

Irrigation Leader

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Collaborative Restoration Efforts in Oregon's Deschutes River Basin and the Threat of ESA Lawsuits: A Discussion With Mike Britton, Craig Horrell, and Ken Rieck

The Endangered Species Act

By Kris Polly

“What is the purpose of the Endangered Species Act (ESA)?” is a question I often ask rhetorically during presentations. “Has it been successful in saving and recovering species?” is my follow-up question. Sadly, the reality is that since the passage of the ESA in 1973, less than 1 percent of the species on the list have been removed.

This issue of *Irrigation Leader* magazine focuses on the difficult issues of the ESA while providing examples of success. Our interview with Mike Britton, Craig Horrell, and Ken Rieck, all irrigation district managers in the Oregon Deschutes River basin, shows that honest efforts to create a habitat conservation plan can still be subject to ESA litigation. Senator James Inhofe (R-OK), Chairman of the Senate Environment and Public Works Committee, shares his thoughts on improving the ESA for people and species. Wyoming Governor Matthew Mead discusses initiatives to return the ESA to its original

intent of conservation and recovery. Tony Francois of the Pacific Legal Foundation sheds light on the delisting of the Modoc sucker. John Swett of the Lower Colorado River Multispecies Conservation Program and John Kenny of the Platte River Recovery Implementation Program provide information and examples of successful programs. Finally, Joe Nelson and Jordan Smith of the National Endangered Species Act Reform Coalition explain recent administration efforts to improve the ESA petition process.

We hope you enjoy this issue of *Irrigation Leader* and find the experiences, ideas, and solutions offered by the good people in our articles helpful to your situation.

Kris Polly is editor-in-chief of Irrigation Leader magazine and president of Water Strategies LLC, a government relations firm he began in February 2009 for the purpose of representing and guiding water, power, and agricultural entities in their dealings with Congress, the Bureau of Reclamation, and other federal government agencies. He may be contacted at Kris.Polly@waterstrategies.com.

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**COVER PHOTO (from left):
Mike Britton, Ken Rieck,
and Craig Horrell.**

C O N T E N T S

2 The Endangered Species Act
By Kris Polly

4 Collaborative Restoration Efforts in Oregon's Deschutes River Basin and the Threat of ESA Lawsuits: A Discussion With Mike Britton, Craig Horrell, and Ken Rieck

10 Reforming the ESA
By Senator James Inhofe

12 An Initiative to Improve the Endangered Species Act for People and Wildlife
By Governor Matthew H. Mead

14 Delisting the Modoc Sucker: The Rest of the Story
By Anthony François

18 Habitat Farming: A Profile of the Lower Colorado River Multispecies Conservation Program
By John Swett

24 Platte River Recovery Implementation Program

WATER LAW

30 Administration Proposes Improvements to ESA Petition Process
By Joseph Nelson and Jordan Smith

34 Your Rights Under the Clean Water Act
By Reed Hopper

38 CLASSIFIED LISTINGS

Collaborative Restoration Efforts in Oregon's Deschutes River Basin and the Threat of ESA Lawsuits: A Discussion With Mike Britton, Craig Horrell, and Ken Rieck

Deschutes River basin irrigation districts deliver water to more than 150,000 acres of productive agricultural lands in central Oregon. They are the foundation of the region's agricultural economy and stewards of the region's land and water resources. For decades, the irrigation districts have been collaborating with local, state, and federal agencies, as well as local conservation groups, to conserve water and improve fish and wildlife habitat throughout the Deschutes River basin.

Eight central Oregon irrigation districts form the Deschutes Basin Board of Control (DBBC), which serves as a forum for the respective districts to coordinate and share resources to improve water deliveries, conserve water, and enhance river conditions. North Unit Irrigation District's (NUID) Mike Britton is the president of the DBBC. DBBC efforts have yielded 90 different projects and returned 80,000 acre-feet of water annually back to the Deschutes River and its tributaries in the basin.

In 2008, the DBBC and the City of Prineville engaged with the U.S. Fish and Wildlife Service (FWS) to begin developing a Habitat Conservation Plan (HCP) to benefit fish and wildlife species, including the Oregon spotted frog. More than 20 stakeholders have participated in this process, including the FWS, the U.S. Bureau of Reclamation, the Confederated Tribes of Warm Springs, Trout Unlimited, the Deschutes River Conservancy, American Rivers, and WaterWatch of Oregon (WaterWatch).

While the HCP process has been a collaborative effort among irrigation districts, conservation groups, and Indian tribes, recent events threaten to derail it. In August 2014, the FWS listed the Oregon spotted frog as threatened under the Endangered Species Act (ESA) and proposed a critical habitat designation of 22,600 acres in the Deschutes River basin for the frog's benefit. While the HCP stakeholders expected the proposed listing, they did not expect to be threatened

by lawsuits. In December 2015, the Center for Biological Diversity sued Reclamation, claiming that its reservoir operations in the basin violate the ESA with respect to the spotted frog. In addition, WaterWatch has given notice that it intends to also sue Reclamation, as well as the irrigation districts, based on similar claims.

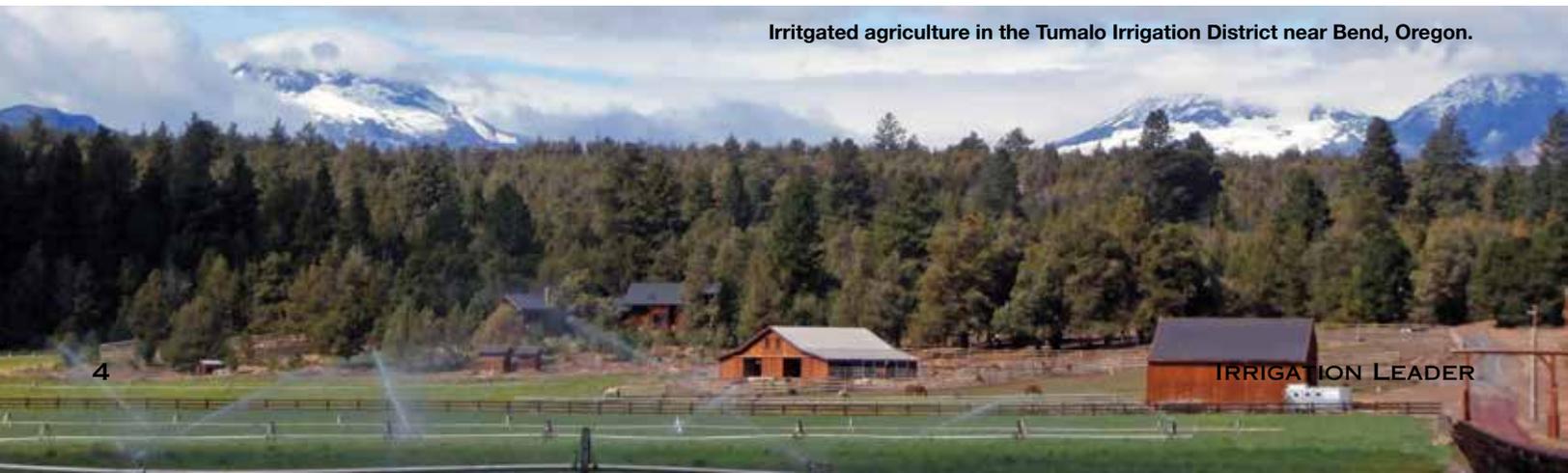
At the center of the HCP process and the litigation are three central Oregon irrigation managers: Mike Britton of NUID, Craig Horrell of Central Oregon Irrigation District (COID), and Ken Rieck of Tumalo Irrigation District (TID). Irrigation Leader's editor-in-chief, Kris Polly, spoke with the three managers regarding their efforts to efficiently deliver water and protect fish and wildlife, navigate large collaborative efforts, and address the challenges posed by litigation.

Kris Polly: Please provide a brief description of the litigation threatening water deliveries in central Oregon.

Mike Britton: Since 2008, we have been working with state and federal agencies, conservation groups, and local farmers and ranchers on a multispecies HCP. There are several threatened fish and wildlife species in the Deschutes basin, and we've been working to improve conditions for both fish and wildlife—for steelhead, bull trout, and the Oregon spotted frog. Our early conservation efforts were focused on bull trout and steelhead, and we've recently shifted more attention to the spotted frog.

In the midst of our collaborative efforts, two environmental groups threatened legal action against Reclamation and the districts regarding alleged harm to the Oregon spotted frog. Last summer, the Center for Biological Diversity and WaterWatch filed separate 60-day notices of intent, setting forth their intentions to sue Reclamation and us for alleged violations of the ESA.

Irrigated agriculture in the Tumalo Irrigation District near Bend, Oregon.



The environmental groups are calling for changes in operations at three reservoirs—Crane Prairie, Wickiup, and Crescent Lake—in order to benefit the Oregon spotted frog. We're concerned about our patrons, which include numerous farm and ranch families. Changes to the storage or release of water at these reservoirs may affect thousands of farms, ranches, and businesses served by these irrigation districts. It's worth noting that Center for Biological Diversity sued the federal government to get the frog listed in the first place and now is suing the federal government to undertake measures to protect it.

Kris Polly: What does litigation under the ESA mean for your respective districts?

Ken Rieck: It potentially complicates all our efforts to conserve water and improve habitat for fish and wildlife, including the Oregon spotted frog. The litigation could mean shifting time and energy away from the HCP and our ongoing development of conservation plans for the frog. It may force us and many others in the basin to switch resources from real, on-the-ground conservation work over to litigation. We have been working on this HCP for a long time and have invested over \$5 million in it, including funds from the FWS, Reclamation, and all eight districts and the City of Prineville. The litigation could also negatively affect our early action plans for the frog. For example, TID and COID have been working for two years on a frog habitat and flow improvement plan in areas below Crescent Lake.

Craig Horrell: We don't understand how the litigation would benefit the Oregon spotted frog or any other species. But we do understand it would be counterproductive to real collaboration. The State of Oregon and many of its agencies, along with local interests like the Deschutes River Conservancy, have committed years of work with us to improve conditions. As Ken said, the litigation could also undermine our current restoration efforts. For example, COID and TID have worked together on several water exchanges to increase instream flows for the frog, and COID and NUID have entered into a joint board resolution to help each other on these same issues.

Mike Britton: We're not sure what would be determined in any litigation, but changes to the current operations could result in real water shortages for thousands of families. NUID is the junior water rights holder in the Deschutes system. Much of NUID's irrigation supply is storage based. Taking stored water by releasing or forgoing storage in the upper reservoirs during the winter and spring for frog purposes will diminish the amount of water available to NUID farms and ranches—it



A typical farm in the North Unit Irrigation District.

is a real threat to our farmers, ranchers, and all water users.

Again, each district is affected differently based on water rights seniority, crop patterns, urbanization, natural river flow rights, and their location in the basin. The junior users have the most exposure, while the senior users have less exposure.

Kris Polly: What were some of the big challenges in collaboratively developing the HCP?

Mike Britton: There have been many of them. Because we're trying to improve habitat for several species with different needs, and we're working with agencies that have different regulations and protocols, it is a constant scientific, policy, and resource challenge. Fortunately, some



A field of carrot seed.



A field of cut hay. North Unit Irrigation District.

of our local conservation groups and many of the state and federal agencies have actually been very collaborative, resourceful, and appreciative of our work. It's been a good team effort to this point.

For the Oregon spotted frog, the lack of contemporary scientific information is a tremendous challenge. Think about it. How can we work to find practical solutions when so little is known about the species? You also have to consider other species in your processes. If you release stored water in the winter or spring for frogs, there could be less water for bull trout, steelhead, and other fish in the summer. Some stakeholders in the basin want full reservoirs for habitat, recreation, and other uses, but they also want full rivers for river habitat. That may simply be impossible given the finite water supplies.

Craig Horrell: I think that the biggest challenge is that when the frog was listed, the science wasn't quite there yet. And in the midst of trying to understand this species, we're doing everything we can to move projects that may provide improved habitat forward. For example, we've been working with the U.S. Forest Service to try to create many acres of wetlands along the Deschutes River (at Ryan Ranch). No one is exactly sure at this point whether it will be effective or whether it would compromise other interests.

Ken Rieck: However, those challenges in no way distract from our belief that the collaborative process is the way to go. It is the only way to responsibly get it done for our basin.

Kris Polly: Do these litigation-oriented environmental groups have support in central Oregon?

Craig Horrell: I believe they have support from some people, but ultimately most people who live and work in our basin understand that collaboration will produce a

more sustainable result than controversial litigation. And I think this applies to everything the districts and others are trying to accomplish, whether it is water transfers, instream leasing efforts, or conservation projects—all things that can help the districts conserve water. Fortunately, many recognize that litigation is simply an expensive, uncertain choice and that it may fail all of us.

Mike Britton: Coming from the stakeholder group that has been working on this for some time, there's huge disappointment that these environmental groups chose to walk away from collaboration.

Kris Polly: How do you communicate with your growers and water users about the issues surrounding these species and the continuing development of the HCP?

Craig Horrell: Last year, COID implemented an HCP plan fee to help bring more light to how we educate our patrons. The fee jumpstarted efforts to educate the public about the ESA, the benefits of the HCP, and the need for COID and the other districts to continue to take responsible, constructive steps to improve the environment. COID also used the fee to improve our overall communications efforts inside the district and with all the other districts and the general public. These steps will help us communicate better than we have in the past.

Ken Rieck: TID also implemented a fee a few years ago to help pay for the conservation plan. We actually had a good reaction; people were pleased to learn that we were taking all these actions to improve the environment. They were looking for action from the district on these issues and liked learning more about the specifics of our efforts. We use all the available communication tools these days from old-school newsletters to social media, like Facebook. It's a job keeping everyone up to date and informed, but we recognize the value to our patrons.

Mike Britton: At NUID, we held a town hall meeting to inform our growers and water users of the seriousness of this issue and to provide current and accurate information. We're also making presentations to various local organizations to make sure they understand the potential risks inherent in litigation. And our local newspapers have been very informative in the coverage they are providing on the issue.

The DBBC has also taken a number of steps to improve communication among our growers and districts. We're constantly evaluating and using many of today's communication tools to provide real-time analysis and information to our growers and the districts. This information helps them make better-informed decisions for their families and businesses.

Ken Rieck: That's right, the DBBC has developed a strong communication and education program that enhances our ability to reach out to the public and share our stories.

Kris Polly: What are the next steps in the development of the HCP?

Mike Britton: We continue to work with our basin partners to find solutions for improving habitat conditions for all the species that will ultimately be covered by the HCP, including the Oregon spotted frog. Once that step is complete, we will begin the work to comply with the National Environmental Policy Act. Naturally, we're working closely with federal and state agencies and local conservation groups as we move forward.

Kris Polly: Are there any positive lessons that have come out of this experience?

Craig Horrell: The one thing I found that is positive is the resolution of the DBBC. We are stronger as a group. We will get through this, and our basin will be in a better position than it was before. And, it's really reassuring to see all of the support that is taking hold for science-based collaboration rather than controversial litigation.

Ken Rieck: Since the early 1990s, there has been a huge increase in the efficiency of water use in the entire basin. We have been able to develop sufficient water for our farmers and at the same time return ever-increasing amounts of water back to the river to help fish, wildlife, and recreation. That had been underway long before all this started.

We are now working together in ways we have not before. We are discussing different and more efficient ways to move water out of these reservoirs, between the districts, and back into the streams and rivers. The HCP

process motivates all of us to come up with outside-the-box solutions. And we have to succeed because our farmers want a healthy environment.

Kris Polly: What advice do you have for other water managers dealing with ESA-related issues?

Mike Britton: If you know a species is going to be listed or that the threat of listing is present, don't wait. Be proactive, engage those who you would not typically consider to be allies, and build support. Do this before litigants and courts have an opportunity to make decisions for you.

Craig Horrell: Get ahead of the communications with your patrons. Once you do that, having their support is really important. One thing I have learned is that staying ahead of the process requires a lot of work, but it's invaluable. Without collaboration and support, especially from your patrons, you are going to fail.

Ken Rieck: I agree completely with that and would also add that it is important to remain determined to stay the course. The process can get really discouraging, so you have to be resolute.

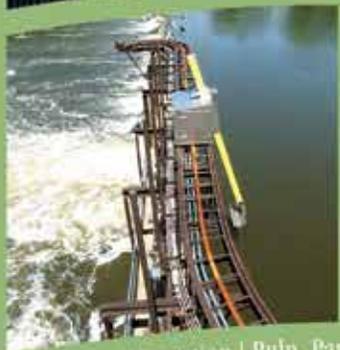
Kris Polly: What is your message to Congress about how the ESA affects the ability of water providers to serve their growers and water users?

Mike Britton: Congress should reevaluate this law. It's 2016. The law should be about collaboration and incentives and should not promote litigation and regulation that can slow restoration for fish and wildlife. The uncertainty the ESA creates is also a real problem for many people who have done nothing wrong. In farming, uncertainty presents huge social and economic risks. It affects job creation, capital investment, and overall economic activity, especially in towns like Madras, Oregon, which relies heavily on farming.

For NUID, the uncertainty of a reliable water supply makes long-term planning impossible. As a result, fewer crops may be produced, affecting local, regional, national, and even international markets. The reduction in American produce increases our reliance on imported products and goods, which brings much concern about food safety and reliance.

Craig Horrell: I agree with Mike. Congress should take a hard look at the law. Our national focus should be recovering these species, not listing them and then spending decades in the courts.

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Reforming the ESA

By Senator James Inhofe

Over 40 years ago, the well-intentioned Endangered Species Act (ESA) was signed into law to provide for the conservation of species and the ecosystems on which these species depend. Since then, the ESA has been hijacked by environmentalists intent on abusing this legislation to pursue their own agendas.

In 2011, the U.S. Fish and Wildlife Service (FWS) engaged in closed-door settlements after being sued by environmental groups over which species would be listed. These sue-and-settle tactics, a hallmark of the Obama administration, eventually lead to clandestine meetings and an agreement whereby FWS would consider, and ultimately list, hundreds more species at the direction of these groups.

Despite repeated requests from Congress, FWS has failed to provide documentation of this surreptitious activity, leaving us to speculate about collusion between environmental groups and the Obama administration. FWS continually touts the importance of science and data-based decisionmaking, but these settlements raise the question of who drives ESA listings and what the basis for those decisions are.

The administration likes to tout that it has delisted more species than any other administration, but it conveniently fails to acknowledge that the species recovery rate hovers at a mere 2 percent. The administration glosses over the minor detail that while 12 species have been delisted, hundreds more have been listed and hundreds more remain to be considered. That is the principal problem. And yet, the federal government still manages to spend billions of dollars each year on what it claims is species conservation.

It's clear that the ESA isn't failing because of a lack of money; it is failing because the budget is not being used for recovery. With no choice but to focus resources on listing species, as a result of lawsuits from



crony environmentalists only interested in maximizing their bottom line, FWS is unable to focus resources on conservation.

These lawsuits also force FWS to designate habitats for species in a way that serves environmental groups, when really, habitats should be designated based on a comprehensive understanding of the species and its surroundings. The ESA has become nothing more than an ATM for environmental groups. The president's notorious and ongoing disregard for sound science and a preoccupation with activist groups means that groups are able to profit handsomely from these sue-and-settle victories through enhanced fundraising activities.

Last fall, a federal district judge held that FWS failed to fully evaluate ongoing conservation methods in its decision to delist the lesser prairie chicken. A few weeks later, when FWS announced that it would not list the greater sage grouse, the administration was quick to use the grouse as an example of the ESA in action. And yet that couldn't be further from the truth, because the federal government retained control of the species' habitat.

Activist groups are clearly in control and not just in the way species are delisted. In Oklahoma, the American



burying beetle was listed as endangered in 1989 but in the decades since, the insect's population has rebounded greatly. FWS, however, has been glacially slow to consider removing it from the list of protected species. The continued listing of the beetle is having real-world effects, unnecessarily driving up costs for businesses and development projects.

These problems highlight the need for increased state and local efforts and decreased federal efforts in order to achieve meaningful results. Not only has local involvement been shown to increase the effectiveness of species recovery, but it is beneficial to local economies. Local involvement has been limited, however, because the president is less concerned with how policies affect individuals in rural states like Oklahoma than he is with the stance of groups that have the resources to sway elections.

The president's complicit participation in sue-and-settle tactics have given the administration the ability to cede any and all scientific responsibility by allowing the FWS agenda to be dictated by environmentalists and the courts. The FWS agenda and the implementation of the ESA should instead be determined by responsible

policymaking based on sound science and by experts at the state and local level.

FWS Director Dan Ashe understands that the ESA must be reformed through legislation, and he is ready to work together with Congress to do so. In my role as chairman of the Environment and Public Works Committee, I look forward to working to reforming the ESA with bipartisan legislative proposals that benefit states while clarifying the act's original focus and achieving real results.

Senator James M. Inhofe (R-OK) is the chairman of the Senate Committee on Environment and Public Works, which has oversight jurisdiction of the U.S. Environmental Protection Agency. He has represented the state of Oklahoma for 21 years and Oklahoma's 1st congressional district for 8 years. He also served in Oklahoma's state house and senate from 1967 to 1977. Prior to his public service, Senator Inhofe was a businessman for 30 years. He is also a proud Army veteran.



An Initiative to Improve the Endangered Species Act for People and Wildlife

Wyoming Governor Matt Mead delivered the keynote at the opening workshop of his Western Governors' Species Conservation and Endangered Species Act Initiative in Cody, Wyoming.



By Governor Matthew H. Mead

Those of us fortunate to live in the West recognize that it would not be the West without wildlife. Wildlife enriches our lives and contributes to our economy. Preserving our wildlife heritage and maintaining our wide-open spaces are critical to our way of life. Therefore, states should lead species conservation efforts, rather than being subjected to the heavy hammer of the Endangered Species Act (ESA).

Today, the ESA is broken. Species are listed at alarmingly high rates, yet species recovery and delisting rarely occur. Since 1973, 2,308 species have received ESA protection. Of those 2,308 species, only 62 species have ever been delisted—33 due to recovery, 19 because a discovery of data error showed they did not warrant protection in the first instance, and 10 due to extinction. These data show that roughly 1.4 percent of species listed have been delisted due to recovery. We must do better for species. We must not merely prevent the extinction of species, but instead, we must recover and delist species in order to have sufficient resources to protect species that are truly imperiled. Unquestionably, in the last 40-plus years,

the ESA has saved some critically endangered species. It can continue to do so, but not as currently implemented—it needs to be improved.

We face considerable challenges when it comes to conserving wildlife as our population expands. For things of such importance to the West—our wildlife and wildlife habitat—it is important that we get species conservation right. That is why I have made the Western Governors' Species Conservation and Endangered Species Act Initiative my focus as chairman of the Western Governors' Association (WGA) this year.

Few organizations are as well situated as WGA to conduct a productive and bipartisan dialog on this significant topic. Governors are leaders in this area, as proven by western states' outstanding record of species conservation. States have an obligation to manage wildlife. Western states have shown their ability to work together to protect species, as demonstrated by their work that resulted in the recent decision of the U.S. Fish and Wildlife Service that the greater sage grouse does not warrant listing under the ESA. Protecting the sage grouse and its habitat required collaboration among scientists; land managers; industry; conservation groups; agricultural producers; local,

state, and federal government entities; and others. The sage grouse is a success story. Western states have shown through collaboration that we can obviate the need to list a species while still allowing for economic development.

Working with WGA, I am bringing together a broad spectrum of stakeholders to take a hard look at the ESA and determine how it is working and how it is not working. The initiative serves as a mechanism for states to share case studies, like the sage grouse, and innovations related to species management in hopes of eliminating the need to list species in the future. Additionally, it allows interested parties to share ideas to improve implementation of the ESA.

We will accomplish the objectives of this initiative through various means. We are hosting a series of workshops across the West. WGA held the first workshop on November 12–13, 2015, in Cody, Wyoming, where I led a great conversation about species conservation. More than 100 participants from private industries, nonprofit organizations, and state and federal agencies were in attendance. On January 19, 2016, Idaho Governor Butch Otter hosted the second workshop in Boise. (You can watch the discussion at both workshops online via the WGA YouTube page.) Governor John Hickenlooper

will host the third workshop on March 9–10, 2016, in Denver, Colorado. Finally, Hawaii Governor David Ige will host the last workshop on April 7–8, 2016, in Honolulu, Hawaii.

Webinars hosted by WGA will expand our outreach beyond the West and highlight conservation success stories. The January webinar titled “Voluntary Species Conservation Incentives and Collaboration” highlighted the successful recovery of the black-footed ferret in Colorado and Wyoming. The webinars will also be available online, along with a growing collection of case studies and resources related to species conservation and the ESA. WGA will announce future webinars on the initiative’s website.

The information and recommendations produced through this initiative will inform the ongoing development of WGA policy on species conservation and the ESA, in the West and nationally. States as partners, and a functional ESA, would pave the way to recover species, not give lip service to it. We must come together and trust that, working in good faith, we can find the solutions needed to keep the West, and the nation, a vibrant and thriving place for both people and wildlife.

Matthew H. Mead is the governor of Wyoming.



Idaho Governor Butch Otter hosted and also addressed the second workshop of the chairman’s initiative in January 2016 in Boise, Idaho.

The Modoc sucker is located in the Pit River watershed of southern Oregon and northeastern California. Photo credit: U.S. Fish and Wildlife Service.

Delisting the Modoc Sucker: The Rest of the Story

By Anthony François

Under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (FWS) has imposed limitations on water resources across the United States. These regulatory protections are a ubiquitous reality for water managers and property owners alike. With more than 160 species listed under the ESA, fish make up more than 10 percent of all domestic listed species and are the largest category of both endangered and threatened animals under the act.¹

Recently, listed fish species have made news and disrupted water management systems in large ways. Protections for the delta smelt have required dramatic changes to the operation of California's Central Valley Project, causing billions of dollars in damage to the economies of the nation's most productive farm counties. Protections for the Rio Grande silvery minnow in New Mexico raise similar concerns, while the alterations to water project operations up and down the West Coast due to the listing of salmonid species are too numerous to catalog.

So one can understand the relief and perhaps even the sense of accomplishment with which the FWS recently announced its decision, "thanks to decades of collaborative efforts," to remove the Modoc sucker (*Catostomus microps*), a six-inch fish native to the Pit River watershed in Northern California, from the endangered species list. A self-congratulatory press release implies that the FWS arrived at this decision proactively and enthusiastically after successfully laboring to increase this little fish's dwindling populations. FWS Director Dan Ashe described the event as a "great victory for conservation, for the Endangered Species Act, and for our natural heritage."²

Would that it really happened that way. This is not an ESA success story. It is spin to cover 30 years of unfounded federal habitat protections for a healthy fish species that the FWS has known for more than half a decade probably did not warrant ESA protections in the first place.

The FWS fails to mention that it is only now getting around to changing the Modoc sucker's status after concluding over 6 years ago that it was no longer endangered or that prior to coming to that conclusion in 2009, the FWS had illegally delayed a required status review of the Modoc sucker for 15 years.

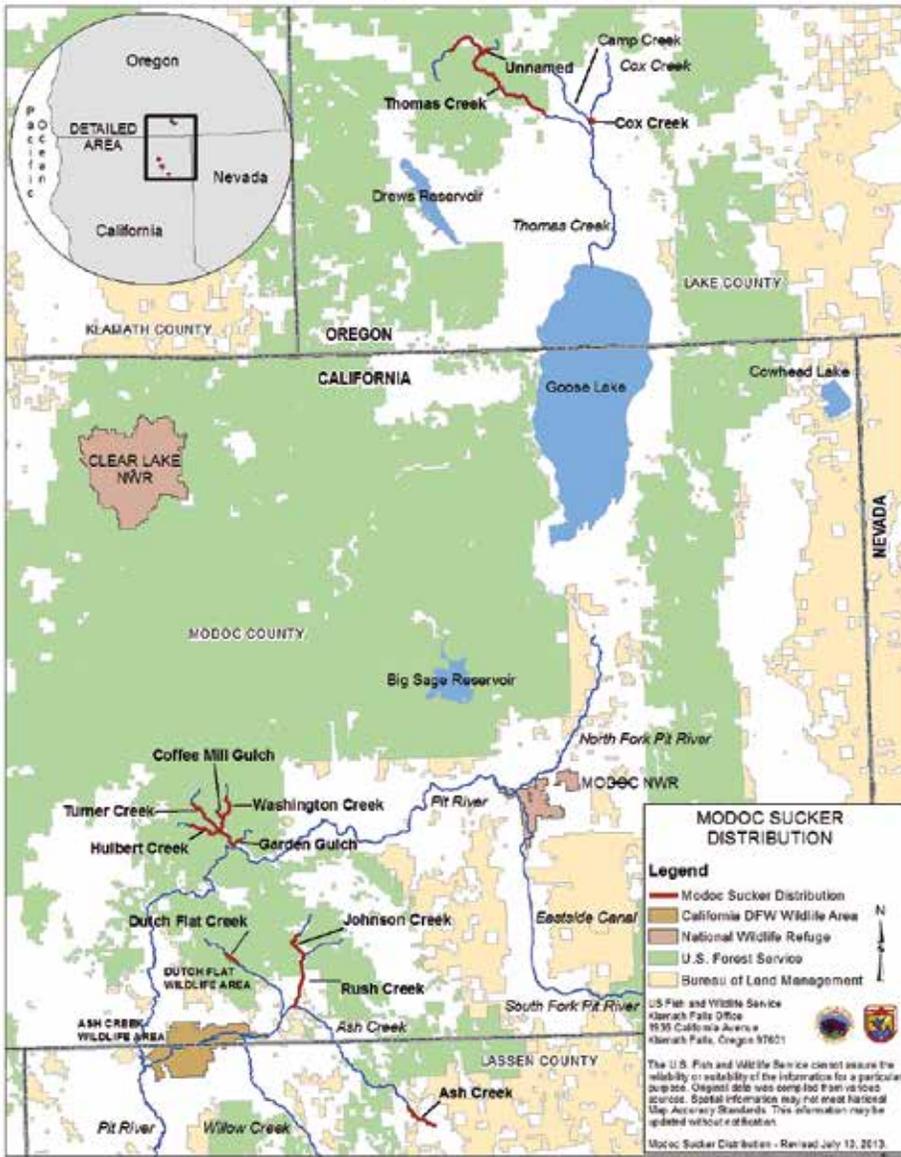
More troubling about the FWS's victory lap is its claim that the delisting is a result of recovery brought about by its regulatory impositions. The official 2009 status review says something very different: Many more populations of the fish existed at the time of its 1985 listing than the FWS then realized. And the FWS's concern, at the time of listing, about hybridization with another species was simply incorrect.

So instead of celebrating a recovery, the FWS should be apologizing for getting it wrong in the first place, for imposing three decades of unnecessary regulation (including, for example, obstacles to pipeline construction), and for dragging its feet for more than six years after concluding the species is not endangered.

The history of the Modoc sucker is an unfortunately familiar one. The fish was listed as endangered in 1985, based on limited information. The FWS then failed to conduct a statutorily required five-year status review for almost two decades. In 2005, the Pacific Legal Foundation sued the FWS on behalf of the California State Grange to compel it to perform more than 200 overdue status reviews of listed species in California, including the Modoc sucker. The FWS finally completed its review of the sucker in 2009 and found that the fish was more populous, with a more widespread habitat, than was thought at the time of listing. It also found that the possibility of hybridization with other species was not a serious concern, as had also been thought in 1985. In short, the listing itself was probably in error. The 2009 review concluded that the fish should be removed from the list of endangered species.

But there the matter sat. The FWS had concluded that a status change was warranted, but it took no action to

Distribution of Modoc Sucker (*Catostomus microps*)
Modoc County, California and Lake County, Oregon



A map of the Modoc sucker habitat. Photo credit: U.S. Fish and Wildlife Service.

actually do so. The fish remained on the endangered list, and protective regulations remained in place. In 2011, the Pacific Legal Foundation filed an administrative petition, this time on behalf of the California Farm Bureau and the California and Oregon Cattlemen's Associations, asking the FWS to carry out the recommendation in the 2009 status review. The Pacific Legal Foundation then had to sue the FWS again in 2013, this time because the agency failed to take timely action on the 2011 petition.

Prompted by almost nine years of litigation, the FWS finally published a proposal to delist the Modoc sucker in February 2014. But even that process languished for almost two years, including a significant time delay occasioned by

1. U.S. Fish and Wildlife Service, *Species Report*, http://ecos.fws.gov/tess_public/pub/boxscore.do.
2. U.S. Fish and Wildlife Service, "Service Removes Modoc Sucker from the Federal List of Threatened and Endangered Wildlife," press release, December 7, 2015, http://www.fws.gov/news/ShowNews.cfm?ref=service-removes-modoc-sucker-from-the-federal-list-of-threatened-and-ES_ID=35389&Source=iframe.

the FWS's failure to publish a notice of the proposed delisting in a local newspaper.

Multiple lawsuits, and only those lawsuits, are what led to the announced delisting. Not a successful recovery effort, and certainly nothing any reasonable observer would call proactive steps by the agency. It is good that the FWS finally took this long-overdue action, and it is fitting to give credit where credit is due. But it is disappointing that the FWS decided to spin so many years of foot dragging as energetic agency action.

The saga of the Modoc sucker is instructive on two aspects of the ESA. First, species are frequently listed based on limited information. Sometimes, the very dearth of information directly prompts the listing. But the consequences of the ESA's protections frequently spur significant scientific interest in the species, yielding much greater information for the FWS's subsequent use in determining status under the ESA. This knowledge-growing result of the act's protections leads to the second lesson. The ESA requires status reviews every five years because Congress anticipated growth and refinement of knowledge, as all good scientific inquiry tends to do. But the ESA has an unfortunate flaw: It does not require the FWS to act when a formal review indicates a change in status. This is why almost a decade of litigation was necessary to get where we are today.

A simple statute change to require that a proposed change in status to implement status review recommendations would not only save time, but would free resources the FWS now wastes on species that it knows do not warrant protection.

Tony François is a staff attorney with the Pacific Legal Foundation's National Litigation Center in Sacramento, California. You can reach Mr. François at (916) 419-7111.

The opinions expressed in this article are the author's and not necessarily those of the Pacific Legal Foundation.





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Habitat Farming: A Profile of the Lower Colorado River Multispecies Conservation Program

By John Swett

Historically, both federal and nonfederal agencies have to work with the U.S. Fish and Wildlife Service (FWS) to get Endangered Species Act (ESA) compliance. In 1994, the FWS designated critical habitat for the endangered razorback sucker and bonytail that included the entire lower Colorado River. That meant that federal or nonfederal entities, including local water providers, that supply Colorado River water would have to undertake potentially cumbersome ESA consultation processes to conduct regular operations.

That designation prompted representatives from nonfederal water and power entities and the U.S. Bureau of Reclamation to seek ESA compliance in all of their actions. We decided that instead of pursuing compliance individually, the entities would create a compliance program to address section 7 consultation for federal agency actions and section 10 consultation for nonfederal actions.

Those discussions began a 10-year planning process. During that process, the FWS issued a biological opinion that only covered management actions along the lower Colorado until 2002. The interested parties were unable to get a program off the ground in that time frame, so they had to reconsult. The parties finalized the program documents in 2004 and signed them in April 2005.

The Program

The 50-year Lower Colorado River Multispecies Conservation Program (LCR MSCP) is both comprehensive and unique. By providing combined section 7 and section 10 compliance for covered actions, state-based water and power agencies and federal entities can go about the business of ensuring water supplies to the Southwest. Actions covered by the LCR MSCP include the delivery of 9 million acre-feet of water for Arizona, California, Mexico, and Nevada; the generation of power from six main stem facilities; and all the maintenance and operations activities associated with water delivery and power generation. It is important to note that this is a federal–nonfederal partnership, in which Reclamation is the implementing agency. It is not, however, a federal program.



The southwestern willow flycatcher.

The Colorado is the most heavily regulated river in the country. It was built that way to be able to convey water. So under the LCR MSCP, activities such as lining banks and dredging get ESA compliance. LCR MSCP partners get the compliance through the implementation of conservation measures.

Covered Species

The LCR MSCP's habitat conservation plan (HCP) covers 26 species and 5 additional evaluation species with conservation measures attached to each species. At the time the program began in 2005, there were 6 listed species: the razorback sucker, the bonytail, the humpback chub, the Yuma clapper rail, the southwestern willow flycatcher, and the desert tortoise. We were also able to get coverage for 20 other species through section 10.

An important part of program negotiations involved

determining which species existing on the river could be listed if actions were not taken. We looked existing state lists—the California Endangered Species Act and the Arizona and Nevada Sensitive Species lists—to develop the LCR MSCP list. At the time, we did not know enough about the five evaluation species to write conservation measures. So we agreed to learn more about them.

Since LCR MSCP implementation, the FWS has only listed one of the covered species: the yellow-billed cuckoo. Following the listing, all that program partners required was a letter from the FWS to confirm that the conservation measures the LCR MSCP partners had been undertaking were sufficient to provide the necessary conservation for this species. Under the program, no additional work was required.

Conservation Measures

Fish augmentation. This main element requires us to put forward the effort necessary to raise and stock approximately 1.2 million native fish back in the lower Colorado River: 660,000 razorback and 620,000 bonytail. There was a sustained population of razorbacks that has existed in Lake Mohave since the 1990s. The bonytail, however, is functionally extirpated on the lower Colorado. So there is much work to be done.

The system has been altered from 100 years ago. Following the advent of dams and rip-rap, the river now stays within in its bank lines. The Mormon settlers on the lower Colorado said of the water that it was “too thin to plow and too thick to drink.” Where the river used to be really turbid and flashy, it is now static and clear. Sediments drop out behind the dams.

The two endangered fish species evolved in that flashy,

turbid water. The clear, blue water that has taken its place has been stocked with nonnative game fish, almost all of which are predators of native fish at all stages of the native fish life cycle. The native fish do not get big enough to survive the gauntlet.

To address this issue, we circumvent the early states of the life cycle by bringing fish to the hatchery, grow them to a subadult size (around 12 inches), and then stock them back into the system. We work with state and federal fish hatcheries to do this.

Habitat creation. The other big component of the LCR MSCP is that we have to create habitat for most of the species covered under the LCR MSCP. There are four habitat types: backwaters, cottonwood willow, honey mesquite, and marsh. We have to build and manage a total of 8,132 acres over the life of the program.

We build these habitats as mosaics so that every acre can be used by multiple species. If we didn't design it this way, the program would have to conserve more than 33,000 acres to accomplish the same goals. We are habitat farmers. Riparian habitat requires overbank flooding to regenerate, and there is no way for this river to get out of its channel throughout most of its length below Lake Mead. We have to build an irrigation system to intensively irrigate habitat over the life of the program.

The MSCP is working toward the 8,100 acres and is ahead of the HCP schedule. Right now, we are at 4,400 acres. We have a build-it-and-they-will-come concept, and it is working. The yellow-billed cuckoo is a great example. Prior to program implementation, there were very few on the lower Colorado. It is a neotropical, migratory bird that was supposed to be attracted to mature, riparian forests. Yet, the birds entered into our habitats three years after planting and are successfully



Stocking a hatchery-raised razorback sucker into the Colorado River.



Fisheries biologists scanning a captured razorback sucker for a passive integrated transponder tag.



The razorback sucker.

breeding. Now we have one the largest populations of yellow-billed cuckoo in the western United States.

Habitat creation also ties into the program's fish augmentation goals. Backwaters serve as a sanctuary habitat for endangered fish. These ponds are hydrologically separated from the lower Colorado to prevent the migration of nonnative fish. The goal is to enable the fish to go through their whole life cycle in those ponds, monitor and manage their progress, and then return them into the river for augmentation.

To create habitat, we need land and a water right. We use lands owned by the California Department of Fish and Wildlife, the Arizona Game and Fish Department, and the FWS. The LCR MSCP can go out and purchase land and water where there is a willing seller, but we do not retain land ownership; we transfer it to our state or federal agency partners.

We just finished up a big project. For decades, many people identified Planet Ranch, which is on the Bill Williams River, immediately upstream of the Bill Williams National Wildlife Refuge, as suitable for conservation. We just completed the deal to acquire 3,000 acres in mid-December 2015 to keep water in the system for the refuge downstream and to create additional habitat that will enhance the wildlife value.



Monitoring small mammal populations at Cibola National Wildlife Refuge Unit 1 Conservation Area near Cibola, Arizona.

Project Partners

The program comprises 57 different partner agencies. The LCR MSCP steering committee has limited responsibilities: It provides authorization for the LCR MSCP program manager to acquire land or water and approves the program budget. Each year, the steering committee approves a report of our prior fiscal year accomplishments, current happenings, and planned activities.

The first five years of the program were dedicated to planning and process documents. But, at this point, our budget is high because we are at the stage of the program in which we need to create this habitat. Halfway through the program, the budget will go down, so we really have to finish habitat creation by 2025. Although we run it through an adaptive management process, it is a difficult thing to do with events like the recent drought.

The Structure of Success

We have seen an increase in razorback survivorship, especially in the reach between the Davis and Parker Dams. We have not seen the same thing with the bonytail, but we continue to do a lot of research.

The LCR MSCP is recognized as one of the most successful, large-scale landscape conservation programs in the world. A reason for this success is that the program has well-defined goals, a strong mission, and a purpose. This isn't a recovery program; it is a compliance program. It seeks to conserve habitat, work toward recovery of existing species, and limit new listings. All the while, the program is dedicated to optimizing future water and power development. We cannot change river operations for our ESA work.

Another fundamental component of our success has been the support of the steering committee. The committee has been really active and willing to compromise to find solutions. All the LCR MSCP partner agencies have skin in the game. Success is really important to everyone involved.

John Swett has been the program manager of the Lower Colorado River Multispecies Conservation Program since 2008. Prior to becoming program manager, he was the LCR MSCP Wildlife Group manager. For more information about the program, you can reach Mr. Swett at jswett@usbr.gov or (702) 293-8555.



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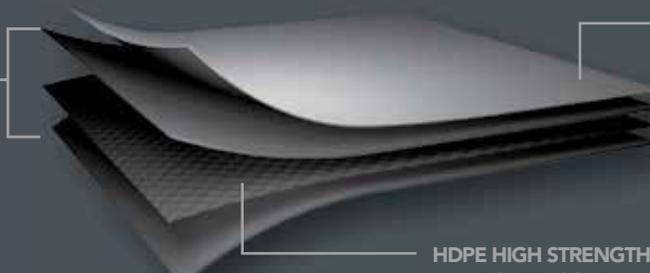
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Platte River Recovery Implementation Program



Platte River Recovery Implementation Program staff traversing the Platte River on an airboat.

The Platte River Recovery Implementation Program (PRRIP) is an effort by the states of Colorado, Nebraska, and Wyoming; the federal government; water users; and environmental groups to maintain and improve habitats for the endangered whooping crane, the least tern, the pallid sturgeon, and the threatened piping plover.

Endangered species issues emerged at different locations on the Platte River about the time the Endangered Species Act (ESA) was passed, framing how those issues were resolved. For example, in the late 1970s, whooping crane litigation arose out of the construction of an impoundment along a tributary of the Platte River in Wyoming. A decade later, the Central Nebraska Public Power and Irrigation District (CNPPID) started a relicensing process with the Federal Energy Regulatory Commission.

The states and the U.S. Department of the Interior came to the realization that the disputes about endangered species along the Platte all involved common issues. Rather than trying to resolve those issues on an individual basis, they determined it would be much more effective and efficient to take a programmatic approach.

In the early 1990s, the states and Interior began discussions that culminated in the signing of a cooperative agreement on July 1, 1997. That agreement initiated a process for developing a plan to assist in the recovery of the endangered species along the Platte River. The agreement created a governance committee with representatives from the three basin states, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, Platte River water users, and environmental groups to lead the negotiation process. After almost 10 years of negotiation, the committee crafted a final program document.

“On January 1, 2007, the PRRIP came into existence. We are implementing the plan that was developed during the cooperative agreement phase,” said Dr. Jerry Kenny, the executive director of PRRIP.

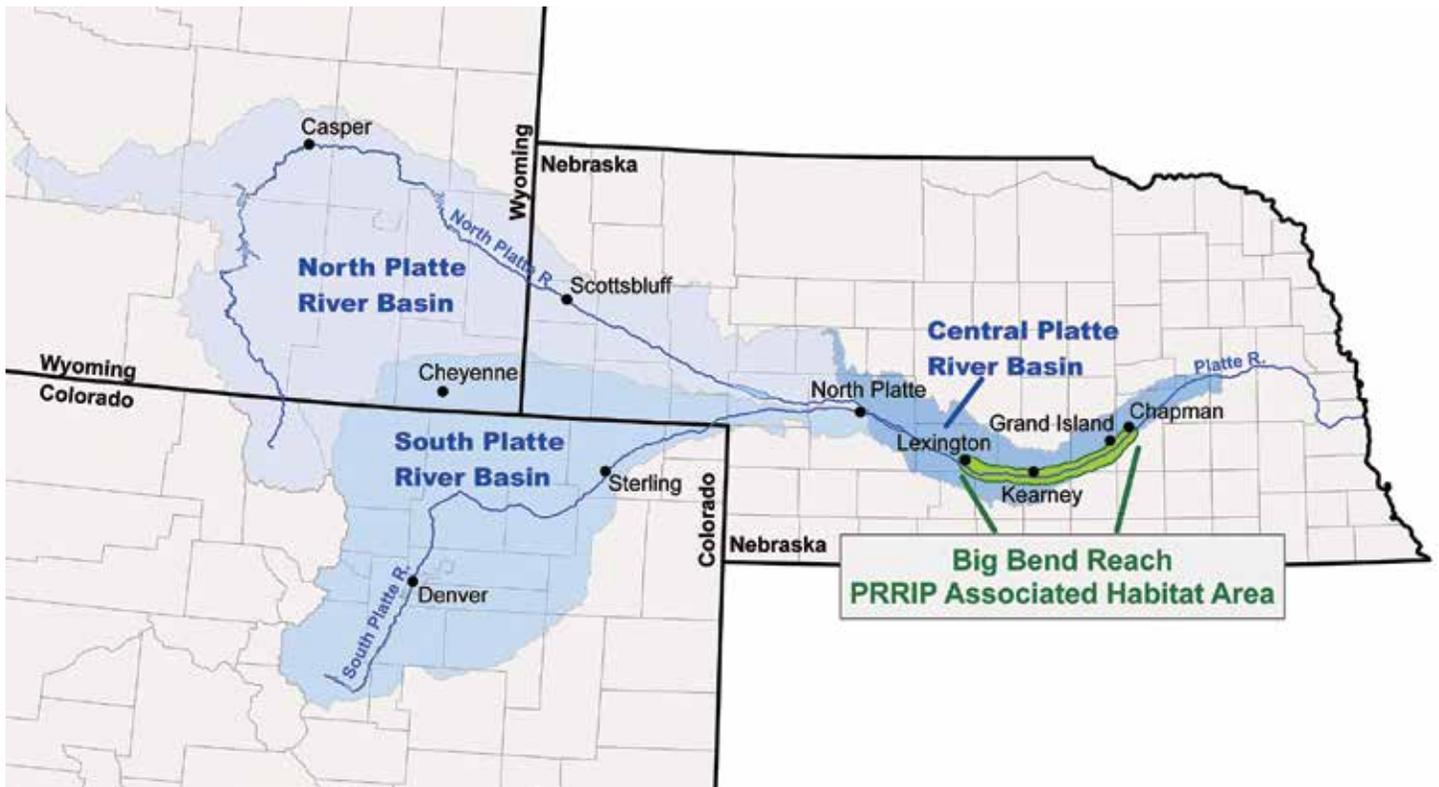
Implementation

The overarching goal of the program is to use land, water, and scientific monitoring and research to achieve benefits for the target species and their habitats in the central Platte River. Species benefit from PRRIP land management and acquisition in the central Platte River and from PRRIP water activities in the central and upper Platte regions. The program also provides ESA compliance for existing water-related activities for the entirety of the North and South Platte River basins and the mainstem of the Platte River upstream of the confluence with the Loup River. The program is implemented incrementally, with the first increment extending through 2019.

The basic day-to-day operations of irrigation districts throughout the basin remain unchanged. There are some operational agreements where species activity is greatest. For example, in the associated habitat region of the central Platte, where most of the activities of the program are focused on species, there is an agreement between the U.S. Fish and Wildlife Service and a district that governs how to ramp up or down on hydropower generation throughout the year. But, by and large, because of the program, the districts are able to continue to operate as they had in the past.

Program Elements

The program has three components: land, water, and adaptive management. Under the land component of the



program, the mission was to acquire 10,000 acres and restore habitat via purchase, easement, or management agreement. The PRRIP has accomplished that goal. The 10,000 acres was a floor, not a ceiling, and over 12,000 acres have been acquired by the program.

The water component seeks to get 130,000 to 150,000 acre-feet of water flow into the Platte River a year. When the states entered into the program, they each contributed water for a total of 80,000 acre-feet. Those contributions reflect different actions by the states. For Nebraska, the contribution involved the environmental account in Lake McConaughy and a portion of the natural inflows into the lake over the nonirrigation season. In Wyoming, the contribution was derived from a modification to Pathfinder Reservoir that recovered storage lost to sedimentation. In Colorado, the Tamarack Project retimes water from the river in times of excess by pumping it into recharge basins so that it comes back in times of shortage.

That leaves 50,000 to 70,000 acre-feet that the program needs to acquire. The single largest contribution toward that number is likely to come from a reservoir project that PRRIP is working on in association with the State of Nebraska and the CNPPID to retime water flows from times of excess to times of shortage. The advantage of a retiming project is that it minimizes the amount of water that the PRRIP needs to look for from existing uses.

PRRIP is also working with its partners on developing water markets to provide options for agriculture.

Depending on the economics for farmers, water may be a cash crop unto itself. If the PRRIP leases water from a district, it is because an individual landowner or district has approached the program to develop a water leasing arrangement. The program has no authority to engage in condemnation for land or water.

The adaptive management component reflects the lack of information with regard to endangered species and their habitat requirements. For nine years, the PRRIP has monitored, analyzed, and modeled to determine the best way to use land and water resources for the benefit of the species. The PRRIP is working toward a better understanding of the connection between the physical environment—river flows, river geomorphology, and vegetation—and habitat use.

Dr. Kenny stated, “The PRRIP has taken a focused, need-to-know approach to its research. Unless we can link the information to a program management action that is linked to one of our target species, we will leave the research to someone else. That approach has allowed us to effectively leverage our resources.”

Measuring Success and Moving Ahead

The program is not tied to specific numeric goals for species, so the program does not focus on year-to-year fluctuations. For example, in some years there is heavy use of the river by whooping cranes, whereas in others, if the birds have started off somewhere in South Dakota or have a strong tailwind, they just fly right over. The focus is on

the long-term trends in habitat and species use.

The lawsuits averted have been a great success. There has not been litigation on the Platte associated with endangered species. All the parties have worked diligently toward solutions and staying out of court. The participating states have also benefitted from a greater degree of regulatory certainty and a streamlined section 7 consultation process.

For the land component of the program, the PRRIP has largely acquired the lands and created the habitat. The program is now entering into more of a maintenance-type role. On the water end, it is moving ahead with the reregulating reservoir project and investigating a large-scale recharge effort. The PRRIP already has water leased and recharge projects underway in conjunction with several irrigation districts. It is also working toward addressing limitations in the river that impede the ability to get water from Lake McConaughy down to the habitat reach. Overall, while the PRRIP has accomplished a great deal, there is still a ways to go.

Cornerstones of an Effective Program

A collaborative approach and the independent implementation of the program have been key to its success. The mission is to find the truth, whatever the answers are. The program has advisory committees for water and land and adaptive management. A six-member

independent science advisory committee with members holding three- to five-year terms advises the program if it is doing things right and if it is doing the right things. In addition, as information is developed and documented in reports critical to the decisionmaking process, it is peer reviewed by independent experts. They weigh in on the appropriateness and rigor of the methodologies and analyses used to reach conclusions, and they weigh in on whether the evidence supports the conclusions drawn. Each step involves a rigorous process to remove bias and get the best information to the decisionmakers.

The PRRIP is a truly collaborative effort. While there are federal entities involved and at the table, they are not in charge. The PRRIP governance committee includes those entities, the three states, water users, and environmental and conservation groups. Everyone has a seat at the table and has a vote. During the development of the cooperative agreement, project participants forged strong relationships and built up a level of trust. That has carried over into the program. The governance committee undertakes good-faith efforts to find real solutions at all levels.

For more information about the Platte River Recovery Implementation Program, contact Dr. Jerry Kenny at (308) 237-5728.

Whooping cranes landing along the Platte River near Kearney, Nebraska.
Photo credit: Abby Jensen, www.jensen-photography.com.



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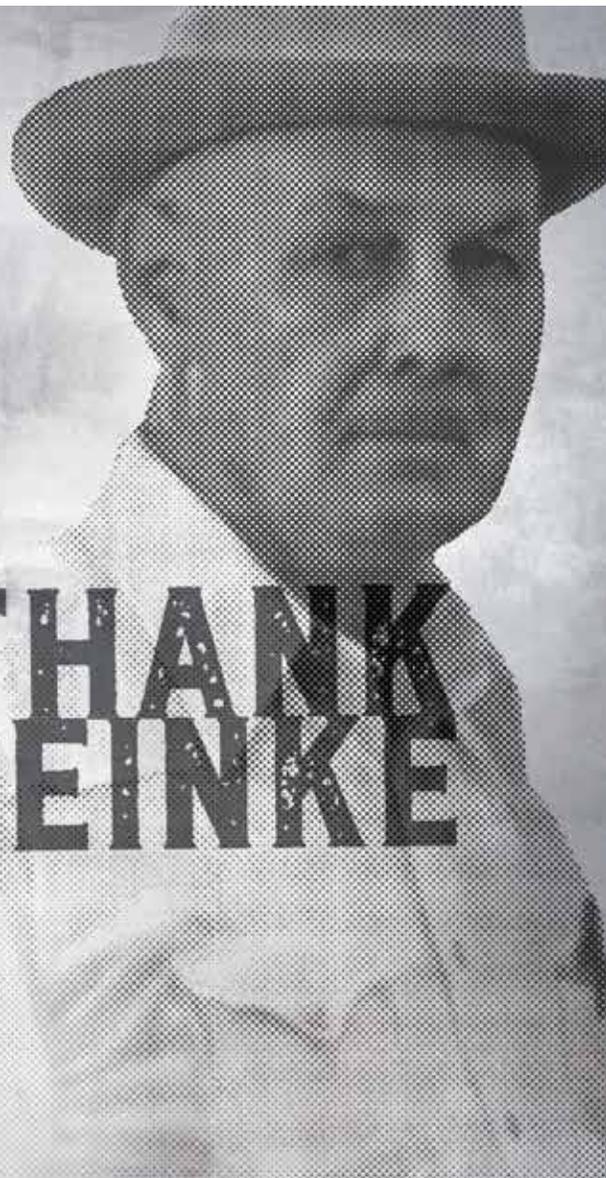
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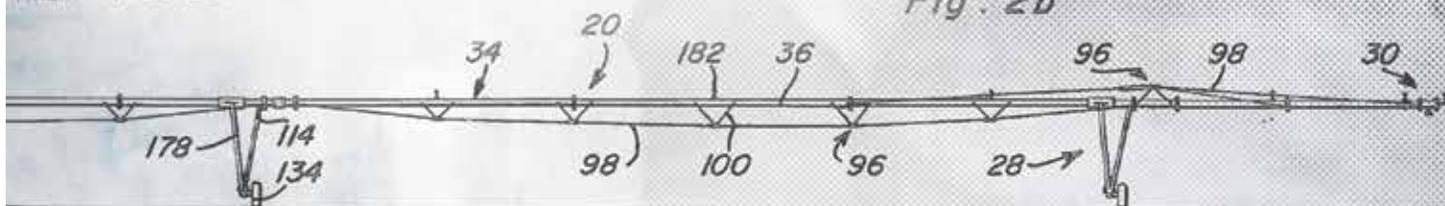


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Fig. 2b



Richard F. Reinke
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BY *Alance A. Olson*
and *Harvey B. Jacobson*
Attorneys



Administration Proposes Improvements to ESA Petition Process

By Joseph Nelson and Jordan Smith

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are currently reviewing comments received on proposed revisions announced last spring to the Endangered Species Act (ESA) petition process. These proposed regulations would impose additional procedural and substantive requirements on the submission and consideration of petitions seeking to list, delist, or reclassify species or modify designated critical habitat.

Listing determinations are central to the ESA because listing a species as either threatened or endangered entitles it to federal protection, including the take prohibition of section 9 and the consultation requirements of section 7. The proposed rule would make much-needed reforms to the existing petition process, including requiring more rigor and scientific documentation in the submission of petitions, increasing the role of state governments, and imposing a one-species-per-petition rule.

In recent years, the petition process has taken on an increasingly significant role under the ESA. The act currently requires the FWS and the NMFS to make decisions about whether to list, delist, or reclassify a species as threatened or endangered solely on the basis of the “best scientific and commercial data available.” Multispecies petitions do not differentiate among the data cited to support the listing of each species. As a result, the FWS and the NMFS have been forced to expend limited agency resources to evaluate these mega-petitions.

Further, if the FWS and the NMFS miss their statutory deadlines to finalize such review, which often occurs, environmental groups file lawsuits against the agencies for violation of the statutory timelines. In doing so, the environmental groups gain a seat at the table with the agencies and dictate the timing of petitions considerations. It is this type of rigged petition and sue-and-settle practice that has led to the multispecies listing settlement through which the present administration has increased the endangered and threatened species list by more than 20 percent since the end of 2011.

The FWS and the NMFS now are attempting



to address these problems by proposing important changes to the petition process. Specifically, the proposed rule would ensure the following:

- **One species at a time.** This change would end a strategy favored by the environmental community in recent years by which a single petition covering tens, if not hundreds, of species is submitted, but can never be adequately analyzed within the statutorily required time frames.
- **Consultation with states on FWS species.** For species or critical habitat under the FWS’s jurisdiction, the petitioner must submit a copy of the petition to the appropriate fish and wildlife management agencies in states where the species occurs at least 30 days before submission of the petition to the FWS and include any comments received from the states as part of the petition submittal.
- **Disclosure of positive and negative information.** Petitions must identify all relevant, reasonably available information, including information that may support a negative finding

(i.e., that the requested action is not warranted).

- **Restarting review time frames for supplemental information.** The petitioner's submission of supplemental information after a petition has been filed would be treated as a new petition that combines the original and supplemental information and restarts the statutory time frames for review.
- **Higher standards for subsequent petitions.** Petitions seeking the revision of a prior determination (e.g., a petition for reclassification or delisting of a previously listed species) would be subject to a higher standard. Such subsequent petitions would be required to present sufficient new information or analysis that was not considered in the prior determination on the species or critical habitat. Further, the rule creates a presumption against a revision to the prior determination, such that a warranted finding could only be made on a subsequent petition if the FWS determines that a reasonable person conducting an impartial scientific review would conclude that the proposed action is warranted despite the previous determination.

The proposed rule also revises several definitions and standards applicable to the petition review process, including the following:

- **Adequacy determination for petitions.** Within 30 days of receipt of a petition, the secretary of the interior must inform the petitioner whether the petition meets the mandatory content requirements. The secretary would retain discretion to reject a petition for failure to meet these requirements without making a statutory finding as to whether the requested action is or is not warranted.
- **Substantial scientific or commercial definition.** For purposes of the warranted/not warranted determination, the proposed rule would define *substantial scientific or commercial information* to mean "credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted."
- **Funding limitations and candidate species status.** The proposed rule defines *expeditious progress* for purposes of the warranted but precluded finding that precipitates classification of a species as a candidate for listing. Through the proposed revision, the warranted but precluded determination could be based on the limitation of funds available for the FWS and the NMFS to conduct listing determinations after fulfillment of nondiscretionary

duties (e.g., statutorily required determinations under section 4, court orders, and court-approved settlement agreements).

- **Treatment of noncomplying information.** The FWS and the NMFS propose an explicit rule that they will not consider supporting material cited by the petitioner that has not been made readily available to the FWS and the NMFS by the petitioner or is not otherwise in the FWS's and the NMFS's possession.

The proposed rule received significant widespread support from the regulated community, including the National Endangered Species Act Reform Coalition, the country's only broad-based coalition of organizations dedicated to improving and updating the ESA.

In its comments, the coalition expressed support for the overall purpose of the proposed rule, while also suggesting improvements, including

- integrating counties or equivalent jurisdictions into the petition review and comment process presently proposed for states.
- expanding the state review and comment process to all species, rather than just FWS-jurisdictional species.
- ensuring that the petition and supporting information is submitted in a form that allows for public posting and access via the web.

As the administration reviews comments received on the proposed rule through the public rulemaking process, congressional lawmakers are considering legislation to codify some of the changes proposed in the listing petition rule. Many landowners and businesses with irrigation and agricultural interests have expressed support for these actions, and the National Endangered Species Act Reform Coalition encourages continued engagement with the administration and Congress on this important issue.

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Your Rights Under the Clean Water Act

By Reed Hopper

The Clean Water Act (CWA) has been a lightning rod since its inception. That is because the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA), which enforce the CWA, have continuously redefined its scope so no one knows or agrees on what it covers.

The Federal Water Pollution Control Act was issued in 1972 and was later amended by the CWA. Originally, the Corps and EPA were of the opinion that the CWA covered traditional or actual navigable waters, like rivers and channels, which could float a boat and be used for interstate commerce. This made sense because the CWA was passed under Congress’s power to regulate interstate commerce. But it didn’t take long before these agencies expanded their jurisdiction to include certain wetlands abutting actual navigable waters. This extension of federal authority was sanctioned by the U.S. Supreme Court in the 1985 case *U.S. v. Riverside Bayview Homes*. The Corps and EPA took that case as *carte blanche* to regulate other waters as well, including small, remote intrastate

waterbodies with no connection to navigation or commerce whatsoever. But that went too far.

In 2001, in *Solid Waste Agency of Northern Cook County (SWANCC) v. Corps*, the Supreme Court put the skids on agency overreach under the CWA, or so it seemed. The court observed that the CWA only prohibited unauthorized discharges of pollutants into “navigable waters” and that Congress expressly recognized that the states, and not the federal government, had the “primary right and responsibility” to regulate local land and water use. The high court held, therefore, that the Corps and EPA had no authority to regulate so-called isolated waterbodies with no hydrological connection to traditional navigable waters downstream.

Not surprisingly, the Corps and EPA were not content with this limitation on their power, so they did what government agencies often do. They found a way around the decision. In effect, they concluded that they could regulate any water that the Supreme Court decision did not expressly prohibit them from regulating. So, they asserted authority over all waters with a hydrological connection to a traditional navigable water, no matter how small, intermittent, or



attenuated the connection.

Not surprisingly, the regulated public was not content with this virtually unlimited exercise of federal power. So we at the Pacific Legal Foundation took the agencies back to the Supreme Court in 2006 in a case called *Rapanos v. United States*, arguing that the CWA, the Court, and the Constitution did not authorize federal regulation of every tributary to a traditional navigable water. Fortunately, the Supreme Court agreed.

However, these precedents did not stop the Corps and EPA from promulgating a new rule redefining covered waters under the CWA, known as *waters of the United States* or the WOTUS rule. That rule was issued last year and purports to federalize virtually all waters in the nation, and much of the land, including isolated waterbodies and tributaries the Supreme Court expressly excluded from regulation under the *SWANCC* and *Rapanos* decisions.

The significance of this arrogation of authority cannot be overstated. Under the agencies' new rule, which has been challenged by more than 70 parties, including 31 states and the Pacific Legal Foundation, millions of landowners would be required to get federal approval to use their land. In effect, the federal government obtains a federal veto power over land use.

Whether the Corps or EPA is operating under the old or new rules defining waters subject to federal control under the CWA, it may still require an expert to determine whether, or to what extent, the CWA applies to you and your land. This is another troubling aspect about the act: The experts often cannot agree on what is covered. According to a 2004 U.S. Government Accountability Office audit cited by the Supreme Court in *Rapanos*, Corps experts within the same district cannot agree on the scope of the CWA.

To address this problem, the Corps has issued regulations that allow a landowner to request that the Corps conduct a formal jurisdictional determination (JD) on one's land. A JD is a site-specific delineation of covered waters and is binding on the landowner and the agency. In theory, it could be helpful to a landowner to know if his land is covered by the CWA, is not covered, or is exempt under a farm or timber exemption. But what happens if the JD is wrong because the Corps misinterpreted the law or misapplied the facts at the site? What happens if the landowner contests the accuracy or validity of the JD?

That question brings us to another case now pending in the U.S. Supreme Court. The Hawkes Company sought a JD from the Corps for a parcel of land in Minnesota. The parcel contains wetlands that Hawkes intends to use for harvesting organic peat for landscaping. Under the *Rapanos* decision, a wetland that has a "significant nexus" or impact on a traditional navigable water may

be regulated. The Corps issued a JD that concludes the wetlands are subject to regulation under the CWA because the wetlands purportedly have such a nexus. But Hawkes contests this conclusion, arguing that the nearest traditional navigable water is more than 120 miles away and that the JD does not show any evidence of any impact downstream, let alone a significant impact. Therefore, Hawkes filed a suit in federal court to challenge the contested JD. But until now, the courts that have considered this issue have held that landowners cannot seek immediate review in court. Instead, landowners must seek a Corps section 404 dredged and fill permit and then challenge the permit or permit denial in court. This requirement is nonsensical because the whole point of challenging the JD is to avoid the cost and delay of seeking a permit that the Supreme Court has estimated may exceed \$270,000 and two years in process.

By any measure, requiring a landowner to seek a permit to determine whether a permit is required in the first place is, at best, unnecessary and wasteful and, at worst, unjust and absurd. As the law currently stands, a landowner whose property is deemed subject to the CWA, through a JD or other declaration, has only three options: (1) abandon use of the property (at ruinous cost); (2) seek an arguably unnecessary permit (at ruinous cost); or (3) use the property without federal approval and risk civil fines of \$37,500 a day and criminal prosecution.

Although Hawkes lost the case in the trial court, the Pacific Legal Foundation represented Hawkes on appeal in the Eighth Circuit Court of Appeals. It held in favor of Hawkes. So, at least in that circuit, landowners can challenge federal claims of jurisdiction immediately in court. This win for property owners put the Eighth Circuit in conflict with the Fifth and Ninth Circuit Courts of Appeals, which have ruled in favor of the government. But now, the U.S. Supreme Court has agreed to hear the *Hawkes* case and decide once and for all if landowners can challenge CWA regulation without going through the arduous and unfair permit process.

We are confident the high court will do the right thing for millions of landowners nationwide and rule that a JD is subject to immediate judicial review.

Reed Hopper is a principal attorney with the Pacific Legal Foundation. Mr. Hopper represented John Rapanos in Rapanos v. United States and now the Hawkes Company in the U.S. Supreme Court. You can reach Mr. Hopper at RHopper@pacificlegal.org.



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All applicants must submit an MRGCD application; Resumes will not be accepted in lieu of the application. EOE

ENGINEER I

The Middle Rio Grande Conservancy District, **General Office** in Albuquerque is recruiting for an **Engineer I**. Job duties include review and direct construction projects, manage project budgets, prepare licenses, and reports. Assist with the designs, specifications and plans for District construction and engineering activities. Proficiency in AutoCAD drafting, surveying and mapping for the operation, design, construction and maintenance of District facilities and water control structures. Bachelors in Civil, Agricultural Engineering or related field required and 4+ years' work experience in engineering and/or hydrology. Candidates must have a valid NMDL. Successful candidates will be required to pass an alcohol and drug screen, and criminal background check including driving records. Salary is exempt at DOE. Applications may be filled out at the General Office, 1931 Second St. SW, Albuquerque, NM, online at <http://mrgcd.com/Forms.aspx> or submitted via e-mail to hr@mrgcd.us and must be completed in full and received by COB January 29, 2016.

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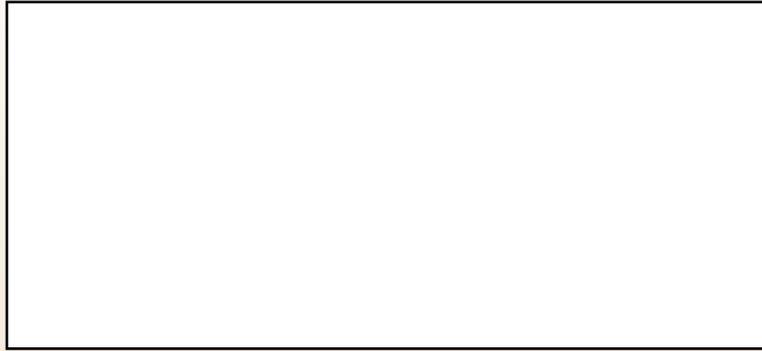
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- January 13–15 Ditch and Reservoir Company Alliance and Four States Irrigation Council, Joint Annual Meeting, Fort Collins, CO
- January 20–21 Idaho Water Users Association, Annual Convention, Boise, ID
- January 27–28 *Irrigation Leader* magazine, Operations and Management Workshop, Phoenix, AZ
- February 3–4 Texas Water Conservation Association, Texas Water Day, Washington, DC
- February 10–12 Montana Water Resources Association, 2016 Annual Conference, Fairmont, MT
- February 18–19 Family Farm Alliance, Annual Conference, Las Vegas, NV
- February 23–25 Association of California Water Agencies, 2016 DC Conference, Washington, DC
- March 12–16 Nebraska Natural Resources Districts, DC Meeting, Washington, DC
- March 14–16 Utah Water Users Association, Utah Water Users Workshop, St. George, UT
- April 11–14 National Water Resources Association, Federal Water Issues Conference, Washington, DC

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