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The Endangered Species: The Urban Water Utility Perspective

Chips Barry

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THE ENDANGERED SPECIES: THE URBAN WATER UTILITY PERSPECTIVE

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**BIODIVERSITY PROTECTION: IMPLEMENTATION AND REFORM OF THE
ENDANGERED SPECIES ACT**

**Natural Resource Law Center
University of Colorado School of Law
Boulder, Colorado**

June 10-12, 1996

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The Endangered Species Act: The Urban Water Utility Perspective

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- B. Political posturing vs. doing the right thing. What is right? vs. What can I get away with now that the pendulum is coming my direction?

The Experience of Denver Water with the Endangered Species in the South Platte and Colorado River Basins

1. South Platte Basin

Denver Water is a member of the Platte River Project, a coalition of water users and water conservation, management, and development organizations in the South Platte River basin that is working on the development of a recovery program for threatened and endangered species on the Platte River in central Nebraska. Denver Water, through the Platte River Project, is working with the U.S. Department of Interior, the states of Colorado, Wyoming, and Nebraska, as well as water interests from Nebraska and Wyoming and the environmental community on this effort. The purpose of developing the recovery program is, in addition to the recovery of threatened and endangered species, to provide reasonable and prudent alternatives to avoid the likelihood of jeopardy to federally listed species and to offset any adverse modifications to designated critical habitat so existing water projects in the basin subject to Section 7 consultation under the Endangered Species Act can continue to operate and receive required permits, licenses, funding, or other approvals in compliance with the act and to address potential development of future water projects within the basin.

Numerous federal-state and state-state issues are outstanding. They include:

- - Finding an equitable distribution of costs between the various program participants.
 - Assuring that the program is consistent with interstate compacts, equitable apportionment decrees, and state water laws.
 - Assuring that the negotiated program is not subject to separate litigation in a different arena. For example, if Colorado participates in the program, it will need assurances from Nebraska that it will not sue Colorado for flows if a separate suit over the South Platte Compact arises.
 - Assuring program participants of regulatory certainty throughout the duration of the program.
 - Constructing a mechanism for independent peer review to evaluate the program performance.
 - Developing a mechanism to adjust program milestones if the federal government is unable to meet its funding commitments.
 - Developing a mechanism to preserve the regulatory certainty for each state should a different state fail to meet its funding commitments.
 - Implementing a flow protection plan for each state, particularly from nonfederally permitted activities.
 - Developing a mechanism to cover future depletions.

- Developing a mechanism to reconcile the time frame of the program with the duration of federal licenses and permits covered by the program.
- Developing an accounting system to monitor the quantities of water developed under the program.

2. Colorado River Basin - Upper Colorado River Recovery Program

The Upper Colorado River Recovery Program is a 15-year program, established in 1988, to recover the Colorado squawfish, razorback sucker, humpback chub and bonytail chub. The program provides offsetting mitigation for impacts caused by water projects to the endangered fish and their designated critical habitat. The geographic extent of the program is the Colorado River and its tributaries, the Green, White, Yampa, Gunnison, above Lake Powell.

The program was established as a result of a 1983 determination by the FWS that all depletions on the Colorado River jeopardize the endangered fish. At the time the FWS had wanted to restore flows to pre-1960 conditions. This would have eliminated new water supply development in the Upper Colorado River and threatened the yields of existing projects.

Water users, the states of Colorado, Wyoming and Utah, the USFWS, USBOR, Western Area Power Association, The Colorado River Energy Distributors Association and the Environmental Coalition participate in the Program. Key features of the program are:

- A Recovery Implementation Committee was established to oversee the implementation of measures necessary for the recovery for the fish. One member from each organization listed above has a seat at the table (except for CREDA, a nonvoting member). The committee operates by consensus.
- Flow protection and acquisition will be accomplished according to state laws, and interstate compacts.
- As set forth in the sufficient progress agreement, as long as the FWS determines the program is making sufficient progress toward achievement of the recovery action items, the program serves as the reasonable and prudent alternative to jeopardy opinions on Section 7 consultations for existing and new projects. If it is determined that insufficient progress has been made, then key items identified in the Recovery Implementation Plan Recovery Action Plan (RIPRAP) which have not yet been accomplished must be achieved before the depletion impacts can occur.

Recovery program elements include:

- Habitat management (instream flow protection under state law, reservoir reoperation study, Grand Valley Management Study)
- Habitat development and maintenance (opening flooded bottomlands, fish passages)
- Nonnative fish controls
- Research and monitoring

What's Worked:

The program has worked relatively well to date: since 1988 the FWS has consulted on 175 projects with a potential to deplete a total of 209,581 a.f. in the Upper Colorado River basin. Forty-three of the 175 projects are historic projects depleting 18,767 a.f.

- The state of Colorado has recently filed instream flow appropriations for the 15-Mile Reach of the Colorado (from the confluence of the Colorado and Gunnison rivers up to the diversion structure for the Government High Line Canal) and the Yampa rivers. These filings are the largest filings ever made by the CWCB.
- Fish passages have been constructed at the Redlands diversion structure, opening 50 miles of historic habitat up to the fishes.
- Massive amounts of research have been conducted.

What Needs Fixing:

Sufficient Progress: The FWS downgraded the threshold for sufficient progress from projects with 3,000 a.f. of depletions or less to projects with less than 1,500 a.f. of depletions until certain action items are achieved. These action items include finalization of the nonnative fish stocking procedures by 10/96, granting of a decree for up to 3,000 a.f. of releases from Steamboat Lake for endangered fish by June 96, completion of a short-term agreement for 21,650 a.f. of water supplies in Reudi for enhancing flows in the 15-Mile Reach, approval of a FY 97 work plan to implement high-priority nonnative fish control projects by September 1996, and the implementation of a strategy for addressing recovery of the endangered fish in the 15-Mile Reach of the Colorado.

Certainty: Recent statements have been made by some FWS staff that the recovery program is not the reasonable and prudent alternative for projects with depletive effects to the 15-Mile Reach. There was some indication that the only measures which would prevent jeopardy would be the one-for-one replacement of depletions to the 15-Mile Reach, until flow recommendations, which exceed the amount of water physically available to the stream today by 200,000 to

400,000 a.f., are achieved. This position has been maintained by some FWS staff during informal consultation with the Ute District and at Management Committee meetings. This position takes us back to the starting point of the establishment of the recovery program.

There is uncertainty as to how the FWS would rely on the recovery program to offset depletive effects of existing projects that will be undergoing Section 7 consultations.

There has also been some indication from the FWS that they believe the elements identified in the RIPRAP only serve as the reasonable and prudent alternative for existing projects and not new projects.

Funding: Over 40 million dollars have been spent to date on the recovery program. There are estimates that another 82 million will be required to complete the capital programs necessary to achieve recovery. We still need verification on what exactly the 82 million will do. Most of the expenditures would be on non-flow related improvements, which makes it inconceivable that the FWS would take the position that flows are the only solution on the mainstem of the Colorado.

Inconsistencies - Flow and Nonnative Fish: There are inconsistencies between subbasins as to what action items must be achieved: in the 15-Mile Reach of the Colorado and the mainstem of the Colorado, it appears that flows are the critical aspect, whereas in the Yampa basin nonnative controls must be achieved and flow augmentation is not as important an element in fish recovery. The FWS seems a bit schizophrenic about this. For example, the construction of Elkhead Reservoir would generate a pool of water that could be used for augmentation of late season low flows in the Yampa River. The reservoir would be funded in part by funds contributed from the recovery program. Although funding for the augmentation pool of the reservoir has been an action item in the RIPRAP since early on in the recovery program, the environmental representatives believe this is an inappropriate expenditure of recovery program funds. Recently the recovery program biology committee has been questioning the need for the flow augmentation which Elkhead would provide. (Is this a principle-based finding to discourage funding of Elkhead Reservoir or a finding based on best science?) Yet at the same time FWS is adamant that the Steamboat Lake decree, which would also make augmentation flows available for the Yampa, is a critical action item in order for the program to maintain or improve its sufficient progress threshold.

In the meantime, a Draft Strategic Plan for Control of Nonnatives indicates that nonnative controls is of low/medium to medium high priority in the Yampa River reaches of concern, but of universally high priority in the Colorado River from the Grand Valley Diversion Structure at the top of the 15-Mile Reach to Lake Powell. Based on these findings, water users are perplexed with the FWS's contention that

instream flows and flow augmentation are the only action items that can offset depletive impacts to the 15-Mile Reach.

Definition of Recovery: Measurable recovery goals have not yet been established for the recovery program. This needs to be done in order to determine whether we are achieving recovery. The FWS has committed to defining these goals by early in 1997.

There is a fundamental and unresolved dispute between the water interests and the FWS on the scope of recovery required. The water interests entered into the recovery program on the unstated premise that if full recovery was pursued vigorously and effectively in the Yampa River basin, water development could occur on the Colorado River. The FWS service apparently takes the position that fish recovery must occur in all basins, even if recovery of the species can be assured by attention to selected river basins.

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Position Paper on Reauthorization of the Endangered Species Act

Urban populations in the West continue to grow rapidly. The Western Urban Water Coalition (WUWC) was established in recognition of the critical role that water plays in the evolution of the most urbanized regions of the western United States. Water requirements for municipal, agricultural and environmental purposes have increased competition for the finite water resources of this region. Application of the Endangered Species Act (ESA) in the West has heightened this competition by requiring that water resources be reserved and used for the conservation and recovery of species protected under that law. The reauthorization of the ESA offers an opportunity to assess the relationship between the demands placed upon water resources for municipal, agricultural and biological purposes, and to make appropriate adjustments to the statute and the manner in which it has been implemented to the changing water usage demands and environmental values of the modern West.

The WUWC's approach to water management embodies a conservation ethic shared by the ESA. The WUWC supports the ESA but believes that the Act and its implementation need to be improved. However, to be able to successfully advance this ethic the ESA must encourage conservation efforts before species are endangered or threatened and must adequately and promptly follow through with recovery efforts for listed species. The fact that critical habitat has been designated for only 20% of the species listed and that recovery plans have been developed for less than 50% of the listed species is ample proof that traditional implementation of the ESA has not been as effective as it should be. This problem will only worsen with over 3,000 additional species now being considered as candidates for listing.

Water utilities are increasingly frustrated over the uncertainty and delay encountered by projects subject to ESA requirements. Traditional ESA programs emphasize single-species efforts, often initiated only when species are facing extinction. Such crisis management results in constantly changing, often fragmented recovery efforts that are inherently protracted and costly.

If the ESA is to reach its full potential for conserving the habitat of endangered and threatened species, the traditional manner in which it has been implemented must

change. These changes should include: proactive conservation initiatives before species are listed; broadening ESA efforts from a single to a multiple species approach; creating opportunities for voluntary participation in ecosystem management programs; use of a consistent and accountable decision process; better implementation of recovery plans; and the voluntary use of adaptive management as a part of incidental take authorizations. To address the concerns contained in this Position Paper and to assist Coalition members in fulfilling their responsibilities, the WUWC supports sufficient funding for the initiatives discussed below. Each of these areas of concern, as well as specific recommendations on changes that should be made to the ESA, are described in greater detail in the text that follows.

Proactive Conservation Initiatives Must Be Used To Resolve Species Conservation Problems Before Species Are Listed

Authorization of early intervention would protect species and ecosystems in a more cost-effective manner. Proactive conservation initiatives, undertaken before species are listed as endangered or threatened, prevent conditions from deteriorating to levels that require (a) severe restrictions on human activity in a habitat, and (b) intensive and expensive recovery efforts. Proactive implementation of such programs would emphasize a consensus approach to conservation issues, and it would avoid the delays that result from the present listing and recovery processes which are often adversarial in nature. Delays in the cumbersome listing process may also exacerbate conditions in an already deteriorating ecosystem, as well as deferring needed habitat preservation and recovery efforts.

A geometric increase in the number of proposed listings will further stress the ability of responsible agencies to react to deteriorating ecosystems. Conservation efforts will be delayed because these agencies do not have staff resources to conduct the studies and document the need for species listing that initiates the ESA process.

There is a growing recognition that in many cases the most effective way to deal with the current situation is through multiple species programs initiated in advance of listing. In order to accomplish this, the ESA must be amended to give formal recognition to such programs, to assure those undertaking these efforts that they will receive appropriate authorization for incidental take of species covered by these advance plans, and to provide that actions undertaken in accordance with such a plan will be considered to be consistent with the "no jeopardy" requirements of the ESA.

The goals of such programs would be to: (1) make listing a species unnecessary due to proactive multiple species management efforts; (2) reduce the impacts of a future listing should it occur; (3) provide an in-place mechanism to resolve problems associated with listing to avoid delays in on-going projects; and

(4) establish the basis for more effective recovery efforts that will have the least adverse impact on development projects for species that are, or will become, listed under the ESA.

Recommendations

- Authorize the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) to enter into pre-listing agreements and to offer incentives to develop programs that enhance habitats on a multiple species basis.
- Require USFWS and NMFS to develop and support cooperative, single and multiple species HCPs that would provide for the incidental take of any species that is listed in the HCP as long as the Plan is effective.
- Authorize federal funding that provides resources to support development and implementation of regional programs (e.g., mitigation banking agreements).
- Federal agencies should develop management plans for individual species throughout their entire range on federal land, and for entire ecosystems, on federal land, as a basis for the allocation of "take."
- Extend the August 1994 "A Deal is a Deal" policy from HCPs to other ESA plans and agreements that focus on proactive initiatives involving species not yet listed, such as conservation plans and prelisting agreements.

Mitigation Actions And Recovery Plans Under The ESA Should Be Broadened From A Single Species To Multiple Species Approach

The ESA should be broadened so that multiple species approaches can be pursued. Current programs focus on recovery and preservation of single species. Such programs may benefit listed species, but they can fail to protect unlisted species or ensure biological diversity. Designation of critical habitat and implementation of recovery plans for a single species allow habitat modifications that may be detrimental to other coexisting species, and they can delay protection until the capacity of a habitat to support a diverse biota is severely compromised.

Project proponents should have the option under the ESA of pursuing solutions to ESA problems based on multiple species approaches covering species subject to the ESA that may be affected by their actions. The discretionary use of a multiple species habitat conservation initiative, as an alternative to single species conservation and

recovery programs, provides a process for long-term planning by states and local agencies to avoid resource conflicts. It also provides a flexible and effective tool that allows the private sector and resource users to work cooperatively with the federal government, and it promotes ESA goals without stifling needed resource development and economic growth initiatives.

Recommendations

- Encourage multiple species habitat conservation plans (HCPs), incidental take permits, and similar initiatives as a discretionary alternative to single species recovery plans.
- Require agencies responsible for implementing ESA programs to develop a process that prioritizes efforts to recover and protect on a regional or subregional basis in order to carry out a multiple species effort.
- Expand the Species Recovery Priority System, developed by the USFWS for single species recovery plans, to apply to multiple species recovery plans that have the greatest opportunity to reduce relative risk in ecosystems containing threatened and endangered species.
- Extend the August 1994 "A Deal is a Deal" policy to the federal agency commitments made in the context of recovery plans that are followed by specific implementation plans (i.e., "Recovery Implementation Plans").

There Should be Provisions for Voluntary Participation in Ecosystem Management in Lieu of Compliance with Individual Species Protections

Resolution of complex endangered species situations such as the Sacramento San Joaquin Bay Delta and the Colorado River will require an ecosystems approach due to the large number of species that are listed or seriously declining. Because individual species protections are piecemeal rather than comprehensive, they can create situations where protections are inadequate while the economic costs of listing, conservation, and recovery are high. Additionally, the ecosystem management approach is consistent with a purpose of the ESA which is to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved" Ecosystem management also produces benefits for species not listed under the ESA. An ecosystem approach can lead to habitat protection actions and species conservation measures that avoid the need to list species in the future, promote biological diversity, and enhance other values that are represented by healthy fish and wildlife populations.

Ecosystem management is the management of the biotic and abiotic characteristics of biological systems to provide for self-sustaining populations of a full suite of aquatic, riparian, and upland species and habitats throughout the range of trophic levels and successional stages, respectively. This approach integrates human activities into ecosystem dynamics, and thereby can restore balance between human beings and the environment. Ecosystem management can correct significant human-induced changes to habitats and ecosystem functions in several ways: by conserving, restoring, and creating habitats; by restoring natural processes and disturbance regimes that create and maintain habitats; and by implementing measures to reduce risks to species and their habitats caused by human activities.

Ecosystem management can be addressed through a variety of factors tailored to each unique situation. For example, in the California Bay-Delta consideration may be given to factors such as flood pulse and meandering of rivers; heterogeneity, distribution, interconnectivity and abundance of aquatic, riverine and upland habitats; rate of water and nutrient movement through the system; character and frequency of natural catastrophes; sources of nutrients; obstructions to fish and wildlife movement within ecosystems (dams, urban development); and chemistry of river waters (e.g. temperature, salinity, pollutant loading).

In each situation, decisions would need to be made about the geographic scope of the effort (such as a watershed, or logical portion thereof), the magnitude of restorations necessary to support ecological communities over a range of natural conditions (e.g., climatic cycles of drought and flood). Monitoring of keystone species and/or overall diversity and productivity responses would steer adaptive management. The ecosystem management approach would not focus on the needs of individual species, though it would consider keystone species or groups of species and their use of the environment for cover, forage, and reproduction.

However, individual species may be given special attention, as appropriate in an ecosystem management plan. For example, where a species is in jeopardy and is recognized to have particular social value, extra steps to preserve the species may be warranted in the near-term while ecosystem corrections/enhancements are put in place. Furthermore, valued or key species may periodically move or migrate beyond the boundaries of an area included in an ecosystem management plan. It may thus also be desirable or necessary to include individual species conservation strategies that include other than on-site, habitat-related measures to maintain the presence and role of that species in the ecosystem and area of interest. This approach could foster the development of creative, out-of-kind solutions that could provide greater ecosystem benefits in a manner more consistent with operational constraints of a water utility than some on-site measures.

The ecosystem approach is proposed as a voluntary alternative to species protection responsibilities under the ESA. The ecosystem management plan would specify requirements for ecosystem protection and enhancement. These requirements would apply to activities within the plan area in lieu of individual species protection requirements, except as incorporated specifically in the plan. This would provide legal reinforcement for the "deal is a deal" policy. Species protections would continue to be applied where appropriate, and would also function to provide necessary incentives for development and implementation of plans under either the ecosystem or species approaches. Provision for the ecosystem approach within the ESA is imperative to provide the necessary flexibility to create solutions for large, complex systems.

Recommendations

- Enact legal authority for a voluntary ecosystem management planning process that addresses management of biotic and abiotic characteristics of biological systems to provide for self-sustaining populations of a full suite of aquatic, riparian, and upland habitats and species across the range of successional and trophic levels. Provide that this can be accomplished by conserving, restoring, and creating habitats; by restoring natural processes and disturbance regimes that create and maintain habitats; and by implementing measures to reduce risks to species and their habitats caused by human activities. Provide that human activities are to be an integral part of an ecosystem management plan.
- Provide that the ecosystem management plan shall specify requirements for ecosystem protection and enhancement. These requirements shall apply to activities within the plan area in lieu of otherwise applicable species protection provisions unless included in the plan itself.
- A requirement that binding mitigation agreements among project proponents and USFWS and/or NMFS may be included in ecosystem management plans. Provide that binding mitigation agreements shall not be subject to additional mitigation requirements for unforeseen circumstances including attraction of new or unanticipated species to the ecosystem management plan area, unless agreed to by the parties to the agreement.

A Consistent And Accountable Decision Process Must Be Used To Execute Provisions Of The ESA

A uniform decision-making process based on scientifically credible information would improve species preservation and habitat protection efforts. If stakeholders in agency decisions are able to review and comment at critical points in the process, there would be clearer expectations and greater confidence that program efforts would benefit endangered and threatened species.

Implementing agencies often lack sufficient staff and resources to thoroughly review and consistently apply all available data when preparing listing decisions, biological opinions, incidental take permits, recovery plans, and designation of critical habitat. This has caused protracted, acrimonious debates that often result in judicial challenge. Such litigation fails to provide timely protection for threatened and endangered species, and it often impedes or halts important water resource development projects. Greater confidence in the credibility and consistency of ESA decisions reduces the hesitation of agencies, developers and the public to participate in the process, and speeds implementation of ESA decision-making and recovery initiatives. Species conservation/ecosystem preservation efforts based on sound technical information and objective decision-making provide the most cost-effective use of limited resources.

It is in the best interests of ESA stakeholders, including municipal water utilities, to assist USFWS and NMFS to acquire the resources necessary to gather, evaluate and utilize sound scientific information. Additional resources could be made available through memoranda of understanding between stakeholders and USFWS and NMFS, or through agreements with state or regional agencies assisting the federal agencies. Designation of critical habitat based on accurately characterized sites results in focused recovery plans that use the minimal resources necessary to achieve program objectives.

Critical habitat currently is required to be designated at the time of species listing. Frequently, insufficient information is available when a species is first listed to define critical habitat with specificity. As a result, there is a natural tendency to designate too much area as critical habitat. A more effective and efficient approach is to designate critical habitat concurrently with recovery plan approval. At that point, much more is known about the species and its habitat needs and a cooperative process, open to outside parties, is available to gather the necessary information.

Recommendations

- Develop such mechanisms as cooperative agreements with other stakeholders to provide technical assistance to federal agencies in

undertaking analysis of biological data, public comments, and other pertinent information needed to make objective, thoroughly-researched and publicly accountable decisions under the ESA.

- Encourage promulgation of regulations and agency guidelines that require agencies implementing ESA programs to develop comprehensive, step-by-step procedures to guide agency decisions and public participation in all key aspects of ESA implementation, including recovery plans, listing decisions, biological opinions and critical habitat designations, and procedures for appealing questionable decisions rendered by agency staff. Guidance should emphasize procedural standardization and a uniform decision-making process.
- Delete the requirement that critical habitat be designated at the time of species listing. Require that such designations occur at the time of recovery plan approval.

Implementation Of ESA Recovery Plans Must Be Better Prescribed And Managed

One frustration with the ESA is that, recovery plan implementation efforts are not always undertaken expeditiously or effectively. Also, in many cases these measures do not allow sufficient flexibility to deal with species conservation problems as they arise. Administrative and legislative actions are needed to address these problems.

Recovery plans should be developed through more open and cooperative procedures whereby: affected agencies and parties are allowed to participate; relevant data are shared; data collection needs are identified through a cooperative process; reasonable time frames are developed and adhered in order to complete the plans and implement them.

Species conservation efforts that result from recovery plans do not always contain measurable milestones by which progress toward species recovery can be gauged. This limits the ability of responsible agencies and regulated parties to evaluate the effectiveness of such efforts and the time and costs estimated to achieve the plan's goals. Moreover, responsible agencies have no means to require other federal or regional agencies and other parties to implement the actions identified in the plans.

Thus, delayed recovery efforts place species and habitats at greater risk, and require more extensive and costly actions when the efforts are initiated. Recovery of listed species is the underlying goal of the ESA, and more must be done to strengthen

and expedite agency recovery plans. Frequently, involved agencies lose track of the fact that recovery plans advance the dual purpose of assisting species conservation as well as making possible resource use and development activities. For example, such plans could, but seldom do, include specific factors that may be adopted for mitigation purposes by parties whose activities may affect listed species or designated critical habitat. Such guidance would benefit species as well as provide options to affected parties on how to conduct their activities in a way that is consistent with the Act.

Recommendations

- Require recovery plans to be more detailed, and include requirements for content, recovery milestones, mid-course progress evaluations, and projected time frames for ultimate recovery and delisting. Recovery plans themselves should be developed under time lines that require implementation as expeditiously as practicable.
- Emphasize implementation of conservation measures in accord with recovery plan requirements.
- Establish guidelines and requirements for cooperative decisionmaking and data gathering procedures for recovery plans.

Adaptive Management Should Be Used In HCPs and Incidental Take Statements When Feasible and Agreed To By the Project Proponent

All too often, creative and efficient approaches to balance the conservation of listed species and the development and utilization of natural resources are stifled by the rigid adherence of federal agencies to the principles that: 1) the benefit of the doubt must be granted to the species; and 2) activities cannot be authorized unless all of the consequences are identified and fully understood in advance. As a result, water supply entities and other parties involved in resource development or utilization are prevented from developing conservation programs that allow for mid-course corrections or other adjustments to the terms and conditions intended to protect listed species. By applying the ESA in this manner, federal agencies not only can cause unduly stringent restrictions to be imposed but also can deprive species recovery and conservation programs of potentially advantageous flexibility that allows new and more effective measures to be undertaken in the future.

One initiative that can be pursued to provide this desired flexibility is to make adaptive management an integral part of ESA decisionmaking under section 7 incidental take statements and section 10 HCPs and incidental take permits. Adaptive management is an approach to natural resource management that allows projects to

proceed when the environmental consequences of the actions involved cannot be known with certainty. For example, adaptive management might be appropriate when time needed to collect adequate information before making an operational or planning decision might be so long that delaying actions or curtailing operations would jeopardize a valuable project, or cause socially or economically undesirable curtailment of operations or restrictions. The advantage of adaptive management is that it would allow the activity to go forward with a mechanism in place to make adjustments as needed in the future.

To apply adaptive management, the nature, magnitude, and cost of any future species protection measures must be in some way circumscribed by agreement between the resource user and the federal agency. The best arrangement would limit and constrain the protection measures, and give the resource user the flexibility to develop cost effective actions that are the least disruptive to operations or development plans.

Recommendations

- Recognize through the ESA and agency policy the role of adaptive management as an approach that may be used on a voluntary cooperative basis in the context of incidental take authorizations. Provide that the parameters for adaptive management be defined in each authorization document.

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The Honorable Richard Pombo
Chairman
Task Force on Endangered Species
House Resources Committee
1519 Longworth HOB
Washington, D.C. 20515

Dear Chairman Pombo:

As the House Resources Committee's Task Force on the Endangered Species Act begins drafting amendments to the Act, we request the inclusion of legislative language which will confirm that the Act:

- does not allow federal agencies to take or reallocate water from existing water supply projects for ESA purposes, preserves states primacy over water allocation and administration, and does not affect or modify interstate compacts and equitable apportionment decrees
- provides certainty with respect to obligations of non-federal entities toward the recovery of endangered species

As you know, millions of people across the country have spent enormous resources on water projects in reliance on existing water allocations, and water cannot be taken from these projects for ESA purposes without causing unacceptable social and economic harm.

In addition, Congress has always recognized state jurisdiction over water allocation and administration matters. It is critical that language be included in the ESA to prevent the Act from being used to destroy the state water allocation and administration systems.

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Finally, entities that enter into recovery plans or conservation agreements to protect endangered species should be guaranteed that "a deal is a deal." Under current law, the USFWS has asserted that it may continually change the obligations that non-federal entities have toward species recovery. In this climate, it is difficult for water providers to ensure that their constituents have a safe, secure water supply.

These proposed changes to the Endangered Species Act will confirm that the Act was not intended to retroactively usurp existing water rights and water allocation systems and provide a mechanism for non-federal entities to establish, once and for all time, their obligations for species conservation.

**NWRA's PRIORITY LIST FOR
ENDANGERED SPECIES ACT REFORM AMENDMENTS**

**• PROTECTION OF EXISTING YIELD OF WATER
PROJECTS, STATE WATER LAW, INTERSTATE
COMPACTS AND EQUITABLE APPORTIONMENT
DECREES**

(a) Subject to the requirements of subsection (b) below, if the Secretary determines that water is required for a goal, purpose, or objective of this Act:

(1) it shall be acquired pursuant to the substantive and procedural requirements of the state in which the species is located; and

(2) where specified flow conditions or lake levels are found by the Secretary to be the minimum quantity of water necessary to avoid jeopardizing the continued existence of a listed species after implementation by the Secretary of all reasonable and prudent non-water alternatives, the Secretary may request that an applicant for a federal permit or approval implement such measures that would avoid jeopardy to such listed species or its critical habitat without causing (A) a reduction in the quantity water which would otherwise be legally available for use by the applicant, or (B) a material increase in the cost of the water legally available to the applicant.

(b) The exercise of authority pursuant to or in furtherance of this Act shall not be construed to (1) create, either expressly or by implication, a federal reserved water right, (2) supersede, abrogate, injure, or otherwise impair rights to the use of quantities of water which have been established in adjudication's which are in conformance with 43 USC 666, (4) supersede, modify, or amend water allocations established pursuant to interstate compacts or Supreme Court decrees, (5) require the transfer of water or rights thereto, or create a limitation on the exercise of rights to water, or (6) constitute a cause for non-delivery of water pursuant to contract.

(c) **FEDERAL RECLAMATION PROJECTS** - The Secretary, in carrying out any provisions of this Act, shall continue the use of water and power projects constructed or to be constructed in accordance with the Reclamation Act of 1902, as amended, in accordance with their project authorizations. No provision of this Act shall be interpreted so as to adversely impact rights under water storage and use contracts or allocation of available supplies to fulfilling those contracts.

• **TO PROVIDE FOR CERTAINTY WITH REGARD TO RECOVERY PLAN OR CONSERVATION AGREEMENTS WHICH ESTABLISH OBLIGATIONS FOR NON-FEDERAL ENTITIES - (A deal is a deal concept)**

(d) If the exercise of authority for the purposes of this Act requires the use, nonuse, or transfer of assets owned or controlled by, non-federal persons or entities as a condition of approval for an activity or project, no further requirements may be imposed for the purposes of this Act on such non-federal persons or entities relating to the continuation of the activity or project so long as such person or entity substantially complies with the requirements of the original federal approval.

Clarifies that the scope of Section 7 consultation for federal actions which may be required for the continued use of existing water projects is limited to new or expanded impacts of the projects.

(2) Consultation under Section 7 regarding agency actions for existing water projects or facilities, including, without limitation, (1) actions relating to routine operation, maintenance, rehabilitation, and repair of such projects or facilities, and (2) the construction or modification of facilities as required by federal or state laws for regulating the safety of dams or other water facilities, shall be limited to the additional impacts which are the direct result of the proposed new actions, and shall not extend to the impacts which may result from the continuation of the previously approved activities.



