

AGRICULTURE FISH AND WATER

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ABSTRACT

Endangered Species Act and Clean Water Act related issues in the Pacific Northwest are threatening the viability of agriculture production. Actions involving the two laws are the latest in a long line of public policies affecting the profitability of the regions agriculture. A combination of agency interpretation of laws and environmental industry legal actions has moved 1970's environmental regulations beyond original legislative intent. Over the last three decades public policy has become a major factor in food producers efforts to maintain profitability. The Methow Valley in Okanogan County Washington is one example of restricted water use due to federal regulatory actions. While agriculture must continue its evolutionary improvement of environmental quality, it is imperative the industry become proficient in administrative and legal challenges.

Key Words: ESA, CWA, public policy, water-use, agriculture viability

INTRODUCTION

Efforts to protect salmon and other aquatic species under the Endangered Species Act (ESA) have the potential to substantially reduce the viability of agriculture production in the northwest states. When ESA is coupled with new Clean Water Act (CWA) the threat to agriculture increases exponentially. The potential for mandatory shifts in water and land use that would negatively impact agriculture is very real. The evolution of laws created in the 1970's through administrative and judicial action may be the single greatest threat to domestic food production. Agency actions in the Methow Valley provide a case study for what agriculture producers in the Pacific Northwest presently face.

PACIFIC NORTHWEST SALMON RECOVERY

The entire state of Washington is under the scrutiny of ESA for at least one species listed as endangered or threatened and most areas have multiple species. This is also true of Oregon, Idaho, western Montana and much of northern California. There are many land based or terrestrial species listed in the five state area, but for the purposes of this paper I am going to focus on the critters that swim and mainly the species of salmon managed by the National Marine Fisheries Service (NMFS). Because salmon habitat is water and water based habitat connects to the entire watershed, salmon listings potentially affect virtually every human activity in the Pacific Northwest. The Columbia River system alone includes from the Rocky Mountains in the east to the Cascade

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Mountains in the west and from the Canadian border into Utah, Wyoming and Nevada. The spotted owl listing affects large chunks of land; salmon potentially affect everything.

Compounding the dilemma, CWA consideration of Total Maximum Daily Load (TMDL) also comes into the equation of salmon recovery efforts. CWA regulatory criterion implicates every human activity as well. In Washington's salmon recovery process CWA provides Washington State Department of Ecology yet another role and brings the Environmental Protection Agency to the table. CWA has become one more hurdle of regulatory compliance.

Total Maximum Daily Load regulations make water quantity and quality issues inseparable. In addition to familiar water quality issues of sedimentation and toxins, the ESA TMDL combination introduce the issue of water temperature and other criterion associated with fish needs. Stream classifications may be changed from agriculture to fish habitat as highest and best use. Temperature requirements and other cultural needs of fish also affect the riparian areas along streams providing the regulatory inroad for buffer management. Due to potential hydraulic continuity ground water use is not exempt from surface water quantity/quality considerations. One example of how TMDL might be used to limit or deny either ground or surface water use is: when low stream flow is considered a cause of increased water temperature agencies may require stream flow enhancement, thus using water pollution as a backdoor mechanism to take water rights. If ground water is implicated through hydraulic continuity agencies will attempt to limit or eliminate that use as well.

Man made drains and canals are also potentially on the block. Agency personnel have indicated that due to loss of habitat from human activity they will consider man made conveyance structures for habitat enhancement.

Along with the modern environmental movement came an evolution of aggressive agency administrative action that often, at the very least, is exercised in the gray area of legislative intent. Environmentalism that was once a grassroots cause has become a very lucrative business. Both agencies and environmentalists were blessed with thousands of words of regulation created in the 1970's that could be molded to meet objectives beyond original legislative intent. Both also recognize the judicial system as an arena where they can move an agenda forward independent of legislative action. The CWA, National Environmental Policy Act (NEPA) and ESA are examples of laws that have evolved creating a legislative drift from original Congressional intent. An example of legislative drift is in a quote from the late Washington State Senator Henry Jackson who was considered to be the father of NEPA. Senator Jackson remarked several years after the law went into effect "we never intended for an Environmental Impact Statement (EIS) to be more than 6 or 8 pages long". Now a 2,000 or more page EIS is common. Beyond the increased use of paper from original intent this indicates that scrutiny on actions is far exceeding original intent as well.

Compared to the wall of regulatory influence, the agriculture industry is only beginning to respond to and counteract thirty years of regulatory growth that too often has gone beyond reason and denies the reality of basic human needs. Public policy has become a major influence in profitability of the production of agriculture commodities over the last several decades - possibly more than any other factor. Without denying the importance of the many areas where public policy affects agriculture producers, the one I am most involved with is environmental regulatory policy.

This paper will focus on a specific case history that is exemplary of agriculture water use issues in the Pacific Northwest.

As Executive Director of the Washington Agriculture Legal Foundation (WALF) and Chairman of the Washington Farm Bureau Salmon and Natural Resource Committee most of my time is spent with salmon recovery issues. WALF is a non-profit charitable foundation. The Foundation was established to provide an opportunity for resource producers to challenge agency actions that deviate from legislative intent and/or ignore Constitutional protections. The Foundation provides a ready-made structure and guidance that enhances coordination of efforts. The goal is to balance the aggressive use of the court system by the environmental industry and to establish research projects that clarify scientific uncertainty.

WALF is supporting Methow Valley irrigators in their effort to protect water rights and bring scientific honesty into Washington's salmon recovery process. The Methow Valley is located in north central Washington in Okanogan County. The valley gets its name from the Methow River, which with its tributaries is the water source for many valley residents. The valley is picturesque and has become a popular area for retirement and people who want acreage in the country. Commercial agriculture in the valley has declined in the last few decades, yielding to part time farmers and hobby farmers.

Over the last ten years Okanogan County, which historically has had a resource based economy, has lost most of its timber economic base due to regulatory restrictions. The listing of salmon species began to have an affect on its agriculture economy about three years ago. Following is an overview of the salmon recovery process in the Methow Valley. It is a story that is and will continue to be repeated in the northwest as well as other western states. Although I am going to focus on one area, I believe it will provide insight to the issues irrigated agriculture faces in the northwest and the west.

On August 11, 1997 the National Marine Fisheries Service (NMFS) listed the Upper Columbia River steelhead trout as "endangered" under the ESA. On July 10, 1998 the U.S. Fish and Wildlife Service (USFW) listed Columbia River bull trout as "threatened" under the same Act. In March of 1999 the Upper Columbia Spring Chinook Salmon was added to the "endangered" list. All have a presence in the Methow river system.

In early 1998 NMFS invoked Section (7) of the Endangered Species Act on several Methow irrigation companies because their ditches crossed U.S. Forest Service (USFS) land. Section (7) consultation requires the agency involved in the action to develop a Biological Assessment (BA) and the agency charged with protection of the species in question to develop a Biological Opinion (BO) from the information provided by the BA. This must be completed before action that could affect an endangered species is permitted. In the case of the Methow the USFS is the agency involved in the action and the NMFS is the agency charged with species protection. Section (7) can be invoked any time there is a federal action or when federal money is involved in an action that might affect an endangered species.

It should be noted that there is discretionary latitude in determining when Section (7) is necessary. In Richland Washington there was Section (7) consultation when changing traffic lights. There was

federal matching money involved and the lights were located less than one half mile from the Columbia River. The river is habitat for endangered species. It delayed the project many months. However, in Seattle there was no Section (7) consultation when the old football stadium was blown up to make way for a new stadium. Also in Seattle, if there was any Section (7) consultation before beginning repairs on a barge damaged main arterial bridge it was superficial. Both had an endangered species connection and a federal action connection. Thorough Section (7) on either of the projects would have inconvenienced a large number of people for a long period of time. In rural areas there are not large numbers of people thus minimizing public outcry and political risks.

On April 23, 1998 the USFS sent Biological Assessments (BA's) on the Methow ditches to NMFS completing the first step in the Section (7) consultation process within the statutory time frame. By statute the consultation process takes about nine months from beginning to develop the final BO. It is possible to extend the process through written request and agreement of the parties involved.

Nearly a year after the Methow assessment began, on February 1, 1999 the USFS sent letters to the Methow Section (7) ditches, stating that NMFS had not yet completed the BO and that irrigation ditches could not be used until it was completed. The letter indicated the reason for delay on the BO was that inadequate information was provided and gave irrigators until March 1st to provide the information. Normal water turn on date for the irrigators is April fifteenth.

On April 14, 1999 NMFS sent a letter to irrigation companies indicating they had not finished the BO because they were waiting for the USFS to complete its BA. The letter stated that ditch use prior to completion of the BO would be in violation of ESA and subject to fine and imprisonment.

A letter from the USFS at the beginning of May 1999 rescinded the right of irrigators to use their conveyance ditches. This action set in motion an appeal process in which the irrigators appeal was dismissed by the USFS without responding to substantive issues. In June 1999 a second letter from the USFS reinstated the right to use conveyance ditches, but by this time NMFS had determined screening on several diversions was not adequate. Most ditches in question were established previous to 1946 exempting them from screening responsibilities by state law. The law delegates this responsibility to Washington State Fish and Wildlife when considered necessary. However, irrigators are in a position of responsibility for any harm to fish under ESA, if due to inadequate screening, even though they are not responsible for screening under state law.

It is important to note that there were no pending federal actions on the conveyance ditches in question. In the first place, several of the ditch companies are covered by the 1866 mining law that gives them a vested right of way across Forest Service land independent of agency control. The Forest Service wrongly believed those companies needed temporary permits to operate. We believe the Forest Service wrongly invoked Section (7), setting in motion what has been a nightmare for the irrigators involved. Even if temporary permits were in order, existing permits were not up for renewal, so there was no pending federal action. Further, the action of permitting ditch use has no bearing on the water right or its use.

If one were to assume Section (7) was appropriate, there is no record of written request from NMFS that indicated information in the BA's delivered by the USFS in April of 1998 was not adequate. BA's and BO's are separate for each diversion involved in Section (7). Nor did the irrigators ask

that the time frame for the BO's be extended. The BO's that should have been final in late 1998 are finally being published in August through October of 2000. Any request to extend statutory time frames should have been documented in the first thirty days following NMFS receipt of the BA's in April of 1998 . NMFS simply failed to follow their statutory obligation to do their job within allotted time frames. Had BO's been completed in a timely fashion irrigators would have had a chance to respond to screening issues or other issues that ultimately prevented them from use of their water right.

In addition to the inappropriate use of Section (7) and violation of statutory time frames, BO's finally issued 30 months after the process began, reasonable and prudent alternatives are not considered, which is also required by law. The final documents appear to be based on hunches without definitive scientific basis being provided. For example, in-stream flows required in the BO's cannot be met in at least eight out of every 10 years, even if irrigation is shut down completely. **Mother Nature has never provided the amount of water sought by NMFS and probably never will.** It is difficult for the irrigation companies to respond to government action when there appears to be no definitive scientific basis and no consideration of Constitutional rights.

During May and June of 1999 Okanogan County and the State of Washington were pressured to join federal agencies in a Memorandum of Agreement that would cut water use for the Section (7) ditch companies by 25 percent. Most irrigation companies in question have senior water rights dating back one hundred years or more. There was no scientific basis provided for the 25 percent reduction, and neither the state nor county has the authority to take away water rights without due process or compensation. The agreement would have treated junior and senior water rights equally in the reduction process. County Commissioners rejected the commitment of water rights, but negotiations continue. If it is determined stream-flow enhancement is critical to the protection of the species in question, federal agencies can condemn property and compensate users for their loss, but compensation or the condemnation process has not been mentioned by NMFS.

The Washington Agriculture Legal Foundation believes water rights are protected under the Fifth Amendment of the U.S. Constitution and under the Washington State Constitution and that Washington's right to manage water within the state is protected by the Tenth Amendment of the U.S. Constitution. The connection between water rights and the value and viability of a person's private property is impossible to ignore. That becomes even more obvious when examining the condition of Methow Valley irrigation ditch company lands that have gone without water for as long as two years. Water rights are constitutionally inseparable from the right of ownership of property.

NMFS actions appear to have the primary purpose of forcing private property owners and resource producers into voluntarily submitting to regulatory requirements that could not legally be imposed by the federal government and have no scientific basis. Rural communities and private property owners that cannot afford technical and legal support to respond to the process are at a marked disadvantage.

The Methow Valley has become the test case for Washington State salmon recovery efforts. Both NMFS and state agencies have indicated the Methow is the prototype for salmon recovery watershed policy development. Apparently in an effort to make a point to the rest of the state, the

regulators destroyed people's financial well-being. Pastures, orchards and hay fields went without water, and curtailment of water use contributed to the loss of property in at least one incident. In a recent Wall Street Journal quote Mike Grady of the National Marine Fisheries Service (NMFS) said "The Endangered Species Act (ESA) gives us the right to set target flows. We are blind to state and local laws. All we care about is getting that block of water to the fish." The Service has ignored the fact that it is not state and local law that protect water and property rights, but Constitutional Law.

The Endangered Species Act statutory language did NOT mandate NMFS actions - they were discretionary decisions by agency personnel.

NMFS has expanded the role of ESA, with respect to salmon species on the west coast, to include Evolutionary Significant Units (ESU). This allows the agency to identify small segments of the overall range of a species as segments where the species is endangered and thus determines the species in that segment is an individual species genetically separated from its counter parts.

The region and the Methow Valley experienced record returns of Spring Chinook in 2000, but they were the wrong fish according to NMFS. Carson Stock Chinook, a hatchery bred fish came back to the river in record numbers, but the Methow Composite Stock is what the agency wants to establish as native to the Methow River. Even though Carson Stock contributed the majority of the genetics for the Methow Composite Stock and the Methow Composite Stock was apparently not developed until 1998, the Composite Stock is the one being protected under the March 1999 ESA listing and the agency wants to eliminate the Carson fish. It will be two more years before the Composite Stock completes its first ocean cycle and returns to the Methow. It should be understood that NMFS does not include hatchery fish as part of the species endangered so their numbers do not count in determining the listing. However, in the Methow all fish have a hatchery background so NMFS is making an exception.

The result of multiple discretionary decisions is that seventy water right holders were denied all water use and over 100 others were denied use of part of their water right in 1999. One irrigation company has now completed its second season without water use and the BO's finally delivered require three historical irrigation companies to comply with stream flow requirements that deny full use of their water rights.

Over 50 more Methow irrigation companies, ditches and individual diverters, impacting hundreds of individual users, were told last fall that they were required to comply with Section (9) of ESA. Unlike Section (7), Section (9) does not require specific action, but allows managing agencies to impose fines if a species is taken due to human activities. In December of 1999 irrigators received letters from the NMFS requiring they produce plans to comply with federal guidelines within three weeks to ensure water use in the 2000 irrigation season. The Methow Valley Section (7) irrigators were the first on a list that now includes many targeted water users in Washington and other northwest states that are presently experiencing similar situations.

This is not a new phenomenon; irrigators in New Mexico, California and other states in the southwest are familiar with ESA efforts to take water rights. The difference may be in the scope, now all water and land use in the northwest is in jeopardy. And it is happening in the northwest,

which has an abundance of water, not in the, water limited deserts of the southwest. On average irrigators in the Methow Valley use about one and one half percent of the annual river flow. In Washington State human depletion is about 2% of the states annual water budget, while 17% evaporates and 81% runs into the ocean. Washington is second to only Alaska in total water availability. The Columbia River alone could supply 22.5 gallons of water a day for every man woman and child in the world. The northwest focus needs to seek better management of the total water available rather than squeezing water out of human use.

If water quantity is found to be an issue of importance, the northwest must do a better job of water management. The majority of available water comes in the spring freshet flows often causing flooding and scouring of streambeds. While flushing is an important component of the natural cycle, quantities often exceed beneficial effect to the natural environment and often cause significant damage to human interests. These aspects cannot continue to be ignored. Both off-stream storage and flood control can result in more water availability and less damage from extreme flows. The truth is we don't have a water shortage in the northwest; we simply do not have effective water management policy.

It is important the agriculture industry continue to develop environmentally responsible management practices but essential they oppose unnecessary administrative actions that deviate from legislative intent and law and do not have scientific basis. It is not a question of protecting or not protecting fish and other species, but in where the burden of responsibility lies when private property is at stake. It is imperative water rights be defended as a protected property right. This issue must be addressed at the beginning of the salmon recovery process.

WALF plans to support a lawsuit by the Methow irrigators in the fall of 2000. This suit will determine the role state rights and water rights play when ESA is involved. Regulators cannot be allowed to circumvent Constitutional protection through misuse of laws and regulations. The Foundation's goal for the Methow Project is to establish that water rights are a constitutionally based property, cannot be taken without due process and compensation even when ESA is involved and that the salmon recovery process must be driven by science. The alternative is to allow salmon recovery in Washington to develop with the assumption that farmers do not have a protected right to use of their water or land.

The importance of these issues is far beyond the well being of farmers. It is yet another obstacle to maintaining domestic production of food and fiber. There are now 6 billion people in the world that need food, shelter, energy and other necessities of life. The only question is who, how and where their sustenance will be provided. Unites States citizens are becoming very aware of the consequence of foreign dependence on oil. The country is also dependent on foreign supply of non-energy minerals and timber. In a recent meeting where a panel had representation from most federal land management and regulatory agencies the question was asked; does your agency consider human resource needs as part of the equation when applying regulatory action? Four out of eight answered no and the rest did not respond. Regulatory restrictions that prevent food production automatically send that production somewhere else with an unknown environmental consequence. Should we not incorporate maintaining resource needs into all regulatory policy rather then send that responsibility and its environmental affects and economic value to another country?

CONCLUSION

Public policy has become a primary factor in agriculture's viability. What happened last year to Methow irrigators is a direct assault on everyone that has a water right or owns property. This paper has focused on the Methow Valley, but as stated this story is being repeated across the northwest states and across the west.

The most important message I can send is that agriculture has to have more aggressive involvement in public policy development, including policy that is developed through the court system. U.S. agriculture has been among the most progressive industries in the world. Farmers have to be astute businessmen by prioritizing business decisions to ensure profitability. Yet very few farmers have line items in their budgets for public policy and I know of no agriculture bankers that require it. If we are going to maintain viability in the industry we will have to shore up our efforts in the area that has become a dominate factor for viability – public policy. Actions such as those that have occurred in the Methow Valley can only be prevented through assertive and coordinated agriculture involvement in the judicial process. Legal challenge must be incorporated into the agriculture industries public policy action plan and public policy must become a part of every producers business plan.