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### The ESA: Oil and Water?

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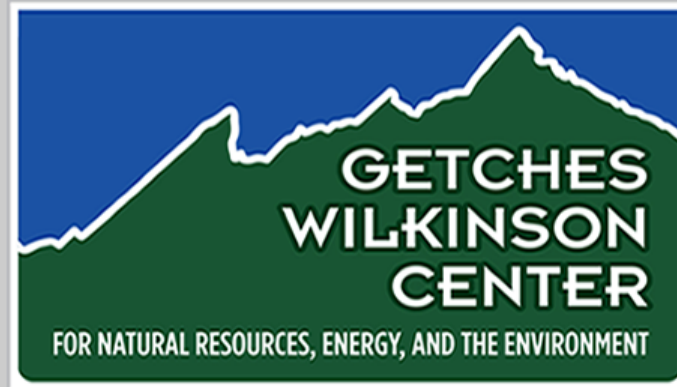
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# **THE ESA: OIL AND WATER?**

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Strategies in Western Water Law and Policy:  
Courts, Coercion and Collaboration  
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NATURAL RESOURCES LAW CENTER  
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# THE ESA: OIL AND WATER?

By Joseph L. Sax

## I. The Endangered Species Act (ESA) raises three difficult legal issues:

- A. Is a reduction in delivery of water in order to comply with the ESA a taking of property for which compensation must be paid?
- B. Is the administration of water in order to comply with the ESA to be accomplished solely in compliance with state water law (in particular pursuant to section 8 of the Federal Reclamation Act)?
- C. Is a reduction in delivery of water in order to comply with the ESA a violation of contract rights for which damages must be paid, under the *Winstar* doctrine?

## II. The United States has sought to implement the ESA without having to litigate these issues, and thus far has largely succeeded. In general the policy under Secretary Babbitt has consisted of the following elements:

- A. to try to bring the United States, local governments and users together for a negotiated solution, sometimes called a partnership approach;
- B. to do so in the context of a large (regional/watershed) conservation strategy that gets ahead of the sort of repeated crises that arise from the prospect of a sequence of isolated ESA consultations, using some form of comprehensive, multi-species program;

- C. To provide incentives to water users, such as multi-species programs that anticipate subsequent listings; to craft a sort of road map so that everyone will know what sort of measures will be considered first if reinitiation of consultation is required, i.e., in effect to anticipate future reasonable and prudent alternatives; to give some assurance to participants that if they sign onto a recommended plan, it will meet those requirements over a reasonable period of time.
- D. to build enough achievement into such a program that there is an umbrella, or bank account, that will serve as a cushion against future projects or activities, so that this cushion will allow activities to go forward in an appropriate way without consultations becoming a shutdown every time someone wants to do something;
- E. in line with the effort to create a bank account or cushion, to strive for recovery, as opposed to simply avoiding jeopardy, as the essence of a program; and
- F. to look for creative solutions that avoid the most intractable prospects (e.g., getting rid of cowbirds that invade nests in existing habitat and were keeping *Bell's vireo* numbers down, as an alternative to drawing down a reservoir to provide additional *vireo* habitat).

**III. How well are these goals being met? The picture is positive, but mixed. One may look at three illustrative cases that demonstrate different stages, or different levels, of achievement.**

- A. Idaho, Snake River: The state has made interim accommodations that permit needed waters to be released downstream for salmon, but holds very tightly to its prerogatives, and has thus far not to any larger, or longer term, program.

- B. New Mexico, Middle Rio Grande: Water has been found to stave off the drying up of habitat on several occasions (e.g, from Albuquerque's reserve), and a Pueblo is making some progress (e.g., dealing with phreatophyte invasion on riparian banks), but so far there is little if any progress in getting any sort of program going on a river that is completely appropriated and where traditional irrigation practices have not changed. Contending interests seem to be at loggerheads. Environmental organization litigation has been initiated.
- C. Colorado, Wyoming and Nebraska, Platte River: An elaborate three-state, regionally-based conservation agreement is in place, and the first increment of a long term plan to restore habitat needs downstream in Nebraska for listed species is also in place. Arrangements have been made to provide needed flows by means such as pumping water during times of abundance for release when needed; increasing storage in an existing reservoir and agreeing to set aside a specified percentage of storage for environmental purposes; and a plan to compensate for any new diversions. While controversy continues, this is a model of a proactive, watershed-based, future-oriented plan.