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# Resource Law Notes Newsletter, no. 20, Sept. 1990

University of Colorado Boulder. Natural Resources Law Center

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# Resource Law Notes

**The Newsletter of the Natural Resources Law Center**
**University of Colorado at Boulder • School of Law**

**Number 20, September 1990**

## Report Considers Role of Water Transfers

Undeveloped water supplies are scarce in the western United States. The construction of major new dams has slowed dramatically in recent years. New groundwater development also is slowing down. The usable water supply pie is no longer increasing to keep pace with increasing and changing water demands.

The West is in transition from an era of water supply development to a period of reallocation of a portion of the developed supplies to new uses. One important reallocation option is the use of water transfers — transactions involving a voluntary change in the use of water under an existing water use entitlement. Western states have created legal frameworks governing rights to use water resources. Transfers of existing rights to use water allow new needs to be met with already developed supplies.

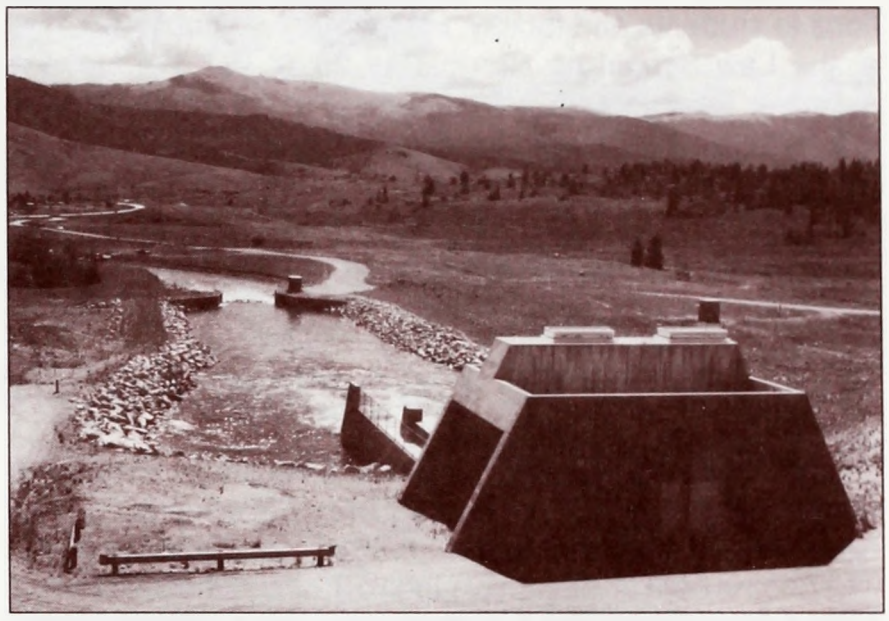
Because of the importance of the water transfer option, the Center organized and led a major study of water transfer experience in six western states. Supported in part by a grant under the Water Resource Research Act, researchers from Arizona, California, Colorado, New Mexico, Utah, and Wyoming examined laws and institutions governing water transfers in their states. They also made a detailed study of the water transfers that went through state review between 1975 and 1984. The results of this 30 month study are now available from the Center in a two-volume report.

The first volume provides a general summary of the findings from the study. It begins with economic and demographic comparisons among the states including comparisons in water use. It contains an executive summary of each state report. It presents a comparative analysis of the level and types of transfers in the six study states. Finally, it offers general recommendations for facilitating water transfers.

Volume two contains the detailed findings from the individual state studies. Included are analyses of the laws and procedures governing water transfer in the states as well as of the transfer activity during the study period. Conclusions and recommendations specific to each state are presented.

The report presents the first systematic empirical analysis of water transfers. While the study concentrates on those transfers subject to state review, it describes the wide variety of ways that water transfers are occurring. The level of transfer activity subject to state review varied markedly among the study states during the study period. The report explores reasons for this variance.

Characteristics of the transfers that occurred during the study period are examined. Analysis includes the quantities of water involved, the original purpose of use and the new purpose of use, and the source of water involved (groundwater or surface water).



Twin Lakes outlet, Upper Arkansas River Basin, Colorado.

Experience under the state water transfer review process is considered at some length. One major finding is that most water transfer applications are approved, though the approval rate varies considerably among the states. Factors such as the length of time required to reach a final decision and the number of protested applications also showed considerable differences among the states.

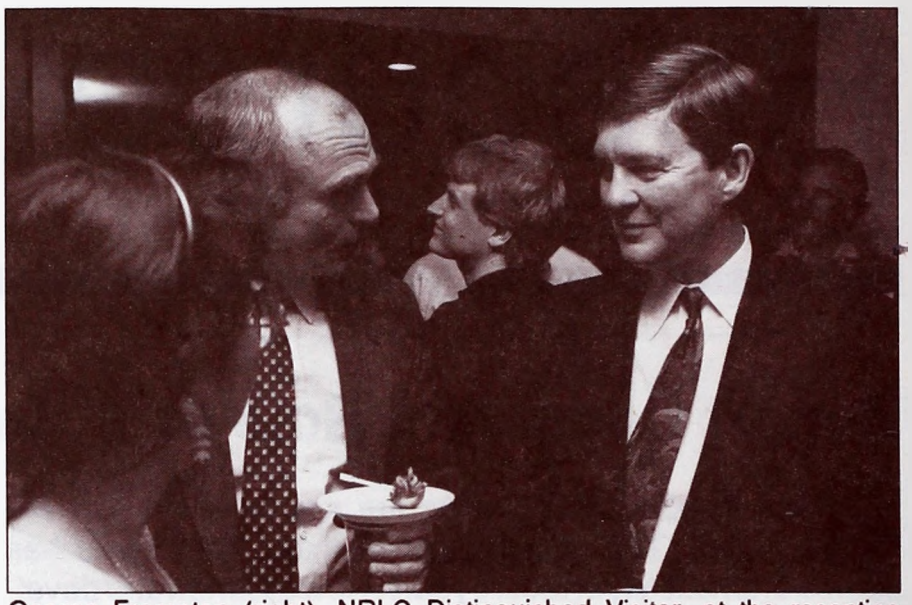
The report discusses the changing nature of the issues raised by water transfers. While there appears to be more general acceptance of the use of voluntary transfers, some states now are subjecting those transfers to review for their effects on matters beyond possible impairment of other water rights. The report discusses these and other issues that must be addressed in determining the role that water transfers will play in meeting the changing water needs of the West.

Volumes I and II are available from the Center. The chapter from Volume II, "Transfers of Water Use in Colorado," can be purchased separately.

# Frampton is NRLC Distinguished Visitor

**George T. Frampton, Jr.**, president of The Wilderness Society in Washington, DC, came to the University of Colorado School of Law as the 1989/90 NRLC Distinguished Visitor on March 20-21, 1990. Frampton has been president of The Wilderness Society since 1986. He is a lawyer and has held a number of positions in his distinguished career, including Assistant Special Prosecutor on the Watergate Special Prosecution Force between 1973 and 1975 and Deputy Director of the Nuclear Regulatory Commission's Special Inquiry Group to investigate the Three Mile Island nuclear accident.

During his visit Frampton gave several informal presentations to students and faculty. He also gave a public address at the Law School on "Earth Day 2020: Will We Have A Healthier Environment?" A transcription of this presentation is available as a Center Occasional Paper.



George Frampton (right), NRLC Distinquished Visitor, at the reception following his address.

# Review of G. Coggins, *Public Natural Resources Law* (1990)

This new treatise* by Professor Coggins is a valuable resource for anyone working in the public lands, natural resources, environmental law, or land-use planning areas. The book is both an historical piece on public land policy in the United States, and also a current compilation of federal laws and regulations governing public land and resource management, including the spectrum of environmental laws and regulations.

Professor Coggins gives thorough coverage to the constitutional, statutory and administrative framework of natural resources law. He discusses the respective authority and limits on authority of the congressional, executive and judicial branches of the federal government as well as federal-state powers over public lands and resources. The chapter on the administrative framework describes the organization, function and authority of the various federal land management agencies and sets out administrative procedures of these agencies under the Administrative Procedures Act.

Finally the book devotes chapters to environmental assessment under the National Environmental Policy Act, a chapter to land use planning on the lands of the several land management agencies, and separate chapters to the individual types of resources including recreation, wildlife, rangeland, timber, minerals and oil and gas. These latter chapters focus on the management of these resources under applicable statutory provisions and case law.

*Public Natural Resources Law* is a good reference book; it provides comprehensive coverage of history, law and policy governing the management and use of the federal lands.

*- Teresa Rice*

* *Public Natural Resources Law* is published by and available from Clark Boardman Co, Ltd, 435 Hudson St., New York, NY 10014. For information call 1-800-221-9428.

# Center Announces New Publications

In addition to the two-volume study of water transfers described on page 1, the Center recently has produced several other publications. There are two new entries in the Western Water Policy Discussion Series. **John Folk-Williams** considers the role that cities play in water policy in the American West (#3), and **Steven Shupe** discusses water-related decision-making processes and their contemporary sufficiency (#4).

In the Center's Occasional Paper series **Professor David Getches** presents a thorough analysis of the legal and institutional issues raised by drought in the lower Colorado River Basin. This report is part of a larger study under the leadership of **Professor Frank Gregg** at the University of Arizona. **Gu Xueting**, who was a Fellow at the Center in 1989/90, provides a summary of Chinese laws relating to natural resources development and protection. Finally, **Robert Wigington**, an attorney with The Nature Conservancy in Boulder, summarizes the market-based approaches that TNC is taking to protect water-related environmental values.

# Spring Conferences Focus on Water Transfers, Instream Flows

Top Five Photos (left to right):
Chips Barry (left) and Jeff Kahn at Colorado Instream Flow Law Conference, April 21, 1990.
Larry MacDonnell,Center Director, introduces conference speakers.
Professor Helen Ingram, University of Arizona, discusses effects of water policy on community values at June conference.
Assistant Secretary of Interior John Sayre listens to other speakers at June conference.
David Harrison (left) and Christopher Meyer participate in June conference panel.

"Moving the West's Water to New Uses: Winners and Losers" was the subject of the Center's Eleventh Annual Summer Program, held June 6-8, 1990. The program featured 23 presentations on a wide variety of topics. **John Sayre**, Assistant Secretary for Water and Science in the Department of the Interior, spoke on "Federal Water Policy to Meet a Changing West." **Professor Helen Ingram** from the University of Arizona talked about the community value of water. **Clyde Martz**, of counsel with Davis, Graham & Stubbs, discussed interstate water transfers in the context of the Colorado River. Conference notebooks containing detailed outlines of the speakers' presentations are available from the Center as are audiotapes of the presentations. Conference participants numbered 180, the biggest attendance at any of the Center's summer programs.

In April the Center again collaborated with the Boulder County Bar Association to present a Saturday symposium entitled "Instream Flow Protection: Is Colorado Law Adequate?" This program featured 13 speakers and attracted 80 registrants. Issues discussed included whether inundation of a flowing stream is incompatible with an instream flow water right.

Bottom Four Photos (left to right):
John Echohawk, Executive Director of the Native American Rights Fund, discusses Indian water rights at June program.
Clyde Martz, of Davis, Graham & Stubbs, discusses interstate transfers.
Bruce Driver, water consultant, speaks about federal water projects.
Leo Eisel, water engineer, addresses instream flow issues.

# Western Water Law Loses Two Major Figures

## Glenn Saunders: A Recollection

*by Larry MacDonnell*

The passing of Glenn Saunders on May 1, 1990, surely marks the end of an era. In Colorado no one was more closely associated with the traditional water rights system than Glenn. If Colorado is still the home of the "pure" prior appropriation doctrine, then it is because Colorado was the home of Glenn Saunders.*

Glenn Saunders

I did not know Glenn well or for long. I knew of him, of course, for his reputation was extraordinary. As a relatively new initiate into the mysteries of water law I wanted to get to know this person whose impact on the Colorado system had been so profound. I knew that he was already in his 80s but that he still went to his office on a regular basis. I hoped to persuade him to put down on paper an account of his career and, in the process, preserve a record of some things that perhaps only he would know.

I first contacted Glenn with this idea in February 1988. He seemed interested and enthusiastic. We arranged to meet in his office in downtown Denver soon thereafter. He suggested that after we had worked for a while we should go over to the Denver Athletic Club for a swim and some lunch. Thus began a pattern that we followed a half dozen times over the following eight months.

At our first meeting I had little idea what to expect. His reputation was somewhat intimidating and I had little sense of his mental or physical condition. I had explained my interest in getting some kind of written history from him and had anticipated developing this history through a series of interviews. Instead, Glenn sat me down and proceeded to speak directly into his dictaphone. I was there to listen and, though I asked an occasional question and provided a list of suggested topics, it was his show.

* Attorney, Saunders, Snyder, Ross & Dickson, Denver.

The result of this effort was published in *Resources Law Notes* in a three part series as "Reflections on 60 Years of Water Law Practice." As far as I can tell, it is classic Glenn Saunders. His strong point of view comes through clearly in many places. He believed in a vision of the West as a great place and of Denver as the center of this greatness. His was a West that Robert Athearn has described so well in *The Mythic West*, a place where civilization would achieve its apex.

Denver would need water for this purpose and Glenn set out to assure that supply. He worked tirelessly on behalf of the city and today Denver has a water supply system that has been valued at $2 billion or more. Much of that water supply comes from the Colorado River basin on the west slope of Colorado through transmountain diversion facilities. Glenn's work to secure the legal rights to this supply often put him at odds with people on the western side of the Divide. I once heard it said that if God had meant water to flow downstream He would have given Glenn Saunders to the Western Slope.

Glenn was an advocate and his cause was Denver. He was said to be absolutely brilliant in the courtroom. That was not hard for me to believe. Even at 83 his mind showed an unusual quickness and toughness. More than once I found myself thinking that I would have preferred to have Glenn on my side in a court fight.

It is too soon to assess his legacy. His accomplishments are many and his influence during much of his career was impressive. Yet Glenn was very much a man of his times. As the West changed, Glenn did not. He was very direct and plain-spoken and was genuinely surprised when some people found what he said to be outrageous. At other times he seemed to know exactly the kind of reaction his comments would produce and, advocate that he was, he thoroughly enjoyed being provocative.

I will remember the swims with Glenn, watching him slowly but surely swimming laps for at least 30 minutes while I, a little more than half his age, wore myself out in an adjoining lane. He told me that even in his busiest times he always exercised. I will remember the lunches where we talked of many things, disagreeing on most. I don't think he liked being old. He was a fighter and I think he missed the action. I feel fortunate to have had this opportunity to get to know Glenn. He was a remarkable and outsized character who lived into a time when most people seem cautious and purposely unremarkable.

# Stephen E. Reynolds: A Memory

*by Charles F. Wilkinson*


Steve Reynolds

When Steve Reynolds, long-time New Mexico state engineer, died this past April, there was an outpouring of respect—nearly reverence—for the passing of a kind that we may never see again. He wielded extraordinary power over New Mexico's water and, because he was determined to maximize his home state's claim to as much water as possible, his influence ranged from Texas to California. Ultimately, he exercised a kind of authority over water associated only with a handful of figures such as Elwood Mead and Wayne Aspinall. And he did it with his own style, a unique blend of complete command of facts and law, stubbornness, respect for stability, honesty,and a personal courtliness that embodied the best of the Old West.

Steve graduated from the University of New Mexico as an engineer, captained its football team in 1938, worked for Phillips Petroleum, served on the faculty at New Mexico Tech, and was appointed State Engineer in 1955. Technically, he served at the pleasure of each of the ten governors who held office during Reynolds' tenure. But there was no real-world possibility that Reynolds could ever be replaced: he soon became too much of an institution for that. He held the office until he death.

A master of both law and science, of both theory and detail, Steve ran one of the most efficient, accomplished public office that one can find. He pioneered the conjunctive management of surface and ground water: he had no clear statutory mandate, but he knew the interconnectedness mandated by hydrology. His office ran the most efficient system for transfers of water rights found in any state. Emlen Hall calls Reynolds "the best trial judge I've worked before. He's fair, he's sensitive, and he takes a real active role." Charles DuMars writes that "Steve found the horse of honesty and fairness in allocation of water in New Mexico and . . . rode it unerringly until his death."

Steve loved New Mexico to his bones and viewed it as his sacred mission to preserve to the state its full share of water—and, some might say, a bit more, to boot. His battles with Texas over the Pecos River and the Hueco Bolson groundwater aquifer near El Paso are legendary. He knew how to play the high-stakes water contests in Congress. Morris Udall, equally avid to promote Arizona's interests, told Reynolds, during 1966 House hearings on the Lower Colorado River Basin Project, that "we think you are very able, very aggressive, and a very statesmanlike representative of your people. We think you drive a hard bargain." In 1965, Craig Hosmer of California learned what it was like to try to stare down the consummate bulldog and gentleman:

> Mr. Hosmer. *Is my understanding correct that the State of New Mexico has no objection to the lower basin project but it wants it conditioned on something else?*
>
> Mr. Reynolds. *Yes, sir.*
>
> Mr. Hosmer. *In essence, you want to hold the lower basin project for ransom, for some water.*
>
> Mr. Reynolds. *I think we want to hold up the progress until there is an equitable apportionment of those waters.*
>
> Mr. Hosmer. *You call it an equitable apportionment. I call it ransom.*
>
> Mr. Reynolds. *Yes, sir.*

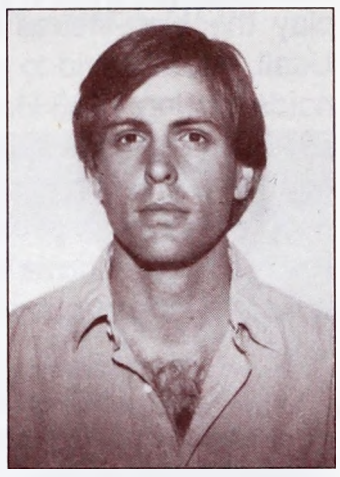
Steve achieved his objectives. Historian Ira Clark estimates that Reynolds obtained approximately 1.4 billion dollars in federal water project funding for the state of New Mexico.

Critics can fairly point to a downside to Reynolds' career. There is a good argument that the federal money was not all needed: much of the water from the San Juan-Chama Project, diverted from the Colorado River Basin over to the Rio Grande, literally evaporates in New Mexico reservoirs because Albuquerque and other municipalities cannot yet make use of the water. Steve's veneration for stability and traditionalism (he once told me that his greatest achievement in office was that the 1907 Water Code, enacted during territorial times, was still completely in place) blocked a number of proposals designed to meet the needs of a changing New Mexico. It is telling that his loudest critics were environmentalists and Indians. Further, even his exceptional personal abilities now leave a potentially unfortunate legacy: many water experts in New Mexico wonder whether the elaborate system put into place by Steve can be administered by anyone else.

But, whatever failings he may have had, Steve Reynolds was one of the main contributors to the post-World War II era in the American West. He was extraordinarily talented. He possessed integrity to a degree beyond the saying. He loved New Mexico and served his state with great distinction. We will miss him and, too, will appreciate our own humanity ever more keenly. For if this rough-hewn, power-paced, inspirational giant of a man was not immortal, then none of us is.

# The Prohibition Against Taking Endangered Wildlife in Section 9 of the Endangered Species Act of 1973: The Existence of Exceptions Supports Full Enforcement

Federico Cheever*



The federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543, is our primary national bulwark against the destruction of the biological diversity on which ecosystems depend. The most far-reaching of the Act's protections is the prohibition against taking in section 9 of the Endangered Species Act, 16 U.S.C. § 1538. The prohibition against taking flatly forbids any entity, public or private, from "taking" any designated species of endangered wildlife. "Taking" includes any act that causes death or injury to any member of an endangered species, even death or injury that results indirectly from habitat modification. The section 9 taking prohibition is a powerful law, but has never been fully enforced.

In 1982, Congress amended the Endangered Species Act and added two exceptions to the taking prohibition, one for "incidental" takings resulting from federal actions, in sections 7(b)(4) and 7(o)(2) of the Act, 16 U.S.C. §§ 1536(b)(4) & (o)(2), and one for "incidental" takings resulting from all other actions, in section 10(a) of the Act, 16 U.S.C. § 1539(a). These exceptions are intended to allow limited takings of endangered species while preventing injury to the species as a whole. The capacity of these exceptions to achieve this goal is still unproved. However, the existence of the exceptions offers new reasons to enforce the section 9 taking prohibition.

## *A. The Section 9 Taking Prohibition*

The taking prohibition embodied in section 9 of the Endangered Species Act of 1973 is simple, unambiguous and breathtaking in its scope. Endangered Species Act sections 9(a)(1)(B)&(C), 16 U.S.C. §1538(a)(1)(B)&(C), forbid anyone to "take" any member of any endangered species of fish or wildlife "within the United States or the territorial seas of the United States" or "upon the high seas." Section 2(19), 16 U.S.C. §1531(19), defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The term take was defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973).

The United States Fish and Wildlife Service ("USFWS"), which is responsible for enforcing the Endangered Species Act for almost all endangered species, has defined "harass" and "harm" in the definition of "take" to include indirect injury through habitat destruction or modification. USFWS defines "harm" to include an "act" that results in "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns." 50 C.F.R. § 17.3(c). USFWS defines "harass" to include an "intentional or negligent act or omission" that creates "the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns." *Id.*

The broad USFWS definitions accurately reflect Congressional intent. The House committee report on the 1973 law contemplated that the prohibition against harassment would allow federal agencies "to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973).

The provisions of the section 9 taking prohibition can be enforced either by federal government action or by citizen suit. *See* 16 U.S.C. § 1540(e) & (g). The statute encourages citizen suits with a generous fee shifting provision. 16 U.S.C. § 1540(g)(4). The federal government may bring criminal prosecutions for "knowing" violations of the prohibition. 16 U.S.C. § 1540(b)(1). The section 9 taking prohibition makes it a violation of federal law for anyone to harm or injure or attempt to harm or injure any member of any endangered animal species anywhere in the United States, on public land or private land, or on the high seas. For these reasons, section 9 is, perhaps, the most powerful piece of wildlife legislation in the world.

Recent cases demonstrate the power and versatility of the section 9 taking prohibition. *See, e.g. Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979) *aff'd* 639 F.2d 495 (9th Cir. 1981)(holding that defendants had "taken" the endangered Palila bird in violation of section 9 by maintaining feral sheep and goats that degraded the mamane-niao forest on which the Palila depends and ordering the removal of the feral sheep and goats from Palila habitat); *Palila v. Hawaii Department of Land and Natural Resources, (Palila II)*, 649 F. Supp. 1070 (D. Hawaii 1986) *aff'd* 852 F.2d 1106 (9th Cir. 1988)( holding that defendants had "taken" the Palila by maintaining a population of mouflon sheep in the mamane-niao forest); *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, 688 F. Supp. 1334 (D. Minn. 1988) aff'd 882 F.2d 1294 (8th Cir. 1989)( holding that EPA's continuing approval of above-ground use of pesticides containing strychnine or strychnine sulfate was a "taking" because it indirectly resulted in the poisoning of "non-target" endangered species); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) *on appeal* 88-6041 (5th Cir.)(holding that U.S. Forest Service timber management on national forests in Texas was a "taking" of the endangered Red-Cockaded Woodpecker because it degraded and fragmented Red-Cockaded Woodpecker habitat). *See also National Wildlife Federation v. Hodel*, 23 E.R.C. 1089 (E.D. Cal. 1985).

* Attorney, Faegre & Benson, Denver. Mr. Cheever was a Fellow at the Natural Resources Law Center for the spring 1990 semester.

## B. Enforcement of the Section 9 Taking Prohibition

Section 9 of the Endangered Species Act is a statutory provision with teeth, a law intended to be a powerful tool in a national effort to preserve the biological diversity on which ecosystems, and therefore all of us, depend. Unfortunately, section 9 has never been fully enforced. Despite the handful of cases demonstrating its power, an apparently general reluctance to invoke the far-reaching language of section 9 taking prohibition has relegated it to a subsidiary role in Endangered Species Act litigation, a satellite to the more limited substantive provisions of Endangered Species Act section 7.

Red-cockaded woodpecker on a long leaf pine. *photo by Jeff Walters, NC State.*

A striking example of a failure to enforce section 9 appears in the Fifth Circuit's recent consideration of the adequacy of regulations to limit takings of sea turtles caused by shrimping. In *State of Louisiana ex rel Guste v. Verity*, 853 F.2d 322 (5th Cir. 1988), the court upheld the challenged regulations while ignoring the legal ramifications of the fact that sea turtles are being taken. The court considered the evidence of how many turtles are being killed in shrimp nets. The court observed that "the relationship of shrimping to sea turtle mortality is strongly demonstrated" and estimated that 2,381 threatened or endangered turtles are killed by shrimpers each year off Louisiana alone. But the court failed to consider whether this mass killing violated the section 9 taking prohibition.

The unwillingness to enforce the section 9 taking prohibition fully has distorted the law of endangered species, creating a system of unequal justice in which some groups and individuals are taken to court for acts that would go unquestioned if committed by others. The State of Hawaii is ordered to remove feral sheep and goats from the habitat of the endangered Palila, while the U.S. Fish and Wildlife Service has difficulty enforcing any habitat protections for the endangered "Alala, or Hawaiian crow, on private land. The United States Forest Service is forced to preserve adequate habitat for the endangered Red-Cockaded Woodpecker, while private timber companies have been free to log in woodpecker habitat. This distortion of the law limits the protection available to endangered species and creates the impression that the law is unfair. If left uncorrected, it could erode our national commitment to preserving biological diversity and biological diversity itself.

## C. Exceptions to the Taking Prohibition

The general reluctance to enforce the section 9 taking prohibition has grown, in large part, out of a perception that the prohibition was draconian, that it lacked the flexibility necessary to avoid injustice in specific cases. However, the 1982 amendments to sections 7(b)(4), 7(o)(2) and 10(a) of the Endangered Species Act have given USFWS and the National Marine Fisheries Service ("NMFS"), the agencies that administer the Act, discretion to fashion exceptions to the taking prohibition to prevent injustice that might be caused by full enforcement.

*The unwillingness to enforce the section 9 taking prohibition fully has distorted the law of endangered species . . .*

First, sections 7(b)(4) and 7(o)(2) together authorize USFWS and NMFS to include "incidental take statements" as part of biological opinions rendered for federal agencies through the Endangered Species Act section 7 consultation process. Section 7 consultation is intended to insure that actions authorized, funded or carried out by federal agencies will not jeopardize the continued existence of any threatened or endangered species. These "statements" allow a federal agency or an applicant for federal authorization or funding, planning to engage in an action that is not likely to jeopardize the continued existence of a species, to take members of that species if the taking is not the purpose of the action.

Second, section 10(a) allows USFWS or NMFS to issue "incidental take permits" for non-federal actions that might otherwise violate the section 9 taking prohibition, if the incidental taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." These exceptions to the taking prohibition were provided under explicitly limited conditions designed to prevent harm to the species as a whole.

Without amending section 9 itself, the 1982 amendments transformed the taking prohibition from an inflexible rule against almost all takings into instrument which can be used to force entities, public or private, whose activities might harm endangered species, into the section 7 or section 10 administrative process, processes designed to resolve conflicts between species preservation and development or other potentially harmful activities. Eight years after their enactment, the effect of these exceptions is only beginning to be felt.

### 1. 7(b)4)/7(o)(2) Incidental Take "Statements"

Section 7(b)(4) of the Endangered Species Act provides that *if*, after consultation on a federal action under section 7, USFWS or NMFS concludes: (A) that the action subject to consultation will not jeopardize the species or recommends a "reasonable and prudent alternative" that will prevent jeopardy, and (B) that the taking "incidental" to the action is not likely to jeopardize the species, *then* USFWS or NMFS

"shall" provide the federal agency with a "written statement" that:

> (i) specifies the impact of the incidental taking on the species;
> (ii) specifies the "reasonable and prudent measures" that USFWS or NMFS considers "necessary and appropriate" to minimize that impact,
> (iii) in the case of marine mammals, specifies those measures that are necessary to comply with the Marine Mammal Protection Act, and
> (iv) sets forth "the terms and conditions . . . that must be complied with by the Federal agency or applicant (if any) or both, to implement the measures specified under clauses (ii) and (iii)."

Section 7(o)(2) provides, "[n]otwithstanding" section 9, that "any taking" that complies with the "terms and conditions" of an incidental take statement provided under "subsection [7](b)(4)(iv) . . . shall not be considered to be a prohibited taking of the species concerned."

Although sections 7(b)(4) and 7(o)(2) together allow actions authorized, funded or carried out by a federal agency to go forward even when they will kill or injure members of an endangered species, sections 7(b)(4) and 7(o)(2) are intended to ensure that the taking they authorize will not jeopardize the continued existence of the species and that everything that can be done "reasonably" and "prudently" to protect the species is done. The explicit conditions required for a valid incidental take statement make it plain that Congress did not intend to simply exempt federal agencies from section 9's requirements.

The section 7(b)(4)/7(o)(2) exception offers federal agencies a mechanism through which they can shield themselves from the section 9 taking prohibition in most cases. Whenever either USFWS or NMFS issues a "no jeopardy" biological opinion under section 7 of the Endangered Species Act, and that agency anticipates incidental taking as a result of the contemplated action, the agency should also issue an incidental take statement. *See Defenders of Wildlife v. EPA* 882 F.2d 1294, 1301 (8th Cir. 1989)(holding that a "statement" cannot operate retroactively), *National Wildlife Federation v, National Park Service*, 669 F. Supp. 384 (D. Wyo. 1987) (holding that "statement" is not required when no taking is anticipated); *National Wildlife Federation v. Hodel*, 23 E.R.C. 1089 (E.D. Cal. 1985)( holding that a "statement" must contain reasonable and prudent mitigation measures and cannot operate retroactively); *see also American Littoral Society v. Herndon*, 720 F. Supp. 942, 948-49 (S.D. Fla. 1988).

### *2. Section 10(a) Incidental Take "Permits"*

Section 10(a) provides that "the Secretary [NMFS or USFWS] may permit under such terms and conditions as he shall prescribe . . . any taking otherwise prohibited by section 1538(a)(1)(B) [the section 9 provision prohibiting takings within the United States and its territorial waters] . . . if the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Section 10(a) allows non-federal entities, not subject to section 7 of the Endangered Species Act and therefore not eligible for a 7(b)(4)/7(o)(2) exception, to get permits for "incidental takings." While many of its requirements are very similar to those of the 7(b)(4)/7(o)(2) exception, its provisions are more detailed, more time consuming, and potentially more stringent.

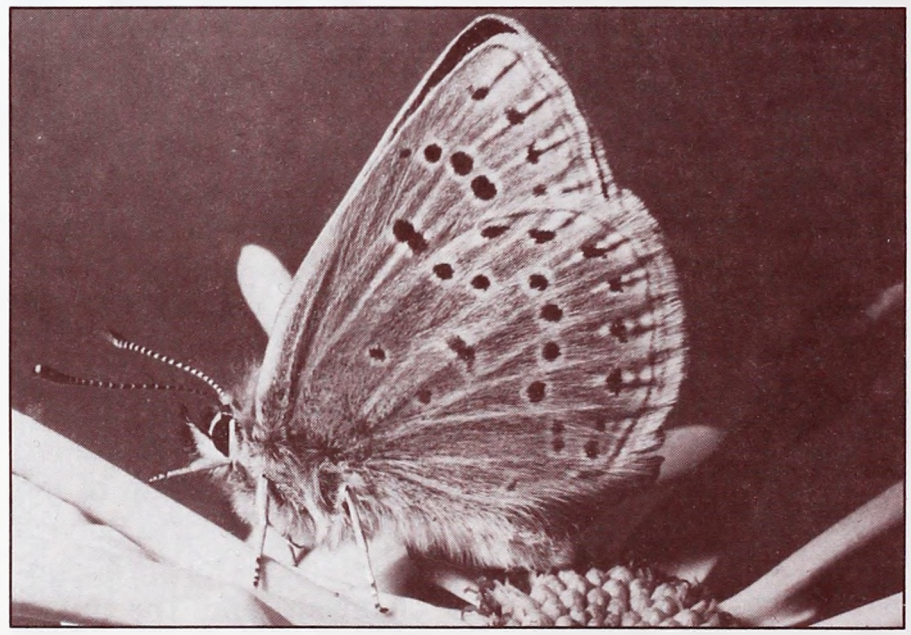
To get a section 10(a) incidental take permit an "applicant" must submit a "conservation plan" to the agency charged with protecting the species, USFWS or NMFS. The required "conservation plan" must specify:

> (i) the impact that will likely result from such taking;
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
> (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

Once USFWS or NMFS receives a "conservation plan," an "opportunity for public comment, with respect to the permit application and the related conservation plan" must be provided.

After reviewing the plan and considering public comment, the agency "shall" issue a permit if it finds:

> (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 assure 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) the measures, if any, required under subparagraph (A)(iv) [measures the Secretary finds necessary or appropriate] will be met.



Mission Blue Butterfly, *photo by Dr. Edward S. Ross, courtesy U.S. Fish & Wildlife Service, Washington, DC*

The permitting agency may also require "assurances" that the plan will be implemented and may impose "reporting requirements" in the permit. The agency "shall" revoke the permit if the permittee is not complying with its "terms or conditions."

The legislative history of section 10(a) shows that the

broad statutory language authorizing USFWS or NMFS to impose permit conditions as it deems "necessary or appropriate" was part of an attempt to prompt both agencies and permit applicants to widen their horizons: to consider protecting unlisted species and ecosystems as a whole as well as listed endangered species. The explicitly contemplated *quid pro quo* for taking the broad view in conservation planning was "long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan." *See* H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 30-31 (1982). The comments accompanying publication of the proposed Fish and Wildlife Service regulations implementing section 10(a) contemplate permits "of 30 or more years duration" but recognize that provision must be made for changing circumstances. 48 Fed. Reg.31417, 31418 (July 8, 1983).

Coachella Valley Fringe-toed Lizard, *photo by B. "Moose" Peterson, Wildlife Research Photographer.*

To illustrate how a long-term conservation plan should work, the House conference committee singled out the habitat conservation plan then being prepared to protect the habitat of three species, including the endangered Mission Blue Butterfly on San Bruno Mountain in San Mateo County, California. The committee report stated that "the San Bruno Mountain plan is the model for this long-term permit" and that "the adequacy of similar conservation plans should be measured against the San Bruno plan."

Unlike 7(b)(4)/7(o)(2) "statement", section 10(a) taking "permits" have only been issued in a handful of cases: Delano, California Habitat Conservation Plan (permit issued January 1990); The Coachella Valley, California Habitat Conservation Plan for the Coachella Valley Fringe-Toed Lizard (permit issued 1986); The San Bruno Mountain, California Habitat Conservation Plan (permit issued 1983). However, as many as thirty more conservation plans are currently on the drawing board (*e.g.*, The Balcones Canyonlands (Austin, Texas Regional) Habitat Conservation Plan; The Riverside County, California Stephens Kangaroo Rat Habitat Conservation Plan.

A 10(a) permit has been challenged only once in court and that court test may have little relevance for future challenges to conservation plans because it was a challenge to the same San Bruno plan that Congress had praised in drafting the section 10(a) legislation, the plan against which all other plans were to be measured. *Friends of Endangered Species v. Jantzen* 596 F. Supp. 518 (N.D. Cal. 1984) *aff'd* 760 F.2d 976 (9th Cir. 1985) (upholding the San Bruno Plan because: (1) Congress had considered the San Bruno plan as a "paradigm" for section 10(a) conservation plans; (2) USFWS had determined that the plan would enhance the habitat of the Mission Blue Butterfly; (3) USFWS had considered expert opinion and public comment before issuing the incidental take permit; and (4) the taking permit was subject to revocation or reconsideration if significant new information emerged).

The San Bruno Plan permanently protected 86% of the Mission Blue Butterfly habitat and provided for habitat enhancement. Unfortunately, it is exceptional. The conservation plan designed to protect the Coachella Valley Fringe-Toed Lizard protects only 11% to 25% of its remaining habitat. The proposed Stephens Kangaroo Rat conservation plan, in Riverside County, California, would permit the destruction of 20% of the remaining occupied habitat of the species (about 4,000 acres) while protecting about the same amount. The recently approved Delano, California conservation plan allows the permanent destruction of 287 acres of habitat for three endangered species in return for the acquisition and fencing of 514 acres of habitat elsewhere. No other plan currently in place will achieve nearly the level of comprehensive protection required by the San Bruno plan.

*The San Bruno Plan permanently protected 86% of the Mission Blue Butterfly habitat and provided for habitat enhancement. Unfortunately, it is exceptional.*

Individuals involved with endangered species issues have reservations about the ability of the section 10(a) process to protect endangered species. Dr. Craig Pease, involved in the biological assessment for the Balcones Canyonlands (Austin Regional) Habitat Conservation Plan, notes that the compromise process required for the development of 10(a) conservation plans quickly precludes bold solutions to habitat conservation problems. Telephone interview, Craig Pease (February 2, 1990). John W. Thompson, a member of the Society of American Foresters, concerned with Red-Cockaded Woodpecker habitat conservation on private lands, observes that the 10(a) process creates "too big a temptation for bureaucrats who think their job is to issue permits." Telephone interview, John W. Thompson (February 2, 1990). William Bunch, an attorney representing Texas Earth First! in the Balcones Canyonlands (Austin Regional) Habitat Conservation Plan process believes that the value of the 10(a) process remains to be seen. Telephone interview, William Bunch (March 1, 1990).

USFWS officials charged with implementing the process are also concerned, but more often about the lack of any provision for interim taking permits while long range conservation plans are being prepared. Telephone interview, James Bartell, USFWS Sacramento, (March 14, 1990); Telephone interview, Joseph Johnston, USFWS, Fort Worth, (March 12, 1990); Telephone interview Peter Stine, USFWS, Ventura, (February 15, 1990).

As the 1988 Endangered Species Act Report of the United States General Accounting Office noted concerning the San Bruno Plan:

> While FWS officials we spoke to generally view the 1982 amendments as a valuable tool to allow development while receiving concessions and funding from developers to protect the species, a local [San Francisco] conservation group views the amendments as 'a dangerous loophole to the original intent of the Endangered Species Act . . .

United States General Accounting Office, *Endangered Species: Management Improvements Could Enhance Recovery Program*, 43 (December 1988).

Merriam's Kangaroo Rat, *photo by E. R. Kalmach, Bureau of Sport Fisheries and Wildlife.*

On the bright side, the 10(a) process has prompted some of the creativity and "ecosystem thinking" it was intended to encourage. The currently proposed Balcones Canyonlands (Austin Regional) Habitat Conservation Plan is being designed to protect the habitat of the officially endangered Black-Capped Verio, the as yet unlisted Golden-cheeked Warbler, two rare but unlisted plants and an entire biota of cave invertebrates, some of which are listed as endangered but many of which have not yet even been formally identified. The Balcones Canyonlands Plan demonstrates the possible promise of using the 10(a) permit process to fashion ecosystem-based endangered species protection.

### *D. Conclusion: Exceptions and Enforcement of the Taking Prohibition*

Recent developments demonstrate that it is too early to draw any general conclusions about the effect of either the 7(b)(4)/7(o)(2) or 10(a) exceptions to the section 9 taking prohibition. However, regardless of their intrinsic value, their existence radically alters the policy considerations for enforcing the section 9 taking prohibition. Before 1982, the taking prohibition was, for the most part, unconditional. If an action were going to kill or injure a member of an endangered species, that action was illegal. In contrast, after 1982, any entity, public or private, federal or non-federal, can seek to shield almost any contemplated action from the taking prohibition, so long as the action will not threaten the existence of an endangered species as a whole.

The existence of the 1982 exceptions to the taking prohibition supports three arguments in favor of full enforcement of the section 9 taking prohibition.

First, the exceptions make enforcement more palatable because they give potential violators an opportunity to shield themselves from liability. If a public or private entity ignores the exception process, created for its benefit by the 1982 amendments, and goes ahead with an action that may kill or injure members of an endangered species, then it has brought section 9 liability upon itself and is in no position to complain if it is enjoined, fined or jailed. In other words, full enforcement of the taking prohibition is fair.

Second, enforcement of the taking prohibition works to force those whose actions may harm endangered species to engage in the administrative process created by the exceptions—a process in which federal agency expertise potentially can limit the danger to endangered species and resolve conflicts between endangered species and contemplated actions. This is far preferable, for everyone, to the high stakes game of "chicken" that results when an entity undertakes an action that is potentially harmful to an endangered species because it gambles that no one else has the information, resources, or desire to sue to stop that action. In other words, full enforcement will force potential violators to use the exception processes.

Third, the key to preserving endangered species is preserving the ecosystems on which they depend. Congress intended that the exceptions to the taking prohibition should encourage creative solutions to endangered species preservation problems, solutions that, among other things, consider the welfare of the ecosystem as a whole. Obviously, these creative solutions cannot be formulated, much less implemented, unless the section 9 taking prohibition provides a credible threat to potential violators: A threat that failure to put up the time, energy and money involved in formulating and implementing creative solutions, will result in much greater expenditures of time, energy and money fighting a section 9 taking suit. The encouraging Balcones Canyonlands (Austin Regional) Habitat Conservation plan is, in part, the result of letters of intent to sue under section 9 filed by Texas Earth First! In other words, enforcement will make the exception processes work for the benefit of species and their ecosystems.

*. . . the key to preserving endangered species is preserving the ecosystems on which they depend.*

Much of the past reluctance to enforce the section 9 prohibition appears to have grown out of perceptions that the prohibition was inflexible, perceptions formed before the 1982 amendments created the two exception processes. Those amendments changed the section 9 prohibition from an unconditional prohibition into a tool for forcing reluctant public and private entities to engage in the administrative process designed to protect endangered species and their ecosystems. The prohibition functions best in that role if fully enforced.

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