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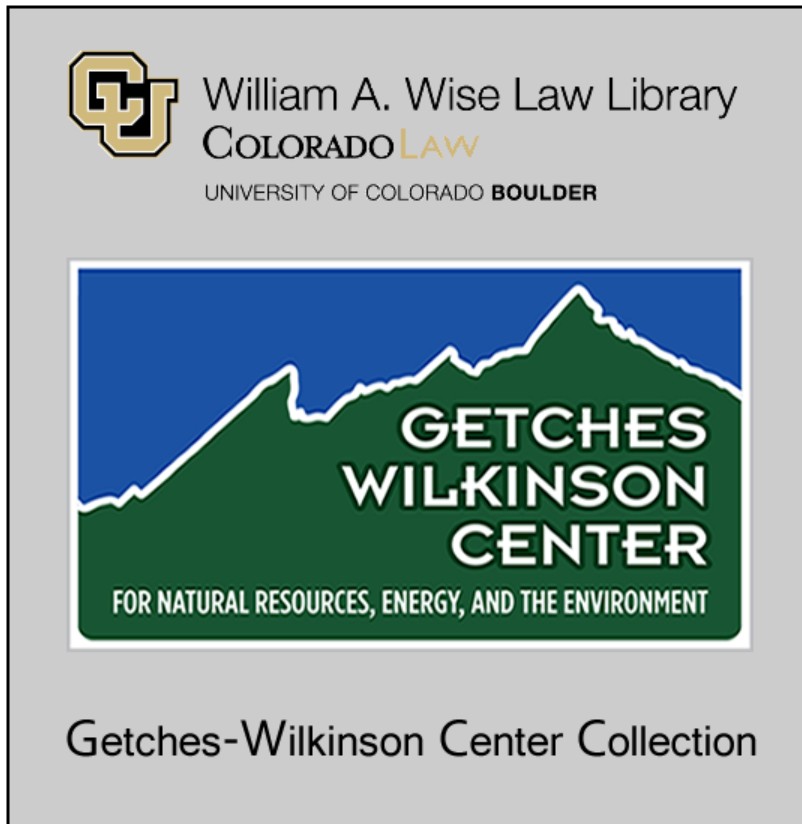


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THE ENDANGERED SPECIES ACT AND
WESTERN WATER PROJECTS

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WESTERN WATER LAW IN TRANSITION

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It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 172 (1978).

I. Introduction

A. Summary

The Endangered Species Act (ESA) is an extraordinarily broad-reaching piece of legislation. Its stated purpose is the conservation of threatened and endangered species--that is, their protection and restoration to viability. Its most potent provision, Section 7, requires that federal actions not jeopardize such species or adversely modify designated critical habitat. The courts have interpreted this provision as creating a mandatory and legally enforceable duty.

The impact of this law on western water law has been substantial. By giving priority to the conservation of endangered species which may be dependent on certain water-based ecosystems, the ESA creates a special position for such species in the competition for scarce water supplies. Because some federal action is almost always involved in western water development, endangered species considerations are an inescapable part of such development.

Implementation of this complex law is fraught with difficulty. Efforts to accommodate continued development and endangered species protection are adversely burdened by major information deficiencies, resulting in an apparent lack of acceptable options. The needs of the species are not well understood. Yet decisions must be made.

The Fish and Wildlife Service (FWS) under the Reagan Administration has moved to administratively narrow the scope of Section 7. Impacts to be assessed from a proposed action are limited only to those arising from the action and do not include cumulative effects from other expected activities. For an action to jeopardize the continued existence of an endangered or threatened species it must appreciably affect the survival and the recovery of such species. On the Colorado River, FWS has been allowing water projects to proceed so long as a "depletion charge" is paid.

At the same time, the courts generally continue to be impressed by the explicit requirements to protect and conserve endangered species found in the Act. The River-side case has made it clear that endangered species considerations are a legitimate issue in Section 404 permits. Because such permits are involved in virtually every water development project, this decision has substantial significance.

Piecemeal, case-by-case administration under Section 7 is essential, but ultimately insufficient to achieve the fundamental purposes of the ESA. Efforts to achieve protection and recovery of protected species through the use of broad-based, cooperative working groups comprised of concerned federal, state, and private interests appear to offer some promise. The effectiveness of the efforts currently underway on the Colorado and Platte rivers should provide important evidence about the value of this approach.

B. References

1. Michael J. Bean, The Evolution of National Wildlife Law (1983)--An excellent book that includes a chapter on the ESA. Good general background as well as thorough coverage.

2. Tarlock, "The Endangered Species Act and Western Water Rights," 20 Land & Water L. Rev. 1 (1985)--Specifically addresses the ESA and western water development.
3. Coggins and Russell, "Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America," 70 Georgetown L. J. 1433 (1982)--A very comprehensive examination of the major provisions of the ESA.
4. MacDonnell, "The Endangered Species Act and Water Development Within the South Platte Basin," (A research report of the Colorado Water Resources Research Institute) (forthcoming)--Discussion of water development on the Platte and Colorado rivers and related legal issues under the ESA.
5. Erdheim, "The Wake of the Snail Darter: Insuring the Effectiveness of Section 7 of the Endangered Species Act," 9 Ecology L.2. 629 (1981)--Good discussion of issues arising under Section 7.
6. Harrington, "The Endangered Species Act and the Search for Balance," 21 Natural Res. J. 71 (1981)-an economic evaluation of the ESA with some reference to western water development.
7. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)--Essential reading as the major legal decision interpreting the ESA.

II. Evolution of the ESA

A. Pre-1973

1. Endangered Species Preservation Act of 1966 (Pub. L. No. 89-669, §§1-3, 80 Stat. 926 (repealed 1973)).
 - a. Directed the Secretary of the Interior to "carry out a program in the United States of conserving, protecting, restoring, and propagating selected species of native

fish and wildlife that are threatened with extinction."

- b. Little guidance given regarding implementation of this program.
- 2. Endangered Species Conservation Act of 1969 (Pub. L. No. 91-135, 83 Stat. 275).
 - a. Expanded the scope of protection to include wildlife threatened with extinction anywhere in the world and established general prohibitions against commercial activities involving such species.
 - b. Created a listing procedure for these species.

B. The 1973 Act (Pub. L. No. 93-205, 87 Stat. 884).

- 1. Established the first comprehensive federal program for protecting threatened species. Expanded upon preceding legislation in four major ways: first, by expanding the listing authority of the Secretary to include "threatened" as well as "endangered" species; second, by prohibiting any person subject to the jurisdiction of the United States to import or export, to "take," or generally to engage in commercial activities involving listed endangered species; third, by establishing a substantially increased role for the states both in protecting listed species and in administering management programs; and fourth, by substantially expanding the acquisition authority to provide habitat for such species.
- 2. Section 7 of the 1973 Act, entitled "Interagency Cooperation," consisted of two sentences:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and

agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Thus Congress explicitly made it the duty of federal agencies to protect endangered species, to insure that their actions do not jeopardize such species, and to consult with the FWS in such instances.

C. Post 1973 Developments

1. The landmark case of Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978), made it clear that federal agencies must follow the requirements of Section 7 not to undertake an action that would jeopardize a protected endangered species.
2. Endangered Species Act Amendments of 1978 (Pub. L. No. 95-632, 92 Stat. 3751).
 - a. Established an exemption process whereby federal actions of overriding importance could be permitted to go forward in spite of their conflict with Section 7.

- b. Formalized the consultation process and required the FWS to render a biological opinion as to whether the proposed activity is or is not likely to jeopardize an endangered species or adversely modify critical habitat. Until completion of the biological opinion federal agencies are precluded from making an irreversible or irrevocable commitment of resources which would foreclose the consideration of modification or alternatives to the identified activity or program. If a "negative" biological opinion is rendered, FWS must suggest reasonable and prudent alternatives to avoid this result.
- 3. 1979 Amendments (Pub. L. No. 96-159, 93 Stat. 1225).
 - a. Primarily aimed at increasing the funding and support needed to implement the terms of the ESA.
 - b. Added the requirement that Section 7 decisions shall be based on the best scientific and commercial data available.
- 4. 1982 Amendments (Pub. L. No. 97-304, 96 Stat. 1411).
 - a. Intended to expedite the listing process by insuring that only biological factors are considered.
 - b. Increased the federal share of program grants to the states.
 - c. Tightened the time limits in which biological opinions must be issued.
 - d. Provided for an early consultation option.

III. Application of the ESA to Water Development in the Upper Colorado and Platte River Basins

A. The ESA and the Upper Colorado River

1. There are two endangered fish species in this basin--the Colorado squawfish and the humpback chub. Their endangered status is thought to have resulted primarily from the construction of several large water projects in this river system by the Bureau of Reclamation.
2. Beginning with the Windy Gap project in 1981, FWS has been following a policy of allowing projects to be built if project proponents agree to pay a "depletion charge" to be used to support research and implementation of measures aimed at recovery of the species. The depletion charge is based on the amount of water that will be taken by the development project in relation to the total amount still available for development.
3. Thirty-three projects have now received a favorable biological opinion on this basis since 1981. Statement of the National Wildlife Federation before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works on the Endangered Species Act, S. 725, April 16, 1985.
4. Reportedly, FWS has recently changed this policy and will now condition its positive biological opinions on the implementation of direct conservation measures such as fish passageways. Id.
5. A cooperative working group has been formed with the intention of developing and implementing measures that will enable water development to proceed without jeopardizing these endangered fishes. A major objective is to determine if there are ways in which necessary water flows can be made available from existing federal storage projects on the river.

B. The ESA and the Platte River

1. As with the Colorado, existing develop-

ment has drastically altered the character of the Platte River. The effect in the whooping crane habitat in central Nebraska has been a sixty to seventy percent loss in the pre-1930 mean annual flow of the river, a nearly forty percent loss of wet meadow habitat within this area, and a more than sixty percent loss in open water and sand bar habitat within this area during the same period. To protect this habitat, FWS has resisted further depletions in Platte River flows.

2. A settlement by the parties enabled the Grayrocks Project to go forward upon condition that the project proponent establish a \$7.5 million trust fund for the maintenance and enhancement of the whooping crane critical habitat. The Wildcat and Narrows Projects both have received negative biological opinions. The Wildcat Project has been in litigation since 1982.
3. The Narrows Unit, a Bureau of Reclamation project, would be a major storage reservoir on the South Platte River in Colorado. As a reasonable and prudent alternative to avoid jeopardy, FWS has proposed that water storage be designated in the Narrows Unit to provide the necessary fundamental flows for improving the whooping crane habitat. A cooperative working group has been established to develop recommendations that could lead to the removal of this jeopardy opinion.

IV. Selected Section 7 Legal Issues

A. The Federal Connection

1. Section 7(a)(2) requires that federal agencies take "such action necessary to insure that actions authorized, funded, or carried out by them ..." do not result in jeopardizing protected species.
2. FWS proposed regulations define "action" as:

All activities of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies--Examples include, but are not limited to: (a) the promulgation of regulations; (b) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (c) actions directly or indirectly causing modification to the land, water, or air.

48 Fed. Reg. 29990, 29998 (1983)
(to be codified at 50
C.F.R. §402.2)

3. Given the emphasis on conservation of endangered species, a broad view of agency action seems appropriate.

B. What is Jeopardy?

1. The heart of Section 7 is found in the directive to federal agencies not to undertake an action that would "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated] habitat of such species"
2. The scope of the analysis
 - a. The Spradley Memorandum (Cumulative Effects to be Considered Under Section 7 of the Endangered Species Act, August 27, 1981) concluded that:

The impact of future federal projects should each be addressed sequentially rather than collectively, since each must be capable at some point of individually satisfying the standards of Section 7. Thus for federal projects,

Section 7 provides a "first-in-time, first-in-right" process whereby the authorization of federal projects may proceed until it is determined that further actions are likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat.

- b. Previously, Interior had taken the position that a broad-based cumulative impacts analysis was required.
- c. Since the case of National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir. 1976), the approach has been to consider both the direct and indirect effects of the proposed federal action. Thus, in that case, the court determined that the Department of Transportation had to consider the impact on the endangered Mississippi Sandhill Crane that would result from private development accompanying the building of a highway.
- d. In the Tenth Circuit decision in the case of Riverside Irrigation District v. Andrews, ___ F.2d ___ (1985), the Court held that the Corps of Engineers should also consider the indirect effects associated with the placement of fill material in considering the issuance of a Section 404 permit. The Court stated:

In the present case, the depletion of water is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge. However,

the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. . . . The relevant consideration is the total impact of the discharge on the crane.

2. The standard for evaluating impacts

a. Definitions in proposed regulations--

jeopardize the continued existence of: "To engage in an action which reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of listed species in the wild by reducing the reproduction, numbers, or distribution of a listed species or otherwise adversely affecting the species."

destruction or adverse modification: "A direct or indirect alteration of critical habitat which appreciably diminishes the value of the habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."

b. Thus an action is prohibited only if it is found to adversely affect both the survival and recovery of a protected species.

c. Moreover, the adverse impacts must be found to "appreciably" affect both survival and recovery.

d. The biological opinion of the

expert agency (usually FWS) is likely to be given considerable weight by the courts in reviewing issues of jeopardy. See, e.g., Roosevelt Campobello International Park Commission v. Environmental Protection Agency, 684 F.2d 1041 (1st Cir. 1982).

3. Risk and Uncertainty

- a. Proposed federal actions may encounter any of 256 species presently listed as either threatened or endangered. When a formal consultation is requested, FWS has ninety days in which to prepare its biological opinion concluding whether the action is likely to jeopardize one of these species. If a jeopardy finding is made, FWS must propose reasonable and prudent alternatives. Moreover, its findings and recommendations must be based on the best scientific and commercial data available.
- b. Though recovery plans are to be prepared for each listed species, quality information needed to make good decisions is difficult to obtain, time consuming, and expensive. Site specific factors related to the proposed action may also be very important.
- c. One attempt to address this problem has been the addition of a provision for informal consultation. Research on recovery plans is also to be prioritized to address those species known to be in conflict with federal activities.
- d. At the same time, Congress has been making it more difficult for FWS to extend the consultation period beyond ninety days.

C. The Duty to Insure

1. In TVA v. Hill at 173, the Supreme Court stated:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species" This language admits of no exception.

2. The federal district court judge in the Riverside case noted: "While the Endangered Species Act does not expand the scope of federal agency's authority, its clear language 'shall insure' directs them to exercise their authority under other statutes to the fullest extent possible to carry out its aims." Thus if an agency's authority permits it to act in a way that would protect endangered species, then it is required to do so under the ESA. On appeal the Tenth Circuit affirmed, finding authority in the Clean Water Act for considering all effects on the "aquatic environment" in issuing a Section 404 permit.
3. In Nebraska v. Rural Electrification Administration, 12 ERC 1156 (D. Neb. 1978) (the Grayrocks decision), the federal district court found that conditions added to a permit to make it an acceptable action under Section 7 may not be discretionary.
4. Agency action which fully complies with the recommendations developed by FWS in its biological opinion will likely be highly persuasive to reviewing courts in

considering a proposed federal action under Section 7. See, e.g., Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982).

5. The ESA clearly overrides other federal laws to the extent that they direct activities or actions that would jeopardize endangered species. TVA v. Hill. If a contrary result is desired, the exemption process must be utilized.
6. In instances of specific conflict between the ESA and a state law, the state law will be preempted. However, Congress has shown a long-standing deference to state law in the water area. See, e.g., California v. United States, 438 U.S. 645 (1978). Also note that in the 1982 Amendments to the ESA, Congress added the following in the "Policy" section of the ESA: "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 concert with conservation of endangered species." In the Riverside case, the 10th Circuit noted the intention of Congress in the Clean Water Act to seek an "accommodation" of the "state's interest in allocating water and federal government's interest in protecting the environment"
7. In the Riverside case, the possible effect of the ESA on the provisions of an interstate compact was raised but not decided. Compacts have the status of federal law. Cuyler v. Adams, 449 U.S. 433, 438 (1981). While an express congressional intent is most certainly necessary to abrogate a compact, there is no clear reason why the implementation of this law (the compact) should not be subject to the achievement of other valid federal objectives as expressed in such federal laws as the ESA.

8. Challenges to regulatory activity under the ESA on the grounds of a taking without just compensation must overcome the modern trend toward allowing encroachment on traditional property rights for valid public purposes. See, e.g., Sax, "Some Thoughts on the Decline of Private Property," 58 Wash. L. Rev. 481 (1983).

VI. Achieving the Purposes of the ESA

The stated purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species," The terms conserve, conserving, and conservation are defined as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."

A. Affirmative Agency Responsibilities Under the ESA

1. Section 5 requires the Secretary of the Interior to "establish and implement a program to conserve" and protect endangered species. Emphasis is placed on land acquisition, although the Secretary is also directed to utilize other authority. The Secretary of Agriculture is also to establish a conservation program within the National Forest System.
2. Section 6 provides that "[i]n carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States." Major federal funding is available for states which establish acceptable conservation programs.
3. Section 7 requires the Secretary to "review other programs administered by him and utilize such programs in furtherance of the purposes of this Act." All other federal agencies and

departments are to "utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act"

4. In 1978, Section 4 of the ESA was amended to add a requirement that the Secretary "develop and implement [recovery] plans ... for the conservation and survival of endangered species and threatened species listed pursuant to this section"
5. The proposition that the ESA creates an affirmative duty on the part of the Department of the Interior to bring about the recovery of protected species has found judicial support in several cases. See, e.g., Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977) and Connor v. Andrews, 453 F. Supp. 1037 (D. Tx. 1978).
6. In an interesting twist, a recent court decision found that the Secretary's duty under the ESA is not limited to the Section 7(a)(2) prohibition against undertaking actions that are likely to jeopardize the continued existence of a protected species but include the affirmative duty to restore listed species. Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984). Thus the ESA supported a decision to devote all of the water in a reclamation storage project to protection of endangered fish rather than for the uses to which it was originally intended to be put.

B. A Management Approach

1. It has been noted that:

The most effective approach to biological conservation revolves around the preservation of ecosystems rather than species, focusing primary

attention on preserving viable, interacting groups of species simultaneously, with subsidiary effort being devoted to protection of individual species within certain guidelines when feasible. By preserving ecosystems rather than species, resources devoted to biological conservation will be used more efficiently, a larger number of viable species will ultimately be preserved, and ecologically sound natural resource development will proceed along more efficient and predictable paths.

Smith, "The Endangered Species Act and Biological Conservation," 57 Southern California L. Rev. 361, 362 (1984).

However, "we are not sure what integrated ecosystem management means and we are reluctant to make major institutional changes to try and manage our resources to this end." Tarlock, "The Endangered Species Act and Western Water Rights," 20 Land & Water L. Rev. 1, 29 (1985).

2. River basins may present a sufficiently coherent system in which to practice something approaching ecosystem management.
3. The efforts currently underway on the Colorado and Platte rivers offer the potential to seek broad-based, long-term solutions to the endangered species problems there. The success of the Platte River Whooping Crane Habitat Maintenance Trust (created out of the settlement in the Grayrocks dispute) in applying on-the-ground management approaches to improving the crane habitat along the Platte River offers some encouragement and suggests an interesting model.

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