

CALIFORNIA: ENDANGERED SPECIES ACT ISSUES IMPACTING WATER SUPPLY

There is, perhaps, no more important issue in California water than the impact of the federal Endangered Species Act (ESA) and the California Endangered Species Act (CESA) on California water supply. Enforcement, or threat of enforcement, of the ESA and CESA have become the foremost controlling factors in California's development of its water resources. Compliance with the ESA and CESA creates significant impacts on water supply throughout the state. This article provides background on the ESA and CESA, and describes examples of the ESA issues impacting California's water supply.

Federal Endangered Species Act

Once a species has been listed as threatened or endangered, the ESA expressly prohibits the "taking" of any listed species, which includes any action that destroys or adversely modifies designated critical habitat. (16 U.S.C. § 1538(a)(1)(B); 50 C.F. § 17.3.) The ESA includes both civil and criminal penalties for any violation. (16 U.S.C. § 1540.) There are certain limited exceptions to ESA's prohibitions, most notably the "consultation" process under § 7 and the "incidental take permit" provisions of § 10.

Under the § 7 consultation process, all federal agencies have an affirmative duty to consult with the U.S. Fish and Wildlife Service (FWS) to insure that any action it authorizes, finds or carries out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat." (16 U.S.C. § 1536(a)(2).) As part of this consultation, the acting agency is required to conduct a biological assessment, from which the FWS is required to issue an opinion detailing how agency action affects the species or its critical habitat. If the action is found to jeopardize the listed species of critical habitat, the FWS must suggest reasonable and prudent alternatives that must be implemented by the acting agency. (16 U.S.C. § 1536(b)(3)(A), 1536(c).) The biological opinion also includes an "incidental take statement" which specifies the impact to the species of any "take" that may occur incidental to an agency's action. (16 U.S.C. § 1536 (b)(4)(B).) The statement

must also identify the measures considered necessary to minimize the impact resulting from any incidental take. (16 U.S.C. § 1536(b)(4)(B)(ii).)

For projects with no federal agency action, state or local governments may rely on the "incidental take permit" provisions of § 10. The key component of § 10 compliance is preparation of a habitat conservation plan (HCP). HCPs may be prepared for single projects or on a regional level. At their core, HCPs are very similar to the biological opinions that come from the § 7 consultation process, in that HCPs essentially set forth the mitigation terms upon which the take of species is conditioned.

California's Endangered Species Act

In 1970, California became one of the first states to enact a statutory scheme to protect endangered and rare animals. (Stats. 1970, ch. 1510, p. 2998, §3.) Fourteen years later, the CESA was enacted, replacing the earlier scheme. (Cal. Fish & Game Code §2050 et seq.) Under CESA, the California Legislature declared that endangered and threatened species be conserved, protected, restored and enhanced. (§ 2052.)

The structure of CESA and ESA are very similar. The definitions of "threatened" and "endangered" species contained in the state statute are comparable to those in the federal act. CESA includes broad prohibitions on "taking" threatened or endangered species, including the availability of criminal penalties for violations. (§2080, §12008.) CESA provides for a listing process, under which any interested person can petition the state to add or remove a species from the list of endangered or threatened species; prohibits state agencies from undertaking projects which may "jeopardize" a listed species; and requires that state agencies "consult" with the California Department of Fish and Game (DFG) before "authorizing, funding, or carrying out" any project that may jeopardize the continued existence of any endangered or threatened species. (§2090-2097.) Where jeopardy is found, DFG is to develop "reasonable and prudent alternatives" to the proposed project that will avoid jeopardy. (§2091.)

Unlike the federal law, however, CESA's jeopardy prohibition is tempered by a "feasibility" qualifica-

tion. (§2092(b).) The statute provides that where “specific economic, social or other conditions” make the reasonable and prudent alternatives proposed by DFG infeasible, the state may nonetheless approve the project where specific conditions are met. These conditions include: (1) implementation of mitigation measures, and (2) adoption of findings that the benefits of the project clearly outweigh the benefits of implementing the reasonable and prudent alternatives to the project, and that there has been an irreversible or irretrievable commitment of resources to the project. In no event, however, may a state agency proceed with a project that, in the lead agency’s judgment, is “likely” to result in the extinction of a listed species. (§2092(c).) CESA also includes an exemption from its consultation provisions for emergency repairs to public facilities necessary to respond to natural disasters. (§2090(c).)

Examples of ESA Impacts to California’s Water Supply

Endangered Winter-Run Salmon in the Sacramento River

Despite enactment of the ESA in 1973, California’s water using community was not faced with a major ESA water supply conflict until 1990, when the National Marine Fisheries Service (NMFS) designated the winter-run Chinook salmon as threatened (the winter-run was later listed as endangered in 1992). In 1991, the Glenn-Colusa Irrigation District (GCID), a major agricultural diverter and senior water rights holder on the Sacramento River, was enjoined from pumping from the Sacramento River during the winter-run’s peak downstream migration season of July 15 through November 30 of each year, due to problems with the fish screens installed by the DFG on GCID’s diversion pumps. Subsequently, GCID and the United States executed a joint stipulation setting forth the terms and conditions of GCID’s pumping operations, and their commitment to develop and construct a new fish screen to ensure a long-term solution to protecting the winter-run, as well as any other listed species affected by GCID’s pumping operations. Today, GCID operates a state-of-the-art fish screen facility that protects migrating winter-run Chinook, while allowing for agricultural diversions.

Similarly, in 1991 DFG filed a complaint for an

injunction against Anderson-Cottonwood Irrigation District (ACID), another agricultural diverter and senior water rights holder on the Sacramento River, due to ACID’s taking migrating winter-run through its pumping operations. Although the trial court denied the DFG’s request for injunction, NMFS stepped in using its own authority under the ESA to assess civil penalties amounting to \$700,000 against ACID. ACID now also operates a sophisticated fish screen facility to address ESA concerns.

CalFed/Bay-Delta Program

For the past several years, California has undertaken the CalFed Bay-Delta Program to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta. A significant component of the CalFed Program involves addressing ESA issues related to the Bay-Delta and the continued ability of California’s massive State Water Project (SWP) and Central Valley Project (CVP) to operate their joint water diversions from the Bay-Delta. As a foundation for implementing the CESA and ESA compliance process, CalFed is implementing a comprehensive Multi-Species Conservation Strategy. The conservation strategy is designed to address all federally and state listed, proposed and candidate species that may be affected by the CalFed Program. It will also address other species identified by CalFed that may be affected by the program, and for which adequate information is available, also will be addressed in the strategy. The conservation strategy, in the context of the CalFed comprehensive long-term plan, is intended to allow for the recovery of listed species and the conservation of currently unlisted species.

ESA Compliance for the CVP Operations Criteria and Plan

The U.S. Bureau of Reclamation (Bureau) operates the CVP, a federal water project that primarily serves water for agricultural uses throughout California. California’s Department of Water Resources (DWR) operates the SWP, a statewide project that serves water primarily for municipal and industrial uses. For the past several years, the Bureau and DWR have worked together in preparing a joint plan of operations that is intended to provide for more efficient operations while meeting ESA requirements. This plan, soon to

be finalized, is called the CVP Operations Criteria and Plan, and generally referred to as "OCAP."

A primary purpose of OCAP is to satisfy the ESA § 7 consultation process associated with Reclamation's continued operation of the CVP. The CVP is a massive project, spanning the length of the state of California, and various components of the CVP encounter distinct ESA issues. This incredible undertaking is generally regarded as the most significant ESA consultation process in California's history.

The Quantification Settlement Agreement and the Salton Sea

Signed late last year, the Quantification Settlement Agreement (QSA) was a historic pact between the Imperial Irrigation District (IID), San Diego County Water Authority (SDCWA), and the Coachella Valley Water District (CVWD) regarding a transfer of Colorado River water from agricultural use in IID to municipal use by SDCWA and CVWD. Although the main focus of the QSA proceedings was on the water transfer, a key issue was how to mitigate the impacts to the Salton Sea that would result from reduced run-off from IID fields that are fallowed to facilitate the water transfer.

Run-off from IID's farming operations is the sole source of inflow to the Salton Sea, and a significant reduction in run-off flows is anticipated to impact threatened and endangered avian species that reside at or near the Salton Sea. These species include the Yuma Clapper Rail, Bald Eagle, Peregrine Falcon and California Brown Pelican. Currently, the QSA parties, in conjunction with the Salton Sea Authority and environmental groups including the Planning and Conservation League, are studying plans to address and mitigate Salton Sea impacts from reduced IID run-off.

The Carmel River

Located in one of the most beautiful areas of California, the Carmel River is habitat for the federally listed steelhead trout and the California listed red-legged frog. The Carmel River is also the primary water supply for the cities on the Monterey Peninsula, yet diversions from the river are constrained by ESA-mandated flow requirements that benefit steelhead. For years, this constraint on the amount of water that may be diverted from the Carmel River has stalled new development on the Monterey Peninsula, fueling

rampant escalation in home prices and significant frustration of the local cities' land use planning goals.

These flow requirements have also prompted increased extractions from the local groundwater basin in order to meet supply needs. As a result of this increased pumping, recent reports indicate a risk of seawater intrusion into the local groundwater basin. The rights to the groundwater from this basin are now the subject of state court litigation.

Recent Litigation and Innovative Projects

Irrigators Awarded \$26 Million Just Compensation for Taking of Water to Benefit Fish

In December 2003, the Federal Court of Claims awarded \$26 million to Tulare Basin irrigators that were deprived of their contractual water in the early 1990s when federal agencies curtailed Delta pumping in order to benefit two endangered fish. (For background, see 8 *Western Wat. L. & Pol'y Rptr.* 4 (January 2004).) This recent decision followed up on an earlier decision in the same case wherein the Court of Claims found the federal government violated the Fifth Amendment of the United States Constitution when it failed to compensate the irrigators for the water used to benefit endangered species. (See *Tulare Lake Basin Storage Water District, et al. v. United States* (2001) 49 Fed.Cl. 313.) These rulings stand in contrast to both the state and federal governments' practice of not compensating water right holders when their water is taken to benefit species. Both sides in the litigation agreed that the Court of Claims decision would have significant impacts on future governmental decisions to reduce contract water deliveries in order to benefit ESA species—at least in situations where the plaintiff holds a clear property right to the water in question.

Matilija Dam Removal

As with the Carmel River, protection of endangered steelhead trout significantly impacts water supply operations on the Ventura River. For the past three years, local water agencies have studied the possibility of removing the 190-foot high Matilija Dam on the Ventura in order to promote upstream spawning by steelhead. A recently released report estimates the removal cost at over \$100 million. The complicated project would involve removal of approximately

6 million cubic yards of silt that has built up behind the Matilija, and require construction of downstream canals and silt screens in order to minimize silt impacts to current water diversions. The Matilija Dam would be the largest dam removed yet in the United States.

Conclusion and Implications

These are only some examples of the pervasive influence the ESA exerts over water supply in California. In addition to the instream species concerns that are the focus of water supply environmental review, virtually all water supply projects also encounter

terrestrial ESA issues. Inevitably, new water supply projects face terrestrial ESA issues because many listed species inhabit the riparian areas where diversion works, pipes and the other facilities associated with water supply projects are constructed. Complying with the ESA requirements associated with these terrestrial species adds another layer of complexity (and cost) to many water supply projects.

Finally, although the ESA will continue to impact California's water supply, the recent award of just compensation damages to the Tulare Basin irrigators marks a new era in government decisions to use CVP and SWP contract water for ESA purposes. (NAJ)

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