the rule of law, a standard that does not support the liberal assault on the Boy Scouts.

Which brings us back to Judge Jones. In siding with the American Civil Liberties Union, which brought the *Barnes-Wallace* lawsuit as part of its nationwide campaign against the Scouts, Jones held that the Scouts are a "religious" organization and "discriminatory" to boot, so San Diego shouldn't be giving it no-bid access to public property. An important fact was overlooked: The Scouts' lease is one of dozens that the city has made available to nonprofits, both secular and religiously oriented. How can it be said that San Diego is unconstitutionally "endorsing" or "advancing" religion when its property leases cover the entire spectrum of nonprofits, from the Girl Scouts to a Jewish Community Center; from a Korean Church to the Boys and Girls Clubs?

U.S. Supreme Court precedents such as *Lynch v. Donnelly* (1984) (allowing a Nativity scene on public property because it was surrounded by nonreligious holiday displays), run contrary to the San Diego ruling. The city's property leases must be looked at in their entirety, as a lush pluralistic forest. The District Court focused on a single tree, the city's arrangement with the Scouts, as if no larger context existed.

Judge Jones threw in a gratuitous insult, calling the Scouts "anti-homosexual." Here, too, he was straying from U.S. Supreme Court precedent. The New Jersey Supreme Court's assertion that the Scouts' ban on homosexual leaders is based "on little more than prejudice" was struck down in *Dale* in 2000.

THE SCOUTS' legal woes aren't confined to San Diego and Berkeley. The ACLU and other anti-Scout bigots are like an evil twin of the Energizer Bunny: always pushing forward with new strategies to force the Scouts to surrender their principles or to pummel them if they don't. An ACLU lawsuit tries to exclude the Scouts from military installations; politicians in Connecticut and Portland, Oregon, among other places, have frozen them out of work-place charity fund-raising programs for government employees. But between them, the two California cases encapsulate all the constitutional questions raised by the Scout-haters' ceaseless crusade, so observers across the nation are watching.

The Scouts deserve thanks for their tenacity in these courtroom clashes. They are standing up for their own First Amendment freedoms — and everyone else's as well. CPR

THOSE IN POWER OVER US

ESA finally meets the Fifth Amendment

A for-once rational court ruling combined with a Bush Administration agreement to settle may signal a new 'people friendly' era under the Endangered Species Act.

M. DAVID STIRLING

"... nor shall private property be taken for public use, without just compensation."

— Fifth Amendment, U.S. Constitution

LAST DECEMBER, the Bush administration quietly settled a landmark lawsuit involving a federal trial court judgment that the government's enforcement of the Endangered Species Act (ESA) had violated the constitutionally-protected property rights of farmers in California's Central Valley. The judge had ordered the government to pay $26 million in damages, including interest, for the undelivered water; under the settlement, the government agreed to pay $16.7 million. Even though settlement of a trial court judgment is not precedent-setting (only appellate court decisions establish precedent), we now have, for the first time since ESA became law, a court ruling that government's ESA enforcement triggers the Fifth Amendment's "just compensation" provision.

In the 31 years since the act became law, owners de-

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Environmentalists' real concern is that neither government funds nor taxpayer patience exist in sufficient supply to pay private property owners every time the federal government 'takes' property under the ESA.

nied use of their property through ESA enforcement have filed numerous lawsuits charging the government with taking private property for public use (*i.e.*, species protection) and seeking "just compensation" under the Fifth Amendment. Their claims seem clearly to be supported by the act itself. Congress declared in its "findings" incorporated into the ESA — Section 2(a)(3) — that endangered or threatened "species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Yet, despite this unambiguous statement of ESA's purpose as serving a "public use," no federal agency and no federal court — until now — has ever recognized ESA enforcement as serving a public use, or that the regulation of private property under ESA is a "taking" under the Fifth Amendment, or that the government should pay damaged property owners "just compensation."

At the heart of this case (*Tulare Lake Basin Water Storage District v. United States)* is the federal government's Central Valley Water Project and California's State Water Project – the natural and man-made systems of dams, reservoirs, pumping stations, and aqueducts that transport water from Northern California through the Central Valley to Southern California. For nearly 50 years, the federal and state water projects have contracted with locally-created water districts in the agriculture-based Central Valley to distribute the water to hundreds of farmers to irrigate their crops. Under these contracts, the water districts collect the farmers' payments for the water they use and forward the payments on to the federal and state governments.

During drought conditions in 1992, the National Marine Fisheries Service determined that continued distribution of water from the federal and state water projects to water districts and Central Valley farmers for irrigation was threatening the survival of the winter-run chinook salmon and the delta smelt. Based on that determination and an established presumption that ESA was to be enforced "whatever the cost" (on which, see below), federal and state water projects, for the next three years, halved the annual water allocation to the districts and farmers, and doubled the annual charge the districts and farmers paid for the water.

The water users filed suit against the federal government alleging that the reduction of water was a "taking" of private property under the Fifth Amendment that entitled them to compensation for their losses caused when the water was not delivered. The court ruling that the federal government had taken the water districts' and farmers' property stated:

> The Fifth Amendment to the United States Constitution concludes with the phrase: "nor shall private property be taken for public use, without just compensation." The purpose of that clause is [quoting a U.S. Supreme Court decision] "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ... The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.

In the debate over ESA between the defenders of private property rights and those who advance the dominant power of government, the champions of individual rights argue that even though Congress preserved fish, wildlife, and plant species for everyone's benefit, *i.e.*, "for public use," ESA enforcement leaves individual property owners with species-preservation losses uncompensated, forcing them to pay disproportionately for a program benefiting everyone. Under the Fifth Amendment, they say, public tax revenues should compensate them for their losses.

Although this argument may seem straightforwardly persuasive, even uncontroversial, it runs directly against the entire history of ESA enforcement. That is what makes the trial court ruling and the Bush administration's settlement so important.

Congress's enactment of the Endangered Species Act in 1973 authorized "the use of all methods and procedures which are necessary" to restore and preserve endangered or threatened species. The first Supreme Court decision to consider ESA — *Tennessee Valley Authority v. Hill* (1979) — held that Congress designed the act to "halt and reverse the trend toward species extinction, *whatever the cost*" (author's emphasis). From that time on, ESA has been enforced by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, and interpreted by federal

courts, as the nation's most dominant and least assailable federal statute. (While courts have ruled even parts of the 9/11 Patriot Act unconstitutional, they have fully upheld and consistently enforced ESA's provisions for more than 30 years.)

Under ESA, when federal enforcement agencies "list" a species as endangered or threatened, or designate land as "critical habitat" for a species, an affected property owner whose activity deliberately or accidentally harms the species or its habitat is subject to civil or criminal penalties, including heavy fines and even imprisonment. Furthermore, neither Fish and Wildlife nor Marine Fisheries will grant property owners permits to improve or modify land designated as habitat without imposing burdensome conditions and costly mitigation procedures. Because of these heavy burdens hanging over property owners, California's 200 ESA-protected species of fish, wildlife, and plants (second only to Hawaii's 300 protected species) have effectively rendered millions of acres of privately-owned land largely unusable by the owners.

The environmental activists, government environmental enforcement bureaucrats, and elected officials who drive the "species-first, people-last" agenda, have been largely successful in court for more than 30 years in keeping ESA enforcement out from under Fifth Amendment protections of individual rights. It was no surprise that they opposed the Bush Administration's *Tulare Lake Basin* settlement, urging instead that the Administration appeal the court's judgment. Even Senator Dianne Feinstein expressed concern that a precedent requiring the government to pay property owners for losses they suffered due to government-imposed environmental regulation "would vastly increase public expenditures."

Their real concern is that neither government funds nor taxpayer patience exist in sufficient supply to pay private property owners every time the federal government "takes" property under the ESA. They fear the government will have to moderate, *i.e.* balance, its regulatory enforcement approach so that people's lives, livelihoods, and property rights receive as much consideration as the species.

Thomas Jefferson foresaw the coming of laws like ESA when he warned that "the natural progress of things is for liberty to yield and government to gain ground." With that in mind, the framers of the Constitution and Bill of Rights strove mightily to give "We the People of the United States" lasting protection from government domination. More than 200 years later, this "natural progress" of government to take power from the people has proven to be a relentless aggressor, justifying Jefferson's warning and the Founding Fathers' efforts to mitigate what James Madison called "the abridgement of the freedom of the people by gradual and silent encroachments of those in power."

It is difficult to say whether the Bush Administration settled in *Tulare Lake Basin* to avoid the binding precedent an appeal might have brought or because the Administration agreed with the court's ruling. But whatever the reason, new ground has been broken, and the federal government's heavy-handed ESA enforcement may become more "people-friendly." CPR

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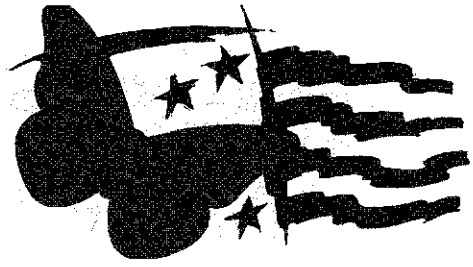

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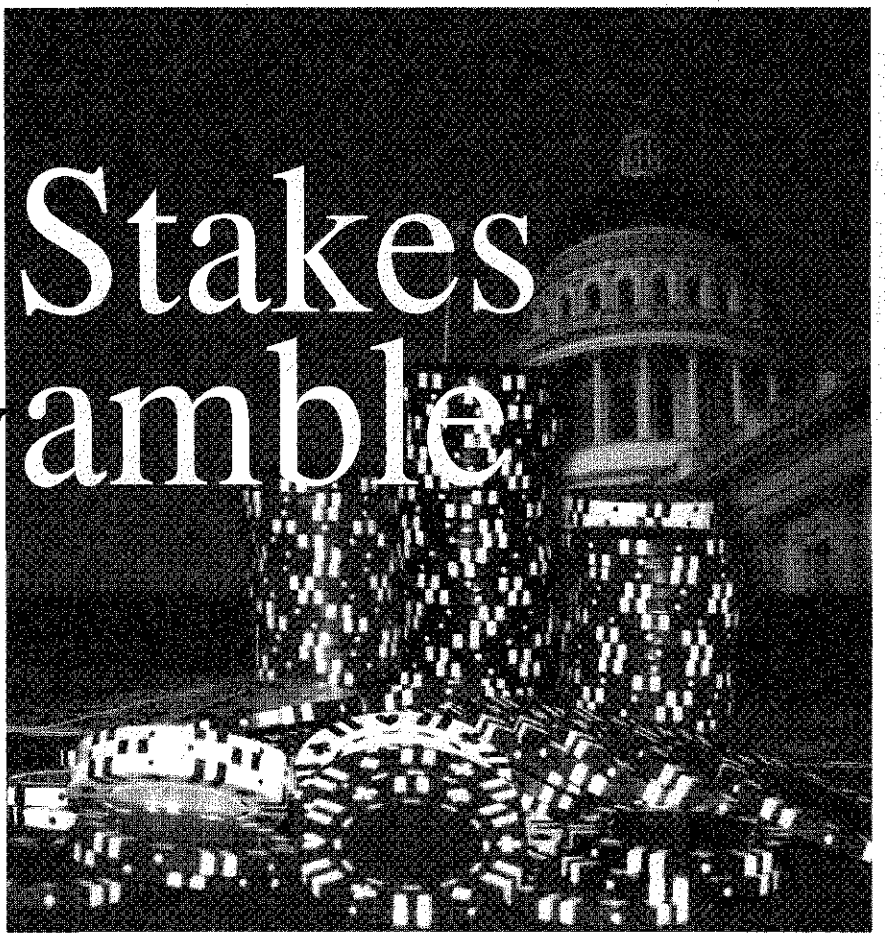
The Governor and the Legislature play for all the chips



The Schwarzenegger magic, Big Labor money, New Media vs. Old. In 2005, all the factors will be in play. CPR's experts survey the field.

How are California's political forces situated to engage in what many knowledgeable observers expect to be a watershed election next fall — one with the potential to leave the governor, who is spearheading a package of initiative reforms, a lame duck if he loses, or, if voters pass even some of the expected ballot measures, to overturn what has been the state's dominant power structure for the past three decades? California Political Review *asked a panel of experts to comment on some of the strategic and tactical factors that will be poured into the all out war for California's political future shaping up for 2005: factors in the media, in big labor, in the business community, in the Republican Party, and in grass roots organization.*

ROGER HEDGECOCK — THE NEW MEDIA

The success of the Gray Davis recall is the reason Governor Arnold Schwarzenegger believes he can leap over the public employee labor unions, the liberal media, the trial lawyers – the whole phalanx of liberal interest groups that control the state legislature – and appeal directly to the voters. The success of the recall hinged entirely on a mass of volunteers mobilized by talk radio and empowered by the Internet. For example, former legislator Howard Kaloogian was the first to point out that the overhead to produce and distribute recall petitions could be cut drastically by downloading them instead of mailing them. The daily pounding of Gray Da-

Roger Hedgecock hosts a highly rated political talk show on AM 600 KOGO in San Diego. A former San Diego mayor, he often sits in for Rush Limbaugh. He is author of America's Finest City: If We Say it Enough, We'll Believe it; Fight City Hall And Win; *and* The Airport Answer.