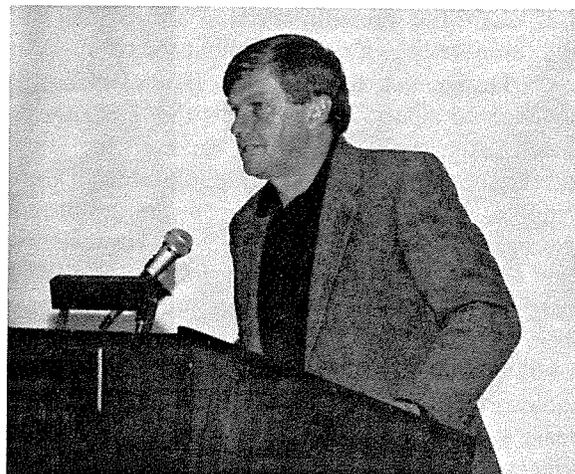


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THE SQUAWFISH THAT ATE FARMINGTON INCORPORATING STATE WATER LAW INTO THE ENDANGERED SPECIES ACT

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For many years, western mountain streams flowed unrestrained down the slopes of granite-surfaced mountains until they reached the alluvial plains where they spread out and slowed in momentum, and where the water became warmer. During the spring snowmelt, the streams flowed at high levels leaving their traditional banks and were reduced to a trickle in the late summer when the water surge of the past winter had been spent.

This highly variable hydrograph provided perfect habitat for a number of native species, one of which was the Colorado Squawfish that spawned in the shallow eddies of warm flood runoff at the margin between the traditional bank of the stream and the newly flooded alluvium. As settlers moved West, they recognized that reservoirs on the streams could harness the stream to accommodate their needs. A dam could hold back the snowmelt runoff and provide water for irrigation, domestic

use, and hydropower. Dams also provided benefits for many living below the reservoir.

A classic example is the Navajo Dam and reservoir on the San Juan River system. That dam now provides extensive benefits to all in the area. It has the potential for furnishing water to three Native American tribes: the Ute Mountain Utes, the Southern Utes, and the Jicarilla Apaches. In addition, it currently provides benefits for a fourth tribe, the Navajos. The Navajos receive extensive water rights from Navajo reservoir for the Navajo Indian Irrigation Project. Further, the non-Indian municipal and rural water users also benefit from a domestic water supply. The city of Farmington generates hydroelectric power revenues from waters that flow through the dam on a regular and even basis. There is potential and existing economic development through coal-fired power production providing extensive benefits. The reser-

voir's final by-product has been the creation of one of the best trout fishing waters within a five hundred mile radius. These waters exist just below the dam where the water flows out at a consistent rate and temperature—a perfect habitat for trout.

Designating the Colorado Squawfish on the endangered species list, under the Endangered Species Act, could potentially affect all the above interests. According to the United States Fish and Wildlife Service, squawfish need the traditional hydrograph to survive in the stream. However, no one can be certain returning to the traditional hydrograph will help improve survival because there are equally plausible alternative explanations for their demise. These include the fact that the squawfish were poisoned from the stream in earlier years when priorities were different by the same agency seeking to protect them now; the fact there are over forty non-native species that prey on the squawfish may be relevant; and that spawning routes were interrupted by the construction of Lake Powell. Whether the fish could ever be "recovered" is also problematic, since at no time have there ever been more than twenty fish found in the river. In very recent times, none have been found.

Thus, the balance is clear. The needs of four Native American tribes, of small municipal interests, of those who may consume electrical power, and of sportsmen who seek to fish for the game fish must be balanced against the needs of the squawfish. While this may appear to be a perfect case for reaching a balance, no balancing process is possible under the Endangered Species Act.

Under prevailing law, the remedies are absolute—the squawfish needs are paramount to all other interests unless one can receive an exemption from a federal committee—a remedy that to date has been virtually impossible to obtain. For the short-term, it appears that Navajo Reservoir will have to be operated to provide releases virtually as though it were not there. The result will be to eliminate many further beneficial uses of water in the area, foreclose hydropower production dramatically, and conceivably destroy the trout fishery.

The above scenario raises a number of interesting questions regarding the Endangered Species Act itself.

- A fair law allows one to plan for its application, and punishes those who have caused the problem—invoking the law by requiring they pay for the consequences of what they have done. The Endangered Species Act reflects the antithesis of this principle. It does not allow one to plan because one does not know which species might be listed. Further, once a species is listed, those who previously took the action to use water that resulted in the endangerment of the species are usually allowed to continue as before. It is the persons who have done nothing but hope to use water who pay the price because they cannot develop at all.
- The law of prior appropriation is the law in New Mexico but the Endangered Species Act may totally change that principle as to new appropriations of water. The key to going forward on a stream that contains an endangered species is the ability to conduct a "Section 7" consultation and propose alternatives to protect the species and allow one to use water under the federal project. Since there is limited water on the stream, the first person to achieve a Section 7 consultation has a better right than subsequent consulters because all the remaining water will likely be reserved for the fish.
- Section 9 of the act makes the "taking" of a squawfish or the destruction of its habitat a crime. While Section 7 only applies to federal projects and the remedy is to prevent the construction of a federal project, Section 9 is not limited to federal projects. What if the United States Fish and Wildlife Service determines that the act of a senior irrigator on the stream of diverting water under state law results in the destruction of the habitat of the squawfish? Is the senior irrigator subject to criminal punishment even though he is using the water under a state water right law? Is the irrigator entitled to compensation?

The above questions and the wisdom of the policy choices made under the Endangered Species Act raise difficult issues for the Congress and the courts in the future.