



Endangered Species Committee Newsletter

Vol. 8, No. 2

June 2006

KLAMATH PROJECT ENJOINED FROM MAKING IRRIGATION DIVERSIONS

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On March 27, 2006, Judge Sandra B. Armstrong of the U.S. District Court, Northern District of California, enjoined the Bureau of Reclamation (Reclamation) from making certain deliveries of water to agricultural users from the federal Klamath Project until a new biological opinion is prepared to address the project's effects on Coastal coho salmon. *Pacific Coast Federation of Fishermen's Associations, et al. v. United States Bureau of Reclamation, et al.* (N.D. Cal. 2006). The court ordered Reclamation to reinstitute Section 7 consultations with the National Marine Fisheries Service (NMFS) to remedy the lack of analytical support for interim water flows called for in the 2002 Biological Opinion, as well as to address new information that had surfaced since that Opinion was issued.

The Klamath Project is located in portions of northern California and southern Oregon, and comprises a number of dams, reservoirs and associated irrigation works. Fish passage to a substantial portion of the Klamath Basin, which historically served as habitat for a number of fish species (including coho salmon), is now blocked by the Klamath Project at Iron Gate Dam. Consequently, Iron Gate greatly influences the amount of water available to augment flows downriver.

In 2002, Reclamation consulted with the U.S. Fish and Wildlife Service and NMFS on a ten-year operations program spanning from 2002 to 2012. From that consultation, NMFS issued a Biological Opinion concluding that operations of the project would result in jeopardy to coastal coho. The Opinion, however, proposed a Reasonable and Prudent Alternative (RPA) necessary to avoid jeopardy, calling for specific water management measures (*e.g.*, "minimum flows" below Iron Gate Dam), a collaborative water bank and water supply enhancement program, an inter-governmental task force, and a "long-term flow target to be achieved by 2010" (the so-called "Phase III" flow target). Instead of requiring the Klamath Project to contribute all of the water necessary to meet the long-term flow target, the RPA capped the project's contribution to the flow levels below Iron Gate Dam at 57 percent of the Phase III flow target. The agencies based the 57-percent cap on their calculation of the environmental baseline—that is, the Klamath Project's proportional share of the responsibility for the decline in the species (*i.e.*, the project's share of the water use in the basin). During the first eight years of the program (2002 to 2010), Reclamation would only be required to guarantee 57 percent of the long-term flow target. Beginning in 2010, the long-term flow target would be achieved not through reductions in Klamath Project deliveries, but rather a combination of voluntary and collaborative actions like the water bank and water supply enhancement program.

In 2002, the Pacific Coast Federation of Fishermen's Association (the "Association") and a host of other

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Committee Newsletter
Vol. 8, No. 2, June 2006
Sean Skaggs, Editor**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



environmental groups filed suit challenging the Biological Opinion. Initially, the district court upheld the 57-percent cap on the Klamath Project's contribution to flows, but ruled as invalid the measures necessary to meet the long-term, Phase III flow target. Because the measures necessary to meet the long-term flow target were not mandatory, the court reasoned, such measures were not "reasonably certain to occur" and could not be relied upon to avoid jeopardy.

The Association appealed the district court's ruling on the 57-percent cap and initial phases of the program. The Ninth Circuit agreed with the association, and on Oct. 18, 2005, held that NMFS's decision to delay the provision of the full quantity of water to coho for the first eight years of the program was not supported by the record. Indeed, the court criticized NMFS for failing to provide a reasoned explanation as to why coho salmon did not need 100 percent of the long-term flow target during the first eight years of the program. "The agency's analysis of the beneficial effects of the long-term flows, in combination with the absence of analysis of the effects of the substantially lower short-term flows, lead us to conclude that the reasoning behind the agency's plan cannot be reasonably discerned." The court also rejected the agencies' reliance on the environmental baseline, and the Klamath Project's proportional share of the water use in the basin, to justify lower flows. "The proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts." The Ninth Circuit remanded the case to the district court "for the issuance of injunctive relief."

On remand, NOAA Fisheries submitted to the district court a "supplement" to the 2002 Biological Opinion seeking to provide a rationale for the agency's decision. Judge Armstrong rejected the supplement as "post hoc rationalizations," impermissibly designed to "[pile] on more evidence." This was futile, the court reasoned, because the agencies had already lost on the merits. And in any event, the supplement failed to adequately address new information, "from the massive fish kill of September 2002 to increased incidents of

disease in the river to new scientific studies,” that had surfaced since the 2002 Biological Opinion. Finding an injunction necessary “to ensure that flows in the Klamath River are sufficient to prevent harm to coho salmon and their habitat while the agencies comply with the law,” the court ordered NMFS and Reclamation to reinitiate consultation and prepare a new biological opinion “based on the current scientific evidence and the full risks to threatened coho salmon.” Borrowing from the only portion of the Biological Opinion that remained valid—the portion pertaining to the long-term, Phase III flow target—the court ordered Reclamation to limit irrigation deliveries “if they would cause water flows in the Klamath River at and below Iron Gate Dam to fall below 100% of the Phase III flow levels specifically identified by NMFS . . . as necessary to prevent jeopardy.” In other words, the court set a “floor for river flows during reinitiation of consultation,” irrespective of the project’s proportional share of the water use in the basin.

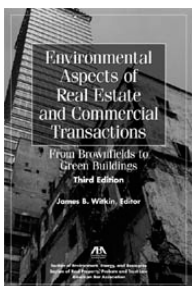
Since the district court’s decision on remand, Reclamation has announced its plans to comport with the court’s order and complete a new plan by spring of 2008. A draft 2006 Klamath Project Operations Plan is expected any day. And while it appears there is plenty of water this year, if 2007 is a low water year, the Klamath Project may see significant reductions in deliveries in order to comply with the court’s order.

TENTH CIRCUIT AFFIRMS DISMISSAL OF WYOMING’S CHALLENGE TO PROTECTION OF GRAY WOLVES UNDER THE ENDANGERED SPECIES ACT

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The Tenth Circuit recently entered the fray over the protection of charismatic megafauna by the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, in a decision related to gray wolf management. *See Wyoming v. U.S. Dept. of Interior (Wyoming v. DOI)* 442 F.3d 1262 (10th Cir. 2006). The case follows a series of proposals by the U.S. Fish and Wildlife Service (USFWS) over the past few years to remove or reduce the level of ESA protections afforded to several predator species with ranges extending across the United States, including the gray wolf, after deciding that the populations had recovered for purposes of the ESA. The delisting of a distinct population segment (DPS) of Northern Rocky Mountain gray wolves is contingent upon adoption by states of a USFWS-approved state law and wolf management plan adequate to assure that recovered populations would remain viable upon removal of ESA protections. *See* 17 Fed. Reg. 6634, 6634 (Feb. 8, 2006) (to be codified at 50 CFR Pt. 17). USFWS approved Montana’s and Idaho’s laws and wolf management plans, but rejected Wyoming’s and indicated it would not propose to delist wolves in Wyoming until a new state plan is approved. USFWS objected to provisions in Wyoming’s law that would designate wolves as “trophy game” in some areas, enabling its regulation by the Wyoming Game and Fish Department, while the classification could change to “predatory animal” depending on the number of wolf packs in certain areas. When classified as the latter, the Wyoming Department of Agriculture has jurisdiction, and species designated as such are considered “pests” that can be “taken by anyone, at any time, without limit, and by any means, except poison.” The state of Wyoming filed suit against DOI and USFWS, alleging that Defendants violated various statutes by rejecting Wyoming’s wolf management plan and refusing to delist the Northern Rocky Mountain DPS of gray wolves on that basis.

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In *Wyoming v. DOI*, the Tenth Circuit issued a terse opinion on the state of Wyoming's lawsuit against USFWS. This case was consolidated with a similar suit brought by the "Wolf Coalition," *Wyoming Wool Growers Association v. U.S. Department of the Interior*, No. 04-0253 (D. Wyo. filed Sept. 21, 2004), in which plaintiffs alleged, *inter alia*, that despite defendants' "formal and binding declaration that they would prevent and control wolf depredations," they "repeatedly neglected to fulfill their commitment to the Plaintiff Wolf Coalition members," causing damage to outfitting, agricultural and tourist industries; livestock, elk, moose, deer, sheep and antelope populations; and the Wyoming Game and Fish Commission's "ability to manage wildlife and raise revenue." *Wyoming Wool Growers Association*, Complaint, No. 04-0253, 2004 WL 3175709 at ¶¶ 92-94, 96-102. The Wolf Coalition consists of state and local governmental bodies, agricultural advocates, stock growers and cattlemen's associations, county predatory animal boards, outdoor sporting groups and other interested parties. *See id.*

The state of Wyoming and the Wolf Coalition alleged various constitutional claims and violations of the ESA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.* Specifically, the plaintiffs alleged that DOI failed to properly manage and control gray wolves in Wyoming, erred in rejecting Wyoming's Gray Wolf Management Plan, allowed gray wolf populations "to expand well beyond . . . recovery goals," and failed to delist the gray wolf when merited. *Wyoming v. DOI*, 442 F.3d at 1264; *Wyoming Wool Growers*, Complaint, No. 04-0253, 2004 WL 3175709, at ¶ 107. The court dismissed the statutory claims because the state and other plaintiffs failed to either identify a final agency action or show that the United States "unlawfully withheld or unreasonably delayed" legally required action—prerequisites to judicial review under the APA. The court also affirmed the district court's conclusion on the state's constitutional claims, agreeing that the USFWS' and DOI's actions with respect to the wolf management program "are consistent with the powers delegated . . . through the ESA via the Commerce Clause, and . . . do not invade any province of

Wyoming's state sovereignty reserved by the Tenth Amendment." *Wyoming v. DOI*, 442 F.3d at 1264 (quoting the district court holding, *Wyoming v. U.S. Department of Interior*, 360 F. Supp. 2d 1214, 1244 (D. Wyo. 2005)). The Tenth Circuit varied from the district court's opinion only in expressing no opinion on the plaintiffs' ESA and NEPA claims. *See id.* at 1264-65.

In the district court, Circuit Judge Alan B. Johnson addressed plaintiffs' claim that federal defendants failed to apply the ESA's best available science mandate, 16 U.S.C. § 1533(b)(1)(A), when rejecting Wyoming's wolf management plan. Plaintiffs argued that USFWS was obligated to delist the wolf even without a petition. Judge Johnson explained that the regulations effectuating the best available science mandate are triggered only upon a petition or status review; because neither the state nor the coalition filed a petition to delist the gray wolf, the applicable regulations did not apply. *Id.* at 1228-29. The court rejected plaintiffs' argument that "filing a petition would be futile because they already knew what determination the federal agencies involved would make," explaining that this assertion "fail[s] to recognize the significance of the petition process[,] which strikes a delicate balance between judicial review, agency expertise and the public's right to a healthy, sustainable ecosystem which fosters biological diversity. The petition process sets up mandatory bright lines of both timing and behavior that are readily open to judicial review." *Id.* (citing 16 U.S.C. § 1533(b)(3)(C)(ii)).

The district court refused to allow plaintiffs to "create a de facto petition process that ignores the legislative mandates found in the ESA," and would not review the disputed federal actions through the lens of the best available science provision of the ESA because the decisions "did not implicate that statutory prerogative." The court also found that both the state and the coalition "failed to demonstrate that the Federal Defendants have a mandatory duty to control wolf depredations" or that they "are under a discrete non-ministerial duty [to do so]." *Id.* at 1233-34.

As to the NEPA claims, the district court held that the agency was not under an obligation to supplement the

wolf environmental impact statement, and that the NEPA claims were barred by the statute of limitations applicable to actions against the United States. *Id.* at 1238 (citing 28 U.S.C. § 2401(a)).

Wyoming also brought constitutional claims against DOI and USFWS, alleging that a USFWS letter issued to Wyoming violated both the Guarantee Clause and the Tenth Amendment of the U.S. Constitution, and arguing that the USFWS's "demand that the Wyoming legislature enact a specific regulatory scheme is unconstitutional." *Id.* The court rejected these claims as well. It stated that "[i]t is well settled that the ESA is a Constitutional exercise of Congressional authority under the Commerce Clause." *Id.* at 1240 (citing *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (C.A.D.C. 2003), *reh'g denied, reh'g en banc denied* 334 F.3d 1158). Further, "the alleged harm being suffered by Wyoming, i.e. the Federal Defendants' failure to regulate gray wolf depredations, is entirely speculative and unproven," and, "while the States have historically possessed broad powers over wildlife within their borders, such powers are not constitutionally based—and thus are susceptible to pre-emption." *Id.* at 1241 (citations omitted). Noting that "Wyoming is under no mandate to regulate gray wolves[,]," the court found that the state also failed to show that the federal government "commandeered the legislative processes of Wyoming" and instead found the United States' management actions "entirely consistent with the Tenth Amendment." *Id.* at 1241-42.

Ultimately, the district court denied all of plaintiffs' prayers for relief and dismissed its claims under the ESA and NEPA, stating that

The Court is at a loss to explain the actions of the State of Wyoming. The statutory mechanisms, namely the petition process, are in place for the State to create a reviewable record. This action, if it had been taken, would have forced the Federal Defendants to make choices under hard deadlines set by Congress. It would have also triggered the 'best science available' mandate, and much of the Federal Defendants' arguments presented here would have melted away, allowing this Court to

reach the merits of many of Wyoming's claims. The statutory requirements are not mere bureaucratic hoops to jump through, but rather are the stated will of Congress, and the people, and as such should be adhered to with great care. This case touches the heart of federalism. The complaints filed here are not cognizable under the limited jurisdiction of this Court.

Id. at 1245. The Tenth Circuit affirmed the judgment of the district court "for substantially the same reasons given in [the district court] opinion." *Wyoming v. DOI*, 442 F.3d at 1264. Wyoming has petitioned to have wolves delisted within its borders, and USFWS should decide on that petition by the summer of 2006. Mead Gruver, *Court Upholds Dismissal of Wyo. Wolf Suit*, WASH. POST, Apr. 4, 2006.

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CORPS OF ENGINEERS FORCED INTO SECTION 7 CONSULTATION ON ACF OPERATIONS

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On Jan. 31, 2006 the state of Florida moved for a preliminary injunction in the Northern District of Alabama, *see Alabama v. U.S. Army Corps of Eng'rs*, Case No. 1:90-CV-1331, asserting ongoing procedural and substantive violations of the Endangered Species Act (ESA) resulting from the Army Corps of Engineers' (Corps) operation of dams in the Apalachicola-Chattahoochee-Flint River (ACF) System. Florida sought to compel the Corps to complete formal Section 7 consultation and to implement a species protective flow regime pending its conclusion. Florida's motion was the latest salvo in the long-standing dispute over Corps reservoir operations, which involves the three states of Alabama, Florida and Georgia, and has been pending before the district court since 1990.

Florida's motion was designed to protect three species that reside in the Apalachicola River Basin—the threatened Gulf sturgeon, and two mussel species, the endangered fat threeridge and the threatened purple bankclimber. The species' range has declined dramatically since the construction of dams on the Chattahoochee River, including Buford Dam, which impounds Lake Lanier near Atlanta, Georgia. The Apalachicola River, formed by the confluence of the Chattahoochee and Flint Rivers, is designated critical habitat for the Gulf sturgeon. Gulf sturgeon spawning was documented for the first time in 2005 at limestone outcroppings immediately below the most downstream Corps facility, Jim Woodruff Lock and Dam. The mussels reside primarily in sloughs and sidechannels quickly disconnected from the mainstem when Apalachicola River flows recede below threshold elevations.

The Corps, on March 7, 2006, initiated formal consultation pursuant to ESA Section 7 in response to Florida's motion before responding to it. The Corps currently is consulting on a set of interim operations

intended to comply with the ESA's substantive prohibitions until the Corps updates its master water control manual and related operating rules for the ACF System. At that time, the Corps has explained, additional formal consultation will occur on the updated documents.

In a later response to Florida's motion, the Corps argued Florida lacked standing to bring its ESA claim and, alternatively, that Florida's motion for preliminary injunction was moot as a result of the Corps' initiation of consultation. Florida replied that certain issues remained live because the Corps' interim flow regime was inadequate to secure the species' welfare. A hearing was held April 14, 2006 on Florida's motion.

On April 17, 2006, the district court issued a succinct order concluding Florida had standing sufficient to enforce the ESA, but that Florida's procedural claim was moot as a result of the ongoing consultation. The court also considered evidence that Gulf sturgeon spawning activities were being disrupted in 2006 and that Gulf sturgeon eggs present below Jim Woodruff Lock and Dam were under threat of unauthorized take, but concluded that evidence was insufficient to warrant judicial intervention before the consultation was complete.

The task of developing a reasonable and prudent alternative to the Corps' operations is now before the U.S. Fish and Wildlife Service (USFWS). The agency has indicated a biological opinion will be issued July 21, 2006. One intervening event likely to shape that opinion is a forthcoming proposal concerning critical habitat for the two mussel species. That rulemaking is being conducted pursuant to a stipulated settlement in an unrelated case, which calls for a proposed critical habitat rule by late May 2006. *See Center for Biological Diversity v. Hamilton*, Case No. 1 04 CV-0729 (N.D. Ga.), Stipulated Settlement Agreement (filed Sept. 1, 2004). USFWS has indicated that it would issue a conference opinion on the impacts of Corps operations on mussel habitat as part of the consultation.

THE U.S. FISH AND WILDLIFE SERVICE IS STILL SEEKING TO DELIST BALD EAGLES

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The U.S. Fish and Wildlife Service (USFWS) is again seeking comments on whether to remove bald eagles from the list of endangered species. In 1967, bald eagles were officially declared endangered, under a law that preceded the Endangered Species Act of 1973, throughout most of their range. Wildlife experts believe there may have been 100,000 nesting bald eagles in the lower 48 states when the bird was adopted as our national symbol in 1782. By 1963 there were only 417 bald eagle nesting pairs in the lower 48 states. Currently, wildlife experts estimate there are more than 7,000 nesting pairs.

In 1999, USFWS announced its intention to delist bald eagles from the Endangered Species Act. In February of this year, USFWS re-opened the comment period on the proposed de-listing.

In addition to re-opening the comment period, USFWS published a proposed definition of “disturb” to clarify the meaning of this term under the Bald and Golden Eagle Protection Act, one of two federal laws that will continue to protect bald eagles. Under USFWS proposed definition, any activity that actually causes injury, death, or nest abandonment would be prohibited. USFWS also published Draft National Bald Eagle Management Guidelines. The Guidelines, which provide information on how to avoid impacts to eagles, were also made available for public review and comment.

If bald eagles are delisted from the Endangered Species Act, they will continue to be protected by the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). Both acts protect bald eagles by prohibiting killing, selling or otherwise harming eagles, their nests or eggs.

JUDGE ILLSTON SETS ASIDE FISH AND WILDLIFE SERVICE BIOLOGICAL OPINION AND CRITICAL HABITAT DESIGNATION

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In a lengthy opinion issued on March 13, 2006, Judge Susan Illston of the U.S. District Court, Northern District of California, granted summary judgment in favor of several environmental plaintiffs in *Center for Biological Diversity, et al. v. Bureau of Land Management, et al.* Plaintiffs challenged the Bureau of Land Management’s (BLM’s) resource management plan for the Imperial Sand Dunes Recreation Area under the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), the Administrative Procedure Act (APA) and the Federal Land Policy and Management Act (FLPMA). Comprising approximately 167,000 acres in southeastern California, the Dunes Recreation Area is home to the desert tortoise and the Peirson’s milk-vetch (a plant listed as threatened under the ESA), and includes approximately 21,836 acres of critical habitat for the milk-vetch. BLM’s management plan proposed to re-open several habitat areas to off-highway vehicle use. In 2005, the U.S. Fish and Wildlife Service (USFWS) issued its Biological Opinion on BLM’s proposed management plan and concluded that such off-highway vehicle use would not result in “jeopardy” to listed species or “adverse modification” of designated critical habitat.

Based on several deficiencies, Judge Illston set aside USFWS’s 2005 Biological Opinion. The Court found the Biological Opinion “flawed” because it permitted significant declines in the milk-vetch population (up to 50 percent) before instituting any mitigation measures to address those population declines. In other words, the Biological Opinion failed to “insure” that off-highway vehicle use within the Dunes “was not likely to jeopardize the continued existence of any . . . threatened species” as required under Section 7(a)(2) of the ESA. Likewise, the Biological Opinion concluded that the proposed increase in off-highway vehicle use would not result in “adverse modification” of critical habitat, yet it neglected to explain how

continued and expanded habitat degradation of almost half the designated critical habitat for milk-vetch (about 48 percent) would not constitute adverse modification.

The court also set aside USFWS's Incidental Take Statement for the desert tortoise because it failed to contain a "meaningful standard by which incidental take can be measured." The Incidental Take Statement not only failed to provide a precise take limit, but it failed to explain why such a numerical value could not be obtained. The court determined that more was required. In addition, the "terms and conditions" required under ESA section 7(b)(4) to minimize the level of take resulting from off-highway vehicle use were conspicuously absent. The court wrote that "the Service's failure to include any Terms and Conditions . . . with respect to minimizing take from recreational use in general, and OHV use in particular, violates the plan language of the ESA, and is therefore arbitrary and capricious."

The court's decision also reviewed the USFWS's final rule designating critical habitat for the milk-vetch that eliminated approximately 31,000 acres (almost 60 percent) from the area originally proposed to be designated as critical habitat. USFWS reasoned that there would be little benefit to including the additional 31,000 acres because such areas were already occupied by the milk-vetch, and thus any effects on the species would be addressed through the Section 7 consultation process. The court found the USFWS's final rule arbitrary and capricious because it erroneously concluded that there would be no benefit to including the additional 31,000 acres as critical habitat. Like many such habitat designations, the milk-vetch rule essentially ignored the distinction between the "jeopardy" standard under Section 7 and the "recovery" standard that applies once critical habitat is designated. Citing the Ninth Circuit's 2004 decision in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, the court explained that "by finding that there were no additional regulatory benefits to be gained by designating critical habitat in the areas that were ultimately excluded, the Service improperly ignored the recovery goal of critical habitat."

The court also ruled in favor of the environmental plaintiffs on a number of other grounds, including under the ESA and NEPA. Under the court's order, the parties are scheduled to submit additional briefs concerning the form of relief.



Endangered Species Committee Newsletter

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NINTH CIRCUIT HOLDS THAT ESA CONSULTATION IS REQUIRED FOR THE REGISTRATION OF PESTICIDES

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In *Washington Toxics Coalition v. U.S.EPA*, 413 F.3d 1024 (9th Circuit 2005), plaintiffs sought to enjoin the Environmental Protection Agency's (EPA) registration of 54 pesticide-active ingredients that may be harmful to endangered or threatened salmon and steelhead in the Pacific Northwest. EPA registers pesticide-active ingredients under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA provides comprehensive regulations controlling the use, sale and labeling of pesticides and regulates how EPA registers, labels and cancels the registration of pesticides.

Plaintiffs sued EPA in 2001 for a violation of the Endangered Species Act (ESA), contending that EPA failed to consult with the National Marine Fisheries Service pursuant to section 7(a)(2) of the ESA. Groups representing pesticide manufacturers, formulators, distributors, sellers and applicators intervened contending that EPA is not bound by the ESA because it complied with FIFRA requirements.

The U.S. District Court for the Western District of Washington held that EPA was not exempt from requirements of section 7(a)(2) and enjoined the pesticide registrations pending compliance with consultation requirements. The court held that the comprehensive language found in section 7(a)(2) applied the ESA consultation requirements to "each federal agency," including the EPA. EPA appealed to the Ninth Circuit Court of Appeals, maintaining it was not required to comply with the ESA since it was bound only to follow the FIFRA provisions.

The Ninth Circuit affirmed the district court's decision, stating that FIFRA requirements "do not overcome an agency's obligation to comply with environmental statutes with different purposes." The Ninth Circuit previously held that FIFRA did not exempt parties

from compliance with the Clean Air Act or National Environmental Policy Act, holding that if two environmental statutes have different but complementary purposes, agencies must comply with both. *Headwaters Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Oregon Env'tl. Council v. Kunzman*, 714 F.2d 901 (9th Cir. 1983). Similarly, the Ninth Circuit ruled in this case that EPA must comply with FIFRA and the ESA because the two statutes have consistent and complementary objectives. FIFRA weighs the benefits of a pesticide's use against the economic, social and environmental costs to ensure there is no unreasonable risk, while the most important considerations under the ESA are the weighing of benefits and risks to threatened and endangered species.

EPA also argued that once it approved a pesticide under FIFRA, it could not comply with the ESA because it lacked "the discretion to meet any other legal obligations." EPA supported its argument with several cases in which agencies could not comply with the ESA because the agency activity was not ongoing and had already been completed. In this case, however, the court found that "EPA has continuing authority over pesticide regulation," and has discretionary control "to inure to the benefit of a protected species." EPA's continuing authority over pesticide regulation creates a "continuing obligation to follow the requirements of the ESA," thus providing the discretion necessary to comply with the ESA.

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THE KEYSTONE CENTER ISSUES REPORT ON RECOMMENDATIONS FOR REFORM OF THE ESA

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In an effort to garner support for reform of the Endangered Species Act (ESA) among a range of interests, U.S. senators on the Environment and Public Works Committee asked the Keystone Center, a mediation group specializing in public policy issues, to convene a group consisting of various stakeholders that would be affected by a reauthorization of the ESA. The purpose of this group would be to make recommendations regarding potential changes to the ESA. In response, the Keystone Center formed a 23-member Working Group to meet to discuss ESA reform issues.

The six senators asked that the Working Group address three specific questions:

1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat listed species need to recover?
2. If not, how can the ESA be improved to better conserve habitat and help species recover?
3. What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help implement?

The Working Group reached consensus that the ESA as currently written and implemented has been only moderately successful at protecting habitat, and that the act would benefit from changes. The Working Group developed the following response to the senators' first question:

The Keystone Working Group on Habitat believes that, as currently implemented, the Endangered Species Act (ESA) is not effectively protecting and conserving the habitat that listed species need to recover as effectively as it could, and that changes are possible which could potentially improve the performance of the ESA while at the same time reducing the concerns of regulated parties.

The Working Group's discussions regarding potential improvements to the ESA centered primarily on critical habitat, recovery plans, and regulatory streamlining and incentives. The Working Group was not able to adopt consensus recommendations regarding critical habitat or recovery planning, but the final report contains extensive discussion of these issues.

The Working Group made approaches to regulatory streamlining and incentives to encourage habitat protection a central part of its recommendations. The Working Group was able to reach consensus on only a small subset of the recommendations under consideration. There was widespread support for increased conservation incentives through the tax code and the Farm Bill. A recommendation to codify the Safe Harbor and Candidate Conservation Programs also received consensus support. Additional recommendations regarding regulatory streamlining did not receive consensus support, but are discussed in detail in the final report. These recommendations include: (1) codification of no surprises and creation of a habitat conservation plan (HCP) insurance fund to support no surprises assurances (2) codification of the low-effect HCP program, and (3) increased integration of sections 7 and 10.

The final report of the ESA Working Group is available on the Keystone Center's Web site at www.keystone.org.

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