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**Water and Endangered Species in the
West: Legal Context**

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**Water and Endangered Species
in the West:
Legal Context**

Water is for fighting, and so are endangered species

It's an explosive combination:

- Water resources are limited and variable
- Human demands for water are increasing, and seek certainty
- Freshwater fish are the most imperiled group in the U.S.

Key ESA provisions

- Listing / critical habitat designation
- Section 7 consultation
- Section 9 take prohibition

Listing

- FWS and NMFS list “species” they determine are “endangered” or “threatened.”
- Listing determinations must be made “solely on the basis of the best scientific and commercial data available,” taking into account state and local protective efforts.

Critical Habitat Designation

- Must be designated concurrently with listing, “to the maximum extent prudent and determinable.”
- Definition: specific areas which have the physical or biological features essential to the conservation of the species and which may require special management considerations or protection.
- Must consider the economic impact, and any other relevant impact, of designation. Areas can be excluded if the benefits of exclusion outweigh the benefits of designation, unless extinction will result.

Section 7 Consultation

Federal agencies must ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat.

- Consultation with FWS/NMFS results in “jeopardy” or “no jeopardy” opinion.
- Must use the best available scientific information.
- Jeopardy opinion must be accompanied by RPAs

Section 9: The Take Prohibition

- No one may “take” an endangered animal species.
 - Services may issue 4(d) rules that provide for the conservation of threatened species.
- “Take” includes not only to hunt, kill, or wound, but also to harm or harass.
- Permits can authorize “incidental take.”

Some Key Uncertainties About the ESA in the Aquatic Context

- Application of the constitutional prohibition against uncompensated takings of property
- The scope of federal discretion in operation of Reclamation projects
- The precise relationship between the ESA and state water law

Constitutional Takings

- Regulatory vs. physical takings
- Tulare Lake Basin Water Storage Dist. v. US
- Brown v. Legal Foundation of Washington (2003) – all the justices appear to agree that a physical taking approach can apply outside the context of land

Discretion in Project Operation

- Section 7 applies as long as “discretionary Federal involvement or control” remains
- Bureau of Reclamation takes narrow view
- Courts have mostly taken a broad view
 - TVA v. Hill
 - NRDC v. Houston; Klamath Water Users
 - Middle Rio Grande
- But authorization of private action may change the landscape
 - EPIC v. Simpson Timber Co.

The ESA and State Water Law

- Federal supremacy BUT Congress has frequently articulated policy of some deference
- Limited case law
- ESA is not trumped by state water rights, but there may be an obligation to look to solutions consistent with those rights
- Contracts must give way to preventing jeopardy, but probably not to “conservation” programs.

Challenges for the Future

- Can critical habitat play a more useful role?
- Science and the ESA: Does the emperor have any clothes? How much data is enough?
- Can all contributing actors be drawn into the solution?
- Can adaptive management be implemented “safely” and effectively?