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## Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande

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# Contractual Discretion and the Endangered Species Act: Can the Bureau of Reclamation Reallocate Federal Project Water for Endangered Species in the Middle Rio Grande?\*

## ABSTRACT

*The San Juan-Chama Project provides water to municipalities and irrigation interests in the Middle Rio Grande Valley of New Mexico under contracts entered into with the Bureau of Reclamation. Interests representing an endangered fish are now asserting claims for a share of this water. This article addresses the question of whether the terms of the San Juan-Chama contracts provide the Bureau of Reclamation the authority to reallocate contracted San Juan-Chama water for the Rio Grande silvery minnow in light of that agency's obligations under the Endangered Species Act. The article examines the terms of the contracts themselves and concludes that contract language can be construed to provide sufficient authority for reallocation of project water. This conclusion is strengthened if the Endangered Species Act is held to amend the project's authorizing statutes and the contracts. The Ninth Circuit case law supporting this conclusion is examined in the context of the Middle Rio Grande. The implications of the fractured Winstar opinions on the application of the unmistakable-terms canon of government contract construction are also analyzed. If parties sue to enjoin the government from reallocating water to the silvery minnow and the Ninth Circuit reasoning is adopted, the Endangered Species Act will be held to amend the contracts and permit reallocation. If not, the parties will likely be afforded damages if the government elects to reallocate water for the minnow.*

## I. INTRODUCTION

The issue of water for people versus water for endangered fish has come to a head in the Middle Rio Grande Valley of New Mexico, as it has

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and will elsewhere in the arid West. The Bureau of Reclamation has asserted that it lacks the discretion under repayment contracts with users in the Middle Rio Grande to reallocate contracted federal project water for preservation of an endangered fish, the Rio Grande silvery minnow. The Bureau of Reclamation (BOR) constructed the San Juan-Chama Project to divert and transport water from the Upper Colorado Basin to New Mexico. The City of Albuquerque (the City) and the Middle Rio Grande Conservancy District (MRGCD), the primary irrigation district in the Middle Rio Grande Valley, are major contractors for this federal project water. The City agrees with the BOR that the agency lacks discretion to reallocate water for the minnow and recently filed suit in Federal District Court, seeking declaratory and injunctive relief.<sup>1</sup> Other pending lawsuits also raise the question of the BOR's discretion and duty to reallocate San Juan-Chama contracted water for the silvery minnow.<sup>2</sup>

This article analyses one question embedded within the discretion issue: What authority to reallocate contracted San Juan-Chama water for the silvery minnow do the terms of the repayment contracts provide to the BOR in light of that agency's obligations under the Endangered Species Act?<sup>3</sup> One line of argument concludes that the BOR does have the contractual discretion to reallocate San Juan-Chama water for the minnow because the terms of the repayment contracts themselves provide the BOR the authority to reallocate project water for fish and wildlife purposes and in times of "shortage." This argument is further bolstered by the Ninth Circuit's holdings in a line of similar cases from the Central Valley of California. The Ninth Circuit held that the Endangered Species Act amends and supplements reclamation law and contracts and thus the requirement to

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1. See *City of Albuquerque v. United States ex rel. Babbitt*, No. CIV 99-00985 (D.N.M. filed June 22, 2000).

2. See, e.g., *Rio Grande Silvery Minnow v. Martinez*, No. CIV 99-01320 (D.N.M. filed Nov. 15, 1999). Due to a change in administrations, the case is now named *Rio Grande Silvery Minnow v. McDonald*; however, the case number remains the same.

3. Other questions embedded within the discretion issue include whether reallocation for endangered species would violate the authorizing statutes and interstate compacts that require project water to be used for beneficial and consumptive uses within New Mexico. See *Upper Colorado River Basin Compact*, art. III, ch. 48, 63 Stat. 31 (1949) (current version at 43 U.S.C. § 620o (1994)); *Colorado River Storage Project Act*, ch. 203, 70 Stat. 105 (1956) (current version at 43 U.S.C. §§ 620-620o (1994)); *San Juan-Chama Project Act*, Pub. L. No. 87-483, 76 Stat. 96 (1962) (current version at 43 U.S.C. § 620a (1994)). Another issue is whether the government's reallocation of federal project water for endangered species purposes constitutes a Fifth Amendment taking. See, e.g., *Tulare Lake Basin Water Storage Dist. v. United States*, No. 98-101 L, 2001 U.S. Claims LEXIS 72 (Fed. Cl. Apr. 30, 2001) (holding that the government's reallocation of contracted federal project water for endangered species was a physical taking). These issues are outside the scope of this article and will not be substantively addressed.

conserve endangered species under the Act overrides the rights of the water users under their contracts for federal project water.<sup>4</sup>

A contrasting line of argument concludes that the fish and wildlife purposes included in the San Juan-Chama Project's authorizing language and in the contracts themselves are incidental to the primary purposes of water supply for irrigation and municipal needs and therefore cannot override those principal purposes. This argument may be further bolstered by *United States v. Winstar Corp.*, a U.S. Supreme Court case that limits the application of the heretofore well settled doctrine that subsequent acts of Congress, such as the Endangered Species Act, govern preexisting government contracts, such as the San Juan-Chama contracts, unless sovereign power has been surrendered in unmistakable terms.<sup>5</sup> If this unmistakable terms doctrine does not apply to the San Juan-Chama contracts, then the Endangered Species Act does not amend or supplement the contracts and the San Juan-Chama water users may have a basis for breach of contract or Fifth Amendment takings claims if San Juan-Chama water is reallocated to endangered species needs and is not available to irrigators and municipalities under the delivery terms of the contracts.

If the unmistakable terms doctrine does apply to the San Juan-Chama contracts, the contractors may have no legal basis to enjoin the government from reallocating water for the minnow. Indeed, the BOR may then have an overriding obligation under the Endangered Species Act to reallocate water as a Reasonable and Prudent Alternative to conserve and avoid jeopardizing the continued existence of the species.<sup>6</sup> However, the contractors may then have a cause of action for monetary compensation for the contracted water they did not receive.

This article examines both of these lines of argument. First, the context of the Middle Rio Grande is explained, with emphasis on the San Juan-Chama Project, the endangered Rio Grande silvery minnow, and the recent and pending lawsuits. The San Juan-Chama repayment contracts are then described, with emphasis on the contracts' specific language that may be interpreted as providing discretion for reallocation of water for fish and wildlife purposes. The issue of fish and wildlife as an incidental purpose versus irrigation and municipal supply as the principal purpose is explored in this section. The article then turns to the mandate of the Endangered Species Act and the Ninth Circuit's interpretation of similar BOR contracts,

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4. See, for example, *O'Neill v. United States*, 50 F.3d 677, 683 (9th Cir. 1995); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1209 (9th Cir. 1999), cert. denied sub nom. *Klamath Drainage Dist. v. Patterson*, 121 S. Ct. 44 (9th Cir. 1999), amended by 203 F.3d 1175 (9th Cir. 2000). Both *O'Neill* and *Klamath* are discussed further in the article.

5. 518 U.S. 839 (1996). See also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986).

6. See *infra* Part II.B.2.

which concludes that the ESA amends and supplements reclamation law and contracts and therefore provides sufficient authority for the BOR to reallocate water for endangered species purposes. The contrasting argument is also explored, with emphasis on whether the government surrendered its sovereign power to amend the San Juan-Chama contracts by subsequent acts of Congress in unmistakable terms under the recent redirection by the U.S. Supreme Court in *United States v. Winstar Corp.* The article concludes with a discussion of the implications of these issues for decision making and the course of litigation in the Middle Rio Grande and elsewhere in the arid West.

## II. THE MIDDLE RIO GRANDE CONTEXT

The Middle Rio Grande Valley, like many regions in the arid West, has seen increased urban growth overlaid on a predominantly rural and irrigation-dependent agricultural economic base.<sup>7</sup> This juxtaposition has resulted in tremendous pressure on water supplies in the Middle Rio Grande Valley. The Rio Grande is the only source of surface water in the valley, and it is fully appropriated. Pumping groundwater to support urban demand is becoming increasingly impractical as the limitations of the supply and the deleterious effects of prolonged groundwater pumping become evident.<sup>8</sup> The City of Albuquerque (the City) and the Middle Rio Grande Conservancy District (MRGCD) had the foresight in the mid-twentieth century to pursue the San Juan-Chama Project authorization and construction to divert water from the Upper Colorado River Basin for storage and release into the Rio Grande to augment native surface water supplies in New Mexico.

With the listing of the silvery minnow as an endangered species dependent on river flows, this imported water has become the subject of lawsuits involving environmental groups, the City, the MRGCD, the State of New Mexico, and the BOR and the Department of the Interior. It is within the context of these lawsuits that the issue of the government's discretion to release water for endangered species will likely be decided.

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7. See generally *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION* (William E. Riebsame ed., 1997); Pamela Case & Gregory Alward, *Patterns of Demographic, Economic, and Value Change in the Western United States: Implications for Water Use and Management*, REPORT TO THE WESTERN WATER POLICY ADVISORY REVIEW COMMISSION, August 1997.

8. See PUB. WORKS DEP'T, CITY OF ALBUQUERQUE, N.M., *WATER RESOURCES MANAGEMENT STRATEGY* 21 (Apr. 24, 1997), available at <http://www.cabq.gov/waterresources/strategytext.html>; 1 PUB. WORKS DEP'T, CITY OF ALBUQUERQUE, N.M., *ALBUQUERQUE WATER RESOURCES MANAGEMENT STRATEGY: SAN JUAN-CHAMA DIVERSION PROJECT OPTIONS* § 1.2 (1995) [hereinafter *SAN JUAN-CHAMA DIVERSION PROJECT OPTIONS*].

The following sections provide an overview of the current situation in the Middle Rio Grande and how the discretion issue has been framed there.

### A. The San Juan-Chama Project

The San Juan-Chama Project is a transmountain water diversion project that imports Colorado River water into the Rio Grande.<sup>9</sup> The San Juan-Chama water is diverted through 26 miles of tunnels in southern Colorado and northern New Mexico and is stored at Heron Reservoir prior to release to downstream contracted water users in the Middle Rio Grande Valley of New Mexico. The BOR constructed and operates Heron Reservoir.<sup>10</sup> The BOR entered into repayment contracts with several Middle Rio Grande water users, most notably the City of Albuquerque and the MRGCD, for supply of this water in accordance with the authorizing statutes and the terms of the contracts.<sup>11</sup>

This federal project water is important to the municipalities and irrigators within the Middle Rio Grande Valley. The City and the MRGCD are the two primary contractors for San Juan-Chama water, together accounting for about 70 percent of the project's firm yield.<sup>12</sup> San Juan-

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9. For a fuller description of the San Juan-Chama Project, see 1 SAN JUAN-CHAMA DIVERSION PROJECT OPTIONS, *supra* note 8, at 1-5 to 1-7.

10. Heron Reservoir was constructed in the 1960s pursuant to the San Juan-Chama Project Act, Pub. L. No. 87-483, 76 Stat. 96 (1962) (current version at 43 U.S.C. § 620a (1994)), which amended the Colorado River Storage Project Act, ch. 203, 70 Stat. 105 (1956) (current version at 43 U.S.C. §§ 620-620o (1994)).

11. The City and the MRGCD entered into contracts with the BOR to pay to the government a share of project construction costs and annual operations and maintenance costs. In return, BOR agreed to construct, operate, and maintain the project works, and to deliver annually to the contractors their specified percent shares of available project water. See Contract between the United States of America Department of the Interior Bureau of Reclamation and the City of Albuquerque, New Mexico, for Furnishing a Municipal Water Supply, Contract No. 14-06-500-810, June 25, 1963 [hereinafter City Contract] (on file with author); Amendatory Contract between the United States of America and the Middle Rio Grande Conservancy District, New Mexico, Contract No. I78r-423 Amendment No. 4, June 25, 1963 [hereinafter MRGCD Contract] (on file with author) (both contracts are discussed more fully in section III). The contracts were entered into pursuant to reclamation law, including the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (1994) (codified as amended in scattered sections of 43 U.S.C.). Other contractors include several local municipalities and counties. These are repayment contracts under section 9(d) of the Reclamation Act of 1939, 43 U.S.C. § 485h(d) (1994), as opposed to water service contracts under section 9(e), in which the contractor only pays a set annual amount in return for a specified amount of water.

12. See City Contract, *supra* note 11, art. 7a (the City's original share was 52.27%); MRGCD Contract, *supra* note 11, art. 7a (the MRGCD's share is 20.55%). The City's contract was amended in 1965 to reduce the City's annual share by 5,000 acre-feet, bringing the City's total allocation to 48,200 acre-feet per year or 47.35% of the project's firm yield. See 3 SAN JUAN-CHAMA DIVERSION PROJECT OPTIONS, *supra* note 8, at § D.3.A.

Chama water figures prominently in the City's recently adopted water strategy for future development.<sup>13</sup> The new plan's central feature is the replacement of current groundwater pumping with direct use of San Juan-Chama water.<sup>14</sup> The City therefore feels strongly protective of its contract rights to San Juan-Chama water. It is also important for the irrigators of the MRGCD, although native Rio Grande water is also an important source of irrigation water.

The San Juan-Chama Project was authorized by the Colorado River Storage Project Act<sup>15</sup> and the San Juan Chama Project Act.<sup>16</sup> The Colorado River Storage Project Act was enacted with the following purposes:

to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is authorized...(2) to construct, operate, and maintain the...San Juan-Chama [Project]...<sup>17</sup>

The San Juan-Chama Project Act later authorized construction of the initial phase of the project, with the following purposes:

for the principle purposes of furnishing water supplies to approximately thirty-nine thousand three hundred acres of land in the Cerro, Taos, Llano and Pojoaque tributary irrigation units in the Rio Grande Basin and approximately eighty-one thousand six hundred acres of land in the existing Middle Rio Grande Conservancy District and for municipal, domestic and industrial uses, and providing recreation and fish and wildlife benefits.<sup>18</sup>

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13. See 3 SAN JUAN-CHAMA DIVERSION PROJECT OPTIONS, *supra* note 8, at § D.3.

14. See *id.* The City currently uses the San Juan-Chama water to offset river depletions resulting from groundwater pumping.

15. Ch. 203, 70 Stat. 105.

16. Pub. L. No. 87-483, 76 Stat. 96 (1962) (current version at 43 U.S.C. § 620a (1994)).

17. 70 Stat. 105.

18. § 8, 76 Stat 96. These statements of purpose have been examined closely in the wake of listing of the Rio Grande silvery minnow as an endangered species. See Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species, 59 Fed. Reg. 36988 (July 20, 1994)

The San Juan-Chama authorizing language was construed with respect to the project goals and limitations discussed in *Jicarilla Apache Tribe v. United States*.<sup>19</sup> In *Jicarilla*, the City proposed to store San Juan-Chama project water in downstream Elephant Butte Reservoir for a variety of purposes, including eventual resale, electrical power, and recreation, such as boating and fishing.<sup>20</sup> The City argued at that time that each of these uses was authorized by the San Juan-Chama Project Act.<sup>21</sup> The Tenth Circuit called into question the proposition that storage for recreation is a beneficial use under state law, but did not rule on that issue.<sup>22</sup> Instead, the court concluded that storage for recreational purposes "would be at odds with the federal statutes authorizing the San Juan-Chama project."<sup>23</sup>

The court examined the Colorado River Storage Project Act and the San Juan-Chama Project Act, and from the later act concluded that "the principal uses of the San Juan-Chama water are to be municipal, domestic, industrial, and irrigation. True, it expresses the intention that the water

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(codified at 50 C.F.R. pt. 17 (2000)). While water supply for municipal and irrigation purposes is undeniably included within the principal purposes of the San Juan-Chama project, at issue is whether water for fish and wildlife benefits is a sufficiently prominent purpose to reallocate supplies to it from contractors. One case from the Middle Rio Grande concludes that it is not when the water would be used for recreation and fishing. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1138 (10th Cir. 1981). A line of cases from the Ninth Circuit, addressed more fully below, argues for a more prominent role for fish and wildlife purposes, reasoning that the Endangered Species Act, with its huge and imperative mandate to federal agencies to conserve endangered species, amended and supplemented reclamation law and those contracts that arose under reclamation law. See generally *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995).

19. 657 F.2d 1126.

20. *Id.* at 1133.

21. *Id.*

22. See *id.* at 1136-37.

23. *Id.* at 1137. The Tribe argued that section 8 of the Reclamation Act of 1902 required that state law govern the release of San Juan-Chama water. Section 8 states that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." 43 U.S.C. § 383 (1994). New Mexico state law establishes beneficial use as the "measure and limit" of a water right. N.M. STAT. ANN. §§ 72-1-2, -5-22, -5-23, -5-25 (Michie 1997). The Tribe argued that storage of water for recreational or fish and wildlife purposes is not a beneficial use recognized explicitly by New Mexico law, though the New Mexico Attorney General has argued that there is nothing in New Mexico law that precludes such a recognition. See Op. N.M. Att'y Gen. 98-01. The Tenth Circuit applied the Supreme Court's ruling in *California v. United States* that "state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary." 438 U.S. 645, 668 n.21 (1978) (citations omitted). In response to the *Jicarilla* decision, Congress passed legislation to explicitly authorize the storage of San Juan-Chama water at Elephant Butte Reservoir for "recreational and other beneficial purposes." Act of December 29, 1981, Pub. L. No. 97-140, § 5, 95 Stat. 1717.



provide recreation and fish and wildlife benefits. It is plain, however, that such benefits are not intended to be primary purposes, but, rather, incidental ones."<sup>24</sup> The *Jicarilla* court based its decision not only on the provisions of the authorizing statutes, but also on the "more compelling reason for the decision not to allocate water to recreation or fish and wildlife. Congress has been told repeatedly that there is a critical shortage of water in the Rio Grande Basin, and that additional water is desperately needed for municipal, industrial and agricultural purposes."<sup>25</sup> Based on this desperate need, the court held that the San Juan-Chama project's authorizing statutes were "deliberately intended to make recreation and fish and wildlife benefits incidental to other primary uses of the water."<sup>26</sup> The court was concerned that large scale allocations of San Juan-Chama water to recreational uses proposed by the City would "leave little room for primary uses. Recreation could not justifiably constitute the only beneficial use of such a large amount of San Juan-Chama water."<sup>27</sup>

In contrast, the current issue in the Middle Rio Grande is not storage for recreational boating or fishing, but provision of instream flows desperately needed to support an endangered species. In the Endangered Species Act, Congress emphatically laid down a clear statutory mandate to federal agencies to conserve endangered species.<sup>28</sup> Recreation and fishing uses had no such statutory mandate when the Tenth Circuit issued its ruling in *Jicarilla*. When faced with this same issue, the Ninth Circuit held that the Endangered Species Act amended and supplemented federal reclamation law, and the federal mandate to conserve endangered species overrode contractors' rights to federal project water.<sup>29</sup>

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24. 657 F.2d at 1139. In 1993, the Department of Interior Regional Solicitor referred to section 8 of the San Juan-Chama Project Act, Pub. L. No. 87-483, 76 Stat. 96 (1962) (current version at 43 U.S.C. § 620a (1994)), and took an opposite view in a Solicitor's Opinion Memorandum regarding BOR discretion to allocate water for endangered species: "this language clearly specifies that providing fish and wildlife benefits is one of the principal purposes of the San Juan-Chama project." Memorandum from the Intermountain Regional Solicitor of the Bureau of Reclamation, to Upper Colorado Regional Director of the Bureau of Reclamation, addressing Water Management for Endangered Species in the Middle Rio Grande 6 (Apr. 2, 1993) (on file with author). Interestingly, the Memorandum concluded that "ample authority exists to provide flows for the minnow," in the context of a BOR contract for water for fish and wildlife purposes. *Id.* at 1, 6.

25. 657 F.2d at 1141.

26. *Id.*

27. *Id.*

28. Endangered Species Act, 16 U.S.C. § 1531(c)(1) (1994).

29. See *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), cert. denied sub nom. *Klamath Drainage Dist. v. Patterson*, 121 S. Ct. 44 (2000), amended by 203 F.3d 1175 (9th Cir. 2000).

## B. The Endangered Species Act and the Rio Grande Silvery Minnow

### 1. *The Requirements of the Endangered Species Act*

The Endangered Species Act (ESA)<sup>30</sup> places several requirements on federal agencies. The first is a general requirement to "conserve endangered species" and to "utilize their authorities in furtherance of the purposes of this chapter"<sup>31</sup> by "carrying out programs for the conservation of endangered species."<sup>32</sup> In addition, under Section 7 of the ESA, federal agencies are required to consult with the U.S. Fish and Wildlife Service (FWS)<sup>33</sup> "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 result in the destruction or adverse modification of habitat of such species which is determined...to be critical..."<sup>34</sup>

Once a species is listed as endangered or threatened, a proposed federal agency action<sup>35</sup> triggers a Section 7 consultation, typically with the FWS. The action agency prepares a Biological Assessment "for the purpose of identifying any endangered species or threatened species which is likely to be affected" by the proposed agency action.<sup>36</sup> If the Biological Assessment concludes that a proposed action may affect a listed species, formal Section 7 consultation is initiated and a Biological Opinion is requested of the FWS.<sup>37</sup> The Biological Opinion assesses whether the proposed agency action will jeopardize the continued existence of the listed species or result in adverse modification of critical habitat.<sup>38</sup> If the Biological Opinion concludes that jeopardy will occur, the FWS must suggest Reasonable and Prudent Alternatives that can be taken by the action agency to avoid jeopardy.<sup>39</sup>

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30. 16 U.S.C. §§ 1531-1544. For a fuller history and discussion of the provisions of the Endangered Species Act and implementing regulations, see MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 193-276 (3rd ed. 1997).

31. 16 U.S.C. § 1531(c)(1).

32. § 1536(a)(1).

33. Consultations regarding marine fish and mammals are held with the National Marine Fisheries Service.

34. § 1536(a)(2).

35. Courts have broadly construed the question of whether an action is an "agency action" triggering section 7 requirements. See *Connor v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). Such actions may include federal permits, see, e.g., *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985), and land management plans, see, e.g., *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1051-55 (9th Cir. 1994). However, the action must be one over which a federal agency has discretion and control. See generally *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995).

36. 16 U.S.C. § 1536(c)(1).

37. § 1536(b).

38. *Id.*

39. § 1536(b)(3)(A).

Department of Interior's regulations implementing the ESA define the Section 7 consultation requirement to apply to "all actions in which there is discretionary Federal involvement or control."<sup>40</sup> The discretionary qualifier was acknowledged by the Ninth Circuit in *Sierra Club v. Babbitt* when it concluded that, where the action agency lacks the discretion to influence actions that result in impacts on endangered species, "consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species."<sup>41</sup> In that case, the proposed private action was the construction design of a logging road through public forest land by a private party under a right-of-way agreement with the Bureau of Land Management, which construction might have adversely affected the endangered spotted owl, thus triggering Section 7 consultation.<sup>42</sup>

In the Middle Rio Grande, a key issue is whether the BOR has the discretion to reallocate contracted federal project water for the benefit of an endangered fish. If it does, then the BOR must consult with the FWS under Section 7 of the ESA. If the FWS issues a Biological Opinion that concludes that the existing release schedule for delivery of San Juan-Chama water to the contractors jeopardizes the continued existence of the silvery minnow, then the FWS must also suggest Reasonable and Prudent Alternatives (RPAs) to avoid jeopardy. The RPAs may include reallocation of contracted San Juan-Chama water for the purpose of avoiding jeopardy to the silvery minnow.

## 2. *The Rio Grande Silvery Minnow*

The Rio Grande silvery minnow is a small fish that occurs only in the Middle Rio Grande, and currently occupies only about five percent of its known historic range.<sup>43</sup> The FWS listed the minnow as endangered in 1994, noting that the threats to the species included "dewatering, channelization, and regulation of river flow to provide water for irrigation; diminished water quality caused by municipal, industrial and agricultural discharges; and competition or predation by introduced, non-native fish species."<sup>44</sup>

The BOR has entered into several consultations with the FWS pursuant to Section 7 of the ESA regarding the impact of various BOR

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40. 50 C.F.R. § 402.03 (2000).

41. 65 F.3d 1502, 1508-09 (9th Cir. 1995).

42. *Id.* at 1505-06.

43. Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species, 59 Fed. Reg. 36988 (July 20, 1994) (codified at 50 C.F.R. pt. 17 (2000)).

44. *Id.*

operations on the silvery minnow in the Middle Rio Grande.<sup>45</sup> The BOR and the Corps of Engineers prepared a joint Programmatic Biological Assessment for various water supply operations and flood control maintenance activities in May 1998 and initiated Section 7 consultation with the FWS. Thereafter, the FWS prepared a "Draft Biological Opinion and Conference Report" that concluded that the government's water supply and flood control activities were likely to jeopardize the Rio Grande silvery minnow and result in destruction and adverse modification of its proposed critical habitat.<sup>46</sup> The BOR and the Corps then prepared a second Programmatic Biological Assessment and again initiated formal Section 7 consultation with the FWS.<sup>47</sup> This second assessment refocused the consultation on what the federal agencies identified as their "discretionary actions."<sup>48</sup> The BOR asserted that its discretion is limited with respect to releasing water from Heron Reservoir to supply its contractors:

The Secretary's discretion is limited by Reclamation's obligation to meet water orders from users in accordance with contract obligations. In meeting these obligations, the Secretary 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>49</sup>

The BOR argued that its discretion is limited by the narrow statutory purposes provided by reclamation law and authorizing statutes:

Under general principles of Reclamation law, water can only be stored and released from Reclamation reservoirs for valid beneficial uses, and consequently must be released at a time

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45. 16 U.S.C. § 1536(b) (1994). Section 7 of the Endangered Species Act requires federal agencies to consult with the FWS if a proposed agency action *may affect* an endangered species. For a summary of BOR's Section 7 coordination activities, see Memorandum in Support of Federal Defendants' Motion to Dismiss, or in the Alternative, Motion for Partial Dismissal at 6-9, *Rio Grande Silvery Minnow v. Martinez* (D.N.M. filed Nov. 15, 1999) (No. CIV 99-01320).

46. See Regional Director of the Fish & Wildlife Service, Draft Biological Opinion and Conference Report on the Effects of the Bureau of Reclamation and U.S. Army Corps of Engineers Programmatic Biological Assessment: Water Operations and River Maintenance on the Middle Rio Grande, New Mexico 9 (n.d.) (on file with author). This Draft Biological Opinion has been characterized by the BOR as a draft internal document, never finalized or released for public comment. See Memorandum in Support of Federal Defendants' Motion to Dismiss, or in the Alternative, Motion for Partial Dismissal at 7, *Rio Grande Silvery Minnow* (No. CIV 99-01320).

47. U.S. Dep't of the Interior, Bureau of Reclamation & U.S. Dep't of the Army, Army Corps of Engineers, Programmatic Biological Assessment of Federal Discretionary Actions Related to Water Management on the Middle Rio Grande, New Mexico (Oct. 1999).

48. See *id.* at 13-14.

49. *Id.* at 14.

and in a way to meet water delivery calls. Further limiting Reclamation's authority is that Congress authorized the Middle Rio Grande Project for domestic, municipal, and irrigation purposes only. In meeting these statutorily authorized purposes, the United States also takes into consideration other needs on the river, such as recreation, wildlife, water quality, and species conservation.<sup>50</sup>

### C. The Middle Rio Grande Lawsuits

The listing of the Rio Grande Silvery Minnow, combined with increasing water demand and reduced runoff during the mid-1990s, resulted in a flurry of lawsuits filed in Federal District Court in New Mexico. These suits address key issues that will help determine how implementation of the Endangered Species Act with respect to limited water supplies will affect the future of development in the arid West.

#### 1. *The Critical Habitat Cases*

At the time of listing of the silvery minnow as endangered, the FWS declined to designate critical habitat for the minnow due to budgetary constraints and because "there was insufficient information to perform the required analysis of the impacts of the designation" (primarily an analysis of the economic effects of the designation on the region).<sup>51</sup> The FWS was subsequently ordered to designate critical habitat within a statutorily mandated deadline.<sup>52</sup> The FWS designated critical habitat for the minnow in 1999.<sup>53</sup> The designation included all of the last remaining portion of the minnow's occupied range, encompassing 163 miles of the mainstem Rio Grande through the populous and irrigation-rich Middle Rio Grande Valley. However, this designation was challenged by the MRGCD, the Office of the New Mexico State Engineer, and a number of environmental groups on the grounds that the designation was too broad and violated the Endangered Species Act as well as the National Environmental Policy Act.<sup>54</sup> In December 2000, the District Court set aside the critical habitat

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50. *Id.*

51. Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,274, 36,276 (July 6, 1999) (codified at 50 C.F.R. pt. 17 (2000)).

52. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1193 (10th Cir. 1999).

53. Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,274.

54. See *Middle Rio Grande Conservancy Dist. v. Babbitt*, No. CIV 99-00870 (D.N.M. filed Aug. 4, 1999) [hereinafter *MRGCD v. Babbitt*], consolidated with *New Mexico State Engineer v. Babbitt*, No. CIV 99-00872 (D.N.M. filed Aug. 4, 1999), and *Forest Guardians v. Babbitt*, No. CIV. 99-01445 (D.N.M. filed Dec. 15, 1999).

designation as arbitrary and capricious and ordered the FWS to prepare an Environmental Impact Statement and propose a new rule designating critical habitat for the minnow.<sup>55</sup> The appeal by the FWS of the District Court's Final Judgment is currently pending.<sup>56</sup>

## 2. *City of Albuquerque v. United States*

The City of Albuquerque filed suit against the BOR in September 1999, seeking a declaratory judgment that "the United States has no discretion, authority, or duty to utilize the City's contracted San Juan-Chama water in the Rio Grande system for endangered species purposes under the federal Endangered Species Act."<sup>57</sup> The City also sought a court order enjoining the BOR from taking action inconsistent with the provisions of the declaratory relief it sought.<sup>58</sup>

The City's fears stemmed from statements the BOR made in various documents and meetings and legal claims by environmental groups that asserted that the government could and should release San Juan-Chama water to augment native Rio Grande stream flows in order to support the minnow.<sup>59</sup> In particular, the City was concerned about statements in the draft "biological jeopardy opinion," prepared in October 1999 but not released, that identified releases of San Juan-Chama water as a "Reasonable and Prudent Alternative necessary to augment natural Rio Grande stream flows for an endangered species commonly known as the Rio Grande Silvery Minnow."<sup>60</sup> The City also cited statements in a 1999 Department of Interior Environmental Assessment on the designation of critical habitat that San Juan-Chama water should be made available to augment river flows,<sup>61</sup> and statements in meetings with BOR and Department of Interior officials to that effect.<sup>62</sup> The City also pointed to legal claims made by

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55. *MRGCD v. Babbit*, No. CIV 99-00870, at 2 (D.N.M. Dec. 27, 2000) (Final Judgment setting aside final rule). Judge Mechem also ordered the FWS to "fully and earnestly participate in mediation of the case of *Rio Grande Silvery Minnow v. Martinez*" (the ESA case, discussed below) and consolidated the two cases for the purposes of the mediation. *Id.* at 2-3.

56. See Federal Defendants' Notice of Appeal, *Middle Rio Grande Conservancy Dist. v. Norton*, (D.N.M. filed Feb. 23, 2001) (Nos. CIV 99-00870, -00872, -01445) [hereinafter *MRGCD v. Norton*] (restyled following 2000 Presidential election).

57. Plaintiff City of Albuquerque's Complaint for Declaratory Judgment and Injunctive Relief at 3, *City of Albuquerque v. United States* (D.N.M. filed Sept. 1, 1999) (No. CIV 99-00985).

58. *Id.*

59. See *id.* at 10.

60. *Id.*

61. *Id.*

62. *Id.* at 11-12.

environmental groups that the City said jeopardized its right to utilize its contracted share of San Juan-Chama water.<sup>63</sup>

The BOR, the Department of the Interior, and the Corps of Engineers (collectively, the Federal Defendants) moved to dismiss the City's case on the grounds that there had been no agency action, and even if there were an agency action, the City's cause of action was not ripe because the Section 7 consultation was not complete, and the City lacked standing because it could not show an actual or concrete injury.<sup>64</sup> The City argued that it had a reasonable apprehension of harm due to the government's statements noted above.<sup>65</sup> The City also asserted that the Section 7 ESA process was inapplicable to the San Juan-Chama water because the government lacked discretionary authority over the City's contracted share of the water.<sup>66</sup> In particular, the City argued that the release of the San Juan-Chama water is governed by interstate compacts that require the beneficial consumptive use of the water in New Mexico.<sup>67</sup> No assertions were made on either side with respect to the discretion provided by the terms of the contract itself in light of the mandate of the ESA.

The court concluded that the government had taken no action to repudiate the contracts or their terms, that the City had not changed its position or future planning in reliance on the government's actions or inactions, and that there was no evidence that the City has not received or will not receive its contracted share of San Juan-Chama water.<sup>68</sup> The court accordingly dismissed the case without prejudice.<sup>69</sup>

### 3. *Rio Grande Silvery Minnow v. Martinez*

Following the release of the BOR's second Biological Assessment (on the heels of the internal draft of the jeopardy Biological Opinion), a number of environmental groups filed suit in Federal District Court on

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63. *Id.* at 10-11.

64. Memorandum in Support of the United States' Motion to Dismiss at 1 (No. CIV 99-00985).

65. See Plaintiff City of Albuquerque's Response in Opposition to Federal Defendants' Motion to Dismiss at 19 (No. CIV 99-00985).

66. *Id.* at 9-10.

67. *Id.* at 10. The two compacts at issue are the Colorado River Compact, ch. 42, 45 Stat. 1057 (1928) (current version at 43 U.S.C. § 617 (1994)), and the Upper Colorado River Basin Compact, art. III, ch. 48, 63 Stat. 31 (1949) (current version at 43 U.S.C. § 620o (1994)). The City argued that instream flow for the benefit of the minnow is not a beneficial use as recognized by New Mexico state law, nor would instream flow be consumptive within New Mexico. Plaintiff City of Albuquerque's Response in Opposition to Federal Defendants' Motion to Dismiss at 10-11, *City of Albuquerque* (No. CIV 99-00985). See also *supra* note 3; *supra* note 23.

68. *City of Albuquerque*, No. CIV 99-00985, at 5 (D.N.M. filed June 22, 2000) (Memorandum Opinion and Order dismissing case).

69. *Id.*

behalf of the minnow in November 1999. The plaintiff environmental groups sought declaratory and injunctive relief and alleged violations of ESA by the BOR's and Corps' "failing to complete consultation...over the full range of present and future Middle Rio Grande water operations."<sup>70</sup> The plaintiff environmental groups asserted that this failure was particularly serious because "current management actions by the Defendants are jeopardizing the continued survival of the listed species and are adversely modifying the species' critical habitat; and Defendants have further failed to use their authorities to undertake the actions necessary to conserve the endangered species under the ESA, such as providing necessary water for Middle Rio Grande flows essential to the health and survival of the silvery minnow."<sup>71</sup>

The plaintiff environmental groups moved for summary judgment in January 2000 on their claim that the BOR and the Corps failed to consult with the FWS regarding the full range of water operations and river management actions, including the BOR's water deliveries to contractors.<sup>72</sup> The environmental groups cited a line of Ninth Circuit case law to support their assertion that the contract language as well as the mandate of the ESA indicate that the government has the discretion to reallocate contracted water for endangered species purposes, and is therefore compelled to consult under Section 7 of the ESA regarding such operations.<sup>73</sup> In particular, the plaintiffs pointed to the "shortage" clause of the City's contract, which provides,

On account of drouth or other causes, there may occur at times during any year a shortage in the quantity of water available from the reservoir storage complex for use by the City pursuant to this contract. In no event shall any liability accrue against the United States or any of its officers or

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70. Plaintiffs' Complaint for Declaratory and Injunctive Relief at 2, *Rio Grande Silvery Minnow v. Martinez* (D.N.M. filed Nov. 15, 1999) (No. CIV 99-01320). The Complaint also alleges violations of the National Environmental Policy Act. The Plaintiffs included Defenders of Wildlife, Forest Guardians, New Mexico Audubon Council, National Audubon Society, Sierra Club, and Southwest Environmental Center, on behalf of the Rio Grande Silvery Minnow. *Id.* at 4-6.

71. *Id.* at 3.

72. See Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 1-2 (No. CIV 99-01320). The court stayed the deadline for Response and Reply Briefs, pending the on-going court-ordered mediation in the case. *Rio Grande Silvery Minnow*, No. CIV 99-01320 (D.N.M. Sept. 12, 2000) (order granting stay).

73. See Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 26-29 (No. CIV 99-01320). See also Plaintiffs' Complaint for Declaratory and Injunctive Relief at 32. See *infra* Part IV for a discussion of the Ninth Circuit case law.



employees for any damage, direct or indirect, arising out of any such shortage.<sup>74</sup>

This is the same language construed by the Ninth Circuit to allow reallocation of contracted water for endangered species purposes.<sup>75</sup>

The plaintiff environmental groups raised the same issues in their Motion for Preliminary Injunction and accompanying Memorandum in April 2000. Plaintiffs' stated intent was "to prevent imminent harm to the endangered Rio Grande silvery minnow from Defendants' river operations and water deliveries on the Middle Rio Grande" during the year 2000.<sup>76</sup> The motion requested the court to order the BOR and Corps to

manage federal water deliveries, federal reservoirs, other federal facilities so as to maintain flows in the Middle Rio Grande which are sufficient (1) to prevent discontinuous flows or river drying, particularly in the critical river reach below San Acacia Diversion Dam; and (2) to facilitate silvery minnow spawning this year.<sup>77</sup>

The plaintiffs' call for continuous flows in the river sparked strong responses from the federal defendants, joined by the City, the MRGCD and the State of New Mexico.<sup>78</sup> The government and the City argued the issue of governmental discretion under the contracts.<sup>79</sup> The City first asserted that the government had no discretion over release of San Juan-Chama water to its contractors because release for the minnow would not be for "beneficial consumptive use," that such reallocation would violate the Colorado River Compact and the Upper Colorado River Basin Compact, and therefore the BOR and Corps had no obligation to enter into Section 7 consultation with the FWS regarding release of San Juan-Chama water.<sup>80</sup>

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74. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 27, *Rio Grande Silvery Minnow* (No. CIV 99-01320). See also City Contract, *supra* note 11, art. 18b.

75. See *O'Neill v. United States*, 50 F.3d 677, 683 (9th Cir. 1995).

76. Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 1, *Rio Grande Silvery Minnow* (No. CIV 99-01320).

77. *Id.* at 2

78. See Federal Defendants' Motion and Memorandum to Strike Plaintiffs' April 11, 2000 Motion for Preliminary Injunction and April 11, 2000 Memorandum in Support (CIV 99-01320); Defendant-Intervenor Middle Rio Grande Conservancy District's Response to Plaintiffs' Motion for Preliminary Injunction; Response of the State of New Mexico to Plaintiffs' Motion for Preliminary Injunction; The City of Albuquerque's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction filed April 11, 2000.

79. See The City of Albuquerque's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction filed April 11, 2000 at 12-16 (CIV 99-01320). See also Federal Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 33-36 (CIV 99-01320).

80. See The City of Albuquerque's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction filed April 11, 2000 at 12, 14 (CIV 99-01320).

The City also addressed the issue of the contract's "shortage" clause raised by the plaintiff environmental groups. The City first asserted that the shortage clause in their contract addresses only liability for shortages, but does not allow the BOR to underdeliver contracted water.<sup>81</sup> The City then argued that the option of declaring a shortage for fish and wildlife purposes is not available in this case due to the overriding requirements of the interstate compacts for "beneficial, consumptive use" only.<sup>82</sup> The City concluded its discretion argument with the assertion that the intended shortage was a physical, not a regulatory, shortage, a shortage of supply in the Colorado system, but not of demand in the Rio Grande system.<sup>83</sup>

The government also addressed the shortage clause, examining the language in the MRGCD contract similar to the language in the City's contract.<sup>84</sup> The government argued that this provision's sole purpose is to shield the government from liability for damages, and in any event, the BOR does not have unilateral ownership of the water stored in its reservoirs and has no general authority to shift around that contracted water.<sup>85</sup>

The contractual discretion issue and its supporting arguments and counter-arguments have not been ruled upon by the court in the *Rio Grande Silvery Minnow* case. An Agreed Order was entered on August 2, 2000, withdrawing the plaintiffs' Motion for Preliminary Injunction because the parties agreed to engage in court-supervised mediation.<sup>86</sup> In addition, the parties came to a detailed agreement, stipulated in the court's Order, to implement various measures to ensure the minnow's survival through the year 2000 low-flow season. The agreed measures included close monitoring of the minnows and river levels, and use of "supplemental water" to provide continuous flows during the late summer and fall low-flow months.<sup>87</sup> In particular, the City and the MRGCD agreed to provide 65,000 acre-feet and 20,900 acre-feet, respectively, of their San Juan-Chama water for "beneficial consumptive use" for irrigation in exchange for native Rio Grande flows for the benefit of the minnow.<sup>88</sup> In October 2000, additional water was needed and another similar exchange of the City's San Juan-

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81. *Id.* at 15.

82. *Id.*

83. *Id.* at 16.

84. See MRGCD Contract, *supra* note 11, art. 12b. See also City Contract, *supra* note 11, art. 18b.

85. Federal Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 35, *Rio Grande Silvery Minnow* (CIV 99-01320).

86. *Rio Grande Silvery Minnow*, No. CIV 99-01320, at 11 (D.N.M. Aug. 2, 2000) (Agreed Order Resolving Plaintiffs' Motion for Preliminary Injunction).

87. *Id.* at 3.

88. *Id.* at 3-4.

Chama water for native Rio Grande flows was agreed to in a Supplement to the Agreed Order.<sup>89</sup>

With these exchanges on paper reflected in modifications to the schedule of releases from upstream reservoirs (if not in actual water molecules), the minnow survived through the 2000 low-flow season and the parties to the *Rio Grande Silvery Minnow* lawsuit dodged the bullet of a judicial ruling on the merits, including the contractual discretion issue. If the ongoing court-ordered mediation succeeded in producing a long-term solution, such a ruling may have been avoided completely. However, since water allocation in the Middle Rio Grande is a zero-sum game, a long-term solution will necessarily mean that some party or parties will have to give up some of their allocation.<sup>90</sup> Not surprisingly the court-ordered mediation has been unsuccessful. On March 27, 2001, the parties filed a Joint Motion requesting that all stays be lifted and that court ordered mediation terminate. Given the high value placed on this water and contract rights to it, a judicial resolution now seems inevitable.<sup>91</sup>

In a line of cases from the Central Valley of California that examined the contractual discretion issue in the context of BOR water supply contracts, the Ninth Circuit looked to the terms of the contracts themselves as well as the amendatory power of the ESA. Accordingly, this article now turns to the terms of the San Juan-Chama contracts themselves and the issues they present regarding government discretion to reallocate water for the silvery minnow.

### III. THE SAN JUAN-CHAMA REPAYMENT CONTRACTS

#### A. Authorization of the Contracts

The MRGCD and the City both entered into repayment contracts with the BOR on June 25, 1963, "pursuant to the Federal Reclamation Laws, including particularly the Act of June 13, 1962 (76 Stat. 96), and the Act of April 11, 1956 (70 Stat. 105), all as amended or supplemented."<sup>92</sup> The Act of April 11, 1956, is the Colorado River Storage Project Act, which authorized investigations and planning for the San Juan-Chama Project. The Act of

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89. See *Rio Grande Silvery Minnow*, No. CIV 99-01320, at 1-2 (D.N.M. Oct. 5, 2000) (Supplement to Agreed Order Resolving Plaintiffs' Motion for Preliminary Injunction).

90. For an interesting perspective on this issue, see Maria O'Brien, *Shortage and Tension on the Upper Rio Grande: Protecting Endangered Species During Times of Drought, Comments from the Perspective of the Middle Rio Grande Conservancy District*, 39 NAT. RESOURCES J. 145 (1999).

91. See Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CALIF. L. REV. 2375, 2390-94 (2000), for Professor Sax's discussion of this situation and alternative models for resolution.

92. MRGCD Contract, *supra* note 11, pmbl.; City Contract, *supra* note 11, pmbl.

June 13, 1962, is the San Juan-Chama Project Act, which authorized the construction and operation of the initial stage of the project. "Federal Reclamation Law" is defined as the 1902 Federal Reclamation Act "and all acts amendatory or supplementary thereto."<sup>93</sup> The use of the San Juan-Chama water is governed by statutes and interstate compacts, which specify that project water is for beneficial, consumptive use within New Mexico.<sup>94</sup>

## B. The Terms of the Contracts

This section introduces the discretion issues raised by the language of the San Juan-Chama repayment contracts. The language of the contracts is not always crystal clear and often invites conflicting interpretations of contract terms taken by themselves and in concert with other contract clauses. The additional question of whether the contracts were further amended or supplemented by the ESA will be addressed in a later section. The terms of the City's and the MRGCD's contracts for San Juan-Chama water that are relevant to the discretion issue addressed in this article are virtually identical. Contract articles addressing repayment terms, fish and wildlife allocations, water shortages, allocation of project water supplies, and the contractors water rights in general are discussed below.<sup>95</sup>

### 1. Repayment Terms

The contractors<sup>96</sup> agreed to pay, in 50 annual installments, that share of construction costs allocated to their particular water supply purpose: for the City, the municipal water supply; for the MRGCD, irrigation.<sup>97</sup> The government retained the responsibility for construction, operation, and maintenance of project facilities.<sup>98</sup> The contractors also agreed to pay their percent share of the annual costs of operations and maintenance of the water supply facilities. Each contractor's percent share of these annual expenses is based upon the percent share of project water

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93. City Contract, *supra* note 11, art. 1b; MRGCD Contract, *supra* note 11, art. 1b.

94. See *supra* note 3.

95. For a broader discussion of BOR contracts and policy implications, see Duane Mecham & Benjamin M. Simon, *Forging a New Federal Reclamation Water Pricing Policy: Legal and Policy Considerations*, 27 ARIZ. ST. L.J. 507 (1995).

96. As noted above, the BOR entered into repayment contracts with several Middle Rio Grande entities. The City and the MRGCD are the two largest contractors in terms of water apportionment, and therefore have the most to lose if San Juan-Chama water is reallocated for endangered species purposes. For this reason, it is the terms of these two entities' contracts that are examined in this section of the article.

97. City Contract, *supra* note 11, arts. 3, 4, 6; MRGCD Contract, *supra* note 11, art. 4.

98. City Contract, *supra* note 11, art. 7a; MRGCD Contract, *supra* note 11, art. 7a.

allotted to its particular water supply purpose: again, municipal supply for the City and irrigation supply for the MRGCD.<sup>99</sup>

## 2. Cost Allocation for the Fish and Wildlife Function

Article 7b of the contracts estimates that 5.6 percent of annual operation and maintenance costs will be attributable to the "fish and wildlife function."<sup>100</sup> Under this article, the contractors are "not obligated to pay that portion of the annual operation and maintenance costs allocated to the fish and wildlife function."<sup>101</sup> Importantly, this "fish and wildlife" clause further states that "[i]f unusual circumstances arise which throw the allocation out of balance, an appropriate modification in the percentage figure will be made by the Contracting Officer."<sup>102</sup> This language certainly implies that adjustments in the operation of the project for fish and wildlife functions were contemplated by all parties to the contract, and that they all agreed to leave the modification of operations for that function in the hands of the Contracting Officer, *i.e.*, the government. However, it also implies that the contractors did not assume the risk of paying for any reallocations to fish and wildlife purposes. In addition, although the "fish and wildlife function" intended to be served by this article is undefined by the contracts, the language is broad enough to include endangered species conservation as well as recreational fishing.

## 3. Water Shortages

The San Juan-Chama contracts state,

On account of drouth or other causes, there may occur at times during any year a shortage in the quantity of water available from the reservoir storage complex for use by the [contractors] pursuant to this contract. In no event shall any liability accrue against the United States or any of its officers or employees for any damage, direct or indirect, arising out of any such shortage.<sup>103</sup>

The plaintiff environmental groups in *Rio Grande Silvery Minnow* argued that the text of this contract term means that the government has the power to reallocate water due to "other causes," including the mandate of

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99. City Contract, *supra* note 11, art. 7a; MRGCD Contract, *supra* note 11, art. 7a. Article 7a of the City Contract allots to the City for municipal supply 52.27% (later amended to 47.35%) of the "total water supply available from the project in any year for all purposes." Article 7a of the MRGCD Contract allots to the MRGCD for irrigation supply 20.55% of the "total water supply available from the project in any year for all purposes."

100. City Contract, *supra* note 11, art. 7b; MRGCD Contract, *supra* note 11, art. 7b.

101. City Contract, *supra* note 11, art. 7b; MRGCD Contract, *supra* note 11, art. 7b.

102. City Contract, *supra* note 11, art. 7b; MRGCD Contract, *supra* note 11, art. 7b.

103. City Contract, *supra* note 11, art. 18b; MRGCD Contract, *supra* note 11, art. 12b.

the ESA to conserve endangered species dependent on river flows.<sup>104</sup> The City and the federal defendants counter-argued that this clause simply shields the government from liability for damages in the event of a supply shortage, and in any case, under the governing interstate compacts, San Juan-Chama water cannot be allocated to instream flows that are not a "beneficial, consumptive use."<sup>105</sup> The application of Ninth Circuit case law to this contract language is further addressed below.

#### 4. Contractors' Water Rights

The contracts specify that each contractor "shall have the exclusive right to use and dispose of that share of the project water supply available and allocated to [municipal/irrigation] purposes subject to payment on a current basis of such charges as are provided for in this contract."<sup>106</sup> Further, the contracts provide that, upon completion of payment for construction costs, each contractor "shall have a permanent right to the use of that portion of the project water supply allocated to its use herein."<sup>107</sup> This language implies that the contractor allotment percentages are fixed, based upon the allocations of project water to each water supply purpose, and can only be adjusted if the government retained the authority to adjust the project water supply "available and allocated" to each water supply purpose. This issue is discussed further below.

#### 5. The "Other Uses" Clause

The contracts state,

The project is authorized for furnishing water for irrigation and municipal uses and providing recreation and fish and wildlife benefits, and for other beneficial purposes. The supply to be available for [contractors] and the costs payable by the [contractors for a municipal/irrigation water supply] reflect apportionment among these purposes and regulation of releases.<sup>108</sup>

This language can be interpreted in two ways. The first is that the contractors agreed to be subject to reductions in their apportionment of water due to other uses such as fish and wildlife purposes, at the discretion

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104. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 26-27, *Rio Grande Silvery Minnow* (No. CIV 99-01320); Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 32.

105. City of Albuquerque's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 12-16, *Rio Grande Silvery Minnow* (No. CIV 99-01320); Federal Defendants' Response to Plaintiffs' Motion for Preliminary Injunction at 33-36.

106. City Contract, *supra* note 11, art. 18d; MRGCD Contract, *supra* note 11, art. 12d.

107. City Contract, *supra* note 11, art. 18d; MRGCD Contract, *supra* note 11, art. 12d.

108. City Contract, *supra* note 11, art. 18h; MRGCD Contract, *supra* note 11, art. 12h.

of the government that retained the power to determine the supply to be "available" to the contractors. The alternative interpretation is that the government took fish and wildlife purposes into account in its original allotment of 52.27 percent to municipal supply and 20.55 percent to irrigation supply of the water that comes through the project facilities each year. The key to this issue is whether the government retained the power to decide what water is "available" to contractors—is it the entirety of the water that physically passes through the project facilities or is it the "actual available" minus some amount for "other uses"? Read by itself, it is unlikely that the parties to the contract interpreted the language of this article to give the government such discretion. However, taken together with the language in the "shortage" provision, the possibility of reallocation due to "other causes" and "other uses" appears to be more reasonable. The issue of what power the government retained is discussed further below.

#### 6. *Use and Allotment of Project Water*

The contracts allocate shortages and excesses in available water according to the contractors' percentage shares. The contracts state that the project is designed to furnish an estimated firm yield of approximately 101,800 acre-feet annually.<sup>109</sup> Of that estimated firm yield amount, the contractors are allocated their percentage share. For example, MRGCD's percentage share for irrigation purposes is 20.55 percent of the estimated project firm yield. The MRGCD contract accordingly applies this percentage to the estimated firm yield of the project to determine the amount available to the MRGCD: "20,900 acre-feet shall be available annually to the District for use as an irrigation water supply."<sup>110</sup> However, this article also addresses reductions in allocations

[d]uring periods of scarcity when the actual available water supply may be less than the estimated firm yield, the [contractor] shall share in the available water supply in the ratio that allocations above bear to the estimated firm yield....During periods of abundance when the actual available water supply may be more than the estimated firm yield, the [contractor] shall have the right to a share in the actual available water supply in the ratio that allocations above bear to the estimated firm yield, all as determined by the Contracting Officer.<sup>111</sup>

This language implies that if discretionary reallocations for endangered species purposes are valid assertions of governmental power,

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109. City Contract, *supra* note 11, art. 18j; MRGCD Contract, *supra* note 11, art. 12i.

110. MRGCD Contract, *supra* note 11, art. 12i.

111. City Contract, *supra* note 11, art. 18j; MRGCD Contract, *supra* note 11, art. 12i.

then the government must still reallocate the amount each contractor actually receives according to the contractors' specified percentage shares. This suggests that to accommodate the river flow needs of the silvery minnow, the amount of project water "available" for distribution to contractors must be reduced by that amount that will reasonably accommodate the minnow, like shrinking the pie before the pie is cut in pieces. The contrasting approach of cutting the pie into smaller pieces by shrinking each contractors' percentage share of project water to provide river flows for the minnow appears to violate the plain language and intent of the contracts in establishing fixed percentage shares for each contractor. In any case, this clause of the contract clearly and unmistakably leaves the decision regarding the actual available water (*i.e.*, the size of the pie) in any year to the government.

However, the "fish and wildlife function" clause also clearly states that in unusual circumstances modifications to percentage allocations will be made.<sup>112</sup> An endangered fish on the verge of extinction may well be considered an "unusual circumstance" triggering percentage allocation modifications under this contract clause. While the "fish and wildlife function" clause relates primarily to cost allocation, it could be construed to relate to supply allocation as well, because both are tied to the same percentage figure derived from supply allocation. In any case, this contract clause clearly leaves the decision regarding percentage modifications (*i.e.*, the size of the pieces of pie) in unusual circumstances regarding fish and wildlife purposes to the government.

In sum, the terms of the repayment contracts, taken together, suggest there is some government discretion to reallocate water for endangered species. However, the path through the contract language to arrive at this conclusion is tangled, and must be balanced against the contracts' clear commitment to allocate specified percentage shares of available project water to municipal and irrigation users. The power of the government to reallocate water under the contracts becomes clearer if the ESA is held to amend the contracts, thus inserting its overriding mandate to conserve endangered species into the contracts themselves. Accordingly, the article now turns to examining the Ninth Circuit case law that concluded that the ESA does amend such contracts.

#### IV. THE NINTH CIRCUIT'S INTERPRETATION APPLIED TO THE SAN JUAN-CHAMA CONTRACTS

The Central Valley of California spawned a number of lawsuits through the 1990s that mirror the issues raised in the lawsuits pending

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112. City Contract, *supra* note 11, art. 7b; MRGCD Contract, *supra* note 11, art. 7b.



today in the Middle Rio Grande. Irrigators in the Central Valley that had water supply contracts with the BOR found their irrigation supplies reallocated to serve the needs of endangered fish. In a decade-long line of cases arising from these conflicts, the Ninth Circuit held that the government had the right to impose policy requirements of a subsequent act, such as the Endangered Species Act, in a variety of situations involving BOR water supply contracts. In particular, the court held that subsequently enacted statutes such as the Endangered Species Act allowed for government amendment of water supply contracts in situations where the property rights of the contractor were implied at best,<sup>113</sup> where the government altered contract terms when renewing a contract<sup>114</sup> or withdrawing a contract,<sup>115</sup> where a water supply contract included a "shortage" clause identical to those in the San Juan-Chama contracts,<sup>116</sup> and where a federal agency such as the BOR retained some measure of control over the water supply activity.<sup>117</sup>

There are several ways in which the Ninth Circuit holdings can be applied to the question of the government's discretion to reallocate San Juan-Chama water for endangered species purposes in the Middle Rio Grande. First, it can be argued, as the plaintiff environmental groups did in *Rio Grande Silvery Minnow v. Martinez*, that the "shortage" clause in the San Juan-Chama contracts provides the BOR discretion to reallocate water for

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113. See *Peterson v. United States Dep't of Interior*, 899 F.2d 799 (9th Cir. 1990) (holding that the government could impose the policy requirements of a subsequent act on a prior contract where the water supply rights of the plaintiff were only implied).

114. See *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397 (9th Cir. 1993) (holding that the government retained the right to alter the terms of a water supply contract when renewing that contract because the government had not surrendered in unmistakable terms its power to impose the mandates of subsequent environmental laws on the contract).

115. See *Natural Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) [hereinafter *NRDC v. Houston*] (holding that renewals of water delivery contracts are agency actions under the ESA triggering Section 7 requirements).

116. See *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995) (holding that a shortage clause in a water supply contract unambiguously relieved the government from liability due to shortage, drought or any other cause, and even if the contract did obligate the government to supply a specified amount of water without exception, the contract was not immune from subsequently enacted statutes to protect endangered fish).

117. See *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) (holding that contractors' rights to water are subservient to the ESA, and even where the Act was passed long after the contract, the statute still applies as long as the federal agency retains some measure of control over the activity, in this case, title to and operation of the dam), *cert. denied sub nom. Klamath Drainage Dist. v. Patterson*, 121 S. Ct. 44 (2000), *amended by* 203 F.3d 1175 (9th Cir. 2000).

an endangered species,<sup>118</sup> applying the Ninth Circuit holding in *O'Neill v. United States*.<sup>119</sup> The second argument is that the BOR has discretion to reduce the project water "available" to the contractors, as held in *O'Neill* and *Natural Resources Defense Council [NRDC] v. Houston*.<sup>120</sup> Third, minnow advocates could argue that the ESA amends and supplements federal reclamation law and contracts, thereby incorporating into the contracts the ESA's overriding mandate to conserve endangered species, as the Ninth Circuit concluded in *O'Neill*, *NRDC*, and *Klamath Water Users Protective Association v. Patterson*.<sup>121</sup> These three arguments are examined further below, with particular attention on how these issues have been framed in the *Rio Grande Silvery Minnow v. Martinez* case.

#### A. Using the Shortage Clause Together with the Fish and Wildlife Function Clause

The plaintiff environmental groups in *Rio Grande Silvery Minnow v. Martinez* pointed to the Ninth Circuit's decision in *O'Neill v. United States* to support their assertion that the "shortage" clause in the San Juan-Chama contracts provides the BOR the discretion to reallocate water for endangered species.<sup>122</sup> In *O'Neill*, the BOR reallocated federal project water for the benefit of two listed fish species under the authority of the Central Valley Project Improvement Act (CVPIA),<sup>123</sup> enacted for the benefit of the fish following the release of two jeopardy Biological Opinions, thereby shorting downstream irrigators who had water supply contracts with the BOR.<sup>124</sup> The court examined the language of the water contracts between the

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118. See Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 26, *Rio Grande Silvery Minnow* (No. CIV 99-01320); Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 32.

119. 50 F.3d 677 (9th Cir. 1995). For a summary of this case, see Lisa L. Nguyen, *O'Neill v. United States: Endangered Species Act and Central Valley Project Improvement Act Can Invoke Contract Clause that Limits Liability Due to Water Shortages*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 201 (1996). See also Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 399-401 (1997).

120. 146 F.3d 1118 (9th Cir. 1998).

121. 203 F.3d 1175 (9th Cir. 2000).

122. Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment at 26, *Rio Grande Silvery Minnow* (No. CIV 99-01320); Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 32.

123. Pub. L. No. 102-575, 106 Stat. 4706 (1992) (not codified). The purpose of the CVPIA was to dedicate federal project water for fish and wildlife preservation and habitat restoration purposes.

124. A distinction between the contracts in *O'Neill* and the San Juan-Chama contracts is that the CVPIA specifically amended the 1937 congressional authorization of the Central Valley Project (CVP), under which the CVP water supply contracts were made. The CVPIA thus explicitly inserted into the CVP a strong statement requiring "a reasonable balance among

Central Valley irrigators and the BOR, particularly the clause that absolved the government of liability for water shortages due to drought "or any other cause."<sup>125</sup> The *O'Neill* court held that this language "is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'"<sup>126</sup> The court affirmed the district court's conclusion that "the contract does not obligate the government to furnish to [a contractor] the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act."<sup>127</sup>

The San Juan-Chama contracts contain almost the same language in their "shortage" clauses.<sup>128</sup> The *Rio Grande Silvery Minnow v. Martinez* plaintiffs asserted that this language gives the BOR the discretion to declare a shortage by reason of an "other cause" in order to supply water for the silvery minnow.<sup>129</sup> The City responded with three counter-arguments. The first was that the BOR can declare a shortage only for a drought.<sup>130</sup> This argument is not persuasive because it ignores the "other causes" language.

The City's second counter-argument was that, even if the BOR could declare a shortage, there is no clause in the contract that allows the BOR to increase the fish and wildlife share by decreasing the contractors' shares.<sup>131</sup> This argument does not take into account the "fish and wildlife function" clause that retains government power to reallocate percentage costs in the event of "unusual circumstances" regarding the "fish and wildlife function."<sup>132</sup> This clause may provide support for discretion to

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competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." Pub. L. No. 102-575, 106 Stat. 4706. No such explicit amendment of the San Juan-Chama Project Act has occurred. However, this distinction should not obviate the application of *O'Neill* to the San Juan-Chama contract analysis, as the Ninth Circuit's holding in that case did not depend solely upon the CVPIA's explicit amendment of the federal project's purpose. Rather, the *O'Neill* holding focused on the amendatory mandate of the Endangered Species Act and the text of the contract's shortage clause, which is almost identical to those articles in the San Juan-Chama contracts.

125. 50 F.3d at 680.

126. *Id.* at 684.

127. *Id.* at 680.

128. See City Contract, *supra* note 11, art. 18b; MRGCD Contract, *supra* note 11, art. 12b. The San Juan-Chama contracts include the wording "other causes" rather than "any other causes," which may weaken the analogy between the cases.

129. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 27, *Rio Grande Silvery Minnow* (No. CIV 99-01320).

130. City's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 15 (No. CIV 99-01320).

131. *Id.* at 14-15.

132. City Contract, *supra* note 11, art. 7b; MRGCD Contract, *supra* note 11, art. 7b.

reallocate supplies as well as costs because costs are based on supply percentages.<sup>133</sup>

The City's third counter-argument was that the intended shortage to which this clause applies is a physical or climatic shortage in supply, not a regulatory shortage or increase in demand.<sup>134</sup> However, this argument is not persuasive in the context of the Ninth Circuit's broad reading of the "other causes" language.<sup>135</sup>

## B. Redefining Available Project Water

The Ninth Circuit provided another discretion argument in *O'Neill* and *NRDC v. Houston*. As noted above, the *O'Neill* court concluded that the language of the "shortage" clause was unambiguous and that "an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'"<sup>136</sup> Thus, under the Ninth Circuit's reasoning, the needs of an endangered species reduce the water supply legally "available" to the contractors.

The Ninth Circuit applied this same reasoning in *NRDC v. Houston*.<sup>137</sup> In that case, the intervening irrigators argued that an Opinion of the Solicitor of the Department of the Interior, which concluded that the BOR had no discretion to reallocate contracted water, was entitled to deference.<sup>138</sup> The court responded that the Solicitor "assumed that the 'project's available water supply' included all of the [federal project] water, and he did not address the issue of whether the total amount of available project water could be reduced in order to comply with the ESA or state law."<sup>139</sup> The court concluded that the BOR "may be able to reduce the amount of water *available* for sale [to contractors] if necessary to comply with ESA."<sup>140</sup>

This holding supports redefinition of what water is available to contractors under the "use and allotment" and "other uses" contract clauses.<sup>141</sup> Those clauses specify that it is "available water" that is allocated

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133. See *supra* Part III.B.1.

134. City's Response in Opposition to Plaintiff's Motion for Preliminary Injunction at 16, *Rio Grande Silvery Minnow* (No. CIV 99-01320).

135. See *O'Neill v. United States*, 50 F.3d 677, 683 (9th Cir. 1995).

136. *Id.*

137. 146 F.3d 1118 (9th Cir. 1998). See also Nathan Baker, *Water, Water, Everywhere, and At Last a Drop for Salmon? NRDC v. Houston Heralds New Prospects under Section 7 of the Endangered Species Act*, 29 ENVTL. L. 607 (1999).

138. 146 F.3d at 1126.

139. *Id.*

140. *Id.* (emphasis added).

141. See City Contract, *supra* note 11, arts. 18h, 18j; MRGCD Contract, *supra* note 11, arts. 12h, 12i.

to the contractors according to their percentage shares. According to the text of the contracts, "available water" may be affected by droughts, surpluses, and other causes. Under this analysis, "available water" is not what is physically available through the project works, but what is legally available, taking into consideration both physical availability and the legal mandates of the Endangered Species Act.

Thus, the text of the contracts themselves, taken together, provides a fairly strong basis for the conclusion that the contracting parties agreed to the government's retention of discretion to reallocate in the event of shortage, drought, or other causes.<sup>142</sup> If the BOR has the discretion under the contracts to reduce the amount of water that is available to contractors for other causes, such as the need to conserve endangered species, then it must enter Section 7 consultation on those matters and may reallocate water without breaching the contracts.

### C. ESA Amends Reclamation Law

Even if the terms of the contracts themselves do not provide the discretion to reallocate contracted water for endangered species, the *O'Neill* court noted that such discretion is provided by the Endangered Species Act, "as the contract is not immune from subsequently enacted statutes."<sup>143</sup> The court concluded that the ESA amends and supplements federal reclamation law and therefore the contracts entered into pursuant to those laws. Applying the U.S. Supreme Court's holding in *Merrion v. Jicarilla Apache Tribe*<sup>144</sup> with respect to the "unmistakable terms" doctrine of government contract construction, the court stated that

[n]othing in the 1963 contract surrenders in "unmistakable terms" Congress's sovereign power to enact legislation. Rather, the contract was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto....The contract contemplates future changes in reclamation laws...and...limits the government's liability for shortages due to any causes....CVPIA marks a shift in

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142. However, reading the contract terms together leads to the conclusion that the parties also intended any such reductions to occur pro rata, according to and preserving the percentage allocations to each contractor. If the project water "available" to the contractors is reduced under the ESA, the contractors may still have a successful breach of contract or Fifth Amendment takings claim if the remaining "available" water is allocated disproportionately among the contractors.

143. 50 F.3d at 686.

144. 455 U.S. 130 (1982).

reclamation law modifying the priority of water uses. There is nothing in the contract that precludes such a shift.<sup>145</sup>

The court held that a pre-existing water supply contract "does not obligate the government to furnish to [an irrigation contractor] the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act."<sup>146</sup>

This conclusion was echoed in the most recent Ninth Circuit holding on this issue in *Klamath Water Users Protective Ass'n v. Patterson*.<sup>147</sup> In *Klamath*, irrigators sued the BOR over the operation of the Link River Dam. A contract between the BOR and the dam operator governed the management of the dam.<sup>148</sup> The FWS issued a Biological Opinion in 1992 that specified minimum lake levels behind the dam in order to avoid jeopardy to two threatened and endangered fish located in and around the project.<sup>149</sup> The irrigators claimed third party beneficiary status regarding the contract and sued to protect their pre-existing irrigation supply from the dam. The court concluded that the irrigators were not intended third party beneficiaries of the contract between the BOR and the dam operator.<sup>150</sup>

The irrigators also claimed that the dam operator did not have a legal duty to operate Link River Dam to meet ESA obligations.<sup>151</sup> However, the court concluded that the contractors' rights to the federal project water were subservient to the ESA because "[i]t is well settled that contractual arrangements can be altered by subsequent Congressional legislation."<sup>152</sup> The court noted that the BOR had retained authority to manage the dam and remained fee simple owner.<sup>153</sup> "Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity."<sup>154</sup>

In the case of the San Juan-Chama contracts, the BOR explicitly retained title to the project facilities<sup>155</sup> and control over operations and maintenance of the project facilities, including releases to contractors.<sup>156</sup> The San Juan-Chama contracts were also authorized pursuant to the Federal

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145. 50 F.3d at 686 (citing 1963 Contract pmb.; *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1407 (9th Cir. 1993) (Hall, J., concurring)).

146. *Id.* at 680.

147. 204 F.3d 1206 (9th Cir. 1999), *cert. denied sub nom. Klamath Drainage Dist. v. Patterson*, 121 S. Ct. 44 (2000), *amended by* 203 F.3d 1175 (9th Cir. 2000).

148. *Id.* at 1209.

149. *Id.*

150. *Id.* at 1212.

151. *Id.* at 1213.

152. *Id.*

153. *Id.*

154. *Id.*

155. City Contract, *supra* note 11, art. 12.

156. City Contract, *supra* note 11, art. 7a; MRGCD Contract, *supra* note 11, art. 7a.

Reclamation Laws and all acts amendatory or supplementary thereto.<sup>157</sup> These considerations support the argument that the ESA amended and supplemented the San Juan-Chama contracts just as the Ninth Circuit held that it amended the Central Valley Project contracts. In that case, conservation of endangered species became not just an objective, but a goal to be afforded the highest priority by federal agencies to "halt and reverse the trend toward species extinction, whatever the cost."<sup>158</sup>

The Federal Defendants in *Rio Grande Silvery Minnow v. Martinez* argued that the plaintiffs used the *O'Neill* holding too broadly, and that declaring a shortage would not make more water available for the minnow.<sup>159</sup> The government noted that the language of the shortage clause only limits the government's liability for money damages in case of a shortage, and that the BOR cannot just shift water away from contractors under this clause.<sup>160</sup> The Ninth Circuit did not agree with this reasoning. The *O'Neill* court broadly applied the proposition that the mandates of the ESA modify the pre-existing contracts so that, under the shortage clause, the needs of an endangered species render that water "unavailable" to the contractors.<sup>161</sup>

In sum, the text of the San Juan-Chama contracts can be construed to enable reallocation of project water for endangered species purposes. Although the terms of the contracts, by themselves, can be construed together to support the government's reallocation discretion, the argument is strengthened substantially if the ESA is held to amend the contracts with its mandate to put species preservation as the highest priority of every federal agency. However, a recent U.S. Supreme Court case<sup>162</sup> called into question the use of the "unmistakable terms" doctrine of government contract construction that underlies this conclusion in *O'Neill* and other Ninth Circuit cases. Accordingly, this article now turns to an analysis of the *Winstar* decision and its effect on the Ninth Circuit reasoning.

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157. City Contract, *supra* note 11, pmbl.; MRGCD Contract, *supra* note 11, pmbl.

158. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

159. Federal Defendants' Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 35, *Rio Grande Silvery Minnow* (No. CIV 99-01320).

160. *Id.* at 35-36.

161. See 50 F.3d at 684.

162. *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

## V. The Unmistakable Terms Doctrine and the San Juan-Chama Contracts

### A. The Unmistakable Terms Issue

The *O'Neill* court held that

[n]othing in the 1963 contract surrenders in 'unmistakable terms' Congress's sovereign power to enact legislation. Rather, the contract was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto....The contract contemplates future changes in reclamation laws...and...limits the government's liability for shortages due to any causes....CVPIA marks a shift in reclamation law modifying the priority of water uses. There is nothing in the contract that precludes such a shift.<sup>163</sup>

In arriving at this conclusion, the Ninth Circuit cited the Supreme Court for the proposition that "Congress's power to exercise sovereign authority 'will remain intact unless surrendered in unmistakable terms' ...[C]ontractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign."<sup>164</sup> The Ninth Circuit had applied this reasoning in previous cases regarding construction of water supply contracts,<sup>165</sup> and reiterated it most recently in *Klamath Water Users Protective Association v. Peterson*: "It is well settled that contractual arrangements can be altered by subsequent Congressional legislation."<sup>166</sup> This doctrine of government contract construction guided the Ninth Circuit's conclusion that the Endangered Species Act amended and supplemented the BOR's water supply contracts.

However, a 1996 U.S. Supreme Court case examined the "unmistakable terms" doctrine as it applies to government contracts and concluded that its application should be limited.<sup>167</sup> If the unmistakable terms doctrine does not apply to the San Juan-Chama contracts, then the ESA may be held not to amend federal reclamation law, weakening the argument for the BOR's discretion to reallocate project water for the silvery minnow. In that case, minnow advocates would be left with a discretion argument resting on the terms of the contracts by themselves. If the

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163. 50 F.3d at 686 (citing 1963 Contract pmb.; *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1407 (9th Cir. 1993) (Hall, J., concurring)).

164. *Id.* (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48 (1982)).

165. See, e.g., *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1406 (9th Cir. 1993).

166. 204 F.3d 1206, 1213 (1999) (citations omitted), *cert. denied sub nom. Klamath Drainage Dist. v. Patterson*, 121 S. Ct. 44 (2000), *amended by* 203 F.3d 1175 (9th Cir. 2000).

167. *Winstar*, 518 U.S. 839.



unmistakable terms doctrine does apply to the San Juan-Chama contracts, minnow advocates can more easily assert that the ESA amends the contracts, strengthening the argument that the BOR has discretion to reallocate project water for the silvery minnow. The *Winstar* case is the key to this distinction.

### B. *United States v. Winstar*

In *United States v. Winstar*, three banks brought suit against the United States, claiming that the enactment and enforcement of a federal statute breached prior contracts between the banks and the government.<sup>168</sup> The banks had entered into contracts with the government for special accounting treatment that encouraged healthy banks to acquire failing thrifts during the savings and loan crisis of the 1980s. Congress subsequently passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),<sup>169</sup> which limited the application of the special accounting measures specified in the contracts. Under FIRREA, some banks were seized and liquidated for failure to comply with the new statutory limitations. Three banks filed suit, claiming breach of contract and seeking damages.

In its defense, the government argued that the contracts had not surrendered sovereign authority to make regulatory changes in unmistakable terms.<sup>170</sup> The government relied on the unmistakable terms doctrine as stated in previous Supreme Court decisions: "'Sovereign power...governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'"<sup>171</sup> However, a seven-to-two majority of the Supreme Court found for the *Winstar* plaintiff banks in a decision that was split into three different opinions and a dissent.

The principal opinion by Justice Souter examined the unmistakable terms doctrine and established an effects test that limits the doctrine's application in future government contract disputes. Justice Breyer's concurring opinion expands upon the discussion of the doctrine. Justices Scalia, Kennedy, and Thomas concurred in the judgment, but not in the principal opinion's argument. Justices Rhenquist and Ginsburg joined in a dissent that attacked the limitation of the unmistakable terms doctrine.

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168. See *id.*

169. Pub. L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.).

170. 518 U.S. at 871.

171. *Id.* at 871-72 (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

### 1. Justice Souter's Principal Opinion

Justice Souter's principal opinion, joined by Justices Stevens, Breyer, and O'Connor,<sup>172</sup> examined the application of the unmistakable terms doctrine with respect to a contract's effect on sovereign power.<sup>173</sup> Justice Souter framed the collective holding of the key cases<sup>174</sup> that established the doctrine as

a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an Act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.<sup>175</sup>

Therefore, Justice Souter concluded that the rule applies "when the Government is subject either to a claim that its contract has surrendered a sovereign power (e.g., to tax or control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power (e.g., the equivalent of exemption from Social Security obligations)."<sup>176</sup>

In particular, Justice Souter found that the application of the unmistakable terms doctrine "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government."<sup>177</sup> An injunction against enforcement of a subsequently enacted statute would constitute such a blockage of sovereign power, as would award of damages in situations where such an award would be the equivalent of an exemption from the terms of a subsequent statute. In such cases, the unmistakable terms doctrine would apply to protect sovereign power. Justice Souter particularly pointed to the *Bowen*

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172. Justice O'Connor joined in Part III of Justice Souter's Opinion, which addresses the unmistakability doctrine, but did not join in Part IV-A and IV-B on other issues regarding application of the sovereign acts doctrine.

173. 518 U.S. at 871.

174. The cases establishing the unmistakable terms doctrine examined by the *Winstar* opinions were *Merrion*, 455 U.S. 130 (holding that a tribe as a sovereign government has inherent power to impose a severance tax on mining activities), *Bowen*, 477 U.S. 41 (holding that section 103 of the Social Security Amendments Act of 1983 was enforceable even though the amendment abrogated previous agreements between the government and state social security agencies that allowed states to withdraw social security coverage for the states' employees), and *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987) (holding that a waiver of federal sovereign power to control navigation will not be inferred from silence in a government treaty conferring title to a riverbed).

175. 518 U.S. at 878.

176. *Id.* at 878-79.

177. *Id.* at 879.

case, in which "the sole relief sought was dollars and cents, but the award of damages as requested would have been the equivalent of exemption from the terms of a subsequent statute."<sup>178</sup> In that case, granting a claim for a tax rebate under an agreement for a tax exemption would "block the exercise of the taxing power, and the unmistakability doctrine would have to be satisfied."<sup>179</sup>

At the other end of the spectrum, Justice Souter saw many ordinary government contracts "say, to buy food for the army; no sovereign power is limited by the Government's promise to purchase and a claim for damages implies no such limitation."<sup>180</sup> Justice Souter concluded that these were "humdrum" contracts that "no one would seriously contend...might be subject to the unmistakability doctrine."<sup>181</sup> Justice Souter characterized these types of contracts as "risk-shifting," to be treated "as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence....Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows."<sup>182</sup> Justice Souter concluded that the unmistakable terms doctrine simply does not apply to such risk-shifting contracts

[s]o long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of [sovereign] power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it.<sup>183</sup>

In *Winstar*, the plaintiff banks were not seeking to enforce the contractual obligation for special accounting measures or to enjoin the enforcement of FIRREA, but were seeking only money damages. Justice Souter concluded that the award of dollars and cents in damages would not prevent the government from exercising its authority under FIRREA, nor would it be the equivalent of an exemption from the terms of the subsequent statute.<sup>184</sup> Therefore, Justice Souter concluded that these were

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178. *Id.* at 879-80.

179. *Id.* at 880 (citing *Bowen*, 477 U.S. at 51).

180. *Id.*

181. *Id.*

182. *Id.* at 868-869 (citations omitted).

183. *Id.* at 880.

184. See *id.* at 881. Justice Souter was not concerned that such a conclusion may incur larger costs in regulation arising from increase award of damages: "Just as we have long recognized that the Constitution 'bar[s] Government from forcing some people alone to bear public

simply "risk-shifting" contracts and since there was "nothing for the unmistakability doctrine to guard against," it did not apply.<sup>185</sup>

## 2. Justice Breyer's Concurring Opinion

In his concurring opinion, Justice Breyer accentuated the distinction between an "ordinary" government contract, typically governed by rules applicable to contracts between private parties, and a government contract that involves "unique features of sovereignty."<sup>186</sup> First, Justice Breyer acknowledged that the cases establishing the unmistakable terms doctrine applied it appropriately because they involved unique features of sovereignty such as the power to tax and control navigation.<sup>187</sup> Justice Breyer then concluded that these were unusual cases and that, in contrast, ordinary principles of contract law, where contracts are construed in terms of the parties' intent as revealed by language and circumstance, should apply to ordinary government contracts.<sup>188</sup> Further, Justice Breyer noted that the inclusion of explicit language reserving the right to amend, as in *Bowen*, supports the application of the unmistakable terms doctrine in such "unusual" cases.<sup>189</sup> However, in the *Winstar* contracts, Justice Breyer found no amendatory language and nothing in the plaintiffs' damage claim that implicated a unique feature of sovereignty—the court could award damages without preventing the government from enforcing FIRREA.<sup>190</sup>

## 3. Scalia's Concurring Opinion

Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment that the government had breached the contracts with the banks, but did not agree that one can apply to government contracts the same "intent of the parties" construction that is applied to private contracts:

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burdens which, in all fairness and justice, should be borne by the public as a whole,' so we must reject the suggestion that the Government may simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change." *Id.* at 883 (alteration in original) (citations omitted). Justice Souter was, however, concerned about the doctrine's effect on the ability of the government to enter contracts: "Injecting the opportunity for unmistakability litigation into every common contract action would, however, produce the untoward result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Id.* at 884 (citation omitted). Justice Rhenquist, in his dissent, does not take this prospect seriously: "The Government's contracting authority has survived from the beginning of the Nation with no diminution in bidders, so far as I am aware, without curtailment of the unmistakability doctrine announced today." *Id.* at 929.

185. *Id.* at 880.

186. *See id.* at 911-14, 918.

187. *See id.* at 914-17. *See also supra* note 174.

188. *See id.* at 911.

189. *See id.* at 916.

190. *See id.* at 918.

When the contracting party is the government...it is reasonable to presume (*unless the opposite clearly appears*) that the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts.<sup>191</sup>

Justice Scalia noted that this proposition is the cornerstone of the unmistakable terms doctrine:

The requirement of unmistakability embodies this reversal of the normal reasonable presumption. Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a commonsense way against that background understanding.<sup>192</sup>

Justice Scalia looked to the text of the contracts and found within their terms an unmistakable promise not to change the regulation of accounting measures: "Either there was an undertaking to regulate respondents as agreed for the specified amortization periods, or there was no promise regarding the future at all—not even so much as a peppercorn's worth."<sup>193</sup> Since the contracts had made promises to regulate in a certain fashion, with no mention of the possibility of amendment, Justice Scalia concluded that no further promise not to change that regulation was needed to establish that these promises were unmistakable: "While it is true enough, as the dissent points out, that one who deals with the Government may need to 'turn square corners,' he need not turn them twice."<sup>194</sup>

#### 4. Justice Rhenquist's Dissent

Justice Rhenquist, joined by Justice Ginsburg, dissented in the judgment and in what he saw as the principal opinion's drastic reduction in the scope of the unmistakable terms doctrine, "shrouding the residue with clouds of uncertainty."<sup>195</sup> Justice Rhenquist attacked the principal opinion's distinction, on the basis of effects, between those contracts to which the unmistakable terms doctrine applies and those to which it does not. He saw this distinction as artificial, leading to sophisticated lawyers crafting their claims so as to result in remedies (injunctions or damages) that obviate the application of the unmistakable terms doctrine, a result that has

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191. *Id.* at 920-921.

192. *Id.* at 921.

193. *Id.* at 922.

194. *Id.* (citations omitted).

195. *Id.* at 924.

an "Alice in Wonderland aspect to it, which suggests the distinction upon which it is based is a fallacious one."<sup>196</sup>

The Dissent points out that the effects test is a cart-before-the-horse analysis. The unmistakable terms doctrine is a canon of government contract construction that is designed to assist in determining liability prior to the assessment of remedies such as injunctions or damages.<sup>197</sup> Only once liability is established would the issue of remedies arise. However, the principal opinion's effects test leapfrogs the issue of remedies into the assessment of basic liability, and disallows the application of the unmistakable terms doctrine in assessing liability where the contract is deemed to be risk-shifting based on the remedy sought. Justice Rhenquist concludes that this approach "tosses to the winds any idea of the unmistakability doctrine as a canon of construction; if a canon of construction cannot come into play until the contract has first been interpreted as to liability by an appellate court, and remanded for computation of damages, it is no canon of construction at all."<sup>198</sup>

In sum, the fractured *Winstar* decision leaves us with some uncertainty regarding the extent and applicability of the unmistakable terms doctrine in specific situations.<sup>199</sup> A four-member plurality of the Court supported a limitation of the doctrine to situations where the remedy sought, either injunction or damages, would block the exercise of a sovereign power. Three members supported application of the doctrine to the text of government contracts so that, in the absence of explicit terms that admit the possibility of future statutory amendment, the affirmative promises made by the government would be construed as unmistakably surrendering sovereign power consistent with the terms of the contract. Finally, two members (who are usually ideological opposites) disagree with the majority and prefer a broad application of the unmistakable terms doctrine.

### C. *Winstar* Applied to the San Juan-Chama Contracts

Under Justice Souter's effects test, the application of the unmistakable terms doctrine to a government contract depends on the remedy sought and its effects on the exercise of sovereign power. A claim seeking to enjoin the BOR from reallocating water for the silvery minnow pursuant to the Endangered Species Act would seek to block the exercise

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196. *Id.* at 929.

197. *Id.* at 929-30.

198. *Id.* at 930.

199. For a further discussion of the range of possible interpretations and applications, 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).

of a sovereign power—the power to fulfill agency obligations under the Endangered Species Act. According to Justice Souter, this would implicate something “for the unmistakability doctrine to guard against,” and would warrant the application of the doctrine. This reasoning strengthens the Ninth Circuit’s conclusion that, with the application of the unmistakability doctrine to the BOR contracts, the mandates of the Endangered Species Act amend the contracts, and provide discretion, in addition to that provided by the explicit terms of the contracts, for reallocation of water for endangered species.

However, a claim for money damages that does not seek to enjoin, or have the equivalent effect of preventing, reallocation of water for endangered species purposes does not block any sovereign power, but may result only in dollars and cents payments to the contractors if government liability for breach of contract is found. In that case, water reallocation could still occur and the BOR’s obligations under the ESA could still be satisfied outside the contracts.<sup>200</sup> According to Justice Souter, the increased cost of regulation arising from such damage awards is not as significant a concern as is the possibly chilling effect of unfettered application of the unmistakable terms doctrine to all government contracts.<sup>201</sup> In fact, a damage award for breach of contract may be more socially and economically efficient than compliance with the contract, if it is held to deprive the BOR of discretion to reallocate water for endangered species. While a monetary figure can be placed on an acre-foot of water for irrigation or municipal purposes, the value of endangered species is “incalculable,” according to Congress and the Supreme Court.<sup>202</sup>

Admittedly, Justice Souter’s approach applied here does have an “Alice in Wonderland” quality to it, as Justice Rhenquist remarked in his *Winstar* dissent.<sup>203</sup> It is the effect of the remedy sought, not the terms of the contract or the intent of the parties, that governs how a government contract is interpreted and determines whether a breach has occurred. Justice Breyer’s approach of looking to the contract itself to see if it implicated “unique features of sovereignty” in order to warrant application of the unmistakable terms doctrine appears more sound. Under Justice Breyer’s reasoning, inclusion in the contract of explicit language regarding

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200. This is not to suggest that a court would necessarily find the BOR in breach of the San Juan-Chama contracts for reallocation of water for endangered species purposes. Based on the terms of the contracts themselves, a court may reasonably find that the BOR retained reallocation discretion independent of the Endangered Species Act. *See supra* Part III.A-B.

201. *See Winstar*, 518 U.S. at 883.

202. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187-88 (1978).

203. 518 U.S. at 929.

amendment, as in the *Bowen* case, is a sufficient hallmark of sovereignty to warrant the application of the unmistakable terms doctrine.<sup>204</sup>

In the case of the San Juan-Chama contracts, the contracts themselves state that they are "pursuant to the Federal Reclamation Laws,...all as amended or supplemented."<sup>205</sup> It is this language that the Ninth Circuit interpreted to mean that the government had not surrendered its sovereign power to amend the contracts in unmistakable terms, and thus that the Endangered Species Act amended the contract.<sup>206</sup>

Under Justice Scalia's textual approach with respect to intent of the parties, this contractual language would arguably warrant the application of the unmistakable terms doctrine for either an injunction or damages claim. While in *Winstar*, Justice Scalia found only amendatory language by itself sufficed to warrant the application of the unmistakable terms doctrine, here the San Juan-Chama contracts include more. Specific terms within the contracts retain discretion for allocation of water in the hands of the government in times of shortage, drought or "other causes."<sup>207</sup> It is this language the Ninth Circuit interpreted as providing governmental discretion within the terms of the contract itself.<sup>208</sup> Taken together, these terms would likely satisfy Justice Scalia's textual approach, indicating that it was the intent of the parties to permit subsequent amendment of the contracts and to leave final discretion for allocation in certain circumstances to the government, thus warranting application of the unmistakable terms doctrine.

In sum, the *Winstar* decision and the Justices' myriad approaches to government contract construction described in that case's disparate opinions generally support the application of the unmistakable terms doctrine to the San Juan-Chama contracts. Only in the case of a plaintiff claiming money damages for breach of contract does the possibility arise that the doctrine would not apply. Even in that case it may not be needed, as the terms of the contract may be sufficient by themselves to provide discretion for the government's reallocation of water for endangered species purposes. Under this analysis, parties to the Middle Rio Grande lawsuits must take into account the probable conclusion that the San Juan-Chama contracts, by themselves and in light of the mandates of the ESA, provide the government sufficient discretion to reallocate project water for the silvery minnow.

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204. See *id.* at 916.

205. City Contract, *supra* note 11, at 1; MRGCD Contract, *supra* note 11, at 1.

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

207. See City Contract, *supra* note 11, art. 18b; MRGCD Contract, *supra* note 11, art. 12b.

208. See *O'Neill*, 50 F.3d at 683-84.



## VI. CONCLUSION

This article set out to address one question embedded within the issue of government discretion to reallocate federal project water for endangered species: What authority to reallocate contracted San Juan-Chama water for the silvery minnow do the terms of the contracts provide to the Bureau of Reclamation in light of that agency's obligations under the Endangered Species Act? The shortage, other causes, and fish and wildlife terms of the repayment contracts themselves provide sufficient authority for reallocation of project water if endangered species needs are considered primary rather than incidental project purposes. There are two ways to reach this conclusion. The first is to limit to recreational fishing uses the Tenth Circuit's holding in *Jicarilla Apache Tribe v. United States* that fish and wildlife purposes of the San Juan-Chama Project are incidental purposes.<sup>209</sup> The second approach is to conclude that the ESA amended the San Juan-Chama authorizing statutes and contracts or, put another way, the ESA mandate to conserve endangered species "whatever the cost"<sup>210</sup> overrides the BOR's conflicting duty to provide project water under the contracts. This may be enough, by itself, to find sufficient BOR discretion to reallocate contracted water for the silvery minnow.

The contracts will be considered to be amended by the ESA if the Ninth Circuit's reasoning is adopted and the unmistakable terms doctrine is held to apply to the San Juan-Chama contracts. Under *Winstar*, the unmistakable terms doctrine will apply if the contractors file suit to enjoin the government's sovereign power to reallocate water in order to comply with the ESA. However, if the contractors do not seek to block the reallocation, but seek only damages for their losses, the unmistakable terms doctrine, as limited by *Winstar*, would not apply. But, in order to prevail on their damage claim, the contractors would have to establish that the terms of the contracts do not admit the possibility of reallocation for fish and wildlife or "other causes" in order to prove a breach. They would be left with a textual argument regarding intent of the parties that would have to overcome the discretionary and reallocation language of the contract terms in light of the subsequent ESA mandate to conserve endangered species.<sup>211</sup>

There may be no way for the contractors to avoid the fact that this is not just any fish, but an endangered fish, inevitably drawing the

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209. 657 F.2d 1126, 1139 (10th Cir. 1981).

210. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

211. The contractors may also pursue a Fifth Amendment takings claim. An April 2001 Court of Federal Claims case provides support for this approach. See *Tulare Lake Basin Water Storage Dist. v. United States*, No. 98-101 L, 2001 U.S. Claims LEXIS 72 (Fed. Cl. Apr. 30, 2001) (holding that the government's reallocation of contracted federal project water for endangered species was a physical taking).

congressional mandates of the ESA into the interpretation of contract terms and conflicting agency duties. Some commentators have noted that the power of the ESA is such that it has the potential to amend interstate compacts that underlie federal projects in the West.<sup>212</sup> Others have lamented the failure of government agencies to utilize the full power of the ESA as it was originally intended by Congress.<sup>213</sup> It may have been better in the long run for the Middle Rio Grande water users to find their own solution within the context of mediation, rather than to put the ESA's power to the test in litigation.<sup>214</sup> However, the parties now appear to be forcing a judicial resolution. In any event, the decisions made here in the Middle Rio Grande will bear watching by agencies, water contractors, and environmentalists alike throughout the water-scarce West.

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212. See James S. Lochhead, *Interplay between Interstate Compacts and Federal Environmental Laws*, Address Before the American Bar Association Section of Environment, Energy, and Resources, 7th Section Fall Meeting (October 6-9, 1999) (outline on file with author). Lochhead noted that the mandates of the ESA are creating "train wrecks in the making," and quoted then Congressman, now Vice President Cheney in his remarks on the 1982 amendments to the ESA: "[T]he Endangered Species Act has gone beyond its original purpose and will stop water projects in the West. It even runs the risk of redoing all of the interstate compacts governing which state gets what share of available water supplies." *Id.* at 1.

213. See, e.g., Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

214. Other regions have found solutions that appear to be working. See, e.g., Jennie L. Bricker & David E. Filippi, *Endangered Species Enforcement and Western Water Law*, 30 ENVTL. L. 735, 759-64 (2000); Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish versus Irrigated Agriculture*, 36 NAT. RESOURCESJ. 319, 339-41 (1996); Joseph Sax, *supra*, note 91.