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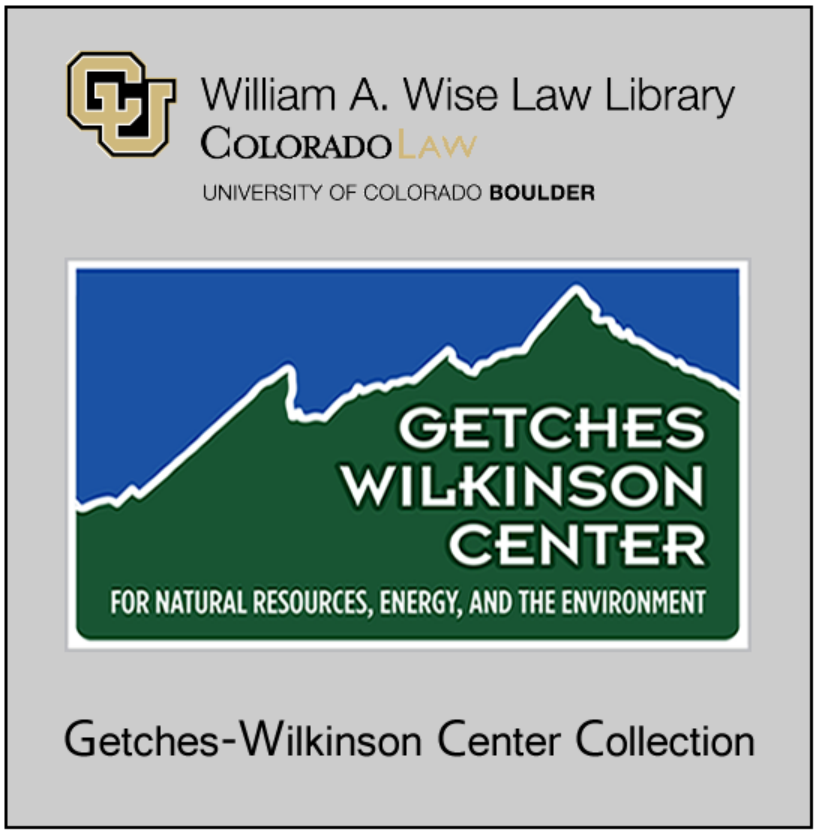

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WETLANDS PRESERVATION AND THE PROTECTION OF ENDANGERED SPECIES AS LIMITS ON WESTERN WATER DEVELOPMENT

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THE FEDERAL IMPACT ON STATE WATER RIGHTS

I. The Conflict Between Western Water Law and Federal Wetlands and Endangered Species Protection Legislation.

A. The Assumptions of Western Water Law. Western states follow the law of prior appropriation (subject to dual riparian rights in California, Nebraska, Texas and Washington). Prior appropriation is premised on the following assumptions:

1. The states' waters are owned in trust for the public so that the acquisition of private rights can be regulated.

2. The optimal use of water will be served by a system that maximizes the recognition of private property rights to the use of water and minimizes public rights for purposes such as instream flow maintenance. See Tarlock, The Recognition of Instream Flow Rights: "New" Public Western Water Rights, 25 Rocky Mt. Mineral Law Inst. Inst. 24-1 (1979).

3. Private rights should be as secure as possible subject to the constraint that claims not be asserted for speculative purposes. Rights are based on the priority of application to a beneficial use, subject to relation back to the date of filing and endure so long as the claimant applies the water to a beneficial use and does abandon the use of suffer a fortfeiture.

4. The whole stream may be diverted during times of peak demand to satisfy calls on it. A call may only be rejected by the stream administrator if it would be futile.

B. The Assumptions of Section 404 of the Clean Water Act and the

Endangered Species Act

1. These two acts seek to promote environmental objectives, the protection of wetlands and endangered species, through regulatory constraints on public and private activity that is inconsistent with the objectives. Section 404 balances a range of environmental and non-environmental factors but The Endangered Species Act prefers one value, the preservation of biological diversity, to the exclusion of other values unless there are strong reasons to do so.

2. The regulatory constraints apply to all forms of private property ownership, fee simple or usufructory.

3. Congress made little initial effort to integrate these federal environmental protection programs with state-created property systems, especially water law. The assumption seems to have been that the only appropriate constraint on federal regulation should be the taking doctrine. e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) and Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 781 (1982)

4. The first Congressional attempt to integrate environmental protection goals and western water law was an amendment to the Clean Water Act. 33 U.S.C. § 1251(g), which was added in 1977, provides:

> (g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established

> by any State. Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

The policy applies only to the Clean Water Act. Congress was urged to apply it to the Endangered Species Act, but choose to adopt a weaker cooperation duties on federal agencies to protect western water rights. See IV A.

5. Nonetheless, the regulatory constraints imposed on public and private activities by the two acts may incidentally alter water allocation patterns vested under state law.

6. These acts give opponents of water diversion and impoundment projects a "small handle" to object to the entire project and to impose substantial operating conditions on the project that may impair its primary purpose and financial stability, although this concern has been discounted. An official of the Colorado River Water Conservation District testified before Congress regarding the potential effect of the Endangered Species Act on western water allocation:

> One result of the Act's inflexibility which is of real concern to us, and should be of concern to all, is the de facto interstate apportionment and intrastate appropriation of waters which the FWS is effectively accomplishing by imposing substantial minimum flow releases on water storage projects. For example, in order to obtain a non-jeopardy opinion on the Colorado River squawfish from FWS on its White River Dam, the State of Utah recently had to agree to release a minimum of 250 second-feet (cfs) of water at the dam during most of the year, with higher releases in the spawning period, and to augment the

> minimum flow by up to 5000 acre-feet from inactive storage when natural river flows fall below the 250 cfs minimum. and as matters stand now, our own sub-district's Taylor Draw reservoir, also to be constructed on the White river above Utah's project, will be forced to release up to 200 cfs, depending upon river flows. All of this has the potential to interfere with appropriative rights under State water laws as well as interstate apportionments under the Upper Colorado River Basin Compact. [Statement of Roland C. Fisher, Endangered Species Act Amendments of 1982, Hearing Before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works on S. 2309, 97th Cong., 2d Sess. S. No. 97-H46230, 235-236 (1982).] See Behnke, The Impacts of Habitat Alternations on the Endangered and Threatened Fishes of the Upper Colorado river and Energy Development in the Southwest: Problems of Water, Fish and Wildlife in the Upper Colorado River Basin 204(1980).

II. Section 404 and The Endangered Species Act: Backdoor Federal Water Rights?

A. De Facto Federal Water Rights. These two acts may allow the federal government to claim de facto federal water rights in situations where traditional federal proprietary water rights would not be recognized. See statement of D. Craig Bell, Executive Director Western States Water Council, Endangered Species Oversight, Hearing Before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, U.S. Senate, 97th Cong., 1st Sess. S. No. 97-1-134 311 (1982).

B. Federal Proprietary Water Rights. The federal government may claim implied federal proprietary rights for Indian tribes, Winters v. United States, 207 U.S. 564 (1908), or for withdrawn public lands, Cappaert v. United States, 4 26 U.S. 128 (1976), (protection of endangered species) that relate back to the date of the reservation not the date of intent to

apply the water to a beneficial use as they would under state law. The theory is that Congress or the Executive either expressly or impliedly reserved in the withdrawal sufficient water to prevent the purposes of an Indian or non-Indian withdrawal for a water-related purpose from being frustrated. The standards for implied federal reserved rights are high. The federal government must prove that the denial of a water right would frustrate the primary purpose of the withdrawal. United States v. New Mexico, 438 U.S. 696 (1978).

C. Nevada v. United States. Nevada v. United States __U.S.__, 103 S.Ct. 2906 (1983) and related litigation illustrates the use of the Endangered Species Act as an end-run around the limitations that the Supreme Court has imposed on federal reserved rights. In 1913 the federal government brought an adjudication on the Truckee River in Nevada to claim reserved rights for the Pyramid Lake Indian Reservation and to establish water rights for the proposed Newlands reclamation project. The Tribe was given 12,412 acre feet annually to irrigate 3,130 acres. A subsequent settlement expanded the irrigated acreage of the reservation and a final decree was entered in 1944. In 1973 the federal government sought to open the "Orr Ditch" decree to claim reserved water rights to maintain the Pyramid Lake fishery. The district court held that the 1944 decree was res judicada to all new claims, but the Nineth Circuit held that as to theowners of Newlands project lands the Tribe was not bound by the decree because the government breached its fiduciary duty to the Tribe by representing the confliciting interests of the Tribe and the proposed project beneficiaries. 649 F.2d 1286 (9th Cir. 1981), modified, 666 F.2d Cir. 351 (9th Cir. 1982). The Supreme Court reversed and unanimously held: (1) the federal government could not reallocate water from project

beneficiaries to the tribe because the landowners are the beneficial owners of the water rights, Ickes v. Fox, 300 U.S. 82 (1937) and Nebraska v. Wyoming, 325 U.S. 589 (1945), (2) the federal government did not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simitaneously performs another task for another interest that Congress has obligated it by statute to do." 103 S.Ct. at 2917, and (3) res judicada barred the 1973 suit because (a) the newly asserted fishing right was the same tribal right asserted in the original 1913 action and thus the 1973 suit flowed out of the same cause of action and (b) parties that were not parties to the original 1913 suit were bound by the "Orr Ditch" decree.:

> Orr Ditch was an equitable action to quiet title, an in personam action. But as the Court of Appeals determined, it "was no garden variety quiet title action." 649 F.2d. at 1308. As we have already explained, everyone involved in Orr Ditch contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are in personam actions, water adjudications are more in the nature of in rem proceedings. Nonparties such as the subsequent appropriators in this case have relied just as much on the Orr Ditch decree in participating in the developement of western Nevada as have the parties of that case. We agree with the Court of Appeals that under "these circumstances it would be manifestly unjust... not to permit subsequent appropriators" to hold the Reservation to the claims it made in Orr Ditch; "[a]ny other conclusion would make it impossible ever finally to quantify a reserved water right." Id., at 1286. [103 S.Ct. at 2925]

Justice Brennan concurring suggested that the Tribe has a reserved rights remedy against the federal government and subsequent litigation, discussed at V D. infra, illustrates the possible relationship between the federal government's Endangered Species Act duties and its fiduciary obligation to

the tribe.

D. Section 404 and the Endangered Species Act as the Public Trust. In recent years it has been hed that private appropriate rights are subject to the historic public trust rights of navigation protection, Ritter v. Standal, 98 Idaho 446, 566 P.2d 769 (1977), and it has been held that the state retains the power to subject new appropriations to a public trust standard. United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W2d 457 (N.D. 1976). California has gone further and held that public trust doctrine may be retroactively applied to reallocate previously perfected appropriative rights. National Audubon Society v. Superior Court of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983). The public trust applies and expands traditional "public interest" powers retained but seldom used by states in considering appropriation filings:

> The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.
>
> The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (See Johnson, op. cit. supra, 14 U.S. Davis L. Rev. 233, 256-257; Robie, Some Reflections on Environmental Considerations in Water rights Administration 91972), 2 Ecology L.Q. 695, 710-711; comment, op. cit. supra, 33 Hastings L.J. 653, 654.) As a matter of practical necessity

> the state may have to approve appropriations despite foreseeable harm to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see United Plainsmen v. N.D. State Water Con. Commission (N.D.1976) 247 N.W.2d 457, 462-463), and to preserve, so far as consistent with the public interest, the uses protected by the trust.
>
> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. [189 Cal. Rptr. at 364-365]

Section 404 resembles California's public trust standard because the Corps applies a public interest test to determine whether permits should be granted, denied or conditioned. The Endangered Species Act is more restrictive than the public trust because the Department of Interior lacks the initial flexability to balance species preservation with other values. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

III. Section 404 of the Clean Water Act

A. Purpose. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the Secretary of the Army (the Corps of U.S. Army Engineers) to issue permits "for the discharge of dredged or fill material into the navigable waters" subject to a veto by the Administrator of the federal Environmental Protection Agency:

> (c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and heis authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable

> adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

B. Scope of Permits. 33 U.S.C. § 1344(e)(1) allows the issuance of either site specific permits or general permits on a state, regional or nationwide basis for activities that are similar in nature and "will cause only minimal adverse environmental when performed separately, and will have only minimal cumulative adverse effect on the environment." As the result of a suit challenging the Corp's issuance of nationwide permits, National Wildlife Federation v. Marsh, No. 83- 3632 (D.D.C. 1982), the Corps has proposed new regulations. 49 Fed. Reg. 12660, March 29, 1984. The proposed regulations would limit the use of nationwide permits in two areas, "isolated waters" and "areas above headwaters." Under the proposal, general use of nationwide permits inthese areas would only be allowed where less than one acre is involved. Dredge or fill activities on ten or more such acres would require individual permits. Activities involving one to ten acres in these areas would require notification to Corps district offices, which would prompt an evaluation process aimed at determining whether the activities could be allowed under a nationwide permit or whether an individual permit should be required.

C. Jurisdiction of the Corps. Navigable waters are defined in the Clean Water Act as waters of the United States and this definition allows the Corps to use the full reach of the Commerce Power in defining navigability. Thus, the Corps is not bound by the tradition "chain in the hghway of interstate commerce test of navigability. e.g. State of wyoming

v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977) Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978). and United States v. Earth Sciences, Inc. 599 F.2d 368 (10 Cir. 1979); The latest revision of the regulations changes the definition of waters of the United States to:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce...,
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as...wetlands...the use, degradation or destruction of which could affect interstate or foreign commerce...;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;...
>
> (7) Wetlands adjacent to waters...identified in paragraphs (a)(1)-(6) of this section...[33 C.F.R. § 323.2(a) (1983)]

D. Exemptions. 33 U.S.C. § 1344 (f)(1) provides the following exemptions from a Section 404 permit requirement:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material--
>
> (A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;
>
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, ripra;, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
>
> (C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
>
> (D) for the purpose of construction of temporary sedimentation basins on a construction

site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the reuirements of subparagraphs (B) and (C) of such section, is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material nto the navigable waters incidental to any activity having as itspurpse bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

E. Procudures and Standards.

1. Procedures. Neither the statute nor due process requires a trial-type hearing. Buttrey v. United States, 690 F.2d 1170 (5th Cir. 1982), cert. denied ___U.S.____ (1983).

2. Standards. Section 404 permits are subject to a number of substantive administrative criteria, 1902 Atlantic LTD v. Hudson, __ F. Supp. ___, 19 ERC 1926 (E.D. Va. 1983), but the major standard is a public interest review that allows the Corps to balance the benefits of the project against its environmental detriments. See Parish and Morgan, History, Practice and Emerging Problems of Wetlands Regulation: Reconstructing Section 404 of the Clean Water Act, 17 Land & Water L. Rev. 43 (1982) and Want, Federal Wetlands Law: The Cases and the Problem, 8 Harvard Envtl. L. Rev. 1(1984).

IV. The Endangered Species Act.

A. Purpose. The primary purpose of the Act is to "provide a program for

the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). In 1982 Congress added the following section to the statement of purpose: "It is further declared to be the policy of congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in connection with conservation of endangered species." 16 U.S.C. § 1531 (c) (2).

B. Endangered Species. 16 U.S.C. § 1532(6) defines the term "endangered species:"

> Any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

16 U.S.C. § 1532(8) defines "fish and wildlife:"

> Any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body of parts thereof.

C. Species Listing. To qualify for protection, a species must be listed through a rule making process by the Secretary of Interior as endangered or threatened. 16 U.S.C. § 1533. A petition process exists which can be initiated by anyone with standing under the Administrative Procedure Act to challenge agency action. 16 U.S.C. § 1533 (3) - (6). 16 U.S.C. § 1533(a)(1) provides the relevant factors for listing a species:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
> (B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;
(D) the inadequacy of existing regulatory mechanism; or
(E) other natural or manmade factors affecting its continued existence.

D. Critical Habitat Listing. To protect a species, its habitat must be protected and thus the Secretary must designate critical habitat. 16 U.S.C. § 1532(5)(A) defines the term to limit critical habitat designation to the area necessary for the species survival:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or bilogical features (1) essential to the conservation of the species and (II) which may require special management considerations or protection; and
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by t he Secretary that such areas are essential for the conservation of the species.

16 U.S. § 1533 (2) sets out the relevant factors for contracting or expanding the designated habitat:

> the Secretary shall designate critical habitat, and make revisions thereto, under subsection 9a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as crtical habitat. The secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, ,that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

These sections preclude the Department of Interior from designating the entire range of the species as critical habitat except for small, confined

populations. 16 U.S.C. § 1532(C).

D. Agency Consultation Duties With the Secretary of the Interior, 16 U.S.C. § 1536(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section refered to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat or such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (b) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available."

1. Supreme Court Intrepretation of 1973 version of Section 7

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), enjoined the completion of a dam that was 90% complete because it threatened the survival of the snail darter (a biological premise that has since been refuted):" [T]he legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." [437 U.S. at 185] See generally Coggins, Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973, 51 North Dakota L. Rev. 315 (1975) and note, Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973, 28 Stanford L. Rev.

124 § (1976). The 1978 Amendment did not change substantially the duties of federal agencies to protect endangered or threatened species.

> Although the 1978 Amendments to ESA softened the obligation on an agency from requiring the agency to "insure" the species would not be jeopardized to requiring the agency to "insure" that jeopardy is not "likely", Pub. L.No.96-159, § 4(1)(C), 93 Stat. 1225, 1226 (1979), the legislative intent was that the Act "continues to give the benefit of the doubt to the species." H.Conf.Rep.No.96-697, 96th Cong., 1st Sess. 12, reprinted in [1979] U.S.Code Cong. & Ad.News, 2557, 2572, 2576. Agencies continue to be under a substantive mandate to use "all methods and procedures which are necessary", TVA v. Hill, 437 U.S. 153, 185, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978) (quoting 16 U.S.C. §§ 1531(c), 1532(2), emphasis added by the court), "to prevent the loss of any endangered species regardless of the cost." Id. at 188 n.34, 98 S.Ct. at 2299 n.34 (emphasis in original). The Act does, however, create a special "exemption" procedure (not at issue here, see note 2, supra) designed to allow necessary actions even if they threaten the loss of an endangered species. See 16 U.S.C. §§ 1536(g), (h). [Roosevelt Campobello Island International Park v. United States Environmental Protection Agency, 684 F.2d 1041, 1048 - 1049 (1st Cir. 1982] See generally Comment, Endangered Species Act Amendment of 1978: A Congressional Response to Tennessee Valley Authority v. Hill, 5 Columbia J. Envtl. Law 283(1979).

2. Agencies Biological Assessment Duties. If the Secretary determines, based on the best scientific and commercial data available, that an endangered or threatened species may be present, the agency undertaking the activity must conduct a biological assessment using the best scientific data available. This may require an agency to undertake new, state of the art studies that make a worst case analysis. Compare Roosevelt Compobello International Park v. United States Environmental Protection Agency, 684 F.2d 1041 (1st Cir. 1982) (Coast Guard must do real time

simulation studies to determine the adverse effects of an oil spill on right and humpback whales) with Village of False Pass v. Clark, F.2d., 20 ERC 17 05 (9th Cir. 1984) and Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983) (Secretary of the Interior must have precise, site-specific information to insure best compliance with Act, but this duty may be satisfied by plans to suspend the activity, oil and gas drilling, when species, whales, are near enough to be threatened by oil spills). See also Cabinet Mountains Wilderness Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. 1982).

3. Jeoparadize. Coggins and Russell, Beyond Shooting Snail Darters in Port Barrels: Endangered Species and Land Use in America, 70 Georgetown L.J. 1433, 1465 (1982) argue:

> A reasonable definition of "jeopardize" is any substantial harm to any population segment of any listed species. That a species is listed as endangered itself indicates that any adverse effect could contribute to its extinction. The use of "jeopardize" in the statute instead of "result in extinction" suggests that Congress contemplated a less demanding standard. The administrative interpretation, which is entitled to some deference, takes a middle-of-the-road approach: an agency action does not "comply if it might be expected to result in a reduction in the number or distribution of that species of sufficient magnitude to place the species in jeopardy, or restrict the potential and reasonable expansion or recovery of that species..." Since an endangered species is already in jeopardy and a threatened species is close to it, only a de minimus impact on the species should be tolerable in applying section 7.

See North Stope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980).

E. Exemptions. TVA v. Hill caused Congress to amend that Act to provide

an exemption procedure. 16 U.S.C. § 1536 (e) - (p). Exemptions are granted by a two-tiered process. The final decisionis made by cabinet level committee, although the committee decision may be vetoed by the Secretary of the Interior and overriden by the committee if the secretary finds that the exemption would extinguish a newly discovered threatened or endangered species. The substantive standards for the grant of an exemption are:

> (l)The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person-
>
> -(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that--
>
> > (i)there are no reasonable and prudent alternatives to the agency action;
> > (ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;
> > (iii)the action is of regional or national significance; and
> > (iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection(d) of this section; and
>
> (B) it is establishes such resonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and apropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned. Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

F. Double Jeopardy. 16 U.S.C. § 1538(2)(B) makes it unlawful to "remove or reduce to possession any such species from areas under Federal Jurisdiction." The "taking" prohibition has caused concern that this section will provide a separate and even more absolute basis for the stopping water resource projects than the consultation process. See Palila v. Hawaii Department of Land and Resources, 471 F. Supp. 985 (D. Haw. 1979). aff'd 639 F.2d 495 (9th Cir. 1981) which applied this section to non-federal, state game conservation programs. In 1982 Congress reduced somewhat the double jeopardy risk by an exemption process. 16 U.S.C. § 1539. The Secretary of the Interior make a grant a permit for a Section 1538 "taking" if he finds that:

> (i) the taking will be incidental;
> (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
> (iii) the applicant will ensure that adequate funding for the plan will be provided;
> (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. . .

V. Section 404 and The Endangered Species Act's Effect on State Water Rights.

A. Private Rights Effected. The effects of a publicly funded or regulated project on private actions are relevant factors for the federal agency to consider. e.g., National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), rehearing denied, 532 F.2d 1375, cert. denied, 429 U.S. 979 (1977).

B. Tenth Amendment Not A Bar to Federal Preemption. State regulation of a resource under its police power including claims of trust ownership is not a bar to federal preemption. Congress may protect endangered or threatened species under the Treaty or Commerce powers. Palila v. Hawaii Department of Land and Natural Resources,

471 F.Supp. 985 (D. Haw. 1979), affrd, 639 F.2d 495 (9th Cir. 1981) (Endangered Species Act may require change in state game conservation practices to protect habitat of threatened species.) See also Sporhase v. Nebraska, 458 U.S. 941 (1982) and Hughes v. Oklahoma 441 U.S. 322 (1979).

C. Nebraska v. Rural Electrification Administration (Greyrocks). Nebraska v. Rural Electrification Administration, 12 ERC 1156 (D. Neb. 1977), appeal vacated and dismissed, 594 F.2d 870 (8th Cir. 1979), is the first major case to apply the two acts to a water allocation controversey. Nebraska sued to prevent the construction of Greyrocks Dam by a consortium of utilities on the North Platte River, originally to protect the interests of downstream Nebraska agricultural diversions. The court set aside a federal loan guarantee from the Rural Electrification Administration and a Section 404 permit because of the effect of the diversion on the downstream habitat of the whooping crane. The REA failed to consult with the Fish and Wildlife Service, and the court concluded that an REA conclusion that there would no adverse effect on the whooping crane habitat did not insure that there would be no jeoparady to the species. The Corps issued a 404 permit before the Fish and Wildlife Service completed its assessment, but reserved the right to impose operating conditions on the reservoir when the Fish and Wildlife study was complete. The court held that allowing reservoir operation before adequate biological information was available did not insure that the habitat would not be endangered. A settlement favorable to the whooping crane and Nebraska irrigators ended the litigation. See Tarlock, The Recognition of Instream Flow Rights. "New" Public

Western Water Rights, 25 Rocky Mt. Mineral Law Inst. 24-1, 24-60-61 (1979).

D. Carson-Truckee Water Conservancy District v. Watt. (Pyramid Lake). Carson Truckee Water Conservancy District v. Watt, 549 F. Supp. 704 (D. Nev. 1982) holds that the Secretary of the Interior has a duty to operate a reservoir to protect endangered and threatened species, cui-ui and Lahontan cut in Pyramid Lake on the Pyramid Lake Indian reservation. throat trout. All parties agreed that the Secretary had a duty to prefer fish to municipal and industrial uses in the operation of Stampede Reservoir in allocating water over and above that involved in the Orr Ditch litigation. See II C supra. The issue was to what decree, and the court held that the Secretary had a duty to prefer all other uses until the fish were no longer classified as threatened or endangered. The court rejected the District's argument that the Endangered Species Act required the Secretary to avoid only those actions that jeopardized the bare survival of the species. As a consequence, the District's operating plan for the reservoir was found to inconsistent with the Secretary's species restoration duties under the Act and his fiduciary obligation to the Tribe:

> For plaintiffs to be able to serve new M & I users, they must hve enough water in storage to insure a steady supply in drought years. The plaintiffs' plan would require the release of M & I water in small quantities, and most of the total annual M & I releases would occur outside the spawning season, when it would not help increase the fish population.
>
> Water releases for the fishery in a single year may require all of the Stampede storage, leaving no reserve for M & I users in drought

> years. In my view, it is not feasible to operate Stampede for both M & I fand fishery purposes.
>
> Plaintiffs concede that it is unlikely that the fish population of Pyramid Lake will increase substantially under their proposal for operating Stampede. The plaintiffs' plan would reduce the average river flow during the spawning season 20% below the level which existed before Stampede was built. This amount is inadequate to meet the Secretary's obligation under the Endangered Species Act. Before Stampede was built, there was not enough water for the cui-ui, and the cui-ui were practically extinct. The plaintiffs proposal does not meet their own standards because it would jeopardize the existence of the cui-ui and hasten their extinction. [549 F. Supp. at 711].

E. Riverside Irrigation District v. Andrews (Wildcat Creek). Riverside Irrigation District v. Andrews, 568 F. Supp. 583 (D. Colo. 1983) holds that the Corps has the discretion to require an individual rather than nationwide section 404 permit for a dam on the tributary of the South Platte that would alter flows and thus have an adverse impact on the whooping crane habitat 250 to 300 miles downstream. The court reasoned that the Endangered Species Act boulstered the Corps' authority to take off-project water depletion effects into consideration in deciding whether to issue a nationwide (and presumeably) individual 404 permit. The court rejected argument's that Section 101 (g) of the Clean Water Act and the South Platte Compact compelled a different result:

> First, congressional policy statements "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly stated purpose."
>
> . . .
>
> Because both the statements of § 101(g)'s sponsor and the relevant committee report state that * 101(g) was not intended to change

existing law, including * 510(2), congress did not intend to limit § 404's scope where it might affect state water rights law when it enacted § 101(g).

The plaintiffs' argument is further diminished because the defendant's actions did not abrogate or supersede anys tate water rights. As discussed above, the defendant only placed conditions on the construction of the dam that might affect the plaintiffs' water rights. While the defendant is barring the plaintiffs from exercising their water rights in a manner inconsistent with federal law, he is not taking away the rights. They must still be utilized, so long as in a manner consistent with federal law. . .

They argue that congress could not pass a clean water act that would impair this previously approved compact. This argument should be rejected. It is true that congress cannot unilaterally reserve the right to amend or repeal an interstate compact. Tobin v. United States, 306 F.2d 270, 273 (D.C. Cir. 1962). This does not mean, however, that approving a compact limits congress's authority later to enact federal laws. In Pennsylvania v. Wheeling, supra, the court held:

> The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among theseveral states? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself.

A subsequent federal law of nationwide applicability will therefore be enforceable even if it affects a prior compact. Congress therefore did not limit its authority to enact the Clean Water Act when it approved the South Platte Compact. [568: F. Supp at 589-590].

Attempts were made to overcome the decision in Congress but EPA opposition seems to have ended this effort. 509 Western States Water Feb. 17, 1984. Compare National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (Dams are not print sources under Clean Water Act).

F. Depletion versus Inundation.

Projects that propose to deplete a stream rather than inundate a critical habitat pose substantial but more manageable problems under the Endangered Species Act because depletions pose less of a threat to species survival compared to inundations, e.g. the Windy Gap project in Colorado. The Fish and Wildlife Service approved the project after theproject sponsors agreed to by-pass 11,000 acre feet of water anually for the protection of downstream aquatic habitat, primarily non-endangered trout, because these releases combined with habitat enhancement and research would not jeopardize endangered species.