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A Sweet Home No More?: The Future for Habitat  
Protection Under the Endangered Species Act  
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# A Sweet Home No More?: The Future for Habitat Protection Under the Endangered Species Act

Federico Cheever

Murray D. Feldman

University of Colorado Boulder. Natural Resources Law Center

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FEDERICO CHEEVER & MURRAY D. FELDMAN, A SWEET HOME NO MORE?: THE FUTURE FOR HABITAT PROTECTION UNDER THE ENDANGERED SPECIES ACT (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1995).

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OUTLINE FOR PRESENTATION ON  
*BABBITT V. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREATER OREGON*

Prof. Federico Cheever  
University of Denver College of Law  
Wednesday, November 29, 1995

I. HOW WE GOT TO SWEET HOME

A. The Structure of the Endangered Species Act

1. The purpose of the Endangered Species Act and the Listing Process  
-- What the Act Protects and Why
2. Enforceable Prohibitions
  - a. Section 7(a)(2) "Jeopardy" Prohibition  
A species level protection applicable to actions authorized, funded, or carried out by the federal government. Enforced through the section 7(a)-(d) consultation process. EXCEPTION to the jeopardy prohibition: Section 7(e)- 7(h) Endangered Species Committee process.
  - b. Section 9(a)(1) "Taking" Prohibition  
A species-member level protection applicable to action undertaken by any person within the jurisdiction of the United States. To "take" includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to engage in any such conduct."  
Enforced through civil or criminal action. EXCEPTIONS to the taking prohibition: Section 7(b)(4)/7(o)(2) "incidental take statement" process as part of consultation and Section 10(a) habitat conservation plan/"incidental take permit" process.

B. PREVIOUS INTERPRETATION OF THE TAKING PROHIBITION

1. United States Fish & Wildlife Service Definition of "Harm" Within the Meaning of "Take." 50 C.F.S. §17.3:  
Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.
2. Application of Harm Definition to Cause-in-Fact Habitat Modifications: *Palila v. Hawaii Dept. of Land & Natural Resources* and *Sierra Club v. Lyng* cases.  
Removing feral sheep and goats from Palila habitat. Enjoining timber cutting in Red-Cockaded Woodpecker habitat.
3. *Sweet Home* plaintiffs facial challenge to the "harm" definition. Confusion and conflict in the D.C. Circuit: *Noscitur a sociis*, legislative interpretation, and habitat acquisition.
4. The Striking Absence of United States Supreme Court Precedent (one case in 22 years) Raises the Stakes.

## II. WHAT THE COURT SAYS

### A. Stevens' Majority Opinion

1. Three Arguments in Support of the Regulation
  - a. Webster's Third New International Dictionary 1034 (1966) ("harm").
  - b. The Purpose of the Endangered Species Act: "To halt and reverse the trend toward species extinction, whatever the cost." Quoting *TVA v. Hill*.
  - c. The Incidental Take Permit Process -- 1982 Congress understood the taking prohibition to include both "indirect" and "deliberate" takings.
2. One Standard of Review -- *Chevron U.S.A., v Natural Resources Defense Council*, 467 U.S. 837 (1984) and agency discretion in interpretation of the law it enforces.

### B. O'Connor's Concurrence

1. Undefined Notions of Proximate Cause in the Habitat Takings Analysis. Proximate Causation "normally eliminates the bizarre."
2. The Conceptual Trap of "Breeding Behavior" which Actually "Injures Wildlife." Real harm to Piping Plovers unable to breed.

### C. Scalia's Dissent -- Three Arguments Against the Regulation

1. Regulation Embraces All Causes in Fact Regardless of Intent or Foreseeability.
2. Regulation includes Omissions.
3. Regulation Includes Injuries to Populations as well as individuals. Endangered slugs immune from psychic harm.

## III. WHAT THE CASE TELLS US

### A. Exalting the Words and Ignoring the Purpose

1. Focus on Prohibition (Taking or Jeopardy) over Purpose (Survival, Conservation, Recovery).

### B. Environmental Law Without Environmental Science

1. Facial Challenges v. Evolving Relations between Fact and Law -- a case only a lawyer could love.
2. Squeezing Biological Reality into Jurisprudential Boxes -- Do We Really care About Individual Species Members?

## IV. CONCLUSION

Why is protecting biological diversity like building a bridge?

**Murray D. Feldman** is an attorney with Holland & Hart in Boise, Idaho. Mr. Feldman's practice covers several environmental and natural resources law areas, including endangered species, public lands, and environmental insurance. He has represented mining and natural resource development clients in Endangered Species Act and other environmental litigation. He has also practiced before the Interior Board of Land Appeals and advises clients on environmental regulatory matters. Mr. Feldman received his law degree from the University of California at Berkeley, Boalt Hall School of Law, where he was an associate editor of the *Ecology Law Quarterly*, after which he served as a law clerk to Justice George Lohr of the Colorado Supreme Court. He received his bachelor's degree from the College of Natural Resources at the University of California at Berkeley, and he holds a master's degree from the University of Idaho's College of Forestry, Wildlife and Range sciences. He recently coauthored a paper on ecosystem management for the 1995 Rocky Mountain Mineral Law Institute, and he is currently working on an article on "Snake River Salmon and the National Forests: The Struggle for Habitat Conservation, Resource Development and Ecosystem Management in the Pacific Northwest" for the *Hastings West-Northwest Journal of Environmental Law and Policy*. Mr. Feldman's article on "National Forest Management under the Endangered Species Act" appeared in the Winter 1995 edition of the ABA's *Natural Resources & Environment* magazine.

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FAX TO NATURAL RESOURCES LAW CENTER, CU LAW SCHOOL  
FAX NUMBER 492-1297

BIOGRAPHICAL INFORMATION

FEDERICO CHEEVER

Assistant Professor of Law at the University of Denver College of Law. B.A./M.A. 1981, Stanford University; J.D. 1986, UCLA School of Law. Judicial Clerk, United States Court of Appeals (9th Circuit), Hon. Harry Pregerson, 1986-1987. Associate Attorney, Sierra Club Legal Defense Fund, 1987-1989. Research Fellow, Natural Resources Law Center, University of Colorado School of Law, 1990. Associate, Faegre & Benson (a large Denver law firm), 1990-1993. Author of An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act: Learning to Live with a Powerful Species Preservation Law, 62 U. Colo. L. Rev. 109 (1991). A new article by Professor Cheever, The Road to Recovery: A New Way of Thinking About the Endangered Species Act will appear in the Ecology Law Quarterly in the Spring of 1996.

Professor Cheever has represented environmental groups in cases under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Wilderness Act and a number of other environmental laws. He has also represented regulated parties in disputes under the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Air Act.

Professor Cheever has worked extensively on cases for the protection of the Red-Cockaded Woodpecker in the forests of Texas and the southeastern United States. In 1988, he tried a Red-Cockaded Woodpecker case in the United States District Court for the Eastern District of Texas resulting in an injunction protection hundreds of thousands of acres of woodpecker habitat.

Professor Cheever teaches Environmental Law, Hazardous Substance Law, Property and seminars in National Forest Management law and Land Trusts and Conservation Easements.

## The *Sweet Home* Decision and Private Property Issues

Murray D. Feldman  
Holland & Hart  
Boise, Idaho

November 29, 1995

- I. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995)
  - A. The *Sweet Home* case is not about private property rights *per se*.
  - B. The case instead is about whether the challenged Fish and Wildlife Service regulation construing the term "harm" in the definition of "take" in the Endangered Species Act permissibly includes "significant habitat modification or degradation where it actually kills or injures wildlife," 50 C.F.R. § 17.3. See 115 S. Ct. at 2409-10.
  - C. *Sweet Home* does have implications for the regulation of private property under the Endangered Species Act because ESA Section 9 broadly proscribes the taking of any listed species by "any person." 16 U.S.C. § 1658(a)(1).<sup>1</sup> Both federal and nonfederal (i.e. private and state) actions are within the statutory take prohibition.
  - D. *Sweet Home* also has broader implications beyond private property concerns because Section 9 interfaces with other ESA sections, including the Section 10(a) incidental take permit provisions, 16 U.S.C. § 1539(a)(1)(B), and the Section 7(b)(4) incidental take statement requirements for biological opinions resulting from Section 7 consultations on federal actions, see 16 U.S.C. § 1536(b)(4).
  - E. As a practical matter, since *Sweet Home* upheld the Service's regulatory interpretation, there is no significant change in the status quo of the ESA regulatory program's application to private property, except as a possible result of the political and policy consequences of the decision and a perceived popular "backlash" against overbroad application of the ESA.

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<sup>1</sup>The statutory prohibition applies only to endangered species, but has been extended to threatened species by regulation. 50 C.F.R. § 17.31(a).

- II. Important *Sweet Home* Sound Bites For Natural Resource Development and Private Property Interests
- A. Among the central purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 115 S. Ct. at 2413 (quoting 16 U.S.C. § 1531(b)).
  - B. ESA questions must be addressed through "case-by-case resolution and adjudication." 115 S. Ct. at 2418.
  - C. "Congress delegated broad administrative and interpretive power to the Secretar[ies of Interior and Commerce]" when it enacted the ESA. *Id.*
  - D. ESA enforcement issues present "difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors." *Id.*
  - E. Private parties should be held liable for a taking under Section 9 "only if their habitat-modifying actions proximately cause death or injury to protected animals." 115 S. Ct. at 2420. (O'Connor, J., concurring).
  - F. "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin." 115 S. Ct. at 2421 (Scalia, J., dissenting).
- III. Where the Section 9 Action/Hot Issues Will Likely Be Now (Other Than Congress)
- A. Service (FWS and NMFS) application of Section 9 and Section 10 issues.
  - B. Causation and proof concerns. If the Act permissibly regulates takings occurring from significant habitat modification or degradation that actually kills or injures wildlife, what type of evidence and quantum of proof does it take to demonstrate such a taking?
    1. *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (severe decline in red-cockaded woodpecker population over ten years resulting from the Forest Service's significant habitat modification from even-aged timber management practices was sufficient to establish harm), *aff'g*, *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1270 (E.D. Tex. 1988) ("'[h]arm' does not necessarily require the proof of the death of specific or individual members of the species") (citations omitted).



2. *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 939 (D. Mont. 1992) (scientific evidence supporting the conclusion that current forest road densities were interfering with essential behavioral patterns was insufficient to demonstrate harm without the additional showing that "the degree of impairment is so significant that it is actually killing or injuring grizzly bears").
3. *Morrill v. Lujan*, 802 F. Supp. 424, 430 (S.D. Ala. 1992) (modification or degradation of suitable habitat for Perdido Key beach mouse is insufficient to establish Section 9 taking without establishing link between habitat modification and injury to the species).
4. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) (must be actual injury to the listed species for there to be harm under the ESA; challengers failed to show harm to bald eagles arising from use of lead slugs in deer hunt and court rejected option of establishing risk-based approach to determining Section 9 liability).
5. *National Wildlife Fed'n v. Burlington No. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (must be sufficient likelihood of future harm to obtain relief under ESA Section 9; to establish taking, must show actual significant impairment of species breeding or feeding habits *and* prove that the alleged habitat degradation prevents recovery of the species).
6. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 787-88 (9th Cir. 1995) (to establish a Section 9 taking, plaintiff has the burden of demonstrating that harm to a listed species will, to a reasonable certainty, result from the defendant's habitat-altering activities; mere possibility that these actions could cause harm to a listed species is insufficient).

C. Ecosystem Management Concerns and Programs

1. *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1311 (W.D. Wash. 1994) (under ESA and federal land management statutes, Forest Service and Bureau of Land Management *had* to plan on an ecosystem basis to address forest conditions in the Pacific Northwest old-growth forests in the range of the northern spotted owl).
2. *Sierra Club v. Murita*, 46 F.3d 606 (7th Cir. 1995) (Forest Service need not implement untested principles of conservation biology in Wisconsin National Forest plans).

3. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995) (federal agency's ESA Section 7(a)(1) obligation to conserve listed species "does not *expand* the powers conferred on an agency by its enabling act") (emphasis in original, citation omitted).
4. National Research Council, Science and the Endangered Species Act (1995) (noting that developing ecosystem management concepts are one of the most promising methods for habitat protection and endangered species conservation).

IV. Can a Section 9 ESA Taking Regulation Ever Be a Constitutional Taking Of Private Property?

- A. Private property shall not be taken for public use without just compensation. U.S. Const. Amend. V.
- B. Under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), whether a government regulation comprises a Fifth Amendment taking requires an examination of three factors:
  1. The character of the governmental action;
  2. Its economic impact; and
  3. Its interference with reasonable investment backed expectations.
- C. A law effects a taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of [its] land." *Agins v. Tiburon*, 447 U.S. 255 (1980).
- D. "Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985).
- E. Government regulation may give rise to a compensable temporary taking for losses resulting from the deprivation of the use of property during the time a regulatory taking is imposed. *First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).
- F. A law that deprives an owner of all economically viable use of its land is a total regulatory taking requiring compensation unless the use restriction has a

foundation in a state's common law property or nuisance in effect when a landowner acquired the parcel in question. *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798 (1992).

- G. Under *Lucas*, determining whether underlying state law previously regulated the activity will ordinarily require an analysis of:
1. The degree of harm to public lands and resources or adjacent private property posed by the proposed development;
  2. The social value of the proposed action and its suitability to the environment in question; and
  3. The relative ease with which the alleged harm can be avoided by measures taken by the developer and the government or adjacent private landowners. 120 L. Ed. 2d at 822.
- H. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), addresses the issue of the required relationship between permit conditions and projected impacts of proposed development to determine whether a taking has occurred.
- I. *Dolan* requires a two-part inquiry.
1. Under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), does the "essential nexus" exist between the "legitimate state interest" and the permit condition exacted by the government?
  2. Is there a "rough proportionality" between the required exaction and the proposed project?
    - a. No precise mathematical calculation is required.
    - b. The regulatory entity must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.
- J. Whether ESA Section 9 regulatory conditions imposed on a private property owner to restrict habitat-altering activities might work a constitutional taking depends on the nature of the conditions and whether they could survive scrutiny under the *Penn Central*, *Agins*, *Lucas*, and *Dolan* standards above.

- K. Even if the ESA Section 9 regulatory conditions worked to prevent all economic resource development activities on the property, and no other uses of the land were practically available, *Lucas* calls for an evaluation of whether traditional property and nuisance principles may have authorized the prevention of the proposed development.
  - L. Stringent regulatory conditions on habitat altering activities imposed under Section 9, in light of the Supreme Court's affirmance of the Service's regulatory interpretation of "harm," may be subject to attack under the *Dolan* standard.
  - M. The "individualized determination" required under *Dolan* should limit the level of conditions that can permissibly be imposed without a constitutional taking to protect endangered species habitat. Regulatory conditions imposed under Section 9 that measurably exceed those necessary to reduce incidental take from an activity to an acceptable level likely would not have the requisite "rough proportionality" to expected resource development impacts to avoid classification as a taking.
- V. Legislative Vehicles For ESA Reauthorization/Reform
- A. S. 768 (Sen. Gorton, introduced May 9, 1995) (timber industry version).
  - B. H.R. 2275 (Rep. Young, introduced September 7, 1995) (resource development version).
  - C. S. 1364 (Sen. Kempthorne, introduced October 26, 1995) (resource development/compromise version).

**MEMORANDUM OF AGREEMENT**  
between  
**THE STATE OF COLORADO**  
and  
**THE DEPARTMENT OF THE INTERIOR**  
**CONCERNING PROGRAMS TO MANAGE**  
**COLORADO'S DECLINING NATIVE SPECIES**

**I. BACKGROUND AND PURPOSE**

The State of Colorado's fish and wildlife and the habitats upon which they depend represent a unique and valuable part of the state's and the nation's natural and cultural heritage. The State of Colorado (State), through the Colorado Department of Natural Resources and its Division of Wildlife and many other state agencies whose actions affect fish and wildlife, and the Department of the Interior (Department), through the U.S. Fish and Wildlife Service and other agencies within the Department whose actions affect fish and wildlife, are committed to the management and conservation of Colorado's wildlife species, particularly as these species come under increased pressure from habitat loss, degradation, and fragmentation resulting from Colorado's rapid growth and development.

This Agreement between the State and the Department is intended to facilitate and promote collaboration and cooperation in managing and conserving fish and wildlife species and habitat within Colorado in a manner that is consistent with the present direction of Colorado's Smart Growth Initiative as well as state and federal laws. The State and the Department are committed to taking an approach to fish and wildlife conservation that uses the flexibility inherent in state and federal laws and regulations and emphasizes voluntary participation of a broad spectrum of partners to achieve long-term conservation and development solutions. These partners include landowners, water right holders, anglers, hunters, conservationists, the public, Native American tribal governments, local governments and state and federal agencies. This Agreement is further intended as a vehicle to demonstrate that the Departments's flexibility in its implementation of the Endangered Species Act (Act) can be used to find practical solutions that will reduce the need to list species, to consider social and economic issues, and to implement a habitat and community approach to conservation. Finally this Agreement is intended to provide a framework to encourage the voluntary participation of non-governmental parties in the conservation of sensitive fish, wildlife, and habitats. As such, this agreement is intended to complement the many other state and federal programs set up to work with non-governmental parties.

**II. AUTHORITIES AND RESPONSIBILITIES**

- A. The Department of Natural Resources has responsibility, through its divisions, to promote the proper use and conservation of the State's land, water, wildlife,

mineral and energy resources, and authority to develop integrated plans to accomplish these goals and to negotiate with the federal government in all resource and conservation matters. The State of Colorado, through the Colorado Division of Wildlife, has broad trustee and law enforcement responsibilities for the protection, management, and enhancement of the State's fish and wildlife resources and their habitats on federal, state, and private lands. In addition the Colorado Division of Wildlife's Long-Range Plan, adopted in 1994, states that the "Division's foremost aim in the future will be to protect and enhance the viability of all Colorado's wildlife species." The Division intends to meet this goal by using "management programs that are coordinated with those of other managers using the best available data to consider their effects over large areas and long timeframes, and that are biologically sustainable, socially desirable, and economically feasible." The State of Colorado, through the Colorado Water Conservation Board, has sole authority to acquire and protect instream flow water rights to preserve the natural environment to a reasonable degree within the framework of the State's water rights system. The State of Colorado, through the Colorado Division of Parks and Outdoor Recreation's Natural Areas Program, has the authority to recognize certain areas that contain significant biological resources, including plants, as designated Natural Areas.

- B. The Department of Interior has authorities under the Act to list species as threatened or endangered, recover listed species, maintain a list of candidate species which may require future federal listing, and consult on federal actions which may adversely affect listed species. The Department has responsibility for migratory birds under the Migratory Bird Treaty Act. The Department has responsibilities for commenting on fish and wildlife matters relating to federal activities such as permits, licenses, superfund sites, oil pollution responses, land management decisions, and water projects. It also has authority and responsibility for management of fish and wildlife habitats on lands managed by the Department.

The Department's authority for entering into this agreement include the Endangered Species Act of 1973, the Migratory Bird Treaty Act, Fish and Wildlife Coordination Act, Bald Eagle Act, and Refuge Administration Act.

- C. Cooperative initiatives between the Department and the State are specifically authorized by section 6 of the Endangered Species Act whereby the Secretary of the Interior is authorized to cooperate with States to the maximum extent practicable and "may enter into agreements with any state for the administration and management of any area established for the conservation of endangered species or threatened species."

### III. GENERAL PRINCIPLES FOR SPECIES NOT LISTED UNDER THE ACT

- A. The State and the Department affirm their commitment to cooperatively take actions, and encourage others to voluntarily take actions in concert with the State's and the Department's duties, such that the need for future protection under the Act will be greatly reduced and in some cases eliminated.
- B. These actions will be identified, organized and implemented through the development of collaborative action plans (*hereinafter referred to as Conservation Agreements*) designed to reduce or eliminate risks to species and their habitats that might otherwise lead to the need for their protection under the Act. While it is recognized that existing laws provide a framework for implementation of these Conservation Agreements, the State and the Department agree, when developing and implementing Conservation Agreements, to place the highest emphasis on voluntary measures that reduce or remove risks to species and habitats so that mandatory measures as may be required by law do not have to be invoked.
- C. The State and Department believe that Conservation Agreements will be most successful where they appropriately and flexibly balance economic vitality, respect for the property rights of landowners and water users, and maintenance of public values, including hunting and angling opportunities. Therefore, the State and the Department believe that Conservation Agreements need to be:
  - (1) based on sound and objective scientific data and analysis, informed as appropriate by peer review;
  - (2) based on a decision-making framework that is collaborative and which places a premium on effective, quick, and responsive communication;
  - (3) cost-effective, such that participants actively keep costs to a minimum by selecting the least costly means to implement Conservation Agreements, by capturing economies of scale through watershed approaches that address multiple conservation objectives, and by developing efficiency enhancing measures that apply to all aspects of the administration of Conservation Agreements in order to reduce overhead;
  - (4) predictable, such that participants fully understand what is expected of them; if expectations change as a result of the adaptive and dynamic nature of implementing Conservation Agreements on the ground, then the basis for these changes will be fully communicated well in advance of making the desired changes on the ground;
  - (5) adaptive, such that participants can easily change approaches or tools according to results of monitoring and evaluation, consistent with

maintaining the objectives of sound science, cost-effectiveness and predictability;

- (6) responsive to considering the economic vitality of areas affected by such agreements.

D. The State and the Department envision that a series of Conservation Agreements will be developed over time by governmental and non-governmental entities pursuant to this Memorandum of Agreement. To facilitate development of species or habitat specific Conservation Agreements, the State and the Department will:

- (1) work with all interested parties and each other to identify species and habitats that could benefit most from voluntary conservation efforts to protect and enhance them and thereby reduce or preclude the need for their protection under the Act. This will be done in a manner that supports local government planning and decision-making processes, and respects interests and opportunities for landowners, water users, hunters, and anglers;
- (2) encourage at every opportunity a multiple species, landscape, watershed, and/or community approach to species and habitat conservation, in contrast to single species approaches, that will allow for multiple issues and opportunities to be addressed together to benefit Colorado's fish, wildlife, plants and habitats. Such an approach can be helpful in ensuring the overall, long-term efficiency of conservation actions.
- (3) provide support for local decision-makers by providing timely and accurate information regarding species, habitats, and pressures that threaten their continued health in a manner that can be efficiently integrated into local comprehensive plans;
- (4) catalogue and make available a broad range of existing tools to protect, rehabilitate and enhance land and water habitats, including but not limited to cooperative agreements, resource management plans (including management of non-native species), protection of instream flows as provided by state law, and willing-seller acquisition of conservation easements, leases and in some cases, fee simple interest in land;
- (5) explore how other innovative tools can be used to create incentives for landowner, water right holders, local governments and others that will result in conservation of fish, wildlife and plants, and their habitats in a manner that enhances the assets of landowners and water right holders. These innovative incentives could include habitat banking, tradeable



permit concepts, capture of tax benefits, transferable development rights and density bonuses, and other measures.

#### **IV. GENERAL PRINCIPLES FOR SPECIES LISTED UNDER THE ACT**

- A. The Department reaffirms its commitment to apply the ten principles presented by the Clinton Administration to reform and implement the Act. These principles commit the Department to work closely with the State and all affected parties to:
- (1) base decisions on sound and objective science;
  - (2) minimize social and economic impacts;
  - (3) provide quick, responsive answers and certainty to landowners;
  - (4) treat landowners fairly and with consideration;
  - (5) create incentives for landowners to conserve species;
  - (6) make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat;
  - (7) prevent species from becoming endangered or threatened;
  - (8) promptly recover and de-list threatened and endangered species;
  - (9) promote efficiency and consistency; and
  - (10) provide state, tribal and local governments with opportunities to play a greater role in carrying out the Act.
- B. The State and the Department agree to work together and participate in the conservation of fish, wildlife, and plant species and their habitats. For those species currently listed under the Act the State and the Department agree to coordinate efforts to define clear and achievable recovery objectives to protect and recover these species and their habitats, and to seek down-listing and de-listing as soon as practicable after recovery objectives have been met.
- C. The State and the Department agree to work with partners, including landowners, water right holders, the public, Native American tribal governments, other Federal and local agencies, conservation organizations, and other organized groups that can assist with species conservation and recovery. The State and the Department will emphasize voluntary actions with partners.

- D. The Department will retain responsibility for protecting species under the Act, and will work in close coordination and cooperation with the State in determining when, and if, a species requires such protection.
- E. If a species covered by a Conservation Agreement ultimately requires protection under the Act, the Conservation Agreement will serve as the foundation for the state and federal agencies, in cooperation with all other affected parties, to jointly develop a Recovery Agreement. The Recovery Agreement will retain those elements of the Conservation Agreement that will benefit the species as well as actions additional to those in the Conservation Agreement that are necessary to conserve and recover the species. It will be the affirmative responsibility of the Department to advise the State of specific changes or additions needed to allow a Conservation Agreement to serve as a Recovery Agreement within 90 days after final listing of a species or as otherwise agreed to by the State and the Department.

The State and the Department believe that development and implementation of Recovery Agreements will streamline implementation of the formal requirements of the Act for threatened and endangered species to the mutual benefit of conservation and development goals. Recovery Agreements will outline specific actions to be taken by state and federal agencies and other affected parties that will serve the following functions:

- (1) identify priority actions likely to accelerate recovery and down-listing or delisting of the species;
  - (2) provide a basis, as appropriate, for the development of Conservation Recommendations, Reasonable and Prudent Measures and Reasonable and Prudent Alternatives for activities requiring consultation under Section 7 of the Act;
  - (3) provide a framework for the development of Habitat Conservation Plans and, for threatened species, 4(d) rules.
- F. The State and the Department intend Recovery Agreements to, where practicable, focus on habitat-based, landscape, and multiple species approaches to conservation actions and planning that will allow multiple issues and opportunities to be considered together to benefit Colorado's fish, wildlife, plants, and habitats.

The State and the Department agree that there is value in taking a broad view of public lands (State and Federal) and their management to determine if there are opportunities to develop public land management objectives and practices that better promote conservation of species and habitat conditions that sustain them, consistent with multiple uses where permitted. The State and the Department also

agree that it is essential to consider economic vitality in the affected areas. To advance these objectives, the State and the Department will collaborate on developing strategies intended to optimize conservation measures on public land and that provide additional flexibility for private landowners. These strategies may include options such as creation of collaborative management agreements, voluntary conservation and recovery agreements with private landowners, industry, non-governmental conservation organizations, and others, and adjustment of public land ownership patterns through sales, exchanges, leases, easements and other means.

- G. The State and the Department intend that upon agreement of all affected parties where both listed species covered by Recovery Agreements and unlisted species covered by Conservation Agreements occupy similar habitats and would benefit from similar conservation actions, the Conservation Agreements may be annexed to the Recovery Agreements to facilitate conservation planning that (1) will benefit multiple species; (2) will promote accelerated recovery of listed species; and (3) will implement actions intended to preclude the need to list species not yet listed. The State and the Department will emphasize actions that benefit multiple species, both listed and unlisted.
- H. Where reintroduction of a listed species is necessary for recovery and identified in a recovery plan, the Department will consult with the State and other affected parties prior to reintroduction and will incorporate such actions into any Recovery Agreement.

## V. TASKS

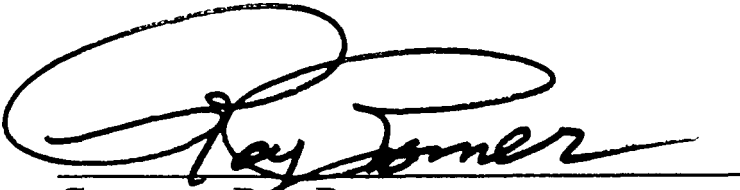
- A. The State and the Department will establish a Steering Committee by December 31, 1995, for the purpose of sharing information, reviewing lists of species at risk, and discussing ideas for their conservation and management.
- B. Consistent with the direction set forth in III.C., the State and the Department agree to mutually develop standards regarding the content of and approval process for Conservation Agreements within 6 months of execution of this Memorandum of Agreement.
- C. The State and the Department agree to develop and implement programs to determine and monitor the status of species at risk.
- D. The State and the Department will encourage partners and stake holders to take a leadership role in working with the State and the Department to develop and implement conservation actions through Conservation Agreements and Recovery Agreements. The State and the Department will initially focus conservation actions in Colorado on:

- (1) declining aquatic species including but not limited to South Platte River species, Arkansas darter, Rio Grande sucker, Colorado River Cutthroat trout, and Rio Grande cutthroat trout;
  - (2) declining short grass prairie species including but not limited to mountain plover, swift fox, burrowing owl, ferruginous hawk and lark bunting;
  - (3) declining populations of sage grouse and Columbian sharptail grouse;
  - (4) declining populations of Preble's meadow jumping mouse;
  - (5) declining amphibians including but not limited to boreal toad and wood frog; and
  - (6) remaining recovery actions that will allow delisting to be proposed for the greenback cutthroat trout.
- E. Within 6 months of execution of the Memorandum of Agreement, the State and the Department will develop criteria to be used to develop a more comprehensive priority list of species requiring conservation and management attention.
- F. The Department will provide the State and other affected parties with timely information about petitions, listings, recovery plans, and, with the concurrence of the Federal action agency, major section 7 issues.
- G. The State and the Department will endeavor to secure funds to implement specific actions under this Memorandum of Agreement.

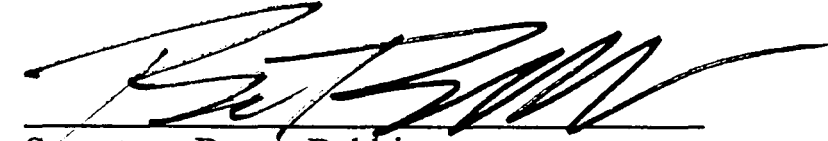
**VI. IT IS MUTUALLY AGREED AND UNDERSTOOD BY AND AMONG THE DEPARTMENT AND THE STATE THAT:**

- A. The performance of the State and the Department under this Memorandum of Agreement is contingent upon the authorization and appropriation of funds.
- B. Specific work projects or activities that involve the transfer of funds, services, or property between the State and the Department will require the execution of separate agreements or contracts, contingent upon the availability of funds.
- C. This Memorandum of Agreement in no way restricts the State or the Department from participation in similar activities or arrangements with other public or private agencies, organizations, or individuals.

D. This Memorandum of Agreement may be modified or amended upon written request of any party hereto and with the subsequent written concurrence of the other party. Participation in this Memorandum of Agreement may be terminated by the Department or the State with a 30-day written notice to the other party. Unless terminated under the terms of this paragraph, this Memorandum of Agreement will remain in effect until December 31, 1999.

  
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Governor Roy Romer  
State of Colorado

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Date 11/29/95

  
\_\_\_\_\_  
Secretary Bruce Babbitt  
United States Department of the Interior

\_\_\_\_\_  
Date 11/29/95