

# Cornhusker Economics

Cooperative Extension

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## California Irrigation Water Restrictions for Endangered Species Protection Held to be Unconstitutional

It finally happened. For the first time, a court has held that restrictions imposed under the Endangered Species Act constituted a Fifth Amendment taking of Property.

So begins a 2002 law review article [Benson, "Tulare, ESA and the Fifth Amendment," 32 *Env L* 551] analyzing *Tulare Lake Basin Water Storage Dist v US*, 49 Fed Cl 313 (2001). In *Tulare*, the U.S. Court of Claims ruled for the first time that the federal government was required to pay irrigators for water they did not receive due to endangered species habitat requirements. In December 2003 the same court ruled that the water was worth \$14 million, which with interest and attorneys fees brought the total monetary award to \$26 million. In water and environmental law circles, this case is the shot heard around the world.

Under the Endangered Species Act (ESA) federal agencies must consult with the U.S. Fish & Wildlife Service (FWS) to determine whether their proposed acts would harm endangered or threatened species or their designated critical habitat. The FWS will propose reasonable and prudent alternatives (RPAs) as project modifications that would avoid jeopardy to protected species. All persons, including the federal government, are prohibited from taking acts that harm protected species or their habitat. Individuals may receive limited ESA exemptions by obtaining "incidental take" permits from the FWS, typically by agreeing to dedicate private property to endangered species protection. But the issue of when FWS restrictions on private property use to protect endangered species might constitute an unlawful taking of private property requiring government compensation has not been litigated until *Tulare*.

The Tulare District is an irrigation district in California's Central Valley. The district receives water from the Federal Central Valley Project (CVP) delivered via state canals that are part of the California State Water Project

Market Report	Yr Ago	4 Wks Ago	1/23/04
<b><u>Livestock and Products,</u></b>			
<b><u>Average Prices for Week Ending</u></b>			
Slaughter Steers, Ch. 204, 1100-1300 lb Omaha, cwt	\$77.69	\$80.43	\$86.30
Feeder Steers, Med. Frame, 600-650 lb Dodge City, KS, cwt	83.84	*	99.75
Feeder Steers, Med. Frame 600-650 lb, Nebraska Auction Wght. Avg	87.94	106.42	107.33
Carcass Price, Ch. 1-3, 550-700 lb Cent. US, Equiv. Index Value, cwt	118.92	*	132.73
Hogs, US 1-2, 220-230 lb Sioux Falls, SD, cwt	35.50	*	43.00
Feeder Pigs, US 1-2, 40-45 lb Sioux Falls, SD, hd	*	26.50	*
Vacuum Packed Pork Loins, Wholesale, 13-19 lb, 1/4" Trim, Cent. US, cwt	92.51	95.20	124.95
Slaughter Lambs, Ch. & Pr., 115-125 lb Sioux Falls, SD, cwt	88.37	*	*
Carcass Lambs, Ch. & Pr., 1-4, 55-65 lb FOB Midwest, cwt	164.86	183.19	181.86
<b><u>Crops,</u></b>			
<b><u>Cash Truck Prices for Date Shown</u></b>			
Wheat, No. 1, H.W. Omaha, bu	3.66	*	3.82
Corn, No. 2, Yellow Omaha, bu	2.27	*	2.59
Soybeans, No. 1, Yellow Omaha, bu	5.58	*	8.32
Grain Sorghum, No. 2, Yellow Kansas City, cwt	4.48	*	4.84
Oats, No. 2, Heavy Minneapolis, MN, bu	2.24	*	1.79
<b><u>Hay,</u></b>			
<b><u>First Day of Week Pile Prices</u></b>			
Alfalfa, Sm. Square, RFV 150 or better Platte Valley, ton	150.00	130.00	130.00
Alfalfa, Lg. Round, Good Northeast Nebraska, ton	80.00	55.00	55.00
Prairie, Sm. Square, Good Northeast Nebraska, ton	115.00	*	*
* No market.			



(SWP). Combined, the CVP and the SWP divert more than 10 million acre-feet of water per year from Northern California for Southern California irrigation and municipal water supply. The CVP diverts water from the Sacramento and San Joaquin Rivers, reducing flows to the Sacramento-San Joaquin Delta and ultimately to San Francisco Bay. The flow depletions were determined by the FWS (and the National Marine Fisheries Service) to threaten the continued existence of the protected chinook salmon and delta smelt, and the RPAs required reductions in irrigation water diversions. For 1992-1994, the Tulare District lost approximately 16.5 percent of its irrigation water supply to endangered species protection requirements.

The Court of Claims ruled that the non-diversion of the water for irrigation purposes was a “physical taking” of property from the irrigation district, which requires compensation. All the commentators I have found disagree with the court’s characterization of the *Tulare* taking as a physical taking, and would instead characterize it as a “regulatory taking.” That is a matter for the Court of Appeals, should *Tulare* be appealed. A subtle distinction, a physical taking involves physically taking the property at issue and using it for some government purpose, versus the government regulating how private property is used. If a taking is a regulatory taking, compensation is not required unless the regulation renders the regulated property worthless. Part of what affects this outcome is whether the court considers the property at issue to be the entire irrigation district water right (then it is a regulatory taking) or only the portion of the water right that the district lost (that portion was physically taken). If the case is appealed, how the property interests at stake are characterized – either Tulare’s entire 118,500 acre-feet entitlement or the average 19,606 acre-feet that the Tulare District was shorted each year for endangered species protection – will likely influence the outcome of the case.

decided and will be reversed on appeal. The Court of Claims has been reversed in the past for awarding compensation claimed from other environmental regulations of private property. It is not clear to me how *Tulare* would fare on appeal. What is clear is that if the *Tulare* decision stands, private property regulations under the Endangered Species Act would be sharply curtailed in the future. If, for example, the FWS had to compensate Nebraska irrigation districts for the surface water that is diverted from irrigation for endangered species protection on the Platte River, it is very likely that the FWS would require less habitat water, based on how much irrigation water the FWS could afford to purchase. This would have a profound effect on administration of the endangered species in the irrigated West. But if *Tulare* is appealed, it is likely to be years before the case is finally resolved. Remember that the Tulare irrigation water shortages occurred in 1992-1994, the Court of Claims determination that the FWS was liable to the Tulare District for the water shortages was in April 2001, and the monetary judgment was made in December 2003 – a nine year process. And this was with no appeals taken. Nonetheless, the first act of the drama to determine the balance between endangered species protection and private property rights has finally ended. It will be interesting to see how the second and third acts play out.

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