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# So Much Conflict, Yet So Much in Common: Considering the Similarities between Western Water Law and the Endangered Species Act

## ABSTRACT

*The West has recently experienced major clashes over its scarce water supplies, with traditional water users on one side and endangered species on the other. These clashes, including those in the Klamath and Middle Rio Grande basins, have pitted western state water laws based on prior appropriation against the federal Endangered Species Act (ESA). One could easily mistake these laws for polar opposites, but, in fact, western water law and the ESA share a number of important and ironic similarities. This article identifies some of the similarities that arise from the basic provisions of the laws and from the way they are implemented. Despite these important similarities, however, recent efforts to reform the laws have been notably one-sided, focusing almost entirely on the ESA. The article concludes that the West will not achieve a sustainable balance in water use by revising the ESA alone.*

## I. INTRODUCTION TO CONFLICTS BETWEEN WESTERN WATER LAW AND THE ESA

For most of the 30 years since its enactment,<sup>1</sup> the federal Endangered Species Act<sup>2</sup> (ESA or the Act) has been the nation's most controversial environmental law. Ever since the Supreme Court's strongly worded opinion in *TVA v. Hill*<sup>3</sup> blocked completion of a large

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1. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973).
2. 16 U.S.C. §§ 1531-1544 (2000).
3. 437 U.S. 153 (1978).

federal dam to save the obscure Snail darter fish,<sup>4</sup> critics of the ESA have argued that it goes too far in limiting human activity in the name of saving species.<sup>5</sup>

The Snail darter controversy was just the first of many episodes in which the Act has been criticized for favoring fish over people. In fact, several of the most heated ESA conflicts have involved water disputes, as those with traditional economic interests in using water—agricultural irrigators, mostly—have challenged federal actions to preserve enough water in lakes and rivers to support imperiled fishes. The following is but a partial list of major water-use conflicts involving threatened or endangered fish species.

*The Klamath Basin.* The Klamath River of Oregon and California is the third-largest river on the U.S. west coast, but many people had never heard of it until 2001, when a water crisis that had been quietly brewing for many years suddenly exploded into a national news story.<sup>6</sup> An extreme drought left the Klamath Basin with a fraction of its normal water supply, and federal officials concluded that what little water was available was needed to ensure the survival of three fish species protected by the ESA.<sup>7</sup> As a result, farmers who for decades had reliably received water from a federal irrigation project got little or none in 2001. The media stories of “farmers versus suckers” were oversimplified at best,<sup>8</sup> but they helped turn the embattled Klamath Basin irrigator into a powerful new poster child for the cause of revising the Act. The controversy flared again in September 2002 when 33,000 salmon died in the lower Klamath River, allegedly because irrigation demands left too little water in the river to support salmon returns.<sup>9</sup>

4. Tellico Dam was later finished when Congress ordered its completion in spite of the ESA. See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 684 (2d ed. 1998).

5. For example, Senator Pete Domenici of New Mexico, incensed over the prospect that the water needs of the endangered silvery minnow might result in less water for traditional users on the Rio Grande, recently referred to the Act as “a Frankenstein” and “a monster.” *Consulting Process Required by Section 7 of the Endangered Species Act: Hearing Before the Senate Comm. on Environment and Public Works, Subcomm. on Fisheries, Wildlife, and Water, 108th Cong.* (2003) (statement of Senator Domenici), available at [http://epw.senate.gov/hearing\\_statements.cfm?id=213020](http://epw.senate.gov/hearing_statements.cfm?id=213020) (last visited Feb. 6, 2004) [hereinafter *Senate Comm. ESA Hearing*].

6. See Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 TUL. ENVTL. L.J. 197, 214–28 (2002).

7. The species involved were the Lost River sucker, the Shortnose sucker, and the southern Oregon–northern California stock of Coho salmon. *Id.* at 217.

8. See, e.g., Douglas Jehl, *Cries of Save the Suckerfish Rile Farmers’ Allies*, N.Y. TIMES, June 20, 2001, at A1.

9. Laura Paskus, *Sound Science Goes Sour*, HIGH COUNTRY NEWS, June 23, 2003, at 7–12.

*The Carson-Truckee Basin.* The ESA became a key issue in a long-running water dispute between Nevada irrigators and the Pyramid Lake Paiute Tribe of Indians.<sup>10</sup> The farmers received water from the nation's oldest federal irrigation project, but over time these irrigation diversions had severely depleted and degraded Pyramid Lake at the heart of the Tribe's reservation.<sup>11</sup> The Tribe's efforts to restore its traditional fishery were aided when two Pyramid Lake fish species, the Cui-ui and Lahontan cutthroat trout, were listed under the ESA.<sup>12</sup> Water demands for these fishes became a source of strife and litigation among the Tribe, irrigators, and federal agencies for more than two decades.<sup>13</sup>

*The California Central Valley.* California's rivers supply irrigation water to many thousands of farms and millions of people, but they also provide habitat to imperiled fish species including Chinook salmon and Delta smelt.<sup>14</sup> For more than a decade, Central Valley irrigators have tried to fight off a variety of ESA-based restrictions on their water supplies, just as environmentalists have sought to ensure adequate flows for protected fish species. Litigated disputes have involved a range of subjects, from the renewal of irrigation water contracts<sup>15</sup> to the federal government's right to allocate water from its storage projects in times of drought.<sup>16</sup>

*The Methow Valley.* In this scenic (and dry) eastern Washington basin, farmers tangled with federal officials over irrigation water restrictions imposed to protect threatened salmon and steelhead. Unlike most other farmers who have faced water supply restrictions under the Act, the Methow irrigators did not receive water from a project built by the US. government. Rather, their irrigation ditches crossed federal land, and the permits allowing this use of federal land were modified under the ESA to ensure adequate water flows for fish.<sup>17</sup> Irrigators and local

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10. See John Kramer, *Lake Tahoe, The Truckee River and Pyramid Lake: The Past, Present and Future of Interstate Water Issues*, 19 PAC. L.J. 1339, 1341-59 (1988).

11. See *Nevada v. United States*, 463 U.S. 110, 119 n.7 (1983).

12. See *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 259 (9th Cir. 1984).

13. A few of the many Carson-Truckee water cases are *Nevada v. United States*, 463 U.S. 110 (1983); *United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217 (9th Cir. 1989); and *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 254 (D.D.C. 1973).

14. See *O'Neill v. United States*, 50 F.3d 677, 681 (9th Cir. 1995).

15. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1123-24 (9th Cir. 1998).

16. *Westlands Water Dist. v. United States*, 805 F. Supp. 1503, 1507 (E.D. Cal. 1992), *aff'd*, 10 F.3d 668 (9th Cir. 1993).

17. David E. Filippi, *The Impact of the Endangered Species Act on Water Rights and Water Use*, 2002 PROC. ROCKY MTN. MIN. L. INST. 22-1, 22-12-14.

governments sued to challenge the federal government's authority to impose these restrictions, and lost.<sup>18</sup>

*The Rio Grande River.* At the time of this writing, New Mexico was home to the nation's hottest ESA dispute, involving the need to keep water flowing to prevent the extinction of the endangered Rio Grande silvery minnow. Environmentalists sued to require the federal government to ensure that the overworked and drought-stricken Middle Rio Grande does not dry up due to water diversions for cities and farms. Irrigators, the City of Albuquerque, and the State of New Mexico joined the federal government in opposing the suit, arguing that saving the minnow could mean economic ruin. In June 2003, a divided panel of the Tenth Circuit Court of Appeals held that the federal government is not barred from releasing water for the silvery minnow, even if such releases result in delivery of less water for irrigation, municipal, and other uses.<sup>19</sup> The decision prompted New Mexico politicians to seek relief from Congress, which enacted the 2004 Interior appropriations bill with a rider that largely overturns the Tenth Circuit's decision and restricts options for providing water to ensure the minnow's survival.<sup>20</sup>

These five conflicts, like most others involving the ESA and water use,<sup>21</sup> all take place in the West. This fact should not surprise the informed reader. Since the days of the pioneers, battling for water has largely been a western pastime.<sup>22</sup> The West, of course, is easily the driest region of the United States, with most areas averaging less than 20 inches

18. *Okanogan County v. Nat'l Marine Fisheries Serv.*, No. CS-01-192-RHW (E.D. Wash., Mar. 14, 2002), *aff'd*, 347 F.3d 1081, 1085-86 (9th Cir. 2003).

19. *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003).

20. Energy and Water Development Appropriations Act, 2004, H.R. 2754, 108th Cong. § 208(a and b) (2003) (passed Nov. 18, 2003); Associated Press, *Congress OKs Energy-Water Bill Including Minnow Language*, ABQJOURNAL.COM, Nov. 18, 2003, at <http://www.abqjournal.com/drought/apenrgy11-19-03.htm> (last visited Feb. 5, 2004) [hereinafter *Minnow Language*].

21. Other western river basins that have experienced conflicts over water use and the ESA include the Columbia, see Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 WASH. L. REV. 519 (1999); the Lower Colorado, see *Defenders of Wildlife v. Norton*, 257 F. Supp.2d 53 (D.D.C. 2003); and the Edwards Aquifer region around San Antonio, Texas, see Todd H. Votteler, *The Little Fish That Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide over the Texas Edwards Aquifer*, 28 ENVTL. L. 845 (1998). For a thoughtful look at the ESA's effect on river management in the Columbia and Upper Colorado basins, see Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197 (1998).

22. A leading casebook on water law sums it up: "One may ask why we have chosen such a preponderance of western cases.... The answer is easy. The West is dry, and this has heightened anxiety and conflict over water. As one court observed, 'Water litigation is a weed that flowers in the arid West.'" A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* viii (5th ed. 2002) (citation omitted).

of precipitation annually—not enough to grow most crops without artificial water supplies.<sup>23</sup> Consequently, most of the nation's agricultural irrigation takes place in the western states,<sup>24</sup> and irrigation accounts for over 80 percent of water withdrawals in most of the West.<sup>25</sup> Water demands for irrigation are highest in the summer and early fall when western rivers and streams naturally run low; thus, many of these streams are routinely dried up or reduced to a trickle by water diversions.<sup>26</sup> Low flows also tend to exacerbate water quality problems,<sup>27</sup> including high temperatures that may be stressful or even lethal to aquatic life. Other streams maintain a hearty flow in the late summer because of water releases from upstream dams, but those same dams have dramatically altered these streams' natural character. These are some of the fundamental reasons why the West has a large number of threatened and endangered aquatic species and why many of these species are struggling to survive in places where their habitat needs conflict with existing water demands for irrigation.<sup>28</sup>

Legally, many of these conflicts arise in the West because of the water law of the western states, which allocates rights to use water based on the doctrine of prior appropriation. As explained below,<sup>29</sup> western

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23. WESTERN WATER POLICY REVIEW ADVISORY COMMISSION, *WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 2-1* (June 1998).

24. Irrigation is the biggest user of freshwater in the United States, and ninety percent of U.S. irrigation is in the West. WAYNE B. SOLLEY ET AL., U.S. GEOLOGICAL SURVEY CIRCULAR 1200, *ESTIMATED USE OF WATER IN THE UNITED STATES IN 1995*, at 6 (1998).

25. Irrigation accounts for 80 percent of freshwater withdrawals in California, 81 percent in the Lower Colorado Basin, 82 percent in the Pacific Northwest, 85 percent in the Great Basin, 90 percent in the Rio Grande Basin, and 95 percent in the Upper Colorado. In the Arkansas-White-Red and Missouri River Basins, which lie only partially in the West, irrigation accounts for 57 percent and 68 percent of water withdrawals respectively. *Id.* at 10.

26. DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION* 40 (1997).

27. The effects of water storage, diversion, and use on water quality may be summarized as follows:

Every water use changes water quality. Critical characteristics such as temperature and chemical composition are affected when water is removed from a stream or held in a reservoir. Most uses also result in returning some of the water diverted to the stream, typically laden with pollutants picked up along the way. Further, every depletion of the water in a stream can cause the concentration of natural or human-caused contaminants to increase in the water that remains.

David H. Getches et al., *Controlling Water Use: The Unfinished Business of Water Quality Protection* 4 (1991).

28. Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319, 348 (1996) (finding that counties in the West with the greatest amount of irrigated agriculture also have the highest number of endangered fish species).

29. See *infra* notes 34–49 and accompanying text.

water law has created private property rights to use otherwise-public water resources, and these rights generally last forever. State laws impose few if any meaningful environmental constraints on the exercise of these rights, meaning that water users in the West routinely dry up streams—legally. By creating and perpetuating this system of water rights, and then administering that system loosely, the western states have failed to provide for the water needs of aquatic ecosystems and have fostered a common belief that government has no authority to regulate established water uses for environmental purposes.

It is easy to imagine why disputes often arise involving western water law and the ESA. The two legal regimes were developed in different eras by different levels of government to serve distinctly different purposes. Prior appropriation took root in the Wild West of the mid- to late-nineteenth century<sup>30</sup> and was adopted by the states (with considerable federal deference<sup>31</sup>) to encourage development and maximum use of an economic resource.<sup>32</sup> By contrast, the ESA was enacted by Congress as command-and-control legislation to effectuate the environmental protection vision of the early 1970s.<sup>33</sup> Given these differences in their backgrounds, and the increasing number and intensity of conflicts between the two, it would be easy to conclude that western water law and the ESA are as different as any two legal concepts could be.

Easy, perhaps, but wrong. In many fundamental ways the Endangered Species Act and western water law based on prior appropriation are very much alike—more so, perhaps, than devotees of either one would care to admit. These ironic similarities help explain, as much or more than the obvious differences do, why western water law and the ESA often conflict.

Despite these similarities, recent reform efforts have been notably one-sided. The past several years have seen a strong political push for significant ESA revisions, but no comparable campaign to change western water law. While critics fault the ESA for a variety of real

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30. See *Irwin v. Phillips*, 5 Cal. 140, 46–47 (Cal. 1855) (rejecting common-law rule of riparian water rights in favor of the first-in-time, first-in-right customs of the mining camps on the public domain); *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446 (1882) (holding that Colorado had always recognized prior appropriation).

31. TARLOCK ET AL., *supra* note 22, at 105–10.

32. As stated by the Utah Supreme Court, “Because of the vital importance of water in this arid region both our statutory and decisional law have been fashioned in recognition of the desirability and of the necessity of insuring the highest possible development and of the most continuous beneficial use of all available water with as little waste as possible.” *Wayman v. Murray City Corp.*, 458 P.2d 861, 863 (Utah 1969) (citations omitted).

33. PLATER ET AL., *supra* note 4, at 672–74.

or perceived problems, those same critics ignore identical shortcomings in the water laws. This article contends that efforts to revise the ESA without reforming the water laws will not produce balanced water policy and management in the West.

Part II of this article provides bare-bones background on western water law, the ESA, and the interaction between the two. Part III identifies overlooked similarities between these laws and offers reasons why these similarities tend to exacerbate water use conflicts involving endangered species. Part IV discusses the policy implications of these similarities and concludes by suggesting that current ESA reform efforts, in isolation, will not produce balanced solutions to the West's water problems.

## II. WESTERN WATER LAW AND THE ESA: THE BASICS

### A. The Water Law of the Western States

In the United States, the laws governing water allocation and use are chiefly state laws, and the water laws of the western states are primarily based on the doctrine of prior appropriation.<sup>34</sup> In these states, water is officially a public resource,<sup>35</sup> but the states have recognized permanent property rights in the private use of that resource.<sup>36</sup> These water rights typically last forever as long as they are used; that is, a water right holder who actually exercises her right to use water will not lose it.<sup>37</sup> Moreover, the oldest water rights have the highest priority, and

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34. The states of the Rocky Mountain West (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming) basically have always followed the prior appropriation doctrine, whereas the states of the West Coast and Great Plains all converted—to a greater or lesser degree—to prior appropriation after initially recognizing common-law riparian rights. GILLILAN & BROWN, *supra* note 26, at 24–27. The riparian rights doctrine, the traditional water law of the eastern and midwestern states, allows all landowners along a natural watercourse to make “reasonable use” of its waters on lands adjacent to it. *Id.* at 13–16. Thus, under classic riparian principles, shortages are shared among users, while under prior appropriation principles, junior users bear shortages and senior users are protected.

35. “States included claims to ‘ownership’ of all the water within their boundaries in their constitutions and statutes. In effect, this was an assertion of state authority to supervise the allocation of water, usually made in the context of protecting the public’s interest in achieving maximum benefit from the use of a public resource.” David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 STAN. ENVTL. L.J. 3, 7–8 (2001) (citations omitted).

36. Gregory J. Hobbs, *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 41 (2002).

37. While water rights last forever so long as water is actively used, the corollary is a basic tenet of prior appropriation law: “use it or lose it.”



if there is not enough water to satisfy all the users on a particular stream—a common situation in the West—“senior” right holders get their full water entitlement before “juniors” get any.<sup>38</sup>

It has long been said that “beneficial use is the basis, the measure, and the limit of a water right” under prior appropriation.<sup>39</sup> This phrase means two things: first, a user obtains a right by applying water to a so-called “beneficial use,” an activity that the law recognizes as providing some social benefit.<sup>40</sup> Second, by applying water to a specific beneficial purpose, the water user obtains a right to that quantity of water reasonably needed for that specific purpose and no more; “waste” of water is officially prohibited.<sup>41</sup>

Western water law has always recognized a variety of beneficial uses<sup>42</sup> but has not treated all uses equally. Until recent years, the law would not recognize rights to use water beneficially *as it flows in its natural course*—that is, “instream” water rights. In order to establish an appropriative water right, a user would first have to divert or withdraw water from its natural course. Even after the law began regarding instream uses as beneficial, the diversion requirement prevented instream users from gaining legal protection<sup>43</sup> against later (and more junior) appropriators, whose uses could destroy the instream use by taking all the water from the stream. Today, most states in the West do recognize instream water rights in some form but allow only state agencies to obtain such rights, thus sharply limiting their effectiveness.<sup>44</sup>

Many elements of a water right are fixed at the time the right is established. Perhaps most importantly, the right’s priority date—the date on which the original appropriator took the first steps legally necessary to obtain a new water right—determines whether the right holder is

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There are two doctrines that have developed from the use it or lose it principle: abandonment and forfeiture. Abandonment is based on common law and is defined as “an intentional relinquishment of a known right.” Forfeiture, on the other hand, is a doctrine created by statute and requires no intent.

Krista Koehl, *Partial Forfeiture of Water Rights: Oregon Compromises Traditional Principles to Achieve Flexibility*, 28 ENVTL. L. 1137, 1142-43 (1998) (citations omitted).

38. Hobbs, *supra* note 36, at 41-43.

39. Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 920 (1998).

40. *Id.* at 923-28.

41. *Id.* at 928-46.

42. *Id.* at 924-28.

43. See *Colorado River Water Conservation Dist. v. Rocky Mountain Power Co.*, 406 P.2d 798, 800-01 (Colo. 1965) (denying water right for instream use based on absence of diversion, despite statute authorizing instream appropriations).

44. GILLILAN & BROWN, *supra* note 26, at 120-29.

likely to get any water if there is not enough to go around. The source of water, season of use, and the maximum amount that can be used—both in terms of instantaneous flow and annual volume<sup>45</sup>—are also set at the time the water right is established. Other fixed elements of a water right include the type of use, place of use, and point of diversion; these elements may be changed, but only with the prior approval of the state, and only if the change does not injure other water users by reducing the amount of water they are accustomed to getting.<sup>46</sup>

States do not impose meaningful environmental constraints on the exercise of existing water rights. Thus, an appropriator can legally take the last drops of water from a stream so long as he is within the legal limits of his water right. Several western states still offer little or no effective legal protection for instream flows, and even where such protections exist, they do not prevent streams from being depleted or dried up by the exercise of senior water rights—especially since most such protections took effect rather recently.<sup>47</sup> Moreover, while states have some authority to regulate water use under the federal Clean Water Act—that is, to regulate water quantity for the sake of ensuring water quality<sup>48</sup>—states in the West have largely avoided exercising this authority.<sup>49</sup>

In sum, western water law in practice provides nearly complete protection to existing water rights and allocates increasingly scarce water supplies based almost solely on the age of these water rights.

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45. The maximum flow rate that may be diverted at any moment is typically called the “rate” of the water right, while the maximum annual volume is often called the “duty.”

46. A classic statement of transfer principles is found in *Farmers Highline Canal & Reservoir Co. v. Golden*, 272 P.2d 629, 631–32 (Colo. 1954).

47. Some states have very few river segments where instream flows are protected. Others have a greater number of protected reaches, but all the protections have junior priority dates, meaning that flows may fall below “protected” levels if there is not enough water to satisfy both the instream flow right and senior water users. GILLILAN & BROWN, *supra* note 26, at 144.

48. In *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700, 711–21 (1994), the Supreme Court upheld Washington’s authority under the Clean Water Act to impose minimum streamflow conditions on a hydroelectric project. The Court rejected arguments that the Clean Water Act allowed for regulation only of water quality, not quantity, calling this “an artificial distinction.” *Id.* at 719–21.

49. “[T]raditionally, when there is a conflict between protection of water quality and the right to water use established by prior appropriation, it has been resolved in favor of allowing the water use....Several [western] states have proclaimed that water quality regulation will not affect water uses or water rights.” GETCHES, *supra* note 27, at 89–91 (citations omitted).

## B. The Endangered Species Act

Enacted in 1973, the ESA is one of America's best known and most important environmental laws. The ESA's purpose is to conserve endangered species<sup>50</sup> and the ecosystems on which they depend.<sup>51</sup> As the U.S. Supreme Court stated, "examination of the language, history, and structure of the legislation...indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities."<sup>52</sup>

For purposes of this article, four sections of the ESA are noteworthy. Section 4<sup>53</sup> governs the process for listing species as endangered or threatened.<sup>54</sup> The U.S. Fish & Wildlife Service or, for oceangoing species, the National Marine Fisheries Service (the Services) must make listing decisions "solely on the basis of the best scientific and commercial data available."<sup>55, 56</sup> Section 4 also provides a means by which the Services may extend full ESA protection to threatened as well as endangered species.<sup>57</sup> In addition, this section requires designation of "critical habitat"<sup>58</sup> for any species at the time it is listed, although the Services routinely fail to do so.<sup>59</sup> The Services must ignore economics in making listing decisions but consider economics in determining critical habitat.<sup>60</sup>

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50. 16 U.S.C. § 1532 (2000).

51. 16 U.S.C. § 1531(b) (2000).

52. *TVA. v. Hill*, 437 U.S. 153, 174 (1978).

53. 16 U.S.C. § 1533 (2000).

54. The ESA defines an endangered species as one that is "in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. § 1532(6) (2000), while a threatened species is one that is "likely to become an endangered species within the foreseeable future." 16 U.S.C. § 1532(20) (2000).

55. 16 U.S.C. § 1533(b)(1)(A) (2000).

56. *See* 16 U.S.C. § 1533(a) (2000).

57. Section 9 prohibits any person from "taking" endangered fish or wildlife. 16 U.S.C. § 1538 (a)(1)(B) (2000). However, the Services typically extend "take" protection to threatened species by issuing rules under ESA § 4(d), 16 U.S.C. § 1533(d) (2000).

58. 16 U.S.C. § 1533(a)(3) (2003) requires critical habitat designations at the time of listing "to the maximum extent prudent and determinable." Critical habitat may include areas either inside or outside the area actually occupied by the species, provided they are determined to be essential to the conservation of the species. 16 U.S.C. § 1532(5) (2000).

59. As of 1999, only ten percent of listed species had a designated critical habitat. Thomas F. Darin, *Designating Critical Habitat under the Endangered Species Act: Habitat Protection versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 224 (2000). Darin's article explores some of the reasons why the agencies often do not designate critical habitat, despite the language and intent of the Act.

60. Critical habitat determinations must be made "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (2000).

Section 7 applies only to federal agencies, and it is here that the Act's regulatory rubber most commonly meets the road. All federal agencies must avoid taking actions that may cause jeopardy to any listed species.<sup>61</sup> In order to ensure that all agencies meet this substantive standard, the Act mandates a process whereby the acting agency must "consult" with the relevant Service if the agency's proposed action may adversely affect a listed species.<sup>62</sup> If the Service determines that the proposed action may jeopardize the species, it must suggest "reasonable and prudent alternatives" to avoid jeopardy while meeting the purposes of the proposal.<sup>63</sup> The agency may not proceed with the proposed action until consultation is completed.<sup>64</sup> If the agency wants to go ahead with the proposed action despite a jeopardy opinion, it may seek an ESA exemption from the cabinet-level Endangered Species Committee,<sup>65</sup> better known as the "God Squad." Finally, section 7 directs all agencies affirmatively to use their existing authorities to conserve listed species,<sup>66</sup> although courts have rarely found an agency to have fallen short of this requirement.<sup>67</sup>

61. Section 7(a)(2) of the ESA provides that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2) (2000). Rather remarkably, the statute does not define the crucial term of "jeopardize the continued existence," but Interior Department regulations define it as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (1999).

62. The "consultation" provided in section 7(a)(2) culminates in a Biological Opinion (also known as a BiOp or BO) issued by the relevant service assessing the likely effects of the agency's proposed action on a listed species. 16 U.S.C. § 1536(b) (2000).

63. 16 U.S.C. § 1536(b)(3)(A) (2000).

64. According to the statute,

After initiation of consultation...the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d) (2000).

65. 16 U.S.C. § 1536(e) (2000) specifies the membership, standards, and procedures of the "God Squad."

66. 16 U.S.C. § 1536(a)(1) (2000).

67. See J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1126-137 (1995), and cases cited therein; but see *Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998).

Section 9 applies to all persons,<sup>68</sup> not just federal agencies, and prohibits (among other things) a "take" of any member of a protected species of fish or wildlife.<sup>69</sup> Under the Act, "'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>70</sup> The Fish and Wildlife Service by rule has defined "harm" in this context to include "significant habitat modification or degradation where it actually kills or injures wildlife,"<sup>71</sup> thus bringing some habitat destruction on private lands within the Act's prohibition of take.<sup>72</sup> In addition, some federal courts have held that state or local governments violate the Act by permitting certain private actions that, in turn, cause harm to protected species.<sup>73</sup>

Finally, section 10 provides for the issuance of permits allowing the legalized "take" of protected species by non-federal entities where the take would be "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>74</sup> The applicant for such an incidental take permit must submit a conservation plan, better known as a habitat conservation plan or HCP, describing (among other things) the applicant's steps to mitigate or minimize take and the funding available for these efforts.<sup>75</sup> If the Service finds, in essence, that the HCP will minimize taking as much as practicable and that any authorized taking will not cause jeopardy to the affected species,<sup>76</sup> it must issue the permit. The incidental take permit provisions were added to the ESA in 1982<sup>77</sup> and were little used for the first ten years, but HCPs became much more popular during the Clinton Administration.<sup>78</sup>

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68. Section 9 applies to "any person," 16 U.S.C. § 1538(a)(1) (2000), and the Act defines "person" broadly. 16 U.S.C. § 1532(13) (2000).

69. 16 U.S.C. § 1538(a)(1)(B) (2000). Note that listed species of plants are not included in this prohibition.

70. 16 U.S.C. § 1532(19) (2000).

71. 50 C.F.R. § 17.3 (2002).

72. The Supreme Court upheld this rule in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995).

73. See, e.g., *Strahan v. Cox*, 127 F.3d 155, 162-66 (1st Cir. 1997). The Court of Appeals held that the State of Massachusetts violated the ESA by issuing permits for fixed fishing gear to be placed in Massachusetts coastal waters, where such gear was causing harm to endangered whales.

74. 16 U.S.C. § 1539(a) (2000).

75. 16 U.S.C. § 1539(a)(2)(A) (2000).

76. 16 U.S.C. § 1539(a)(2)(B) (2000). Issuance of the permit must "not appreciably reduce the likelihood of the survival and recovery of the species in the wild," a standard very similar to the regulatory definition of "jeopardize the continued existence" found at 50 C.F.R. § 402.02 (2000).

77. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 6, 96 Stat. 1411 (1982).

78. See *infra* notes 197-200 and accompanying text.

In sum, the ESA protects threatened and endangered species nationwide. While it gives special responsibilities to federal agencies, its general ban on actions that kill or harm protected species extends even to private persons and private lands.

### C. The Interaction of Western Water Law and the ESA<sup>79</sup>

Although conflicts over water use and endangered species have grown in recent years, the ESA's potential to affect water development and use has been obvious since at least 1978, when the Supreme Court decided the landmark case of *TVA v. Hill*.<sup>80</sup> Finding the Act to be a clear statement of congressional intent to accord the highest priority to endangered species protection, the Court enjoined the completion of Tellico Dam on the Little Tennessee River in order to prevent jeopardy to the endangered Snail darter. After acknowledging that it "may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million," the Court held "that the explicit provisions of the Endangered Species Act require precisely that result."<sup>81</sup>

The Act makes only one mention of state water allocation laws, declaring, "the policy of Congress is that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."<sup>82</sup> In stating policy with respect to state water laws, the ESA is notably less deferential than the Clean Water Act, which declares that it does not preempt either state authority over water allocation or state-recognized water rights.<sup>83</sup> Given

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79. Other authors have addressed the interaction of the ESA and western water law in some depth. Notable articles include A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND & WATER L. REV. 1 (1985); Jennie L. Bricker & David E. Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 ENVTL. L. 735 (2000); and Holly Doremus, *Water, Population Growth, and Endangered Species in the West*, 72 U. COLO. L. REV. 361 (2001).

80. 437 U.S. 153 (1978).

81. *Id.* at 172-73.

82. 16 U.S.C. § 1531(c)(2) (2000).

83. Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g) (2000), known as the "Wallop Amendment" for former Senator Malcolm Wallop of Wyoming, provides, "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to

Congress's history of explicit *deference* to state water laws, particularly in the West,<sup>84</sup> it is significant that the ESA instead calls for cooperation and conservation.<sup>85</sup>

Over the past 20 years, the ESA has shown that it can affect water development and use not simply by restricting new projects, but also by limiting the exercise of established water rights. The ESA applies most commonly to water use in situations where the use depends on some discretionary approval or action from a federal agency and is, therefore, subject to the procedural and substantive requirements of section 7. For example, the Act may block development of new water projects requiring federal permits if the projects might cause jeopardy to listed species.<sup>86</sup> The U.S. Bureau of Reclamation (USBR) must complete ESA consultation before making any new water supply commitments, even if it is renewing existing contracts to deliver irrigation water.<sup>87</sup> The USBR must also consult on how it operates its existing water supply projects if these operations might adversely affect a listed species.<sup>88</sup> Finally, the USBR may have to reduce water deliveries to irrigators under long-established contracts if the water is needed instead to ensure the survival of species protected by the ESA.<sup>89</sup>

One innovative approach to section 7 compliance is the Upper Colorado Endangered Fish Recovery Program, probably the most well established example of a collaborative, basin wide process for ensuring that water management and use comply with the ESA.<sup>90</sup> Interior

develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

84. See *California v. United States*, 438 U.S. 645, 653-70 (1978).

85. In fact, some in Congress tried in 1982 to add a provision to the ESA identical to the Wallop Amendment of the Clean Water Act but settled instead for the language in 16 U.S.C. § 1531(c)(2) (2000). See Tarlock, *supra* note 79, at 19.

86. *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 512-14 (10th Cir. 1985) (rejecting argument that federal environmental laws may not result in adverse effects on state-issued water rights).

87. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-28 (9th Cir. 1998).

88. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1240-47 (N.D. Cal. 2001).

89. *O'Neill v. United States*, 50 F.3d 677, 681-84 (9th Cir. 1995); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003).

90. The Colorado River program has been summarized as follows:

The Upper Colorado Recovery Program is a consensus-based program produced in the wake of...USFWS' regulatory actions in the 1970s that limited the states' and water users' ability to fully use and develop Compact-guaranteed water....The USFWS formed a coordinating committee in 1984 consisting of the USFWS; the Bureau of Reclamation; the States of Colorado, Utah and Wyoming; organizations of water users from Colorado, Utah, and Wyoming; and two representatives from national environmental groups. The committee ultimately developed a

Secretary Norton recently stated, "We should have more Upper Colorado Endangered Fish Recovery Programs and fewer Klamaths."<sup>91</sup> Serious questions persist, however, about the ecological effectiveness of this program. As stated by one observer, "Although it is unclear how effective the program has been to date in terms of restoring the fish, the Upper Colorado Program is widely considered a 'success,' since it satisfies the Section 7 requirement, yet still allows water development to proceed."<sup>92</sup>

All water users, whether they have any federal connections or not, are prohibited from causing a "take" of a listed species.<sup>93</sup> However, section 9 of the ESA has had limited effects on water use thus far. In one case, an irrigation district was found to have caused a take by operating a water diversion with inadequate fish screens, causing the death of listed fish either at the diversion itself or in the defendant's irrigation canals.<sup>94</sup> The court stated,

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plan, known as the Recovery Implementation Program....The RIP combines five principle elements: habitat management (flows), habitat development, native fish stocking, nonnative species management, and research. Not surprisingly, the most controversial aspect of the RIP involves flows that are deemed critical to fish survival. The RIP generally allows new projects to continue depleting the Colorado River Basin but contains measures to offset the water losses by seeking instream appropriations through state water appropriation laws. Depletion charges are assessed against new projects.

Wood, *supra* note 21, at 229-30 (citations omitted).

91. Secretary Norton's press release goes on to state, "The Upper Colorado Program, put together through a collaborative effort, provides for the recovery of endangered species and the continued use and development of water for people, cities and farms." Press Release, U.S. Interior Department, Office of the Secretary, Interior Secretary Norton Urges Locally-Driven, Cooperative Solutions to Avert Water Crises (June 6, 2003) (on file with author).

92. Hannah Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 NAT. RESOURCES J. 561, 573-74 (2001) (citations omitted). The author also notes,

Twelve years and \$75 million later, none of the fish have been delisted, and it has become obvious that the recovery effort will take much longer than anticipated. The effort to allow water development to continue, however, has fared quite well. In spite of the Jeopardy Opinion for further water development on the Colorado, over 270 projects have been permitted in the three participating states with the recovery program serving as the [reasonable and prudent alternative].

*Id.* at 573 (citations omitted). See also Wood, *supra* note 21, at 248-49.

93. As noted above, the ESA's prohibition against take of listed fish and wildlife applies to "any person." 16 U.S.C. § 1538(a)(1) (2000).

94. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1129-30 (E.D. Cal. 1992).



The Act provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act. Moreover, enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights.<sup>95</sup>

It seems equally clear that a water withdrawal would cause an illegal take if it caused the death of listed species by removing all the water from a stream; the National Marine Fisheries Service has stated that water withdrawals are "very likely to injure or kill" fish protected by the Act.<sup>96</sup> There has been little section 9 enforcement activity against irrigators for drying up streams inhabited by listed fish, although an enforcement threat against irrigators in the Walla Walla River Basin led to a successful flow restoration agreement.<sup>97</sup> More recently, a U.S. district court in Idaho issued the first decision finding a take based on stream dewatering and permanently enjoined a private irrigator from diverting water from Otter Creek without specific structures in place to protect threatened bull trout.<sup>98</sup>

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95. *Id.* at 1134.

96. In publishing its final rule under ESA section 4(d) on take of certain populations of Pacific Northwest salmon and steelhead, the National Marine Fisheries Service made the following statement:

NMFS agrees that water diversions and discharge may have other deleterious effects [beyond changes in stream temperatures] on salmonid habitat. These may include impacts on sediment transport, turbidity, and stream flow alterations. The actual likelihood that these actions would result in take depends on situation-specific conditions....NMFS has revised the take guidance. One change is that *water withdrawals have been added to the list of activities that are very likely to injure or kill salmonids.*

65 Fed. Reg. 42,422, 42,429 (2000) (emphasis added).

97. See *infra* notes 224–225 and accompanying text.

98. *Idaho Watersheds Project v. Jones*, Civ. No. 00-0730-E-BLW (D. Idaho, Nov. 14, 2002). The court concluded its opinion as follows:

[T]he diversion significantly modifies the habitat of the bull trout by reducing flows below the diversion and diverting bull trout into the irrigation ditch. This significant modification of habitat poses two threats to the bull trout. First, in a below-average water year, the diversion is likely to reduce flows in Otter Creek just below the diversion to the point where spawning bull trout could not migrate past the diversion in August and September. Second, the diversion diverts bull trout into the unsuitable habitat of the irrigation ditch, exposing them to injury....These two threats combine to create a reasonably certain threat of imminent harm to the bull trout under § 9 of the ESA. Thus, IWP is entitled to the issuance of a permanent injunction. The injunction will enjoin the Joneses from operating the diversion without (1) a head gate to monitor flows on Otter

Traditional water users and their allies have long argued that environmental restrictions on the exercise of their water rights could amount to a taking of private property requiring compensation,<sup>99</sup> and now a reported decision, *Tulare Lake Basin Water Storage District v. United States*, directly supports their position.<sup>100</sup> The Court of Federal Claims found that ESA restrictions that temporarily reduced the water supply to California State Water Project irrigators took their water rights, based largely on a remarkable holding that these regulatory restrictions effected a *physical* (not regulatory) taking.<sup>101</sup> *Tulare* was the first case to find that restrictions imposed under the ESA amounted to a taking of private property, but its importance as precedent remains to be seen.<sup>102</sup>

Conflicts between western water law and the ESA have increased dramatically in the past decade. The Klamath and Rio Grande conflicts have been especially intense and acrimonious and have focused attention on the clash between water users with water rights based on prior appropriation and endangered aquatic species whose habitat is protected by the ESA. Lost in all this controversy, however, are some ironic similarities between these contending laws.

### III. SOME BASIC SIMILARITIES BETWEEN THE ESA AND WESTERN WATER LAW

In support of their argument that the ESA should defer to state water laws and water rights, critics often argue that the Act is seriously

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Creek to ensure that bull trout can migrate past the diversion, and (2) a fish gate to prevent bull trout from being diverted into the irrigation ditch.

Slip op. at 21 (footnote omitted).

99. See, e.g., Gregory J. Hobbs, Jr., *Ecological Integrity and Water Rights Takings in the Post-Lucas Era* at 74-82, in *WATER LAW TRENDS, POLICIES, AND PRACTICE* (Kathleen Marion Carr & James D. Crammond eds., 1995).

100. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (Fed. Cl. 2001).

101. *Id.*

102. See Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 586-87 (2002). Water users who receive water under contracts with the U.S. Bureau of Reclamation face especially great challenges because these contracts typically have a provision that shields the federal government from liability for failure to deliver a full supply of water. Courts have held that these provisions authorize the USBR to reduce contract water deliveries as needed to comply with the ESA. *O'Neill v. United States*, 50 F.3d 677, 681-84 (9th Cir. 1995); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1138 (10th Cir. 2003). The *Tulare* court distinguished *O'Neill* because the federal government was not contractually shielded from liability in *Tulare*, 49 Fed. Cl. at 321, but did not seem to question *O'Neill's* holding.

flawed.<sup>103</sup> The irony here is that the much maligned ESA and its critics' favored water laws are very much alike in several significant ways.

### A. Similarities in Their Basic Provisions

Some of the similarities between the Act and western water law arise from the basic provisions of the laws themselves—which, as explained below, often differ significantly from the actual implementation of these laws.<sup>104</sup> The following pages identify three similarities that stem primarily from the text of the ESA and the water laws.

#### 1. Both Seem to Provide Nearly Absolute Protection for One Interest

The first basic similarity between western water law and the ESA is that each provides exceptional legal protection for a single interest. Western water law provides almost total security for water users with appropriative rights, while the ESA appears to do the same for threatened and endangered species.

The ESA has been famous for its strong protection of imperiled fish and wildlife ever since *TVA v. Hill*, where the Supreme Court found "beyond doubt that Congress intended endangered species to be afforded the highest of priorities."<sup>105</sup> It is "the unparalleled stringency of the ESA's provisions," say commentators, that make it "the most revered and reviled of federal environmental laws."<sup>106</sup>

The Act's reputation for single-minded toughness is based on two sweeping prohibitions. First, the ESA forbids any person from taking (or causing the take of) any endangered animal.<sup>107</sup> Second, as the Supreme Court noted in *TVA v. Hill*, the Act "affirmatively command[s] all federal agencies 'to insure that action authorized, funded, or carried out by them do not jeopardize the continued existence' of an endangered species or 'result in the destruction or modification of habitat of such species....'"<sup>108</sup> These provisions seem to protect rare fish and wildlife from virtually any kind of harm caused by any person, anywhere in the United States, regardless of the economic costs or other human impacts that may result from such protection. The common portrayal of ESA

103. See, e.g., *Senate Comm. ESA Hearing*, *supra* note 5; Idaho Governor Dirk Kempthorne, Address to the Idaho Water Users Association, Sun Valley, Idaho, June 23, 2003 (on file with author).

104. See *infra* notes 153–163 and accompanying text.

105. 437 U.S. 153, 174 (1978).

106. JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 117 (2002).

107. 16 U.S.C. § 1538 (2000).

108. 437 U.S. 153, 173, citing 16 U.S.C. § 1536 (emphasis supplied by Court).

court cases or agency actions as favoring “worthless” species over human activities<sup>109</sup> reinforces the popular perception that a draconian Act rigidly protects critters and gives no regard to people.

Western water law provides similarly strong protection to those who hold water rights. As discussed above,<sup>110</sup> appropriators who divert water and apply it to beneficial use obtain water rights that last forever, so long as they are used. Though the water itself is by law a public resource and water rights provide only a right of use, these rights are considered private property. And because the water laws provide few if any environmental restrictions to limit the exercise of these rights, a water user may legally withdraw the last drops of water from a stream, unless that water is needed downstream to satisfy an older water right.

While water rights ensure solid legal protection for established water users, in practice these users often enjoy even greater security than their water rights seem to confer. For example, “waste” (excessive or non-beneficial water use) is universally outlawed in the West, but the states rarely take action to curtail an established use or require greater efficiency;<sup>111</sup> to the contrary, most water right holders in the West are not even required to measure their use.<sup>112</sup> Some states have bent, revised, or

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109. As stated by one commentator,

Newspapers carry tales of federal zealots seizing farm equipment from unwitting farmers, homeowners barred from saving their property from wildfire because of brush clearing restrictions, and businesses losing decades of investment—all because of an endangered species. A typical news article attacking the ESA begins: “Would you spend \$2.6 million on a cockroach? The federal government does.” This opening salvo is followed by a scathing review of the “tremendous economic damage” being done to citizens on behalf of a rat, mouse, mole, tortoise, or other lowly and contemptible creature whose earthly purpose cannot be fathomed, especially when measured against economic progress and personal freedom.

Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 279–80 (1998) (citations omitted).

110. See *supra* notes 34–49 and accompanying text.

111. Commentators have noted that state water agencies do not aggressively apply the classic prior appropriation requirement of “beneficial use without waste”:

[A]s to existing users, agencies play a largely passive role. They do not seek out wasteful practices for active enforcement. Occasionally, particularly egregious practices may be routed out...[but] these practices usually come to an agency’s attention by way of complaint rather than through their own investigations. Agencies simply do not actively seek to define and enforce against waste or inefficient water use.

Neuman, *supra* note 39, at 961; see also Karen A. Russell, *Wasting Water in the Northwest: Eliminating Waste as a Way of Restoring Streamflows*, 27 ENVTL. L. 151 (1997).

112. Neuman, *supra* note 39, at 986.

ignored the traditional water law rules in order to allow established uses to continue unchanged.<sup>113</sup>

## 2. *Neither Law Seeks to Balance Economic and Environmental Values*

A second similarity between western water law and the ESA, closely related to the first, is that these laws largely reject the common approach of balancing economic and environmental interests. To the contrary, each offers little consideration of the other's values: western water law largely ignores environmental concerns, and the ESA as written gives little regard to economic concerns.

The ESA protects threatened and endangered species while giving remarkably little consideration to economic factors. Although nearly all other federal environmental laws call for some consideration of economic costs in determining the appropriate level of environmental protection,<sup>114</sup> the ESA generally offers full protection to rare species regardless of economics. As the Supreme Court stated, literally every section of the Act reflects "[t]he plain intent of Congress...to halt and reverse the trend toward species extinction, *whatever the cost.*"<sup>115</sup>

Federal agencies are not to consider economics in determining whether to list a species as threatened or endangered.<sup>116</sup> Nor does the Act consider economics during the section 7 consultation process: a jeopardy opinion may still halt a proposed federal action regardless of the resulting economic impacts.<sup>117</sup> (In issuing a jeopardy opinion, however, the Service is to suggest any "reasonable and prudent alternatives" to the proposed action that would avoid jeopardy,<sup>118</sup> and

113. Summarizing this practice in the Pacific Northwest states, I earlier noted that the states often effectively waive the traditional rules of prior appropriation where they threaten to curtail established water uses. States have routinely bent, changed, or ignored the traditional rules, through action or inaction, in order to maintain such uses. As a practical matter, water management in the region today is based less on strict prior appropriation principles than on protection of the status quo, that is, preservation of the water use practices, legal or not, that have become established in an area.

See Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881, 888 (1998).

114. Of the many federal laws governing hazardous substances in the environment, "the overwhelming majority of statutes employ a balancing test of some sort, requiring that regulations balance the economic and social costs of controls against the health and safety benefits of regulation." THOMAS J. SCHOENBAUM ET AL., ENVIRONMENTAL POLICY LAW 439 (4th ed. 2002).

115. *TVA v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

116. See *supra* notes 55-60 and accompanying text.

117. See *TVA*, 437 U.S. at 174 (The Court's "view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.").

118. 16 U.S.C. § 1536(b)(3)(A) (2000).

Interior Department rules define these alternatives as being “economically and technologically feasible.”<sup>119</sup>) While the Act allows the Cabinet-level “God Squad” to consider economics,<sup>120</sup> in routine ESA administration, the agencies are not to consider economics except for determining critical habitat for listed species.<sup>121</sup>

In the same vein, western water law gives little real consideration to environmental values, especially where established water rights are concerned. Water right holders legally may, and commonly do, dry up streams completely when their cumulative demands exceed the available supply of water.<sup>122</sup> As noted above, western water law traditionally refused to protect water flowing in its natural course, requiring a diversion of water to establish an appropriative right. Even today, instream flow protections—that is, legal mechanisms that protect water flowing in its natural course—provide limited benefits for fish and wildlife in the West because several states have few if any such protections, and those protections that do exist have junior priorities that fail to ensure sufficient flows for quality habitat.<sup>123</sup> Nor do the western states take legal or regulatory action against existing water users for purposes of protecting aquatic ecosystems.<sup>124</sup> As a practical matter, established water rights are immune from regulation by the states for purposes of protecting the environment.<sup>125</sup>

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119. 50 CFR § 402.02 (2002).

120. 16 U.S.C. § 1536(h) (2000).

121. 16 U.S.C. § 1533(b)(2) (2000). The agencies might also consider costs in determining whether an HCP will minimize impacts on listed species “to the maximum extent practicable.” See Barton H. Thompson, *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245, 269 (2002).

122. Authors of a leading book on this subject provided a partial list of some the West’s larger, drier rivers:

Some of the West’s major watercourses that are not dry or virtually dry during substantial portions of the year include the Snake River below Milner Dam in Idaho, the Gila River and, below Theodore Roosevelt Dam, the Salt River in Arizona; the Powder River in Oregon; the Arkansas River near the Colorado-Kansas border; the Rio Grande River below Elephant Butte Reservoir in New Mexico; and the San Joaquin River below Friant Dam in California.

GILLILAN & BROWN, *supra* note 26 (citation omitted).

123. *Id.* at 144.

124. See Neuman, *supra* note 39, at 953–56; Benson, *supra* note 113, at 903–06.

125. Recent experience from the State of Washington illustrates this point. The Washington Department of Ecology has occasionally used its authority under Clean Water Act section 401 to impose minimum flow conditions on hydroelectric projects. The U.S. Supreme Court upheld such actions in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711–21 (1994). Recently, the Washington Supreme Court upheld Ecology’s authority to impose such conditions on hydro projects even if they have valid water rights under state law. *PUD No. 1 of Pend Oreille County v. Dep’t of Ecology*,

In recent years most western states have allowed environmental concerns to be considered when granting *new* water rights. Most state water agencies have legal authority to deny a proposed water use if it would be contrary to the public interest.<sup>126</sup> However, the practical environmental significance of this authority is doubtful for several reasons. First, most western state water agencies make little use of their power to reject new water rights based on environmental concerns.<sup>127</sup> Second, because many areas of the West are already fully appropriated, there is little or no water available for new uses.<sup>128</sup> Thus, in many areas there are few applications for new water rights. Finally, Colorado—which practices western water law in its purest and most traditional form—still allows no public interest consideration as to new appropriations.<sup>129</sup>

Given the limited role for competing values in these laws, it makes news when endangered species protections officially yield to economic considerations, or when appropriative water rights are cut back to serve environmental values.<sup>130</sup> The California Supreme Court's

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51 P.3d 744, 758–66 (Wash. 2002). The Washington Legislature quickly passed legislation that preserves this authority as to hydro projects but otherwise prohibits Ecology from exercising water quality authority in a way that would "abrogate, supersede, impair, or condition the ability of a water right holder to fully divert or withdraw water." S.B. 5028, 58th Leg., 2003 1st Special Sess. (Wash. 2003). Thus, the new law ensures that clean-water laws will not affect water users (other than hydro projects) or their water rights.

126. Getches, *supra* note 35, at 33.

127. "Application of the laws [prior to the 1990s] was uneven among states, however, and rarely was forceful enough to protect social and environmental values....Some public interest review was no more than a cursory determination by the state engineer." *Id.* (citations omitted). "States have done virtually nothing in recent years to improve public interest review of water decisions. Indeed, some states have taken steps backward." *Id.* at 35 (citations omitted).

128. "The entire flow of many rivers has been legally claimed since the turn of the [twentieth] century, or even before....Depleted or nonexistent flows in river channels are a fact of life throughout much of the West." GILLILAN & BROWN, *supra* note 26.

129. The Colorado Supreme Court has refused to allow the Colorado water courts to consider environmental factors without express statutory authorization: "Although environmental factors might provide a reasonable and sound basis for altering existing law, we have previously held: 'If a change in long established judicial precedent is desirable, it is a legislative and not a judicial function to make any needed change.'" Bd. of County Comm'rs of the County of Arapahoe v. United States, 891 P.2d 952, 972 (Colo. 1995).

130. Although the U.S. Environmental Protection Agency's veto of a federal permit for the Two Forks Dam did not actually affect Denver's well established water rights for the project, the veto effectively blocked the project despite these state-law water rights. This result was so extraordinary that some people proclaimed prior appropriation dead, as noted in a wonderfully evocative (and provocative) obituary by a leading commentator. Charles F. Wilkinson, *In Memoriam: Prior Appropriation 1848-1991*, 21 ENVTL. L. v, xvi (1991). Needless to say, reports of prior appropriation's death were greatly exaggerated.

decision in the Mono Lake litigation, holding that the public trust doctrine could effectively reduce Los Angeles's existing water rights, was a dramatic but very rare exception involving water laws.<sup>131</sup> By the same token, the ESA God Squad—the cabinet-level committee with the exclusive authority to allow a federal agency action to cause jeopardy to a listed species—has only granted two exemptions allowing jeopardy in 20-plus years and has not been convened since the Northern spotted owl controversy of the early 1990s.<sup>132</sup>

### 3. Both Laws Protect the Status Quo Better Than They Provide for the Future

One of the most striking similarities between western water law and the ESA is that both laws work best in preserving the status quo—that is, in preventing changes that would adversely affect the interests they protect. Thus, the ESA has been most effective in preventing extinction, largely by limiting new activities (especially on federal lands) that could cause harm to endangered species or their habitat. Similarly, western water law does best ensuring that existing users continue to receive their accustomed water by giving users perpetual water rights and protecting them from being adversely affected by changed conditions. Conversely, neither law does well in providing for the future: the ESA has had limited success in rebuilding populations of imperiled species, while western water law often fails to ensure that water is reliably available for new demands.

The basic rules of prior appropriation effectively lock in established water uses and allow them to continue without change. As noted above, water rights last forever, and their terms are rarely amended to reflect changed conditions. Moreover, nearly all water rights are limited to a particular type of use, point of diversion, and location of use. These fixed aspects of a water right may be changed, but only with prior state approval and only if the state determines, after an adjudicatory hearing or other proceedings, that the proposed change would not harm other water users.<sup>133</sup> Thus, the law ensures that water users on a particular stream will be protected from changed conditions,

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131. *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 727-32 (Cal. 1983). Outside of California, the Public Trust Doctrine has not had much practical effect on western water law or water rights, with the exception of a recent case from Hawaii. *In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for Waiahole Ditch*, 9 P.3d 409, 444-55 (Haw. 2000). Idaho, by contrast, has legislatively barred the public trust doctrine from applying to water rights. See Michael C. Blumm et al., *Renouncing the Public Trust: An Assessment of the Validity of Idaho House Bill 794*, 24 *ECOLOGY L.Q.* 461, 472-76 (1997).

132. NAGLE & RUHL, *supra* note 106, at 211.

133. See *supra* notes 46-47 and accompanying text.



even if one or more of their fellow users transfers their water to another place or purpose of use. Taken together, these fundamental features of appropriation law powerfully preserve the water use status quo.

In practice, established water uses are even more firmly anchored in concrete than these basic rules might suggest. States have not actively enforced some of these rules, such as the requirement of "use it or lose it" or the prohibition against water waste,<sup>134</sup> allowing water users to maintain their existing water rights and practices despite the letter of the law. States have not actively enforced the traditional rules, and have even changed them where they appeared to pose a threat to established water uses.<sup>135</sup> And water right changes (transfers), while providing a legal means to shift water from "old" uses to "new," have not resulted in large-scale movements of water out of irrigation, except in a few places.<sup>136</sup> Despite the region's enormous population growth and economic change over the past 30 years, today agriculture still accounts for more than 80 percent of water diversions in the West<sup>137</sup>—more than 90 percent in some states.<sup>138</sup>

Most western states have the authority to conduct water resources planning, but they have rarely used this authority to take serious steps toward anticipating and resolving future water problems.<sup>139</sup> Water policy in the West has typically been reactive in

134. See *supra* notes 111–112 and accompanying text.

135. As noted in an earlier writing,

Despite the pressures of population growth, environmental restoration, and economic transformation, established water uses have remained solidly protected in the Northwest....The record clearly shows that the states have been extremely reluctant to implement the traditional rules of western water law if doing so would mean upsetting the water use status quo.

Benson, *supra* note 113, at 916.

136. According to a publication that closely tracks water transactions in the West, the Colorado-Big Thompson (CBT) Project on the Colorado Front Range "is the only market where water rights are traded widely and competitively." *Water Market Indicators*, WATER STRATEGIST, Apr. 2003, at 7. In 2002, Colorado had 123 water transactions, of which 110 involved CBT shares. All the other western states combined had fewer than 80 transactions. There does appear to be an upward trend in transactions, however, from an average of 144 transactions in 1996–1998 to an average of 199 transactions in 1999–2002. See *Annual Transaction Review*, WATER STRATEGIST, Feb. 2003, at 10, 15.

137. See *supra* notes 24–25 and accompanying text.

138. As of 1995, irrigation and livestock accounted for more than 90 percent of water withdrawals in four western states: Colorado, at 92 percent; Wyoming, at 94 percent; Idaho, at 96 percent; and Montana, at 97 percent. See SOLLEY ET AL., *supra* note 24, at 11.

139. Professor Getches has summarized states' recent water planning history as follows: During the 1980s a few states had planning processes that attempted to integrate water supply, quality, and other related issues such as environmental protection and flood control. Presumably, planning

nature, responding to short-term crises such as drought and flood but largely failing to address long-term challenges such as population growth, unsatisfied water demands for ecological purposes, and climate change.<sup>140</sup>

The ESA is similarly reactive, taking effect only after a species has declined to the point of being threatened with extinction. Only after a species has been listed as threatened or endangered does it enjoy any official ESA protection.<sup>141</sup> The Act is simply not designed to keep species off the protected lists by maintaining healthy, viable populations or the habitat needed to sustain such populations.<sup>142</sup>

While it has commonly been criticized for failing to recover many species, the ESA has apparently been effective in preserving their tenuous existence. A 1995 National Academy of Sciences report concluded,

Although it is impossible to quantify the ESA's biological effects—i.e., how well it has prevented species from becoming extinct—the committee concludes that fewer

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continued during the 1990s in those states, though it is not revealed by our survey of legislation and court decisions. The majority of western states had no water planning programs or limited their planning to supply issues, and they did not make their planning any more comprehensive during the 1990s. To the extent that states addressed the subject, they deal with piecemeal planning to address specific issues such as groundwater, conservation, or drought.

Getches, *supra* note 35, at 38 (citations omitted).

140. The U.S. Department of Interior has launched an effort it calls "Water 2025" in order to prompt a more forward-looking water policy for the West. WATER 2025: PREVENTING CRISES AND CONFLICT IN THE WEST, at <http://www.doi.gov/water2025/Water2025.pdf> (last visited Feb. 6, 2004). It remains to be seen how successful this effort will be, however. See Reed D. Benson, *The Interior Department's Water 2025: Blueprint for Balance, or Just Better Business as Usual?*, 33 ENVTL. L. REP. 10,837 (2003).

141. The closest the ESA comes to protecting not-yet-listed species is to require a federal agency to confer with the relevant Service before taking any action that could cause jeopardy to a species proposed for listing but not yet listed. 16 U.S.C. § 1536(a)(4) (2000). Recently, however, the Services have established something called a "Candidate Conservation Agreement with Assurances," analogous to an incidental take permit and HCP for species that are in peril but have not yet been listed under the ESA. 50 C.F.R. § 17.22(d) (2002). See Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 288-90 (1998) (noting that these agreements are largely intended to avoid ESA listing, but that "many of these agreements contain more wishful thinking than concrete solutions to the causes of species endangerment").

142. One of the common criticisms of the ESA is that it kicks in too late—that is not "until a species has declined to the point where heroic efforts are often needed to rescue it. However, it would require a whole new approach to the biodiversity problem, a true ecosystems protection law, to address the prevention issue." Parenteau, *supra* note 141, at 278.

species have become extinct than would have without the ESA. In other words, the ESA has successfully prevented some species from becoming extinct. Retention of the ESA would help to prevent species extinction.<sup>143</sup>

Once it kicks in, the ESA is most effective in restricting, modifying, and occasionally stopping new actions, and thus maintaining the status quo. This effectiveness arises from the two broad prohibitions discussed above: no federal agency may take any action that jeopardizes a listed species or adversely alters its critical habitat, and no person may take (kill or harm) a listed animal either directly or by destroying its habitat.<sup>144</sup> While the Act has also been applied to ongoing activities where a federal agency has some discretionary control,<sup>145</sup> it has traditionally been best at limiting new activities—for example, new logging or land development projects—that might impact a listed species or its habitat.

While the ESA does have provisions that call for a more proactive approach to species conservation, they have not been particularly effective. Section 7(a)(1) imposes a duty on all federal agencies to use their authorities to conserve listed species.<sup>146</sup> Most courts, however, have found that agencies satisfy this requirement if they provide any sort of program that could benefit species; rarely has a court found that agency actions violate the ESA's affirmative duty to conserve.<sup>147</sup> The Act also requires the Services to develop recovery plans

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143. Committee on Scientific Issues in the Endangered Species Act, National Research Council, *SCIENCE AND THE ENDANGERED SPECIES ACT 11* (1995). The report also stated, Although not conclusive, the comparison of rates of extinction between listed and candidate species, especially when remedial actions are clearly identifiable and feasible, indicates that the ESA helps to retard extinctions. Recovery actions encouraged by the ESA and supported by agency funding have helped to rescue several species from precarious status....Without the protections and recovery actions required by the ESA, there is a strong, but hard-to-prove, possibility that most, if not all, of these species would be closer to extinction than they are today.

*Id.* at 156.

144. See *supra* notes 61–73 and accompanying text.

145. See, e.g., *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1127–31 (10th Cir. 2003); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053–56 (9th Cir. 1994).

146. 16 U.S.C. § 1536(a)(1) (2000).

147. See *Oregon Natural Res. Council Fund v. U.S. Army Corps of Engineers*, Civil No. 00-431-JO, 2003 WL 117999, at \*3–5 (D. Or. Jan. 2, 2003); *Strahan v. Linnon*, 187 F.3d 623, 1998 WL 1085817, at \*2 (1st Cir. 1998); *but see Sierra Club v. Glickman*, 156 F.3d 606, 618 (5th Cir. 1998) (finding that the Department of Agriculture had violated section 7(a)(1)).

for endangered species.<sup>148</sup> ESA recovery planning has been ineffective in practice, however, because the plans tend to be substantively inadequate, poorly implemented, and largely unenforceable.<sup>149</sup> Not surprisingly, the ESA has not rebuilt healthy populations of very many species, although there certainly have been some success stories.<sup>150</sup>

The ESA has had some success in preserving what is left of a species' habitat, and the same can be said of the water laws in those states that have effective programs for protecting instream flows. For many aquatic species, however, habitat restoration is deemed necessary for their recovery, if not their very survival.<sup>151</sup> Neither prior appropriation nor the ESA was designed primarily for this purpose, however, and both have a poor track record in habitat restoration.

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148. 16 U.S.C. § 1533(f) (2000). The Act requires the relevant Service to develop a recovery plan for each listed species unless it "finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1) (2000).

149. As stated in a leading article on recovery planning, although the ESA provides that recovery or conservation of protected species and the ecosystems on which they depend is the central purpose of the Act, and USFWS informs us that "recovery planning under section 4(f) of the Act is the 'umbrella' that eventually guides all [Endangered Species Act] activities and promotes a species' conservation and eventual delisting," *the recovery planning section and the concept of recovery it embodies have played an insignificant role in the legal protection of endangered and threatened species*. The same agency that declares recovery planning the umbrella that eventually guides all activities also tells us that recovery plans are "guidance documents" and not "decision-making" documents. Although recovery plans are required by law to identify specific recovery actions and a specific time frame for implementing them, the agencies and courts agree that these "implementation schedules" are unenforceable. In 1993, researchers at the University of Idaho announced findings indicating that recovery plans for many species prescribed "management for extinction" rather than management for recovery by setting recovery goals so low that they could not significantly increase the chance of species survival.

Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 26-27 (1996) (emphasis added) (citations omitted).

150. Parenteau, *supra* note 141, at 274-77.

151. See Moore et al., *supra* note 28, at 329-39. A dramatic example is the endangered Rio Grande silvery minnow, once a common and wide-ranging species but now in grave peril of extinction as it occupies only a small reach of the Rio Grande that is commonly left with little or no flow due to agricultural and municipal water diversions. Sean O'Connor, *The Rio Grande Silvery Minnow and the Endangered Species Act*, 73 *U. COLO. L. REV.* 673, 676-77, 681-85 (2002).

## B. Similarities in the Implementation of Western Water Law and the ESA

Some of the most important similarities between the Act and western water laws stem from the practical application of these laws by the responsible agencies and other interested parties rather than from the text of the laws themselves. The following four similarities arise from the way these laws are implemented.

### 1. Both Are Typically More Restrictive on Paper Than in Practice

Experience has shown that implementation of both the water laws and the ESA is often very different from the black-letter law. As commonly applied, neither law is nearly so restrictive as its basic provisions would suggest.

Several commentators have noted that water managers in the West often do not actively apply many of the traditional tenets of prior appropriation, resulting in a situation where water allocation and management diverge greatly from the "rules." For example, Professor Neuman has documented the western states' failure to meaningfully implement the time-honored requirement of "beneficial use without waste."<sup>152</sup> Another longstanding prior appropriation rule, "use it or lose it," is also rarely enforced.<sup>153</sup> As Professor Leshy has stated, contrary to the myth of clear property rights and strong state management of water use, "[t]he reality is that (with some exceptions and variations in particular places), state water allocation and administration tolerates a rather amazing level of data gaps, imprecision, illegal uses, conflicting claims to the same water, and other shortcomings."<sup>154</sup> Professor Tarlock has observed that states commonly do not actively enforce water right priorities—that is, they do not shut off junior users to ensure adequate

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152. Neuman, *supra* note 39, at 923–62.

153. In the words of another observer, Several commentators have observed that western water law theory clearly envisions the loss of water rights and also plac[es] limitations on the use of such rights to only the quantities necessary for beneficial use. In practice, though, once a water right is obtained, there is little method or means for enforcement of any provision or limitation.

Fred R. Disheroon, *New Directions in Western Water Law as to Loss of Water Rights by Forfeiture, Abandonment, or Lack of Perfection*, 159, 160, in *WATER LAW TRENDS, POLICIES, AND PRACTICE* (Kathleen Marion Carr & James D. Crammond eds., 1995).

154. John D. Leshy, Address to the Am. Bar Ass'n Water Law Conference, Feb. 20, 2003.

water supplies to seniors—causing “a substantial gap between the formal and the actual practice of prior appropriation.”<sup>155</sup>

In an earlier article, I argued that protection of established water users, rather than prior appropriation, was the practical modern rule for water allocation and management.<sup>156</sup> I found that the states’ failure to enforce traditional water law principles against existing users was not simply a result of bureaucratic inertia or lack of agency resources. In many cases, the states had actually bent or changed the traditional rules in order to limit any possible adverse effects on established water users.<sup>157</sup> In other words, the traditional legal rules were more restrictive of existing water uses than the states’ actual practice, and, in some cases, the states changed their rules to ensure that result.

In the same vein, several commentators have shown that, in practice, the ESA rarely delivers the tough, uncompromising protection that it seems to provide on paper. Professor Houck made this point a decade ago after extensively analyzing the Services’ implementation of several key provisions of the ESA, including those relating to listing, critical habitat, and consultation.<sup>158</sup> More recently, Professor Parenteau evaluated the Services’ overall implementation of the Act and reached the same conclusion: “On paper, the ESA looks like...the strongest wildlife protection law in the world. In reality, however, the ESA turns out to be not so formidable, a statute that operates, as will be seen, on a

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155. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 771 (2001). Tarlock argues that priority enforcement decreased largely because reservoir storage increased the reliability of water rights in many areas, thus reducing the importance of priority enforcement:

Dams made it increasingly unnecessary to enforce water rights in the rigorous manner that the doctrine suggests and helped produce the culture of non-enforcement of the beneficial use doctrine. The threat of priority enforcement decreased substantially. Water rights became more of a general water entitlement to use water rather than the right to a specific quantity used in a non-wasteful manner as specified in the formal doctrine. As a result, prior appropriation became more and more of a shadow doctrine.

*Id.* (citation omitted)

156. Benson, *supra* note 113. While my earlier article focused specifically on the states of the Pacific Northwest, I believe the other western states all take the same approach to a greater or lesser degree.

157. *Id.* at 895–99.

158. “The Endangered Species Act is not what it seems—either in the media or in the United States Code. It has, in effect, been substantially amended through regulations and practice, transforming it from an act of specific requirements into a more discretionary permit system.” Oliver Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 358 (1993).

philosophy of compromise and accommodation, relying more on mitigation than prohibition."<sup>159</sup>

The federal government has tried to implement the ESA in a way that minimizes its economic and political consequences and has commonly looked for every bit of "flexibility" that the Act might provide in allowing activities to move forward without tough restrictions. After an extensive study of recent ESA consultations regarding salmon in the Pacific Northwest, Professor Blumm determined that the National Marine Fisheries Service (NMFS) had consistently shortchanged the biological needs of listed salmon due to economic and political concerns:<sup>160</sup> "Perhaps the chief lesson from this study is that the ESA affords NMFS sufficient authority to resolve scientific uncertainties in a way that allows the pursuit of the politically palatable, instead of the biologically necessary."<sup>161</sup> Moreover, the Clinton Administration made several user-friendly ESA programmatic changes—including major revisions to the HCP program to offer a better deal for private landowners—despite serious criticism that these policies were inconsistent with the letter and spirit of the Act.<sup>162</sup> The Services' day-to-day decisions and policy choices to avoid economic impacts and political controversy have resulted in an ESA whose legal bark is far more serious than its practical bite.

## 2. Neither Provides Positive Incentives for Resource Stewardship

Both the ESA and western water law establish rules for the management of natural resources that are valuable and scarce—rare species and fresh water. Maximum effectiveness would seem to require a "carrot and stick" approach, with both positive incentives and enforceable controls to promote conservation of these resources. Unfortunately, neither law does well in this area. Both the ESA and

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159. Parenteau, *supra* note 141, at 266.

160. Blumm and Corbin state,

A widespread complaint about the ESA is that the statute emphasizes species protection to the exclusion of economic considerations. The decisions studied in this Article seriously question the accuracy of those allegations. For example, in the numerous eleventh-hour compromises that NMFS made in formulating the 1995-99 BiOp on hydroelectric operations, none favored salmon.

Blumm & Corbin, *supra* note 21, at 598-99 (citations omitted).

161. *Id.* at 602.

162. See Parenteau, *supra* note 141, at 284-300; Sheldon, *supra* note 109, at 308-37. Clinton Administration officials defended these initiatives as both politically pragmatic and practically beneficial for species protection. See Donald J. Barry, *Opportunity in the Face of Danger: The Pragmatic Development of Habitat Conservation Plans*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 129, 130-33 (1998).

western water law have been criticized for providing poor incentives for resource stewardship.

Commentators have long contended that prior appropriation as practiced in the West provides incentives to waste water, not conserve it.<sup>163</sup> Because water rights may be lost through abandonment or forfeiture to the extent that they are not used for several consecutive years, users have an incentive to ensure that they regularly make full use of their water rights, even if these rights substantially exceed their actual needs.<sup>164</sup> Moreover, the more water a user actually diverts and consumes, the more water is generally available to be transferred to a new place or purpose of use<sup>165</sup> and, thus, the more valuable the water right will be. In those parts of the West where growing cities are facing water supply shortages that could be addressed by leasing or purchasing agricultural water rights, irrigators may have a particularly strong incentive to maximize their use of water and thereby increase the future value of their water rights.

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163. As stated in a leading article on this subject, The anti-waste component of the beneficial use doctrine was intended to spread scarce water to many users, but...[it] has not been particularly effective at maximizing the use of water. The doctrine certainly encourages diversion and use—indeed, overuse—of water. In this sense, beneficial use has been instrumental in supporting and encouraging economic development and settlement of the arid West. But because the concept of waste is so generous and poorly defined, and because forfeiture is not aggressively enforced, the doctrine does not even begin to maximize the number of users who could be supported by a given amount of water....In short, the doctrine, as it has been implemented and interpreted, simply is *not* an efficiency-seeking doctrine. The existing beneficial use doctrine fails miserably at encouraging users to accomplish their use with a minimum of water.

Neuman, *supra* note 39, at 975 (emphasis added).

164. In the words of Professors Tarlock, Corbridge, and Getches, Theoretically, every water user operates under a threat that a water use can be challenged as wasteful and thereby held to be in excess of a decreed appropriative right. A successful challenge would result in more water being left in the stream for the benefit of junior appropriators. Such challenges have been rare, and successes even rarer. A more seriously perceived threat is from non-use. Appropriators have operated under the specter of “use it or lose it,” not “use it efficiently or lose it.” Thus, far greater quantities of water than are needed to fulfill particular purposes have been diverted in the false hope of protecting rights to use quantities of water awarded in permits or decrees.

TARLOCK ET AL., *supra* note 22, at 178. In reality, the “use it or lose it” provisions of western water law are not actively enforced either, but water users evidently feel it is better to be safe than sorry.

165. See, e.g., *City of Westminster v. Church*, 445 P.2d 52, 58–59 (Colo. 1968).



These anti-conservation incentives might be less problematic if western water law provided an effective "stick" to deter excessive use, but in practice it does not. As noted above, most water right holders are not even required to measure how much they use, and the states do not enforce the longstanding prohibition against wasteful water use.<sup>166</sup> Moreover, the western states charge nothing for the right to use their public water resources,<sup>167</sup> even though user fees certainly could help reduce water demand.<sup>168</sup>

Similarly, the ESA has also been frequently criticized for its poor incentives, especially where private landowners are concerned.<sup>169</sup> The ESA prohibits any person from causing a take of a protected animal, and, since some forms of habitat destruction may be considered take,<sup>170</sup> private owners whose lands offer habitat for listed species potentially face restrictions on use of their lands. Thus, private landowners have sometimes logged, plowed, or otherwise altered their property in an effort to eliminate listed species or keep them away.<sup>171</sup> Some have argued

166. See *supra* notes 111-112 and accompanying text.

167. To my knowledge, Arizona (under its pathbreaking Groundwater Management Act) is the only western state that charges any fee for use of its waters. See ARIZ. REV. STAT. §§ 45-611-616.

168. "Fees or taxes on water use can internalize the opportunity cost of removing the water from the stream and, in the case of federal reclamation water, offset the sizable federal subsidies that currently encourage excessive use." Thompson, *supra* note 121, at 297.

169. As stated by one leading commentator,

Uncompensated regulation under section 9 of the ESA also encourages overinvestment in land use. Because section 9 limits modification of an endangered species' habitat, property owners can avoid the section 9 prohibition by ensuring that their land is not viable habitat. Nothing prevents a property owner from destroying habitat prior to the listing of a species, and nothing requires a property owner to allow his land to become viable habitat after a listing. Although it is illegal, a property owner who destroys habitat on her property after a listing but before the government surveys the area can also escape section 9's grasp.

Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 351 (1997); see also Robert Innes et al., *Takings, Compensation and Endangered Species Protection on Private Lands*, 12 J. ECON. PERSP. 35, 39 (1998).

170. See *supra* notes 68-73 and accompanying text.

171. Professor Thompson notes,

Stories are legion of property owners evading the ESA by cutting down trees, repeatedly plowing their fields, or otherwise altering their land's ecology to make it unappealing to listed species in the region. There is no reliable estimate of such evasive tactics. The government does not monitor such behavior which, in most cases, is not illegal.... Yet reports by property owners (who, ironically, have an incentive to overstate its occurrence), as well as by environmental advocates and governmental officials (who in today's political environment do not), suggest that such practices are not isolated exceptions.

that the Act even pushes private landowners to resort to an extreme form of self-help against listed species: “shoot, shovel, and shut-up.”<sup>172</sup>

Here again, these perverse incentives might be less troublesome (at least from the endangered species’ standpoint) if the ESA enforcement program on private lands was highly effective in protecting listed species and their habitat. But here again, the regulatory “stick” does not go all that far in ensuring compliance. For one thing, habitat destruction is illegal only after a species is listed, and only if it causes actual harm to a member of a listed species.<sup>173</sup> The federal government rarely enforces the take prohibition,<sup>174</sup> and there have been few ESA citizen suits filed against non-governmental actors alleging a take on private lands.<sup>175</sup> Recently, however, a federal court in Idaho found a take by an irrigator whose diversion was shown to harm threatened bull trout<sup>176</sup>—demonstrating that private water users are not immune from ESA liability simply because they hold state-law water rights, even though they are rarely faced with ESA enforcement.

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Thompson, *supra* note 169.

172. *Id.*; Innes et al., *supra* note 169.

173. ESA regulations define “harm” in this context as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3 (2002); see *Babbitt v. Sweet Home Chapter of Cmty’s for a Great Oregon*, 515 U.S. 687, 708 (1995) (O’Connor, J., concurring). See also 50 C.F.R. § 222.102 (2002) (Department of Commerce definition).

174. As stated in 1998 by a longtime federal official, the self-described “Forrest Gump” of the ESA,

You can probably count on two hands the number of prosecutions, either civilly or criminally, that have been brought by the federal government over the last 23 years because of an alleged take on private lands. So to that extent, it’s not been a readily and frequently utilized tool. And in fact we’ve had the loss of thousands and thousands of acres of endangered and threatened species habitat in the interim.

Barry, *supra* note 162, at 130.

175. Environmental plaintiffs often would rather sue state or local governments for *permitting* private actors to engage in actions that cause take rather than sue the private actors themselves. See *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (state lobster fishing permitting program); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170 (M.D. Fla. 1995) (county ordinance allowing vehicles onto beach); *Pac. Rivers Council v. Brown*, No. CV-02-243-BR, 2003 WL 21087974 (D. Or. Apr. 21, 2003) (state logging approval program).

176. *Idaho Watersheds Project v. Jones*, Civ. No. 00-0730-E-BLW (D. Idaho, Nov. 14, 2002).

### 3. Both Laws Have Produced Their Share of Litigation

One of the most common complaints of ESA critics is that the Act has generated an excessive amount of litigation.<sup>177</sup> For example, in a recent speech, Idaho Governor Dirk Kempthorne's most pointed criticism of the ESA was the following:

I can tell you where the ESA has found success...and that is in creating litigation, controversy and conflict. Rarely do we hear about an endangered species without there being a lawsuit involved. And while it's great for the attorneys, litigation rarely helps the species. Too often, money that could otherwise be used for on the ground habitat restoration and recovery projects is siphoned away to pay for seemingly endless legal battles. Unfortunately, the ESA too often leads to conflict, when instead it should lead to cooperation, conservation and recovery of the species.<sup>178</sup>

While the ESA has, indeed, produced a number of major court battles, the same is certainly true of western water law.

A key provision of the ESA is section 11(g), which authorizes "any person" to sue to enforce the Act.<sup>179</sup> This citizen suit provision is

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177. In his recent remarks at a congressional hearing, Senator Pete Domenici bitterly criticized the Rio Grande ESA litigation and the recent decision in *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003): "Now, four years after the section 7 consultation litigation was brought, millions of dollars have been spent and the court case drags on....Mr. Chairman, the ESA, long-driven [sic] by litigation, is in dire need of reform." *Senate Comm. ESA Hearing, supra* note 5; House Resources Committee Chairman Richard Pombo made the following remarks on ESA citizen suits to force designations of critical habitat:

These frivolous, politically-motivated lawsuits have already bankrupted the critical habitat program. Those who file them are less interested in actual species recovery than they are in lining their own pockets with taxpayer dollars....Taxpayer dollars should be spent recovering endangered species, not on sushi dinners and Armani suits for these so-called activists.

Press Release, Rep. Richard Pombo, Radical Environmental Lawyers Trump Experts, Abuse Law Again (June 3, 2003).

178. Kempthorne, *supra* note 103. ESA supporters would surely disagree that litigation rarely helps the species, particularly since many species would not have been designated as threatened or endangered without it. Notable examples of aquatic species listed due to citizen litigation include the bull trout, *see Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 945 F. Supp. 1388, 1400-01 (D. Or. 1996), and the Oregon Coast stock of Coho salmon, *see Oregon Natural Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1160-61 (D. Or. 1998).

179. 16 U.S.C. § 1540(g) (2000).

similar to those of the other major federal environmental laws<sup>180</sup> in that it allows suits against both federal agencies and private parties who violate the Act but requires prospective plaintiffs to give 60 days' notice before filing to provide time to cure the violation. By allowing citizens to sue in cases where the government is unwilling or unable to act, Congress intended to provide an additional measure of protection for threatened and endangered species. As the Supreme Court noted, "the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'...."<sup>181</sup>

While the ESA has generated its share of litigation, this litigation often seems to receive more than its share of media attention. There would seem to be two obvious reasons for the media's fascination with ESA cases. First, some of these are classic "man bites dog" cases. The Snail darter case of *TVA v. Hill*<sup>182</sup> provides a perfect example: dams kill fish every minute of every day, but when a tiny fish kills a big dam, that's news. Second, ESA cases sometimes force a reluctant government to take an action that adversely affects a powerful interest, causing a loud outcry. Court decisions on the Klamath in 2001 and the Rio Grande in 2003, effectively forcing the Bureau of Reclamation to release more water for fish in a time of drought, each triggered a mediagenic storm of political and ideological conflict.<sup>183</sup>

It is true that the ESA is a preferred legal tool for conservation groups, and ESA litigation is commonly perceived as a way for environmentalists to pursue their goals. Increasingly, however, economic interests are suing to challenge ESA actions.<sup>184</sup> In a case involving

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180. See, e.g., section 505 of the Clean Water Act, 33 U.S.C. § 1365 (2000); section 304 of the Clean Air Act, 42 U.S.C. § 7604 (2000); section 310 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659 (2000).

181. *Bennett v. Spear*, 520 U.S. 154, 165 (1997).

182. 437 U.S. 153 (1978).

183. Following the Tenth Circuit's decision in the *Rio Grande Silvery Minnow* case, Albuquerque Mayor Martin Chavez offered these vitriolic remarks:

[T]he fringe environmental community, with the assistance of two federal judges who are accountable to nobody in our society, who are not elected, who hide behind their nice robes and tall desks, now want to put the future of this community in jeopardy....The fringe environmental community, which wants to take away this city's destiny, wants to take water from the mouths of our children, will not prevail, not as long as I am in office.

*Ruling for Minnow Churns City, State*, ALBUQUERQUE TRIB., June 13, 2003, at 1; see also Jehl, *supra* note 8.

184. See, e.g., *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001) (challenging listing decision); *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) (challenging designation of critical habitat); *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001) (challenging biological opinion).

Klamath Basin water use, the U.S. Supreme Court held that the irrigator plaintiffs had standing to sue under the ESA.<sup>185</sup> But the converse typically does not hold true: environmentalists have a very hard time pursuing their goals in water rights litigation,<sup>186</sup> especially in general adjudications.<sup>187</sup> This difficulty is not for lack of litigation opportunity.

While it generally receives little popular attention, prior appropriation also generates a large amount of litigation. Several western states are currently plodding through massive court cases in an effort to determine the water rights of existing users in certain river basins. These "general adjudications" are seemingly endless, and they typically involve thousands of parties. In Montana's massive statewide adjudication, for example, "[a]s of 2001, after nineteen years, only 56 percent of the 219,413 claims filed with the water courts had been adjudicated. Final decrees had been issued in 16,354 cases (7.5 percent) and another 106,739 claims (49 percent) had received preliminary or temporary preliminary decrees."<sup>188</sup> Among other ongoing general adjudications, Arizona's Gila River adjudication began in 1974 and involves the claims of 24,000 water users; Washington's Yakima adjudication started in 1977 and involves 40,000 users; Idaho's Snake River Basin adjudication began in 1987 and involves 185,000 users.<sup>189</sup> As a group, western water right adjudications are undoubtedly the biggest, longest, and most cumbersome court cases in the U.S. legal system, and some of the most expensive.

Even apart from these behemoth general adjudications, litigation over water rights is common in the West. In Colorado, virtually all matters involving water allocation and use must pass through the state's system of water courts;<sup>190</sup> in this pure prior appropriation state, litigation

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185. *Bennett*, 520 U.S. at 164-77.

186. This is particularly true in the "pure" prior appropriation state of Colorado, where the water courts are not authorized to consider environmental matters in deciding water cases. *See Bd. of County Comm'rs of the County of Arapahoe v. United States*, 891 P.2d 952, 972 (Colo. 1995) and text accompanying *supra* note 129; Melinda Kassen, *A Critical Analysis of Colorado's Water Right Determination and Administration Act of 1969*, 3 U. DENV. WATER L. REV. 58, 59 (1999).

187. *See Dep't of Ecology v. Grimes*, 852 P.2d 1044, 1053-54 (Wash. 1993) (error to consider environmental factors in general adjudication to determine existing water rights; such factors "cannot operate to impair existing water rights," and considering such factors in this context would be contrary to "long established principles of western water law"). *See also Idaho Conservation League v. Idaho*, 911 P.2d 748, 749-50 (Idaho 1995) (public trust doctrine does not apply in water right adjudication).

188. TARLOCK ET AL., *supra* note 22, at 298.

189. *Id.* at 304.

190. *See Kassen, supra* note 186, at 59-62, 64-69.

is thus the virtually exclusive means of resolving disputes over water.<sup>191</sup> In a 1993 decision, a divided Washington Supreme Court held that litigation—in fact, a full-blown general adjudication—was necessary before the state water agency could decide a dispute between rival irrigators on the same stream;<sup>192</sup> the dissenting justices wrote, “Prohibitively expensive and interminable litigation is what the majority has fashioned as a solution....”<sup>193</sup> In fact, water rights cases generally have a reputation of lasting forever. In deciding a long-running case involving Imperial Irrigation District’s (IID) allegedly wasteful water use—an issue that was back in court once again in 2003<sup>194</sup>—the California Court of Appeals wrote in 1990, “All things must end, even in the field of water law.”<sup>195</sup>

#### 4. Both Laws Have Shown Some Increased Flexibility of Late

Both prior appropriation and the ESA have developed a reputation for rigidity. In recent years, however, both—especially the ESA—have shown a limited but significant degree of new flexibility, particularly where private parties are concerned.

One of the most important developments in endangered species policy has been the boom in incidental take permits for non-federal parties. A private landowner who submits a satisfactory HCP, with commitments for endangered species conservation measures, can receive a permit that insulates the landowner from liability for take in connection with otherwise lawful activities, such as logging, farming, or land development.<sup>196</sup> While environmentalists have often criticized HCPs as a poor deal for listed species,<sup>197</sup> the Clinton administration saw them as a way to provide habitat benefits on private lands while also making the ESA more user-friendly.<sup>198</sup> Whatever their merits, HCPs became a popular tool for private landowners and local governments in the

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191. Even though many cases do settle, the requirement of water court approval for nearly all matters involving water rights does have significant consequences for water decision making. *Id.* at 60–62.

192. *Rettkowski v. Dep’t of Ecology*, 858 P.2d 232, 240 (Wash. 1993).

193. *Id.* at 242 (Guy, J., dissenting).

194. *Imperial Irrigation Dist. v. United States*, No. 03-CV-0069 W (JFS) (S.D. Cal.) (filed Jan. 10, 2003).

195. Before making this statement, the court stated, “We note from IID’s brief that it has ‘engaged for three decades in costly and critical litigation about its water rights.’” *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 573 (Cal. App. 1990).

196. See *supra* notes 74–78 and accompanying text.

197. See *Sheldon*, *supra* note 109, at 310–13; *Barry*, *supra* note 162, at 130–31.

198. *Barry*, *supra* note 162, at 130–31.

last decade, growing from a handful of approved plans in the early 1990s<sup>199</sup> to several hundred by 2001.<sup>200</sup>

Somewhat less successful, but still politically powerful, has been the recent push to avoid ESA listing of species on the basis of conservation plans developed by federal, state, or local agencies. The Act does call for such plans to be considered as one factor in determining whether a species should be listed as threatened or endangered.<sup>201</sup> Courts have held, however, that the Services may decline listing on this basis only if the conservation plan is sufficiently certain, mandatory, reliable, and backed by science.<sup>202</sup> In response to this caselaw, the Interior Department has recently developed a policy allowing the Services to consider a broader range of measures, including "formalized conservation efforts that have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective at the time of a listing decision," in making listing determinations.<sup>203</sup>

The Services have also sought to increase the Act's flexibility by developing rules under section 4(d)<sup>204</sup> that are tailored to a particular threatened species and are thus somewhat narrower than the typical blanket extension of the take prohibition.<sup>205</sup> These rules may identify specific activities by private actors, local governments, or states that are *excluded* from the take prohibition as to that particular species.<sup>206</sup> For example, NMFS's 4(d) rule for Pacific Northwest steelhead, issued in 2000, provided thirteen specific take exemptions for such activities as fishery management, routine road maintenance, and water diversions with proper fish screens.<sup>207</sup>

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199. Only 14 HCPs were approved from 1982 to 1992. Sheldon, *supra* note 109, at 300.

200. By February 2001, the federal government had approved over 340 HCPs. Thompson, *supra* note 121, at 267.

201. 16 U.S.C. § 1533(b)(1)(A) (2000).

202. See, e.g., Oregon Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1153-59 (D. Or. 1998), and cases cited therein.

203. Final Policy on Evaluating Conservation Efforts (PECE), 68 Fed. Reg. 15,100, 15,113 (Mar. 28, 2003). Similarly, the federal agencies have promoted Candidate Conservation Agreements as a means to avoid ESA listing. Parenteau, *supra* note 141.

204. 16 U.S.C. § 1533(d) (2000).

205. Since the late 1970s, the Interior Department has had a standing rule that generally extends endangered species protections, including the take prohibition, to threatened species. Endangered and Threatened Wildlife or Plants, 50 C.F.R. § 17.31(a) (2002). This general rule may be superceded, however, by a special rule for a particular threatened species that contains "all the applicable prohibitions and exceptions." 50 C.F.R. § 17.31(c) (2002).

206. See Madeline J. Kass, *Threatened Extinction of Plain Vanilla 4(d) Rules*, 16 NAT. RESOURCES & ENV'T 78 (2001).

207. 50 C.F.R. § 223.203(b) (2002). The purpose of these exemptions was to provide "a mechanism whereby entities can be assured that an activity they are conducting or

Western water law has also shown some improved flexibility of late, at least in a few states. Perhaps the most important recent development is that some states are beginning to remove barriers to transferring existing, consumptive water rights to instream use, allowing restoration of flows that had been depleted by the exercise of established water rights.<sup>208</sup> Water right purchases and leases for instream flow grew significantly in the 1990s, although they seem to have reached a plateau (in terms of total quantity of water) in about 1995,<sup>209</sup> and they remain a small fraction of water right transactions in the West.<sup>210</sup> And even though most states continue to bar privately held instream flow rights,<sup>211</sup> a variety of private entities—primarily nonprofit organizations—have begun working to facilitate water right transfers to instream use.<sup>212</sup>

Similarly, a variety of “water banks” have begun to spring up around the West.<sup>213</sup> These arrangements allow water right holders, typically irrigators, to receive compensation for allowing someone else to use their water rights for a specified period of time. Despite the fact that water banks allow for transfers that are voluntary, remunerative, and temporary, they are regarded by some as a long-term threat to agricultural water supplies,<sup>214</sup> although not to the same degree as permanent water transfers. While some water bank borrowing takes place for municipal, industrial, and even irrigation purposes, several of the new banks were set up largely to meet the water needs of listed species. ESA requirements were the major catalyst for the formation of

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permitting is consistent with ESA requirements...When such a program provides sufficient conservation for listed salmonids, NMFS does not find it necessary to apply ESA section 9(a)(1) take prohibitions to activities governed by those programs.” 65 Fed. Reg. 42,422, 42,423 (July 10, 2000).

208. See TARLOCK ET AL., *supra* note 22, at 355–57 (describing laws and institutions that have developed to transfer water to environmental purposes in Oregon, Montana, Texas, and Washington).

209. Barton H. Thompson, *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 261, 270 (2000).

210. Of the 200 water transactions in 2002, only 15 were for “public trust” purposes, compared to 167 for municipal uses. *Annual Transaction Review*, WATER STRATEGIST, Feb. 2003, at 16.

211. Thompson, *supra* note 209, at 287.

212. *Id.* at 271–72.

213. See Sarah B. Van de Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15, 33 (2000) (describing water banks in Idaho and California); Hobbs, *supra* note 36, at 50 (noting that Colorado recently enacted a statute providing for a pilot water bank in the Arkansas River Basin).

214. See Thompson, *supra* note 209, at 274–76 (discussing reasons for opposition to market-based reallocation of water from agriculture to instream uses).



the Edwards Aquifer bank in Texas,<sup>215</sup> the Environmental Water Account in California,<sup>216</sup> and the Klamath Basin bank in Oregon/California,<sup>217</sup> among others.

### C. Concluding Thoughts on the Similarities between Water Law and the ESA

Even though these laws have recently shown a bit more flexibility, both have proven remarkably resistant to fundamental change—yet another similarity between the two. Except for expanded recognition of legal protection for instream flows in the 1970s and 1980s, western water law has changed little for several decades despite criticism.<sup>218</sup> At its core, prior appropriation law still recognizes permanent property rights based on beneficial use, gives highest priority to the oldest water rights, and charges nothing for private use of a public resource.<sup>219</sup>

By the same token, the ESA has been highly controversial since the late 1970s, but Congress has made only minor changes to the law since the rather modest 1982 amendments.<sup>220</sup> The basic elements of the Act regarding species listing, federal obligations to engage in

215. See Votteler, *supra* note 21, at 873–75; Todd H. Votteler, *Raiders of the Lost Aquifer? Or, the Beginning of the End to Fifty Years of Conflict over the Texas Edwards Aquifer*, 15 TUL. ENVTL. L.J. 257 (2002).

216. See Alf W. Brandt, *An Environmental Water Account: The California Experience*, 5 U. DENV. WATER L. REV. 426, 427–33 (2002).

217. See Paskus, *supra* note 9, at 10–12.

218. Leading commentators in the 1980s believed that western water law was about to undergo fundamental change. See, e.g., Charles F. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 344–45 (1985) (noting that “elements of the prior appropriation system are failures in these times,” and that western water law was in a “time of transition”). However, the states never proceeded with basic water law reforms:

The 1990s began with the states expressing their intentions to adapt water law and administration to the West’s rapidly changing needs. State politicians apparently embraced the essential reform proposals, raising expectations for new legislation and aggressive administrative initiatives that would, in turn, be tested in court....Actual political and legal developments at the state level in the 1990s, however, fell short of the expectations that seemed realistic in the late 1980s. Instead of staying ahead of federal regulatory pressures, the states responded with modest adjustments when they faced controls that seemed intolerable or when they thought that growth was creating imminent shortages. As this section shows, most changes in state law and policy were far from visionary; rather, they were necessary responses to immediate problems.

Getches, *supra* note 35, at 23–24.

219. See *supra* notes 34–49 and accompanying text.

220. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (codified as amended at 16 U.S.C. § 1531 (2000)).

consultation and avoid jeopardy, and the broad ban on take of listed animals, are essentially the same as they were in 1973.<sup>221</sup> One might say that both the ESA and prior appropriation have stood the test of time.

The fundamental similarities discussed above are important but often overlooked. In contrast, the fundamental differences between western water law and the Endangered Species Act are equally important and glaringly obvious. First, the water laws essentially allocate a natural resource by creating a system of *property rights* authorizing its use, whereas the ESA imposes *regulatory limits* on natural resource management and use. Second, western water law is chiefly *state law*, while the ESA is a *federal* statute carried out by federal agencies. Third, a key principle of prior appropriation is *maximum utilization of water resources for human demands*,<sup>222</sup> while the Act seeks to *protect endangered species and the ecosystems on which they depend* from "economic growth and development untempered by adequate concern and conservation."<sup>223</sup>

These fundamental differences probably make conflicts inevitable, but the basic similarities between the water laws and the ESA make their confrontations even more intractable. Each law seems to provide nearly absolute protection to a certain interest, so representatives of each interest may believe that "the law" is clearly on their side, thus reducing the chances for compromise. Accommodation is made even more difficult because neither the ESA nor the water laws provide much official consideration for competing interests. The lack of positive incentives means that any real progress on conservation is not likely to come through voluntary measures, but instead through enforcement or regulatory actions that are inherently controversial. And because both laws are mostly effective in preserving the status quo, they tend to be ineffective in meeting future challenges such as habitat restoration, and they often clash in places such as the Klamath and Rio Grande Basins where the survival of listed species requires cutting back on established water uses. Since both prior appropriation and the ESA have seen their share of court battles, it is hardly surprising that where these laws have crossed paths, the resulting litigation has been especially intense and bitter.

As both laws have begun to show more flexibility, however, some hope arises that the West will see more positive outcomes and fewer bloody collisions at the dangerous intersection of water law and

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221. See Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. § 1531 (2000)).

222. See *Fellhauer v. People*, 447 P.2d 986, 994 (Colo. 1968).

223. 16 U.S.C. §§ 1531(b), 1531(a)(1) (2000).

ESA. One example of such positive outcomes is found in the Walla Walla Basin in Oregon and Washington, where private water users and federal officials have reached a series of agreements to maintain certain flows in a river that had been dried up by irrigation diversions throughout the 1900s. The agreements have temporarily protected the irrigators from liability for take of threatened steelhead and bull trout, providing enough water to keep the Walla Walla flowing while allowing the irrigators to maintain their established practices with a somewhat reduced supply.<sup>224</sup> Building on these agreements, a wide range of government officials and Walla Walla Basin stakeholders—including irrigators, environmental groups, and the Umatilla Tribes—have been working to develop an HCP to cover water use and other activities throughout the Walla Walla Basin.<sup>225</sup> The threat of ESA enforcement catalyzed these actions, but they proceeded even though no litigation was ever filed.

#### IV. IMPLICATIONS FOR ESA AND WATER LAW REFORM

Broadly speaking, the big challenge here is to strike a sustainable balance in water management: to manage water to ensure, as much as possible, that the available water supplies can meet important human needs while also supporting viable ecosystems. This challenge has always been difficult in the West, where natural water supplies vary greatly from season to season and year to year. In many areas, natural supplies have long been inadequate to meet the full range of ecological needs and human demands even in wet years. The challenge has grown even larger in recent years, as the West has been the fastest-growing region of the United States.<sup>226</sup> Climate change<sup>227</sup> and further population

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224. Bricker & Filippi, *supra* note 79, at 761–64; Filippi, *supra* note 17, at 22–10–12. These creative agreements effectively settled a federal enforcement action for take before it was actually filed. The agreements require the irrigators to allow certain flows to remain in the Walla Walla River past their points of diversion and implement other measures to conserve the species. The agreements are not in the form of HCPs and incidental take permits, but they temporarily provide that same type of protection for both the species and the irrigators.

225. Filippi, *supra* note 17 at 22–11–12.

226. The five fastest-growing states in percentage terms from 1990 to 2000 were all in the Intermountain West: Nevada, Arizona, Colorado, Utah, and Idaho held the top five spots. Texas was number 8, and Washington, Oregon, and New Mexico were numbers 10, 11, and 12 respectively. California was number 18 in percentage terms, but it still led the nation in absolute growth with more than 4.1 million new residents in the decade. U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-2, TABLE 3, STATES RANKED BY PERCENT POPULATION CHANGE: 1990 TO 2000 (Apr. 2, 2001), available at <http://www.census.gov/population/cen2000/phc-t2/tab03.pdf> (last visited Feb. 4, 2004).

growth are likely to make the challenge even more daunting for future generations of westerners.

It is fair and appropriate to question whether today's water laws and the ESA are up to this challenge. As currently implemented – which, as noted above, is often quite different from how the laws are actually written<sup>228</sup> – both have serious shortcomings in promoting conservation and sustainability. Some of the most important shortcomings – the lack of attention to competing values, the failure to provide good incentives, the focus on protecting the status quo rather than promoting positive change – are ironically quite similar in both the ESA and western water laws. If the goal is really a sustainable balance, both prior appropriation and the ESA must be reconsidered.

Recent reform efforts, however, seem to have focused entirely on the ESA. Revising the Act has been a top priority of many on Capitol Hill since 1994,<sup>229</sup> and reform proponents are pursuing this goal with renewed vigor in the current Congress.<sup>230</sup> Western politicians have given special attention to the ESA's effects on water laws and water rights. New Mexico's congressional delegation succeeded in getting an appropriations rider that seriously restricts the amount and sources of water available for the silvery minnow under the ESA.<sup>231</sup> New Mexico Representative Steve Pearce introduced H.R. 2603, a bill that would sharply limit the Interior Department's power to make any changes to existing water allocations and practices.<sup>232</sup> Idaho's Senator Mike Crapo,

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227. See Kenneth D. Frederick & Peter H. Gleick, *WATER AND GLOBAL CLIMATE CHANGE: POTENTIAL IMPACTS ON U.S. WATER RESOURCES* 38–40 (1999), available at <http://www.iwrn.net/pdfdocs/climate.pdf> (last visited Feb. 4, 2004).

228. See *supra* notes 152–162 and accompanying text.

229. See Barry, *supra* note 162, at 131–32.

230. For example, the chairmen of the congressional committees with ESA jurisdiction recently made the following statements in press releases: “For too long, the Endangered Species Act has caused substantial harm to property owners while failing to fulfill its stated purpose: to protect, conserve, and recover endangered species. The act itself has many inherent problems....[I will work with subcommittee chair Mike Crapo] to reform the Endangered Species Act.” Press Release, Senate Environment & Public Works Committee Chairman James Inhofe, Sen. Inhofe Says Endangered Species Act Is “Broken” (May 29, 2003). “We wouldn’t cling to 30 year old science and regulatory policy for our national health care and we shouldn’t in the case of improving Endangered Species Act regulations. At present, this law is bankrupt, literally as well as in species recovery.” Press Release, House Resources Committee Chairman Richard Pombo, Critical Habitat for Endangered Species: Bankrupt...Literally (May 28, 2003).

231. Energy and Water Development Appropriations Act, Pub. L. No. 108-137, §§ 208a-208b, 117 Stat 1827 (2004); *Minnow Language*, *supra* note 20.

232. To impose limitations on the authority of the Secretary of the Interior to claim title or other rights to water absent specific direction of law or to abrogate, injure, or otherwise impair any right to the use of any quantity of water, H.R. 2603, 108th Cong. (2003).

with five western cosponsors, has gone much further by introducing the State Water Sovereignty Protection Act. This legislation does not mention any environmental law, but “delegates to each State the authority to regulate water” and provides that federal officials “may exercise management and control over water in a State only in compliance with the laws of the State in which the water is located.”<sup>233</sup> In other words, anything the U.S. government does to affect water may only be done within state water laws, regardless of the federal interest involved. The implications for ESA implementation are obvious.

In contrast, there has been little or no political push for fundamental water law reform in recent years. Serious efforts at water law reform at the state level seemed promising in the 1980s but since then have virtually died out.<sup>234</sup> The western states<sup>235</sup> helped develop the “Park City Principles” a decade ago, recognizing “the pivotal role of states in resolving water problems; the need to include all stakeholders and to reflect public values in all water decisions; and the importance of a holistic approach to resolving water problems.”<sup>236</sup> The Park City Principles also state that “the context for water management decisions is changing faster than the traditional system can accommodate,”<sup>237</sup> which seems to be a recognition that the traditional system of western water law needs revision. Today, the Western Governors’ Association continues to express support for the Park City Principles,<sup>238</sup> but its website says nothing more specific about water law reform at the state

233. State Water Sovereignty Protection Act, S. 561, 108th Cong. § 4(a) (2003). The cosponsors are Senators Enzi (Wyo.), Craig (Idaho), Domenici (N.M.), Burns (Mont.), and Smith (Or.).

234. As explained by Professor Getches,

In the 1980s, progressive leaders in the West urged states to assume the pivotal role in responding to emerging public values in water. They recognized that the West was changing and that state responses could defuse the growing federal influence on western water policy. Their policy reform agenda included greater efficiency and conservation, conjunctive use of groundwater, protection of instream flows, more comprehensive planning, and inclusive public participation at the level closest to the resource. Despite the efforts of reform-minded leaders, state water law and policy in the West remained essentially static through the 1990s.

Getches, *supra* note 35, at 5.

235. The Western Governors’ Association and its subsidiary Western States Water Council convened a series of workshops in the first half of the 1990s to develop a set of principles for water management that became known as the Park City Principles. D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303, 303–04 (1996).

236. *Id.* at 305.

237. *Id.*

238. WGA Policy Resolution 01-12, *Watershed Restoration Through Partnerships* (Aug. 14, 2001), at [http://www.westgov.org/wga/policy/01/01\\_12.pdf](http://www.westgov.org/wga/policy/01/01_12.pdf) (last visited Feb. 4, 2004).

level.<sup>239</sup> Reforming the ESA, by contrast, is now the Western Governors' "highest legislative priority."<sup>240</sup>

Had the western states followed through with meaningful water law reforms in the 1990s, the recent conflicts over water use and endangered species might well have been less severe. Failure of these reforms at the state level, however, has essentially forced the federal ESA to do the heavy lifting of securing minimally sufficient water supplies for imperiled fish and wildlife. As stated by Professor Getches,

[A] key to replacing federal controls was the creation of innovative state programs to respond to the public's demands for water reform....State systems now risk obsolescence as some of the most important water issues in the West are being entrusted to unconventional federally and locally-driven processes. The decline in the influence of state water institutions is ironic not only because of the time-honored myth of "state primacy" in water, but because at the beginning of the [1990s], the states seemed ready to take leadership in promoting change.<sup>241</sup>

There are at least two policy arguments against weakening the ESA while leaving the water laws alone. First, the western states are not prepared to step up in the absence of the ESA; that is, they do not yet have water laws and institutions that seem capable of meeting the habitat needs of aquatic species, particularly where habitat restoration is needed.<sup>242</sup> As noted above, nearly all the western states have provided some legal recognition for instream flows within the prior appropriation system,<sup>243</sup> but most have been reluctant to use that authority actively to protect instream flows.<sup>244</sup> With rare exceptions, states have not begun to take serious steps toward restoring flows that are already being depleted

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239. See <http://www.westgov.org/wga/policy/index.htm#Water> (last visited Feb. 4, 2004).

240. WGA Policy Resolution 03-15, *Reauthorization and Amendment of the Endangered Species Act of 1973* (June 13, 2000), at <http://www.westgov.org/wga/policy/03/esa3-15.pdf> (last visited Feb. 15, 2004).

241. Getches, *supra* note 35, at 24.

242. See generally Bonnie G. Colby & Tamra Pearson d'Estree, *Evaluating Market Transactions, Litigation, and Regulation as Tools for Implementing Environmental Restoration*, 42 ARIZ. L. REV. 381 (2000) (describing necessary elements of successful habitat restoration strategies, including both compulsory (regulatory) and market mechanisms).

243. Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. DENV. WATER L. REV. 177, 179 (1998).

244. GILLILAN & BROWN, *supra* note 26, at 144; Getches, *supra* note 35, at 30-33.

by the exercise of established water rights;<sup>245</sup> in other words, states have rarely been willing to do more than protect the status quo. Moreover, there has been strong western opposition to the use of federal funding to acquire existing water rights from irrigators and to convert these rights to instream use—even though Congress would put up the money, and even though water rights would be acquired only from willing sellers.<sup>246</sup> And because there is now little or no effort to reform western state water laws, one should not expect anything different from the states in the foreseeable future—especially if a weakened or circumscribed ESA no longer provides effective motivation for change.<sup>247</sup>

Second, the ESA has played a key role in launching *cooperative* efforts to address long-term problems of water use and environmental protection. The California Bay-Delta accord leading to the “CalFed” initiative is probably the most famous example;<sup>248</sup> less publicized examples include the Walla Walla River efforts discussed above,<sup>249</sup> the Carson-Truckee water settlement,<sup>250</sup> and the cooperative agreement for endangered fish recovery on the Upper Colorado River.<sup>251</sup> Some critics have contended that the ESA impedes such cooperative efforts to resolve the West’s tough issues of water use and environmental protection,<sup>252</sup>

245. See Neuman, *supra* note 39, at 953–56 (describing Oregon’s failure to promote flow restoration through improved water use efficiency under the state’s salmon recovery plan); Thompson, *supra* note 209 (“With few exceptions, states have not adopted aggressive instream acquisition programs.”).

246. See Filippi, *supra* note 17, at 22-17-18 (describing opposition to the proposed “Reid Amendment” to the 2000 Farm Bill).

247. See *Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future*, 5 U. DENV. WATER L. REV. 308, 311 (2001) (remarks of Prof. John D. Leshy, noting that the ESA has provided the greatest pressure for changes in water use policies and practices).

248. See Elizabeth Ann Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. COLO. L. REV. 341, 366–67 (1996).

249. See *supra* notes 224–225 and accompanying text.

250. See A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement*, 25 ECOLOGY L.Q. 674 (1999). According to Tarlock:

Ultimately, the success of the Pyramid Lake Paiute Tribe in using the Endangered Species Act to control the Basin’s major source of unallocated drought reserve carry-over storage—the Stampede reservoir on Truckee River—created incentives for the urban stakeholders to seek a more comprehensive Basin-wide long-term settlement. The net result is that major stakeholders, with the exception of the [major irrigation district in the basin], are slouching toward sustainable use and management.

*Id.* at 679 (citation omitted).

251. See Wood, *supra* note 21, at 229–30.

252. See generally J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995); Western Governors’ Association Policy Resolution 01-01-11, State Conservation Agreements under the Endangered Species Act (Aug. 14, 2001), at

however, many such efforts would never have been started without a strong push under the ESA.<sup>253</sup> Without the Act, states and water users may perceive no real reason to come to “the table” or no need to bargain seriously if they do. In the words of one of the leading architects of the landmark Bay-Delta accord:

The Bay-Delta experience also demonstrates that collaborative processes alone—regardless of how inclusive and how well managed they are—often will not guarantee that long-term, national values receive adequate protection. Water users frequently need external incentives to put water on the table for environmental protection—whether those incentives are federal mandates, federal dollars, or something else. Absent the mandates of the Clean Water Act and the ESA, there would be no Bay-Delta Agreement and, therefore, no enhanced protection for the natural resources in that system.<sup>254</sup>

Such negotiated efforts may offer the best hope, at least in the short term, for reaching satisfactory solutions to water/ESA issues in the West. Cooperation obviously has not always worked, but perhaps such huge, nasty “train wrecks” as the 2001 Klamath Basin crisis will help convince others that it is best to try to handle such matters collaboratively. Where the water laws and ESA (as well as the players involved) can both show a fair degree of flexibility, the chances for workable solutions will be improved. Where Congress can provide significant funding to implement such solutions, the chances for long-term success will be maximized.

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[http://www.westgov.org/wga/policy/01/01\\_11.pdf](http://www.westgov.org/wga/policy/01/01_11.pdf) (last visited Feb. 4, 2004) (arguing that the ESA, as applied by the courts, undercuts efforts to work with private landowners to ensure habitat protection and restoration).

253. Even though he ruled against plaintiff conservation groups’ challenge to a 2001 Biological Opinion in the *Rio Grande Silvery Minnow* litigation, Judge Parker closed his opinion with these extraordinary remarks:

I believe it is appropriate to compliment Plaintiffs’ counsel for their work on behalf of the endangered silvery minnow and the entire middle Rio Grande system. It is my impression that at the time this lawsuit was filed, not much was being done by the federal agencies, or by the other major players with interests in the middle Rio Grande, to confront seriously the hard, difficult issues that had to be addressed in order to protect the minnow, and the river itself. By filing this lawsuit, the Plaintiffs’ attorney got the ball rolling, prompting all interested parties to come up with far-reaching solutions to the problems that once seemed insurmountable.

*Rio Grande Silvery Minnow v. Keys*, No. CV-99-1320, slip op. at 49 (D.N.M. Apr. 19, 2002).

254. Rieke, *supra* note 248, at 367.



The basic similarities between the Act and the water laws raise serious questions about whether critics actually dislike the ESA more for its politics than its policy. If the real problem is that the Act is a stubborn, single-interest law that generates litigation and fails to provide positive incentives, then why do these critics so rarely object to prior appropriation on these grounds? After all, such arguments apply with equal or greater force to the water laws. Do they object to ESA because the law is too hard-nosed, or because it is hard-nosed in defense of the environment, not water users? Are they upset with the ESA because it spawns litigation, or because environmentalists sometimes win these cases at the expense of powerful economic interests? Do ESA critics bash the Act because it is one-sided, or simply because it favors the wrong side?

ESA critics speak of the need for “balance” in this area,<sup>255</sup> and they may well believe that all that is necessary to achieve this balance is to limit the power of the ESA over water. But if “balance” truly means meeting both economic *and ecological* needs for water, we clearly will not get it by simply subordinating the ESA to the water laws. What we will get instead is prior appropriation—a system that, left to its own devices, does poorly in providing this kind of balance.

Conflicts between humans and endangered species cannot be blamed solely on endangered species. Likewise, conflicts between western water law and the ESA cannot be blamed solely on the Act. The very nature of these laws—their basic similarities as well as their better-recognized differences—make some degree of conflict inevitable. The West is still learning how to resolve these tough conflicts. One thing is sure, however: we will not achieve a sustainable balance in water management simply by removing strong legal protection for aquatic ecosystems. Until there is real change in western water law and management, the ESA must play a crucial role in counterbalancing prior appropriation.

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255. See, e.g., Sen. Domenici, *Senate Comm. ESA Hearing*, *supra* note 5.