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Legal Implications of the Endangered Species Act

By Greg Hicks

The Pacific Northwest enters its dry season in the late spring. Until the late autumn rains fall, many streams and rivers experience lower flows and rising temperatures. This is in part a reflection of the seasonal character of our streams, which flow heavily with winter rains and with melted snow, but lightly after the snowmelt has passed. But these naturally lower seasonal flows are made lower still by the high demands we place on our rivers and streams at this time of the year, and by the changes we have brought to our watersheds. The extraction of groundwater that would otherwise percolate into stream channels from surrounding uplands, and the clearing of those uplands of vegetation that would moderate surface water flows to streams, cause great harm to stream flows. Streams run lower and warmer and even run dry.

This time of lower water flow and high water demand occurs each year at what is a critical period in the life cycles of Northwest salmon, trout and steelhead. Juvenile salmon and steelhead spawned last fall and winter are attempting to descend their rivers to the sea. Adult salmon of some of the most jeopardized species, including summer and fall chinook, are returning from the sea and beginning their ascent to their spawning streams. Resident trout and the prey on which they depend have a constant need for cool, flowing water.

Historically, the lower stream levels characteristic of the summer were adequate to all these purposes, providing water cool and swift enough for the needs of migratory and resident fish alike. Now our water use competes for those same flows. Unfortunately, our seasonal demands for water, peaking just as natural flows diminish, cause us to take the water that fish need when they most need it.

The impact of low water flows on fish populations is now forcing urgent questions, chiefly because of the Endangered Species Act (ESA). The central questions are whether and how much human water use will need to be reduced to meet the habitat needs of fish and other wildlife protected by the ESA. The Supreme Court made plain in its 1995 *Babbitt v. Sweet Home Chapter* decision that habitat modifications that kill or injure by impairing essential behavioral patterns such as breeding, feeding, sheltering and migration are subject to regulation under the ESA.

In the case of protected trout, salmon and steelhead, actions that reduce stream flows to injurious levels are subject to regulation. For example, water appropriations from streams and groundwater pumping from sources that feed streams are subject to the ESA when they reduce stream levels in a way that interferes with breeding, feeding, sheltering and migration, causing death or injury to protected fish.

How the ESA will actually affect human use of water is very difficult to say. Although the Act clearly regulates activities that injure or kill protected species, the statute is written in a way that allows those activities to continue under certain conditions. The most important conditions are the

following three: (1) that the activities that cause harm to a protected species not be intended to do so; (2) that the harm that is caused not appreciably reduce the likelihood that the species will survive and recover; and (3) that the government approve a conservation plan that has good prospects of offsetting whatever harm the activity does cause. Under those conditions, the activity can continue, in spite of the incidental harm it causes. In the case of a fish species, even if death or injury could be shown to have occurred as the result of reduced stream flows and higher water temperatures, some water use could still continue, so long as an effective conservation plan was approved to offset the harm done and so long as the harm done was not seen as undermining the species' prospects for survival and recovery.

The critical questions about whether the harm caused to a protected fish species would or would not undermine its survival and recovery prospects and whether a given habitat conservation plan was truly effective would be answered by the federal agencies responsible for enforcement of the ESA. Much depends on the willingness and ability of the National Marine Fisheries Service and the U.S. Fish & Wildlife Service to accurately assess the impact of harm-causing activities on survival and recovery prospects and to insist that habitat conservation plans be effective. If a given habitat conservation plan will not be effective in offsetting harm caused, for example, by groundwater pumping or stream diversions, the plan ought not be approved, and the activities that reduce flows should be forced to cease until a satisfactory solution is determined.

There are a number of keys to accommodating needs of fish and needs of human water users, including both creative approaches to allocating scarce water and rigorous enforcement against unauthorized and wasteful water use. More effective use of water banks -- setting aside and storing water so that it is available to fulfill critical supply needs without tapping stream sources -- offers prospects for dealing with seasonal scarcities.

The expansion and effective implementation of Washington's trust water rights program would encourage the transfer of water from marginally productive uses to the protection of in-stream flows through voluntary transfers of water rights from private permit holders to the public, leaving the water in the streams. Greater ease in transferring private water rights from one user to another and from one place of use to another could be a useful tool in reducing waste, promoting more effective use of water and improving flows in particular stream reaches. On the enforcement side, effective monitoring of water use through metering would reduce excess use. There must also be a greater insistence that wasteful means of diverting and applying water cease.

All those tools for accommodating human water use and the needs of fish would be subject to oversight and administration by the Water Resources Division of the Washington State Department of Ecology. Ecology will have a vital role in accomplishing the best possible allocation of water. Private water users and municipalities alike will have strong incentives under the ESA to adjust their water uses. To the extent that those adjustments require that water rights be transferred from place to place or from one use to another, Ecology will be involved. The ESA itself states that federal agencies will cooperate with state and local agencies to resolve water resource issues that have implications for the conservation of endangered species. Federal law recognizes the vital role of Ecology and its sister agencies around the West in helping develop habitat conservation plans that will be effective in conserving listed species.

Recently publicized events in the Methow Valley are an example of the impact of the ESA on established private water uses. The USDA Forest Service refused to issue the Skyline and Wolf Creek

irrigation canals special use permit to conduct water across Forest Service land from the Chewuch River to their places of use. The National Marine Fisheries Service had determined that the diversions would reduce water flows in the Methow in a way that jeopardized the survival of endangered salmonids. Section 7 of the ESA prohibits federal actions that cause such jeopardy except under the most unusual circumstances. In the normal course, a proposed federal action that threatens jeopardy to a protected species cannot go forward unless it is modified to avoid jeopardy, perhaps through the development of a mitigation plan. Skyline will line its canal with plastic and eventually replace it with pipe.

If the permit in the Methow case had been granted after a finding of “no jeopardy,” the permittee could have safely proceeded to divert its water for the life of the permit. That situation contrasts sharply with that of water users whose exercise of their water rights does not require federal involvement. Those water rights holders will essentially be on their own in deciding whether their activities threaten to harm or kill a protected species and in developing an approved habitat conservation plan. When there is a federal connection to exercise of a water right, the ESA requires consultation between the federal action agency and the National Marine Fisheries Service or the U.S. Fish & Wildlife Service when federal action might affect a protected species.

That consultation requirement and the involvement of a federal agency can be a valuable tool for identifying the need to address endangered species issues and for developing a strategy to address them. For private parties acting on their own, the process of identifying endangered species act problems and of developing a satisfactory habitat conservation plan can therefore be more complicated, more costly, and a little less certain. In the end, not all attempts at remediating “takings” will result in adequate water flows.