s duties under ESA § 7 were to conflict with a duty imposed by another federal statute.

253. *Id.* at 2534.

254. Reclamation Act, ch. 1093, § 10, 32 Stat. 390 (codified at 43 U.S.C. § 373 (2007)).

255. Reclamation Act, ch. 1093, § 6, 32 Stat. 389 (codified at 43 U.S.C. § 491 (2007)).

256. In his *Silvery Minnow* dissent, Judge Kelly insisted that allowing USBR “to consult and presumably reallocate water . . . is in considerable tension” with Section 8 and with Supreme Court authority “recognizing that the federal government generally must respect state-law water rights . . . .” 333 F.3d 1109, 1157–58 (10th Cir. 2003) (Kelly, J., dissenting).

congressional directives.”<sup>257</sup> Reclamation statutes beyond § 8 also restrict USBR’s flexibility to a limited extent; for example, § 9(c) of the 1939 Reclamation Project Act<sup>258</sup> allows the agency to enter into contracts to supply water to cities or to furnish electric power from its projects, but only if, “in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes.”<sup>259</sup> That provision shows an intent to preserve irrigation over other uses, but it only applies to new contracts for non-irrigation purposes, and even there it still places the decision “in the judgment of the Secretary.”

One also might argue that the cases applying § 402.03 did not ask whether the federal agency had *any* discretion in taking a particular action, but rather, whether it had discretion to weigh the needs of listed species in making the decision. While that is true, those cases all involved a legal framework that required an agency to make a decision based on certain defined criteria that seriously constrained the agency’s discretion; the question in those cases was whether that limited discretion left the agency any room to protect the species in question.<sup>260</sup> The question in those cases was not whether the relevant law had affirmatively granted the agency discretion to protect listed species, but rather, whether the law had foreclosed that discretion by specifying the factors the agency could consider in making a particular decision. In operating its projects, USBR simply does not operate within tight statutory limits that would raise a serious question about what it can do with the little discretion it has remaining.

Congress has not imposed mandatory, statutory duties that apply generally to the operation of all Reclamation projects, but may establish such duties for one particular project, thus eliminating

257. 438 U.S. 645, 678 (1978). Moreover, *California v. United States* directly or indirectly identified a number a congressional directives that would effectively preempt state law. See Reed D. Benson, *Deflating the Deference Myth: National Interests v. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 280 (2006).

258. Reclamation Project Act of 1939, ch. 418, § 9(c), 53 Stat. 1187 (codified at 43 U.S.C. § 485h(c) (2007)).

259. 43 U.S.C. § 485h(c) (2007).

260. See, e.g., *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. at 2537 (CWA § 402 has exclusive list of nine criteria, leaving no room for EPA to consider the protection of listed species); *EPIC v. Simpson Timber Co.*, 255 F.3d 1073, 1080–81 (9th Cir. 2001) (permit gave agency discretionary power to impose protections for the spotted owl, but not species listed after the permit was issued).

operational discretion for purposes of § 402.03 and ESA § 7.<sup>261</sup> Congress enacted such a statute in response to the Tenth Circuit's decision in the *Silvery Minnow* case<sup>262</sup> when it prohibited USBR from using its discretion, "if any, to restrict, reduce or reallocate any water stored in Heron Reservoir or delivered pursuant to San Juan-Chama Project contracts . . . to meet the requirements of the Endangered Species Act . . ." <sup>263</sup> That sort of specific, unambiguous language would certainly be effective in freeing USBR from its duties under § 7(a)(2). But because few projects have anything like this San Juan-Chama statute, there is only a weak argument that all the others must be operated according to a non-discretionary statutory mandate under the *NAHB* test.

### 3. Water Supply Contracts do not Divest USBR of Operating Discretion.

In the absence of a statute that would deprive USBR of the discretion needed to trigger its duties under ESA § 7,<sup>264</sup> the government's position has been that its contracts with certain water users leave it no discretion to reduce deliveries to those users, regardless of the ESA. As summarized by the Tenth Circuit in *Silvery Minnow*, "BOR contends that the Repayment Contracts define their obligations under the ESA. Because the contracts do not expressly permit a reduction in deliveries of project water below their fixed amounts, BOR maintains it lacks discretion to comply with the ESA" under 50 C.F.R. § 402.03.<sup>265</sup> In other words,

261. Of course, Congress has imposed other mandatory, statutory duties on the Reclamation program from the very outset. For example, § 5 of the 1902 Act limited the number of acres on which any landowner could receive project water, and also required that the landowner "be an actual bona fide resident on such land." Reclamation Act of June 17, 1902 § 5, ch. 1093, 32 Stat. 389, codified at 43 U.S.C. § 431(2007).

262. *See* *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 1003, 1007 (describing and citing to the relevant provisions of appropriations acts for fiscal year 2004 (imposing one-year restriction on use of San Juan-Chama Project water) and fiscal year 2005 (making the restriction permanent)).

263. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137 § 208, 117 Stat. 1827 (Dec. 1, 2003).

264. The 2003 appropriations rider regarding the San Juan-Chama Project, *id.*, was enacted after the Tenth Circuit's decision in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), and before that decision was vacated as moot, 355 F.3d 1215 (10th Cir. 2004). However, no such statute applies to the Middle Rio Grande Project, where USBR's discretion to operate for the benefit of the minnow remains a live issue. *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 1003, 1009 (D.N.M. 2005).

265. 333 F.3d at 1127 (footnote omitted).

the government maintains that the contracts represent a binding commitment by USBR that forces the agency to operate its projects in a way that ensures full water supplies to the contract users, leaving no authority to reduce those supplies to avoid jeopardy to listed species.

There are several fundamental problems with this argument. Most obviously, these contracts are not statutes, and so they do not present the “implied repeal” problem that was fundamental to the Court’s analysis in *NAHB*.<sup>266</sup> Further, no statute elevates these contracts to the status of a nondiscretionary mandate that USBR must meet regardless of any other legal responsibility. The *NAHB* majority opinion repeatedly emphasizes that an agency need not comply with ESA § 7(a)(2) if its requirements seemingly conflict with another mandatory federal *statute*.<sup>267</sup> Although *NAHB* does not state that *only* statutorily required actions can be non-discretionary under § 402.03, neither does it give any indication that anything else would qualify, and no other argument for avoiding the statutory mandates of ESA § 7 would fit the *NAHB* rationale.<sup>268</sup>

The contracts themselves do not lock USBR into operating its projects solely for the benefit of the contract water users. The agency apparently takes the position that it has no discretion even to take actions that would increase the *risk* that these users will not receive a full water supply from its projects.<sup>269</sup> Many contracts

266. See *supra* notes 176–185 and accompanying text.

267. 127 S. Ct. 2518, 2533 (ESA “alters § 402(b)’s statutory command,” and would also “result in the implicit repeal of many additional otherwise categorical statutory commands”); *id.* at 2534 (Section 402.03 resolves the problem by excusing compliance with § 7 “when the agency is forbidden from considering such extrastatutory factors,” and is reasonable because it does not interpret § 7 “to override express statutory mandates”); *id.* at 2535 (“an agency cannot be considered the legal cause of an action that it has no statutory discretion *not* to take”) (emphasis in the original); *id.* at 2536 (“§ 7(a)(2)’s no-jeopardy mandate covers only discretionary agency actions and does not attach to actions . . . that an agency is *required* by statute to undertake . . .”) (emphasis in the original).

268. See *id.* at 2536 (§ 402.03 is reasonable interpretation of statute “because it gives effect to the ESA’s provision, but also comports with the canon against implied repeals because it stays § 7(a)(2)’s mandate where it would effectively override otherwise mandatory statutory duties”).

269. USBR evidently took this position in 2002, when it refused to release water from Heron Reservoir at the end of the irrigation season for the benefit of the silvery minnow, even though users had already received all their contracted water for that year. The agency refused to release the water because it was concerned that 2003 and future years would also be dry, and chose to hold all available water in the reservoir so as not to risk cutting future deliveries to contract users. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222, 1231-34 (D.N.M. 2002). The court wrote, “The BOR gives the benefit of the doubt to a dire

provide for delivery of a specific quantity of water,<sup>270</sup> but nearly all USBR contracts also have terms that shield the government from liability for failing to deliver a full water supply on account of drought or other causes.<sup>271</sup> The government argues that these hold-harmless clauses apply “only to circumstances in which it is ‘impossible’ to deliver the fixed contractual water, not to situations in which it *creates* the shortage for purposes of complying with the ESA.”<sup>272</sup> That argument conflicts not only with the broad “other causes” language contained in many of these contract provisions, but also with cases interpreting such provisions in the context of requirements imposed by the ESA and other statutes.<sup>273</sup> Judge Kelly, dissenting in *Silvery Minnow*, argued that these clauses are “exculpatory” and “defensive in nature, and do not represent an affirmative grant of discretion to enforce the ESA.”<sup>274</sup> Nonetheless, they represent a recognition that the contracts do not guarantee a fixed quantity of water, and that drought is only one circumstance that may prevent the project from delivering a full supply. Judge Kelly is probably right in arguing that these provisions do not provide an affirmative grant of discretion to USBR, but he is almost certainly wrong in suggesting that without such an affirmative grant of discretion, the contracts alone would free USBR of any duties to comply with ESA § 7(a)(2).

drought prediction, not to the silvery minnow. BOR and the FWS propose to put the silvery minnow in certain jeopardy now based on the assumption of continued drought conditions in the future.” *Id.* at 1233. The court also noted that in deciding whether to hold water in the reservoir or release it for the minnow in 2002, “the potential harm to [project] contractors in releasing water from Heron Reservoir was emphasized while the harm to the silvery minnow was downplayed.” *Id.* at 1234.

270. For example, Albuquerque’s contract for San Juan-Chama Project water specifies 101,800 acre-feet. *See Silvery Minnow*, 333 F.3d at 1123–24.

271. *See id.* at 1124, 1126. The language of these clauses varies somewhat from contract to contract, but commentators and courts have noted that clauses of this type appear in USBR contracts “with high consistency.” *See id.* at 1146 (Kelly, J., dissenting) (quoting Benson, *supra* note 37, at 393–94).

272. *See id.* at 1127 (emphasis in original). For example, the failure of the newly completed Teton Dam made it impossible for USBR to perform its water delivery contracts. *See Fremont-Madison Irrigation Dist. v. United States*, 763 F.2d 1084, 1088 (9th Cir. 1985) (denying recovery for water losses caused by Teton Dam failure, based in part on contract language absolving the U.S. of liability for losses caused by failure of storage facilities).

273. *See, e.g., O’Neill v. United States*, 50 F.3d 677, 682–83 (finding a clause excusing government liability for failure to deliver water “on account of errors in operation, drought, or any other causes” covered shortages caused by requirements of the ESA and Central Valley Project Improvement Act).

274. *See Silvery Minnow*, 333 F.3d at 1151 (Kelly, J., dissenting).



This last point is reinforced by a basic principle of federal contract law, the sovereign acts doctrine. The Supreme Court has stated this principle as follows:

While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, we have declined in the context of commercial contracts to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract. Rather, we have emphasized that without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms. Therefore, contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign.<sup>275</sup>

The Ninth Circuit applied this principle to a USBR contract as early as 1990,<sup>276</sup> and used it to uphold the application of the federal environmental laws to such contracts in 1993.<sup>277</sup> In the Tenth Circuit's vacated *Silvery Minnow* opinion, both majority judges produced a concurring opinion stating that because the contracts did not waive the government's sovereign authority in unmistakable terms, the ESA "modifies the contracts because the contracts do not affirmatively state that future legislation will not apply."<sup>278</sup> Most recently, the Court of Federal Claims—in a remarkably thorough and scholarly opinion on this subject—relied on the sovereign acts doctrine to hold that USBR did not breach its contracts with Klamath Project water users when it withheld water for endangered species in 2001,<sup>279</sup> resulting in shortages for project

275. *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) (quotations omitted).

276. *See Peterson v. U.S. Dep't of Interior*, 899 F.2d 799, 811–12 (9th Cir. 1990) (upholding "hammer clause" of 1982 Reclamation Reform Act regarding delivery of project water to lands in excess of legal acreage limit).

277. *See Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1406 (9th Cir. 1993) (upholding potential modification of contract terms resulting from application of ESA or National Environmental Policy Act).

278. *Silvery Minnow*, 333 F.3d at 1139 (Seymour, J., concurring). This concurring opinion stated that it was applying the unmistakable terms doctrine, but the principle is the same one stated in *Bowen*. *See supra* note 276 and accompanying text.

279. *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. 677 (2007). Having found that enactment of the ESA was a sovereign act within the terms of the doctrine, the court concluded that:

irrigators.<sup>280</sup>

The 1996 case of *United States v. Winstar Corp.*,<sup>281</sup> in which the Supreme Court produced four opinions but none gained a majority of votes, has created significant uncertainty about the future application of the sovereign acts doctrine to federal contracts.<sup>282</sup> In both the *Silvery Minnow* concurrence and the Klamath case, however, the courts sorted through the *Winstar* mess and concluded that the doctrine does cover the application of the

[I]f the sovereign acts doctrine is applicable, the government is not liable for contract violations caused by a sovereign act, unless the unmistakability doctrine is triggered. . . . Here, as plaintiffs readily admit, there are no unmistakable terms in any of the contracts precluding the government from exercising its sovereign powers—indeed, the water shortage clauses in most of the contracts reflect the opposite intent. Instead, plaintiffs assert that any silence of the contracts on this point should be read in their favor, as precluding the United States from enforcing the ESA. That claim, however, is decidedly contrary to the law regarding the unmistakability doctrine and, indeed, would turn that doctrine on its head.

*Id.* at 695 (citations omitted).

280. Another recent case from the Court of Federal Claims, however, states that the sovereign acts doctrine would not have protected the government from liability for failing to deliver a full water supply from the New Melones Dam because it would not have been *impossible* for the government to do so and still meet its duties under the environmental laws. *Stockton East Water Dist. v. United States*, 75 Fed. Cl. 321, 372–73 (2007). That conclusion is dictum, however, because the court determined for other reasons that the plaintiff had failed to prove that USBR breached the contracts. *Id.* at 376. On plaintiffs' motion for reconsideration, the court rejected the government's arguments that it had misapplied the sovereign acts doctrine, and explained why it had required the government to show that performance was impossible. *Stockton East Water Dist. v. United States*, 76 Fed. Cl. 497 (2007). There is an active disagreement among the courts about whether the government must show impossibility of performance in order to gain the benefit of the sovereign acts doctrine. *See* *Stockton East Water Dist. v. United States*, 76 Fed. Cl. at 508–12 (impossibility is required); *Klamath Irrigation Dist. v. United States*, 75 Fed. Cl. at 691–95 (impossibility is not required). However, even if the government needs to show that it cannot possibly comply with both its ESA duties and its contracts, it may be able to meet this burden in some circumstances. For example, the government argued that it couldn't possibly give water to the irrigators and the silvery minnow at the end of the 2002 irrigation season. *See* *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222, 1225–26 (D.N.M. 2002).

281. *United States v. Winstar Corp.*, 518 U.S. 839 (1996). In *Winstar*, the Court found the government liable for breaching contracts with certain financial institutions. A later-enacted federal statute had effectively nullified a key element of those contracts, and the Court determined that the sovereign acts doctrine did not shield the government from liability in that case.

282. For an excellent analysis of *Winstar* and a discussion of its potential effect on future contract disputes—including those involving USBR contracts—see Michael W. Graf, *The Determination of Property Rights in Public Contracts after Winstar v. United States: Where Has the Supreme Court Left Us?* 38 NAT. RESOURCES J. 197 (1998).

Endangered Species Act to USBR contracts.<sup>283</sup> The *Winstar* plurality opinion seemed to narrow the sovereign acts doctrine by stating that it applies only in circumstances where sovereign power would be blocked<sup>284</sup>—but sovereign power would indeed be blocked if the contracts left USBR with no power to protect species under ESA § 7(a)(2), and so that crucial aspect of *Winstar* is no help to the government or the contract users in this context.<sup>285</sup> Given that the ESA is clearly a “sovereign act” that was not intended to change contract terms for the government’s benefit, and that very few if any USBR contracts could be construed as unmistakably surrendering the government’s sovereign powers, it would certainly appear that this basic principle of federal contract law does apply in this context.<sup>286</sup>

Here again, the sovereign acts doctrine does not affirmatively grant discretion for purposes of § 402.03, but it does not need to. The question is whether water supply contracts *eliminate* USBR’s discretion so as to preclude it from meeting its mandatory duties under ESA § 7. Under the sovereign acts doctrine, the contracts could do so only if they surrendered the government’s powers in unmistakable terms. USBR simply did not abandon all discretionary power when it entered into contracts to supply project water. To the contrary, under basic principles of federal law, Congress essentially assured that the government could continue to exercise ongoing sovereign power when it provided for Reclamation project water to be delivered under contract.<sup>287</sup>

283. In *Silvery Minnow*, the two concurring judges analyzed both the *Winstar* plurality and dissenting opinions and concluded that either approach would leave the doctrine applicable to the dispute over contracts and the ESA on the Rio Grande. 333 F.3d at 1140–41 (Seymour, J., concurring). In *Klamath Irrigation District*, 75 Fed. Cl. at 682–95, the court considered and rejected a variety of plaintiffs’ arguments based on *Winstar*.

284. 518 U.S. at 879. The plurality found that the government could not rely on the doctrine in that case, because the *Winstar* plaintiffs sought only damages, and their requested relief did not amount to an exemption from the new law. *Id.* at 881–82.

285. See *Silvery Minnow*, 333 F.3d at 1140 (Seymour, J., concurring).

286. See *Klamath Irrigation District*, 75 Fed. Cl. at 683–85, 695 (plaintiffs admit that Klamath Project contracts have no such terms). The government has argued that the sovereign acts doctrine does not apply to USBR contracts because the ESA has not directly required that project water be dedicated to species habitat. Brief of Federal Defendants-Appellants at 54–55, *Rio Grande Silvery Minnow v. Keys*, Nos. 05-2399, 06-2020, and 06-2021 (10th Cir. filed Dec. 2005–Jan. 2006). The government has cited no authority to indicate that the doctrine applies only where the statute itself, as opposed to action by the regulatory agencies entrusted by Congress with administering the statute, creates a conflict with contractual obligations.

287. Contracts have been a part of the Reclamation program from its early days, and a

Under § 402.03 as interpreted by the courts, USBR's obligation to consult in operating its projects comes down to the existence or absence of agency discretion. This discretion question will be answered primarily by standard legal analysis, through the interpretation of statutes, contracts, and cases. But as with any ESA controversy, serious policy issues are bubbling just below the surface of the legal dispute. The remainder of this section identifies policy concerns that relate to USBR's project operation duties under § 7.

### C. Policy Concerns Relating to Exempting Project Operations from Section 7

Underlying the legal dispute about agency discretion is a policy difference over the proper application of § 7 to federal projects that have supplied water for irrigation and other purposes since before the ESA was enacted. Conservationists tend to regard § 7 as an essential tool for ensuring the continued existence of aquatic and riparian species whose habitats have been dramatically altered by USBR projects (among other factors). Water users, on the other hand, believe that the water from these projects belongs to them because they have used it for years and have met their obligations under their government contracts. These two camps may agree generally on the desirability of preserving both irrigation and endangered species, but not on whether it is appropriate for the ESA to shift project water from farmers to fish. Aside from that simple question of values, however, the question of § 7(a)(2)'s application to project operations raises some more nuanced issues.

Excluding project water deliveries from the § 7 consultation and no-jeopardy requirements would represent a change from established practice on many projects, where USBR has been consulting for several years on the effects of its operations on listed species.<sup>288</sup> In other words, "no discretion for USBR" means less

requirement of the program since 1926, when Congress prohibited delivery of water from any new project "until a contract or contracts in form approved by the Secretary shall have been made with an irrigation district or irrigation districts," providing for payments in annual installments over a period not exceeding 40 years. Act of May 25, 1926, ch. 383, 44 Stat. 649 (codified at 43 U.S.C. § 423e). By then, however, many contracts were already in existence, and the statute authorized the Secretary to amend existing contracts. 44 Stat. 648, codified at 43 U.S.C. § 423d.

288. This is true at least for projects located within the jurisdiction of the Ninth Circuit. For example, FWS issued its first BO on the effects of Klamath Project operations on Lost

protection for listed species affected by Reclamation water deliveries, especially as to those projects where ESA consultations have already occurred. This rollback could mean extinction in the wild for the Rio Grande silvery minnow and serious trouble for other species whose survival depends on adequate water from a USBR project. Moreover, it is highly unlikely that any other (existing) federal law would fill the resulting void in regulatory protection for these species, given the basic premise that project water deliveries are so firmly anchored in legal concrete that even ESA § 7(a)(2) cannot budge them.<sup>289</sup>

It is true that USBR project operations and associated water uses would remain subject to ESA § 9 and its prohibition on “take” of a listed animal.<sup>290</sup> Both in practice and in policy, however, § 9 enforcement makes a poor substitute for § 7 consultation in its application to Reclamation projects. In practice, § 9 cases have always been rare; despite the relatively clear causal links between water withdrawals, dry streams, and dead fish,<sup>291</sup> there is still no reported decision finding a “take” resulting from diversions that dewatered a river.<sup>292</sup> A dramatic increase in § 9 enforcement

River and shortnose suckers in 1992. See *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999). NMFS produced its first BO on CVP operations on winter Chinook salmon in 1993. See *Barcellos & Wolfsen v. Westlands Water Dist.*, 849 F. Supp. 717, 724 n.13 (E.D. Cal. 1993). In revising the “Operating Criteria and Procedures” governing operation of the Newlands Project (Nevada), USBR consulted with FWS on effects of the revisions on the cui-ui fish as early as 1988. See 62 Fed. Reg. 66,441, 66,463 (Dec. 18, 1997).

289. In California, a state statute—Section 5937 of the Fish and Game Code—may protect fish populations below USBR dams. In litigation over the operation of Friant Dam, a part of the CVP, the courts held that USBR was subject to § 5937 because that statute was a state law requiring USBR compliance under § 8 of the 1902 Reclamation Act. *Natural Resources Defense Council v. Patterson*, 333 F. Supp. 2d 906, 919–21 (reviewing law of the case regarding application of § 5937 to USBR); *id.* at 924–25 (holding that USBR has violated § 5937 in operating Friant Dam).

290. See *supra* notes 54–61 and accompanying text.

291. One should not underestimate, however, the conceptual and practical challenges of proving “take” of listed fish in the context of water management and use. See James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 609–23 (analyzing several such problems).

292. For a discussion of the shortcomings of § 9 enforcement in protecting listed species, see Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 61 (2004). This article notes an unreported federal court decision from Idaho finding take by a water user. The Ninth Circuit later reversed and remanded, holding that the district court improperly granted summary judgment in light of a factual dispute about the harm caused by defendant’s diversions. *Idaho Watersheds Project v. Jones*, No. 03-35870, slip op. at 3 (9th

actions seems unlikely, although if § 7 no longer applies to USBR project water deliveries, it is reasonable to expect environmental or fishing groups to bring a few more cases. But even if such cases restore some measure of protection for listed species, § 9 is inferior to § 7 in the context of USBR project operations. Compared to the consultation process, “take” enforcement will mean more decisions made in the federal courts rather than the expert agencies, greater focus on establishing past harm to individual listed animals rather than developing “reasonable and prudent alternatives” to conserve the species in the future,<sup>293</sup> and increased scrutiny of the actions of private water users rather than the government’s operations.<sup>294</sup>

Collaborative processes are another potential source of protection for listed species, and USBR has argued in favor of this approach for addressing ESA issues associated with project water use.<sup>295</sup> Existing cooperative efforts regarding listed species and USBR projects, however, got their start primarily because key players—including water users and western state governments—were concerned that § 7 consultations on project operations might result in reduced deliveries for existing uses.<sup>296</sup> For example, the

Cir. Apr. 18, 2005).

293. The ESA implementing rules define “reasonable and prudent alternatives” to mean “alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency’s legal authority and jurisdiction, that is [sic] economically and technologically feasible,” and that the Service believes would avoid jeopardy to the species or adverse modification of critical habitat. 50 C.F.R. § 402.02.

294. Environmental plaintiffs have sometimes (successfully) sued government agencies rather than private resource users, arguing that the government violated § 9 by authorizing private activities that resulted in take. For example, the First Circuit held that the State of Massachusetts violated § 9 by issuing permits for fixed fishing gear to be placed in that state’s coastal waters, where that gear was harming endangered whales. *Strahan v. Coxe*, 127 F.3d 155, 162–66 (1st Cir. 1997). But if USBR were to establish that it had no discretion to reduce project water deliveries for purposes of § 7, it would have an excellent argument that its operations are not the legal cause of harm to the species under § 9. Thus, the focus would shift to the water users themselves, whose diversions could be viewed as the proximate cause of any alleged harm to the protected species. *See generally* Rasband, *supra* note 323, at 623–29 (arguing against “vicarious liability” for government agencies under ESA § 9, especially in the context of water use in the West).

295. In its 2003 *Water 2025* policy statement, USBR stated that success in meeting ESA requirements “almost always requires a collaborative effort between stakeholders,” and went on to say that “the twin goals of recovery of endangered species and meeting the water needs of people cannot be attained when the issues and resources are locked into a cycle of short-term litigation and decision-making.” U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, *WATER 2025: PREVENTING CRISES AND CONFLICT IN THE WEST 20* (August 2005), available at <http://www.doi.gov/water2025/Water%202025-08-05.pdf>.

296. *See* Benson, *supra* note 324, at 74–75 (discussing importance of the ESA in

State of Wyoming has complained about the cooperative federal-state program for addressing ESA issues on the central Platte River, but has remained involved because it wants to avoid the Platte becoming “another Klamath.”<sup>297</sup> If it becomes clear that the Platte will not become the next Klamath because § 7 does not apply to the operation of USBR projects on the North Platte River, the State of Wyoming, at least, may well pick up its marbles and go home.<sup>298</sup> To the extent that ESA § 7 no longer creates uncertainty about future water deliveries from USBR projects, cooperative efforts are likely either to disband or to continue their existence primarily for public relations purposes. It is ironic that USBR has urged cooperation as the only sensible path for addressing ESA concerns associated with project water uses, while simultaneously pursuing a legal strategy that would remove the primary motivation for such efforts to make meaningful strides toward conserving listed species.

In contrast to cooperative efforts, the push to remove USBR project operations from § 7 coverage offers no “win-win” solutions. To the extent that the courts uphold the government’s position and agree that there is no discretion to reduce water deliveries despite the ESA, the users simply gain certainty and the species simply lose protection. At best it’s a zero-sum game, and if it leads to a decline in cooperative efforts and a rise in § 9 enforcement cases, the game will only get more contentious, focusing more on

motivating cooperative efforts to address water use impacts on listed species, including the “CalFed” initiative, the Carson-Truckee water settlement, and the Upper Colorado Endangered Fish Recovery Program).

297. Mike Besson, at that time the Director of the Wyoming Water Development Commission, said in 2004 that he did not like the cooperative program for endangered species recovery in the Platte River Basin, but that Wyoming would remain in the process. “What I’m trying to prevent is another Klamath.” Andrew Beck Grace, *Truce Holds on the Platte River*, HIGH COUNTRY NEWS, Aug. 16, 2004, at 3.

298. Wyoming Governor Dave Freudenthal announced in 2006 that he was signing the agreement reluctantly because “there are no good choices in this area.” Without a cooperative agreement, he wrote, Wyoming would be faced with a “federal regulatory framework in which . . . the states, municipalities, industries, and irrigators would be left subject to the whims of the federal government in the context of individual consultations—on both new and existing uses—on any project or activity in the Platte River Basin which has a federal nexus.” In signing the agreement, however, Freudenthal wrote that he took “solace from [Nebraska] Governor Heineman’s recent correspondence and his reminder that, if at any time the Program progresses in a direction counter to the best interests of Wyoming, I can push away from the table and take a different course.” Press Release, Governor Dave Freudenthal, Governor Signs On to Platte River Agreement (Nov. 27, 2006), *available at* [http://www.waterchat.com/News/State/06/Q4/state\\_061201-03.htm](http://www.waterchat.com/News/State/06/Q4/state_061201-03.htm) (last visited Nov. 11, 2007).

establishing liability and less on developing solutions.

#### IV. CONCLUSION

In the *Tulare Lake* case discussed above,<sup>299</sup> the Court of Federal Claims found that ESA restrictions had taken plaintiffs' water rights, and concluded with the following sentence: "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so."<sup>300</sup> One could disagree sharply with the court's legal analysis—and many have<sup>301</sup>—yet still perceive some basic equity in that final soundbite.

The dispute over USBR's discretion in operating its projects, however, is not a matter of compensation for water users. The question is whether the government remains "free to preserve the fish" and other imperiled species. If the answer is no, that would represent a loss of existing protection for species affected by USBR projects, an unwarranted extension of the Court's recent decision in *NAHB*, and a rollback of a statute whereby Congress once made saving species from extinction the highest of national priorities.

299. See *supra* notes 84–87 and accompanying text.

300. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001).

301. As noted by the Court of Federal Claims in another case involving a claim by irrigators that ESA restrictions had taken their water rights, "*Tulare* has been the subject of intense criticism by commentators who, *inter alia*, have challenged the court's application of a physical taking theory to what was a temporary reduction in water." *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 538 n.59 (citing three articles); see also Melinda Harm Benson, *supra* note 87, at 583–87.