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# Upstream Struggle: California Attempts to Salvage Wild Salmon and Steelhead Trout

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## Upstream Struggle: California Attempts to Salvage Wild Salmon and Steelhead Trout

Nathaniel H. Clark

### Code Section Affected

Public Resources Code § 6217.3 (new).

SB 562 (Wiggins); 2008 STAT. Ch. 4 (*Effective April 14, 2008*).

### I. INTRODUCTION

“Save some for the fish” may be more than a playful jab amongst the thirsty, it could be the key to saving California’s crippled fisheries.<sup>1</sup> Wild salmon and steelhead trout face unprecedented critically low populations,<sup>2</sup> and California’s recreational and commercial salmon fishing industries have essentially been put on hiatus,<sup>3</sup> with severe economic consequences for the State.<sup>4</sup>

California’s wild salmon and steelhead trout populations cannot survive unless the rivers from which they naturally spawn are protected.<sup>5</sup> But such protection requires water<sup>6</sup>—the most coveted natural resource in the State.<sup>7</sup>

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1. DENNIS MCEWAN & TERRY A. JACKSON, STEELHEAD RESTORATION AND MANAGEMENT PLAN FOR CALIFORNIA 216 (1996) (on file with the *McGeorge Law Review*) (arguing that providing more water for rivers may be the most effective method to restore struggling steelhead populations); *Gov. Schwarzenegger Takes Action to Address Impacts of Vote to Close Commercial and Recreational Salmon Fisheries*, STATE NEWS SERVICE, Apr. 10, 2008, at 2-3 [hereinafter STATE NEWS SERVICE] (declaring a state of emergency in fishery industry due to poor ocean conditions and significant restrictions on salmon fisheries).

2. CAL. CONSERVATION CORPS, SALMON RESTORATION PROGRAM INFORMATIONAL PAMPHLET 2 (2004) (on file with the *McGeorge Law Review*) (claiming threatened and endangered status for Coho and Chinook Salmon); Senator Pat Wiggins, Editorial, *What It Will Take to Restore Salmon?*, EUREKA TIMES STANDARD, Apr. 12, 2008, [http://www.times-standard.com/ci\\_8901613?IADID=Search-www.times-standard.com-www.times-standard.com](http://www.times-standard.com/ci_8901613?IADID=Search-www.times-standard.com-www.times-standard.com) (on file with the *McGeorge Law Review*).

3. SACRAMENTO ASSOCIATED PRESS, Apr. 16, 2008, available at WL 4/16/08 APALERTCA 01:31:02 2008 (on file with the *McGeorge Law Review*).

4. See STATE NEWS SERVICE, *supra* note 1 (noting a potential \$255 million state economic impact and loss of 2,263 jobs); CAROLYN ALKIRE, THE VALUE OF RECREATIONAL FISHING IN CALIFORNIA: DIRECT FINANCIAL IMPACTS 1 (2008) (approximating \$2 billion spent annually by anglers on recreational fishing trips and equipment).

5. MCEWAN & JACKSON, *supra* note 1, at 19 (noting that steelhead spawn in coastal and freshwater streams from Los Angeles County to Sacramento); Trout Unlimited, Habitat, <http://www.tu.org/site/c.kkLRJ7MSKtH/b.3022959/k.BDA7/Habitat.htm> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*) (stating that salmon and trout require cold and clean water for healthy habitat but that rivers suffer from lack of water and protection because of dams and over-harvesting of forestry).

6. Trout Unlimited, *supra* note 5.

7. Jennifer Steinhauer, *Governor Declares Drought in California*, N.Y. TIMES, June 5, 2008, <http://nytimes.com/2008/06/05/us/05drought.html?hp> (quoting Governor Schwarzenegger on California’s water infrastructure as saying, “nothing is more vital to protect our economy, our environment and our quality of life”).

Because water is limited,<sup>8</sup> California's largest rivers may not be getting enough to provide a proper habitat for endangered species.<sup>9</sup> For decades the Department of Fish and Game has led a state-wide effort to salvage wild salmon and steelhead trout populations.<sup>10</sup>

Chapter 4 is the latest attempt to reinforce what has thus far been a losing battle to save the wild salmon and steelhead trout.<sup>11</sup> In enacting Chapter 4, the Legislature appropriated much-needed funds to the Department of Fish and Game and the Salmonid<sup>12</sup> Monitoring Program for the purpose of coastal salmon and steelhead fishery restoration programs.<sup>13</sup>

## II. BACKGROUND

California voters approved the "The Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006" (2006 Bond Act),<sup>14</sup> making \$45 million available for Bay-Delta and coastal fishery restoration projects.<sup>15</sup> Despite intentions to appropriate funding in the traditional annual budget, fallout over regulatory concerns resulted in a decision by the Budget Conference Committee to remove the funding approved by the Governor in the 2007-08 budget.<sup>16</sup> Chapter 4 resolved the issue by providing clear and sufficient expenditure rules.<sup>17</sup>

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8. Matt Weiser & Carrie Peyton Dahlberg, *Schwarzenegger Hopes Drought Decree Is Wake-Up Call*, SACRAMENTO BEE, June 5, 2008, at A1 (reporting that Governor Schwarzenegger declared California's first drought since 1991).

9. *Id.* (noting that Governor's decision to declare drought was partially driven by legal action to protect endangered species threatened because the major rivers feeding the Sacramento-San Joaquin Delta are critically dry).

10. Department of Fish and Game, Fisheries Restoration Grant Program: Program Overview, <http://www.dfg.ca.gov/fish/Administration/Grants/FRGP/> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*); CAL. CONSERVATION CORPS, *supra* note 2.

11. CAL. PUB. RES. CODE § 6217.3(b) (enacted by Chapter 4) (appropriating over \$5 million to the Department of Fish and Game for the purpose of salmon and steelhead fishery restoration projects); CAL. CONSERVATION CORPS, *supra* note 2.

12. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1032 (10th ed. 1993) (defining "Salmonid" as "any of a family (Salmonidae) of elongate bony fishes (as a salmon or trout) that have the last three vertebrae upturned").

13. CAL. PUB. RES. CODE § 6217.3(a)-(b) (enacted by Chapter 4).

14. *Id.* § 6217.3(a)(1) (enacted by Chapter 4).

15. *Id.* § 6217.3(a)-(b) (enacted by Chapter 4).

16. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 3 (Mar. 25, 2008).

17. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 3 (Feb. 12, 2008) (making \$45 million in bond funds available for steelhead and coastal salmon restoration projects).

A. *Water Project and Fishery Restoration Development*

1. *Central Valley Project and State Water Project*

The California Legislature authorized the Central Valley Water Project (CVP) in 1933, but after the Rivers and Harbor Act of 1935, the Federal Government took control of the program.<sup>18</sup> The CVP was designed to protect the Central Valley from water shortages and floods, improve river navigation, provide domestic and industrial water, generate power, conserve wildlife and fish, and enhance water quality.<sup>19</sup> The CVP has overseen the construction of twenty dams and reservoirs as well as California's largest watersheds in the Sacramento and San Joaquin rivers.<sup>20</sup> The complex water-control system administers water to many of the State's major agricultural counties, while hydroelectric power and irrigation related sales yield millions in annual income.<sup>21</sup>

The California Legislature passed the Burns-Porter Act in 1960, initiating the State Water Project,<sup>22</sup> which has grown into the nation's largest state-run water and power development and distribution project.<sup>23</sup> In conjunction with the CVP, these projects comprise an impressively massive irrigation and water-supply system, spanning hundreds of miles, from Trinity Lake to Los Angeles County.<sup>24</sup>

2. *Summary of California Water Law*

The Public Trust Doctrine, the law governing water usage in the State, places all navigable waters<sup>25</sup> of the State and the underlying land of such waters in the custodial care of the State.<sup>26</sup> California recognizes three systems of water rights:

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18. U.S. Department of the Interior, Bureau of Reclamation, Central Valley Project: General Overview, <http://www.usbr.gov/dataweb/html/cvp.html> (last visited Oct. 14, 2008) (on file with the *McGeorge Law Review*) (stating that The River and Harbors Act of 1935 put funding under Federal direction and construction under the U.S. Army Corps of Engineers).

19. *Id.* (noting that fish and wildlife conservation became an equal priority to irrigation with the passage of the Central Valley Improvement Act).

20. *Id.* (further noting the construction of over 500 miles of canals, conduits, tunnels, and related facilities).

21. *Id.*

22. California Department of Water Resources, State Water Project: History, [http://www.publicaffairs.water.ca.gov/swp/history\\_swp.cfm](http://www.publicaffairs.water.ca.gov/swp/history_swp.cfm) (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*) (stating that Proposition One (the Burns-Porter Act) passed with a margin of 173,944 votes out of 5.8 million ballots counted).

23. *Id.*

24. See California Department of Water Resources, State Water Project: Map, <http://www.publicaffairs.water.ca.gov/swp/pdf/SWPmap.pdf> (last visited Feb. 13, 2009) (on file with the *McGeorge Law Review*) (providing a map showing the various State Water Project facilities).

25. BLACK'S LAW DICTIONARY 1057 (8th ed. 2004) (defining navigable water as "[a] body of water that is used . . . as a highway for commerce with ordinary modes of trade and travel on water").

26. Nat'l Audobon Soc'y v. Superior Court, 33 Cal. 3d 419, 424-25, 658 P.2d 709, 712 (1983).

riparian,<sup>27</sup> appropriation, and prescription.<sup>28</sup> Water is classified as either surface or underground.<sup>29</sup> Surface water includes “water from springs . . . and running streams,” whereas underground water includes subterranean streams.<sup>30</sup> Flowing stream and river water cannot be owned; any rights pertaining to such water are usufructuary (use only).<sup>31</sup> One can, however, appropriate water from a river (with a canal for example) and obtain greater claim to the water than subsequent appropriators.<sup>32</sup> Such rights are still limited as usufructuary.<sup>33</sup> California incorporated the reasonableness doctrine in 1928 with the introduction of Article X § 2 to the State Constitution.<sup>34</sup>

### 3. *The Department of Fish and Game*

The Department of Fish and Game (DFG) and the California Conservation Corps jointly created the Salmon Restoration Program in 1980 and the Fishery Restoration Grant Program in 1981.<sup>35</sup> The California Legislature passed the Salmon, Steelhead Trout, and Anadromous Fisheries Program Act in 1988 with the goal of increasing the natural production of salmon and steelhead trout.<sup>36</sup>

The DFG has invested over \$180 million in various projects intended to counter rapidly declining wild salmon and steelhead trout populations<sup>37</sup> and has spent “over 1.5 million hours modifying 1,251 fish barriers, planting 1,275,661 trees, stabilizing 24,710 feet of stream bank, and installing 5,533 instream and

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27. BLACK'S LAW DICTIONARY 1352 (8th ed. 2004) (defining riparian right as “[t]he right of a landowner whose property borders on a body of water or watercourse”) “Such a landowner traditionally has the right to make reasonable use of the water.” *Id.*

28. See Gregory A. Thomas, *The Future of Water Law Reform in California a Quarter Century After the Governor's Commission*, 36 MCGEORGE L. REV. 495, 496 n.9 (2005) (unlike non-statutory riparian and prescriptive water rights, the appropriation of water requires filing for a permit); 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 915 (10th ed. 2005) (listing the three ways water rights can be acquired in California as ownership of riparian land, appropriation, and prescription).

29. 12 WITKIN, *supra* note 28, § 916.

30. *Id.*

31. *Hargrave v. Cook*, 108 Cal. 72, 77, 41 P. 18, 19 (1895) (defining “usufructuary right” as “a right . . . to make a reasonable use of a reasonable quantity for irrigation”); BLACK'S LAW DICTIONARY 1580 (8th ed. 2004) (defining “usufructuary right” as “the right to a usufruct; . . . a person who has the right to the benefits of another's property; a life renter”).

32. *Crandall v. Woods*, 8 Cal. 136, 141 (1857).

33. *Id.*

34. Clifford W. Schulz & Gregory S. Weber, *Changing Judicial Attitudes Towards Property Rights in California Water Resources: From Vested Rights to Utilitarian Reallocations*, 19 PAC. L.J. 1031, 1064 (1988) (describing the doctrine as evolving in the courts for 50 years before the Constitutional Amendment).

35. CAL. CONSERVATION CORPS, *supra* note 2; Department of Fish and Game, *supra* note 10.

36. C.F. Raysbrook, *Foreword to DENNIS MCEWAN & TERRY A. JACKSON, STEELHEAD RESTORATION AND MANAGEMENT PLAN FOR CALIFORNIA*, at iii (1996) (noting that the Act mandated a policy of significantly increasing the “natural production of salmon and steelhead by the end of century”).

37. Department of Fish and Game, *supra* note 10; SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 2 (Feb. 12, 2008).

cover structures.”<sup>38</sup> Since 2000, the DFG has cited various accomplishments, including the treatment and stabilization of hundreds of miles of stream, the restoration of 122 miles of instream habitat, and the removal of sediment and barriers to enable fish passage.<sup>39</sup>

## B. Upstream Struggle

### 1. State of Emergency

Despite recognition as one of the country’s leading fishery restoration projects,<sup>40</sup> Governor Schwarzenegger declared a state of emergency over concern for a critically imperiled fishery industry and a potential state economic impact of \$255 million with an estimated loss of 2,263 jobs.<sup>41</sup> Poor conditions have resulted in the endangerment of indigenous salmonid species.<sup>42</sup> Adult steelhead trout populations are less than half that of the 1960s.<sup>43</sup> In an alarming example, a mere 58,200 fish are expected to spawn in the Sacramento River and its tributaries—down from 775,000 in 2002.<sup>44</sup> Central Valley Spring Run populations have dropped ninety percent since last decade and rivers throughout the State are running dry.<sup>45</sup> The decline has led the Fish and Game Commission to ban recreational salmon fishing on the California coast following a decision by federal regulators to close commercial and sport salmon fishing.<sup>46</sup>

### 2. Endangered Species Act

Congress passed the Endangered Species Act of 1973 to conserve various endangered and threatened species of “esthetic, ecological, educational, historical,

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38. CAL. CONSERVATION CORPS, *supra* note 2.

39. See Department of Fish and Game, *supra* note 10 (noting the treatment of 895 miles of stream, the stabilization of 53 miles of stream bank, the restoration of 122 miles of instream habitat, and the removal of 440 barriers opening 661 miles of stream).

40. See CAL. CONSERVATION CORPS, *supra* note 2 (“In 1992 and 1996, the Salmon Restoration Program received the *Renew America National Environmental Achievement Award* and the *Times Mirror Chevron Award*, respectively” for efforts in the field of fisheries and watershed restoration. (emphasis in original)).

41. STATE NEWS SERVICE, *supra* note 1.

42. CAL. CONSERVATION CORPS, *supra* note 2 (explaining that the focus of environmental restoration is to ensure appropriate water temperatures and river complexity to restore the natural balance and listing numerous California salmon as threatened or endangered).

43. See Raysbrook, *supra* note 36, at iv (stating that in 1996 the steelhead population in California was 250,000, which was less than half of the number of steelhead thirty years prior).

44. Matt Weiser, *State Panel to Vote on Drastic California Salmon Fishing Cutback*, SACRAMENTO BEE, Apr. 12, 2008, at B1 (discussing concern by recreational and commercial fishermen over the economic impact of a ban on federal water salmon fishing and a potential state ban on near-shore water and Central Valley salmon fishing).

45. Wiggins, *supra* note 2.

46. SACRAMENTO ASSOCIATED PRESS, *supra* note 3.

recreational, and scientific value.”<sup>47</sup> “Conservation” is defined as “the use of all methods and procedures . . . necessary to bring any endangered species or threatened species to the point . . . [where assistance is] no longer necessary.”<sup>48</sup> Such methods include but are not limited to habitat acquisition and maintenance, and “in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.”<sup>49</sup> “Endangered” means within danger of extinction,<sup>50</sup> while “threatened” means likely to become endangered in the foreseeable future.<sup>51</sup>

The Sacramento River Winter-Run Chinook salmon is listed in the Federal Register as endangered.<sup>52</sup> The Central Valley Spring-Run Chinook salmon and steelhead are listed as threatened.<sup>53</sup>

### III. CHAPTER 4

Chapter 4 appropriates \$5.29 million—made available by the 2006 Bond Act—“to the Department of Fish and Game for the purposes of coastal salmon and steelhead fishery restoration projects, including the Coastal Salmonid Monitoring Plan.”<sup>54</sup> No more than \$2.52 million shall be allocated to the Salmonid Monitoring Program.<sup>55</sup> Expenditure of the funds is governed by section 6217.1<sup>56</sup> of the Public Resources Code, with the exception of funding for the Salmonid Monitoring Program.<sup>57</sup>

The 2006 Bond Act was approved by voters in the November 2006 statewide election and made \$180 million in bond funds available for Bay-Delta and coastal fishery restoration projects.<sup>58</sup> Any conflicts between Chapter 4 and the Bond Act are governed by the Bond Act.<sup>59</sup>

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47. Endangered Species Act of 1973, 16 U.S.C. § 1531(a) (2006).

48. *Id.* § 1532(3).

49. *Id.*

50. *Id.* § 1532(6).

51. *Id.* § 1532(20).

52. Rules and Regulations, 70 Fed. Reg. 37160, 37168 (June 28, 2005) (to be codified at 50 C.F.R. pts. 223-24).

53. *Id.*

54. CAL. PUB. RES. CODE § 6217.3(b) (enacted by Chapter 4).

55. *Id.*

56. *Id.* § 6217.1 (West 2001 & Supp. 2009) (enumerating regulations regarding the allocation of funds to salmon and steelhead trout conservation and restoration, including mandating at least 87.5 percent of funding go through existing grant programs operated by the Department of Fish and Game).

57. *Id.* § 6217.3(c)(1) (enacted by Chapter 4).

58. *Id.* § 6217.3(a)(2) (enacted by Chapter 4).

59. *Id.* § 6217.3(c)(3) (enacted by Chapter 4); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 2 (Mar. 26, 2008).

#### IV. ANALYSIS

Chapter 4 bolsters the efforts of the Department of Fish and Game to curb declining populations, but these efforts have historically failed to salvage California's wild salmon and steelhead trout.<sup>60</sup> It is difficult to oppose a law designed purely to save an endangered and valuable indigenous species.<sup>61</sup> However, Chapter 4 cannot alleviate the California drought,<sup>62</sup> nor does it provide new measures for restoring the State's rivers from which the fish spawn.<sup>63</sup> While the appropriated funds will help, success will require a state-wide effort to preserve California's rivers and streams.<sup>64</sup>

##### A. Pacific Coast Federation of Fisherman's Ass'n v. Gutierrez<sup>65</sup>

In June 2008, claiming federal jurisdiction pursuant to the Endangered Species Act, the U.S. District Court for the Eastern District of California heard plaintiff Pacific Coast's requests for injunctive relief in the form of increasing river water flow and the lifting of dams.<sup>66</sup>

When considering the Endangered Species Act, the court must afford the endangered species the "highest of priorities."<sup>67</sup> The Supreme Court has held that because the value of endangered species is "incalculable," courts are *prohibited* from balancing economic consequences with the value of the species.<sup>68</sup> However, the party seeking the injunction must still show "a likelihood of success on the merits[] and . . . a 'reasonable likelihood' of irreparable harm."<sup>69</sup> Under Ninth Circuit precedent, the court interpreted the standard as preventing agencies from engaging "in an action that reasonably would be expected, directly or indirectly, to *reduce appreciably* the likelihood of both the survival and recovery of" a species.<sup>70</sup> After hearing extensive scientific testimony, the court determined that

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60. Weiser, *supra* note 44 (noting that the annual expected spawn from the Sacramento River and its tributaries is down to 58,200 from 775,000 in 2002); Wiggins, *supra* note 2 (noting that Central Valley Spring Run populations are down 90 percent from last decade).

61. CAL. PUB. RES. CODE § 6217.3 (enacted by Chapter 4) (appropriating over \$5.23 million to the Department of Fish and Game for the purpose of salmon and steelhead fishery restoration projects but failing to mandate any change in policy).

62. Weiser & Dahlberg, *supra* note 8.

63. See generally CAL. PUB. RES. CODE § 6217.3 (enacted by Chapter 4) (appropriating funds to the Department of Fish and Game but failing to provide new measures for preserving California's rivers and streams).

64. See Wiggins, *supra* note 2 (arguing that salmon restoration efforts will require cooperation of fishermen, farmers, water users, tribes, power companies, the Governor, and the Legislature).

65. No. 1:06-CV-00245, 2008 WL 2851568 (E.D. Cal. July 18, 2008).

66. *Id.*

67. *Id.* at \*7; *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

68. *Hill*, 437 U.S. at 187-88.

69. *Gutierrez*, 2008 WL 2851568, at \*7.

70. *Id.* at \*9 (emphasis in original).



salmonid populations are suffering from high water temperature stemming from low water levels and severe upstream migration restrictions in the form of dams.<sup>71</sup> These are primarily functions of the CVP and the State Water Project, which in addition to controlling water levels via dams,<sup>72</sup> control water pumps; but these water pumps are estimated to destroy large proportions of juvenile salmonids, which can be trapped and killed within.<sup>73</sup> The court further noted that indirect salmonid casualties result from the unnatural diversion of populations into polluted or predatorial areas.<sup>74</sup>

The court held that the irreparable harm necessary for equitable relief had been met, but ordered a new trial to determine the appropriate actions.<sup>75</sup> The ultimate holding could potentially preempt state measures under Chapter 4 by mandating changes in the control of water supply and dams pursuant to federal law.<sup>76</sup>

### B. Fish Out of Water?

While the appropriation of funding is a boost, an appropriation of water would be a boon.<sup>77</sup> Under current law, the onus of preserving wild salmon and steelhead trout falls directly on the State; like the rivers they swim in, fish are public trust resources of the Department of Fish and Game.<sup>78</sup> The 2006 Bond Act raised \$928 million for the protection of rivers, lakes, and streams.<sup>79</sup> Hundreds of millions will be invested to restore fishery projects, prevent pollution, and repair watercourses.<sup>80</sup> But the 2006 Bond Act's opponents argue that nothing will be invested towards *new* reservoirs, aqueducts, or water storage.<sup>81</sup> Water will simply be taken from other sources, such as drinking water, while our population continues to grow.<sup>82</sup> Nor does

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71. *Id.* at \*31-32 (noting a worst case scenario of such scarcity in water supply that water temperatures could become too low to preserve any habitat for the 2009 winter-run spawn and explaining that man-made dams, while designed to facilitate migration, delay migration efforts and deplete energy supply of fish).

72. *Id.* at \*1 (noting that plaintiffs seek injunctive relief in the form of additional water flow by lifting dam gates).

73. *Id.* at \*44 (estimating mortality rates of 75 percent for State Water Project pumps and 15 percent for CVP pumps).

74. *Id.* at \*45.

75. *Id.* at \*53 (declaring a hearing to schedule further trial appearances).

76. *Id.* at \*1 (claiming federal jurisdiction pursuant to the *Endangered Species Act*).

77. Raysbrook, *supra* note 36, at iii (citing Governor Wilson's *Water Policy Statement* of 1992, which points out an urgent need to provide "sufficient water to restore fish and wildlife resources"); Weiser & Dahlberg, *supra* note 8 (noting that Governor Schwarzenegger's decision to declare drought was partially driven by legal action to protect endangered species threatened because the major rivers feeding the Sacramento-San Joaquin Delta are critically dry).

78. MCEWAN & JACKSON, *supra* note 1, at 3; Nat'l Audobon Soc'y v. Superior Court, 33 Cal. 3d 419, 424-25, 658 P.2d 709, 712 (1983).

79. CALIFORNIA PROPOSITION 84, ANALYSIS BY THE LEGISLATIVE ANALYST 50 (2006).

80. *Id.*

81. *Id.* at 52-53 (emphasis added).

82. *Id.*

Chapter 4 provide any source or strategy to procure more water for these rivers.<sup>83</sup> Such is California's peril: there just simply is not enough water to go around.

The U.S. Eastern District Court of California has yet to order additional water flow for the purpose of cooling river temperatures or mandate the raising of dams to allow unimpeded salmonid migration—but it may in the near future.<sup>84</sup> Because the court has apparently made a valid claim of federal jurisdiction pursuant to the Endangered Species Act, it is possible that water will be taken from other sources in an attempt to salvage indigenous salmonid species.<sup>85</sup> Although this could negatively impact agricultural development, U.S. Supreme Court precedent provides that the deciding court must ignore economic consequences because the highest priority under the endangered Species Act is saving the species.<sup>86</sup>

### C. *Necessary Yet Insufficient*

The State Senate did not introduce the law with intent to innovate; it rushed the bill through legislation to qualify for large amounts of federal funding.<sup>87</sup> Despite civilian reluctance to accept federal government handouts, the infusion of funds seems absolutely necessary.<sup>88</sup> Salmon, which were once so plentiful they could be caught with pitchforks,<sup>89</sup> are now so few in numbers that their harvesting has been banned altogether.<sup>90</sup> Opposition by California fishermen to the ban shows how important the indigenous fish are to their livelihood, but for now, they must find other sources of sustenance.<sup>91</sup> The ban, and the funding appropriated by Chapter 4, are truly necessary, but may be insufficient for success.<sup>92</sup>

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83. CAL. PUB. RES. CODE § 6217.3(a)-(b) (enacted by Chapter 4) (appropriating over \$5.23 million to the Department of Fish and Game for the purpose of salmon and steelhead fishery restoration projects but failing to mandate any change in policy).

84. Pac. Coast Fed'n of Fisherman's Ass'n v. Gutierrez, No. 1:06-CV-00245, 2008 WL 2851568, at \*53-54 (E.D. Cal. July 18, 2008) (scheduling a new trial date to determine the course of action to force the CVP and State Water Project to comply with the Endangered Species Act).

85. *Id.* at \*1.

86. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 187-88 (1978).

87. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 2 (Feb. 12, 2008); SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 562, at 3 (Mar. 26, 2008) (noting that California must provide adequate funding to compete for up to \$90 million in federal funding allocated to northwestern states for restoration programs).

88. See Weiser, *supra* note 44 (noting reluctance by fishermen over seeking government aid, but acknowledgment of its necessity).

89. Wiggins, *supra* note 2.

90. SACRAMENTO ASSOCIATED PRESS, *supra* note 3.

91. See Weiser, *supra* note 44 (interviewing several fishermen who explain that the ban on salmon fishing will effect not only commercial and sport fishermen, but also bait and tackle shops, fuel docks, motels, and restaurants).

92. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 3 (Mar. 26, 2008) (noting Sonoma County Water Agency's support of funding as best way to assure availability of water in future).

## V. CONCLUSION

Salmon is a delicious and healthy supper,<sup>93</sup> and it is not only great for your body—our favorite slice of sashimi is good for California’s economy as well.<sup>94</sup> But aside from additional funding, Chapter 4 brings nothing new to the dinner table.<sup>95</sup> Chapter 4 came to fruition with a strong majority vote and is an acceptable vehicle to appropriate funds already raised by the 2006 Bond Act.<sup>96</sup> The staggering drop in salmonid populations shows that the urgency in which the bill was passed is only matched by the reality of the crisis it attempts to solve.<sup>97</sup>

In an era of fish farms that distort natural genetic variation,<sup>98</sup> processed meat that is dyed to look natural,<sup>99</sup> and global concern for the environment, it would be senseless to ignore the plight of endangered wild salmon.<sup>100</sup> Californians must learn to conserve water, our most precious resource.<sup>101</sup> But with federal intervention looming, a severe drought presiding, and economic consequences imperiling, the state faces a true challenge.<sup>102</sup> And while Chapter 4 is a common sense effort to ebb the tide, a state-wide effort to protect and restore California rivers will be needed if these fish are going to be saved at all.<sup>103</sup>

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93. See Jeffrey A. Foran et al., *Quantitative Analysis of the Benefits and Risks of Consuming Farmed and Wild Salmon*, 135 J. OF NUTRITION 2639, 2640 (2005) (noting studies show consuming Salmon may help prevent coronary disease, Alzheimer’s disease, and slow progression of rheumatoid arthritis and asthma).

94. See STATE NEWS SERVICE, *supra* note 1 (noting a potential \$255 million state economic impact and loss of 2,263 jobs); ALKIRE, *supra* note 4.

95. CAL. PUB. RES. CODE § 6217.3(a)-(b) (enacted by Chapter 4) (appropriating over \$5.23 million to the Department of Fish and Game for the purpose of salmon and steelhead fishery restoration projects but failing to mandate any change in policy).

96. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562 (Mar. 26, 2008) (noting assembly floor vote of 61-12); SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 3 (Feb. 12, 2008) (noting committee 2/3rd vote of 8-4); CAL. PUB. RES. CODE § 6217.3(a)-(b) (enacted by Chapter 4) (noting Proposition 84 as source of funding for Chapter 4).

97. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 562, at 1-2 (Mar. 26, 2008); CAL. PUB. RES. CODE § 6217.3 (enacted by Chapter 4) (noting that Chapter 4 appropriates funds for the purposes of coastal salmon and steelhead fishery restoration projects).

98. Jeffrey A. Hutchings & Dylan J. Fraser, *The Nature of Fisheries-and Farming-Induced Evolution*, 17 MOLECULAR ECOLOGY 294, 295-96 (2007) (discussing negative genetic effects fisheries have on salmonid species, including smaller size and younger age at maturity).

99. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 124-25 (HarperCollins Publishers Inc. 2002).

100. CAL. CONSERVATION CORPS, *supra* note 2; Wiggins, *supra* note 2.

101. Steinhauer, *supra* note 7.

102. *Pac. Coast Fed’n of Fisherman’s Ass’n v. Gutierrez*, No. 1:06-CV-00245, 2008 WL 2851568, at \*53-54 (E.D. Cal. July 18, 2008) (scheduling new trial date to determine course of action to force the CVP and State Water Project to comply with the Endangered Species Act); Weiser & Dahlberg, *supra* note 8; STATE NEWS SERVICE, *supra* note 1 (noting a potential \$255 million state economic impact and loss of 2,263 jobs); ALKIRE, *supra* note 4.

103. Trout Unlimited, *supra* note 5 (stating that salmon and trout require cold and clean water for healthy habitat but that rivers suffer from lack of water and protection because of dams and overharvesting of forestry); Wiggins, *supra* note 2 (arguing that salmon restoration efforts will require cooperation of fishermen, farmers, water users, tribes, power companies, the Governor, and the Legislature).