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# Endangered Fish v. Humans: The Fight Over Competing Water Needs

By Gene Tanaka, Best Best & Krieger



## Introduction

The struggle to allocate scarce water resources between humans and endangered fish is not new. But droughts in the Southwest which lower stream flows, and population increase which raise demand, have diminished the available water. These factors have exacerbated existing threats to protected fish species, such as greater variability in stream flows, increased water temperatures, fertilizers and overfishing. The consequences are playing out before federal and state administrative agencies and courts and will be felt by communities, which depend on surface water supplies.

This article discusses the threat posed by reduced stream water levels, examines the response by the United States Environmental Protection Agency, California State Water Resources Control Board and other regulatory agencies to set numerical stream flow requirements, and analyzes the law regarding the regulators' response.

## Nature in the Balance

In the American Southwest, temperatures

are rising. According to the EPA, “[e]very part of the Southwest experienced higher average temperatures between 2000 and 2014 than the long-term average (1895 and 2014). Some areas were nearly 2° F warmer than average.”<sup>1</sup>

The higher temperatures have exacerbated droughts in the Southwest. A. Park Williams, a climate scientist at the Lamont-Doherty Earth Observatory of Columbia University, noted that the California drought “would be a drought no matter what,” and “would be a fairly bad drought no matter what,” but “it is definitely made worse by global warming.” Richard Seager, another climate scientist at Columbia, explained: “When the atmosphere is as warm as it is, the air is capable of holding far more water. So more of the precipitation that falls on the ground is evaporated, and less is in the soil, and less gets into streams.”<sup>2</sup> In their study, Williams and Seager calculated that human-caused warming “accounted for 8-27 percent of the observed drought anomaly in 2012-2014 and 5-18 percent in 2014.”<sup>3</sup>

Drought measurements show that the number of droughts have increased in the Southwest. The Palmer Drought Severity Index uses the Palmer Index, which is calculated from precipitation and temperature measurements, and the Drought Monitor, which uses “several indices (including Palmer), along with additional factors such as snow water content, groundwater levels, reservoir storage, pasture/range conditions and other impacts.”<sup>4</sup> Averaged over the six states in the Southwest, the following figure shows “the last decade has seen the most persistent droughts on record.”<sup>5</sup>

Not surprisingly, stream flows in California and the American Southwest have declined. “Streamflow totals in the Sacramento-San Joaquin, the Colorado, the Rio-Grande, and in the Great Basin were 5 percent to 37 percent lower between 2001 and 2010 than the 20th Century average flows.”<sup>6</sup> The United States Geologic Society, California Water Science Center map below shows current streamflow conditions as a percentile of historical averages.<sup>7</sup>

At the same time, populations in California and the Southwestern United States are projected to increase. The California Department of Finance predicted that the population of California will increase by about 13 percent, or 5 million people, between 2015 and 2030.<sup>8</sup> Similarly, the U.S. Census Bureau predicted that from 2000 to 2030, the population in the Southwestern states would grow rapidly: Colorado 34.7 percent, New Mexico 15.4 percent, Arizona 108.8 percent, Utah 56.1 percent and Nevada 114.3 percent.<sup>9</sup>

Taken together, increased temperature, reduced stream flows and increasing populations threaten protected freshwater fish species and may reduce water supplies for people.

## The Regulators' Response

The EPA and USGS suggest that regulators for U.S. Clean Water Act programs may develop numeric stream flow targets to protect aquatic life. Their Draft Technical Report strives to provide “a flexible, nonprescriptive framework to quantify flow targets to protect aquatic life from the effects associated with flow alteration.”<sup>10</sup> Although EPA’s top water official, Joel Beauvais, told energy industry stakeholders that the Report is not “guidance” or “encouragement” of specific practices, the

discussion of uses in the Report implies otherwise.<sup>11</sup> Specifically, the Report suggests incorporating flow criteria for water quality standards, National Pollutant Discharge Elimination System permits, such as storm sewer systems and certain federal licenses or permits such as dams.<sup>12</sup>

The EPA and USGS say that the Report “was developed to serve as a source of information for states, tribes, and territories. . . .”<sup>13</sup> Coincidentally or not, the California State Water Board and Department of Fish and Wildlife have embarked on an administrative effort to set flow criteria for at least five stream systems in the State. In its California Water Action Plan 2016 Update, the State says it is “implementing a suite of actions to enhance flows statewide in at least five stream systems that support critical habitat for anadromous fish [fish that are born in freshwater, live most of their lives in the sea and return to freshwater to spawn].”<sup>14</sup> These actions include “developing defensible, cost-effective, and time-sensitive approaches to establish instream flows. . . .”<sup>15</sup>

These are but two examples of the responses by different regulatory agencies.

### Is it Legal?

Yes and no. The Clean Water Act (CWA), Federal Endangered Species Act (ESA) and California law may be used to set numeric stream flows, but there are limitations. The balance turns on the regulatory context in which the requirements arise.

#### A. Clean Water Act

On the one hand, the United States Supreme Court held that the distinction between water quality and water quantity is “a false distinction.”

“[L]owering of the water quantity in a body of water could destroy all of its designated uses....”<sup>16</sup> In other words, CWA water quality standards may be enforced by ensuring that stream flows are sufficient to dilute pollutants to maintain those standards. On the other hand, the CWA itself provides that the states, not the United States, shall decide how to allocate quantities of water. “[T]he authority of each State

to allocate quantities of water . . . shall not be superseded, abrogated or otherwise impaired.”<sup>17</sup> These competing concerns have surfaced in several cases.

- **Total Maximum Daily Loads - CWA** Section 303(d) establishes a TMDL program to help water bodies to meet water quality standards.<sup>18</sup> A TMDL is a numerical calculation of the maximum quantity of a pollutant that may be added to the waterbody from all sources and still meet the water quality standard for that pollutant.<sup>19</sup> In Virginia, EPA set a numeric TMDL for stormwater flows because it believed too much stormwater caused sediments to exceed its water-quality standard. In an unpublished decision, a federal district court concluded that, while sediment is a pollutant, stormwater is not, and therefore, may not be subject to a TMDL.<sup>20</sup> Under this logic, stream flows, like stormwater flows, are not pollutants which may be regulated by TMDLs.

- **Section 401 Certifications - CWA** Section 401 requires states to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into navigable waters. The certification must “set forth any effluent limitations or other limitations . . . necessary to assure that any applicant” will comply with, among other things, state water quality standards.<sup>21</sup> The State of Washington set minimum stream flow requirements as part of its Section 401 certification of a hydroelectric dam to protect salmon and steelhead runs. In upholding Washington’s flow restrictions, the Supreme Court held that “diminishment of water quantity, can constitute water pollution.”<sup>22</sup>

Section 404 Permits - CWA Section 404 authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged and fill materials into the waters of the United States, and allows the EPA to veto a permit if it will have an unacceptable adverse environmental effect.<sup>23</sup> After the Army Corps issued a permit to dredge and fill for construction of a dam and reservoir across a creek, the EPA vetoed the per-

mit because the change in the quantities of water would, among other things, harm fish and wildlife species and destroy wetlands without adequate mitigation.<sup>24</sup> In upholding EPA’s veto, the U.S. Fourth Circuit Court of Appeals held that the EPA had the authority to veto Section 404 permits because the lack of stream flow released from the dam would cause environmental harms.<sup>25</sup>

The above examples show courts have upheld and rejected flow restrictions under the CWA. The difference depends upon the statutory language of the CWA and case law.

#### B. Federal Endangered Species Act

Minimum flow restrictions have also been used under the ESA to protect threatened or endangered species and their habitat. Cases have delineated the parameters of their use.

- **Section 7 Consultation - ESA** Section 7 prohibits federal agencies from authorizing, funding or carrying out any action that is likely to jeopardize a protected species or adversely modify its habitat.<sup>26</sup> To accomplish this, federal agencies must consult with the U.S. Fish and Wildlife Service before taking a discretionary action which may affect a protected species, a process known as a Section 7 consultation.<sup>27</sup> Based on this process, the U.S. Ninth Circuit Court of Appeals concluded that the U.S. Forest Service properly conditioned its rights-of-way permits on maintaining minimum stream flows to prevent harm to endangered and threatened fish species in Washington State.<sup>28</sup>

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- Section 9 Take Prohibition – ESA  
Section 9 broadly prohibits any person from taking an endangered species.<sup>29</sup> Take means to kill or harm an endangered species or alter its habitat in a way that harms the species.<sup>30</sup> After reports that permits issued by the Texas Commission of Environmental Quality caused the deaths of endangered whooping cranes, a federal district court enjoined the approval of new permits.<sup>31</sup> However, the U.S. Fifth Circuit Court of Appeals reversed the district court judgment because there was no evidence that the whooping crane deaths were proximately and foreseeably caused by the Texas Commission's permits.<sup>32</sup>
- Fifth Amendment Takings Clause – the Fifth Amendment of the U.S. Constitution provides that private property shall not be “taken for public use, without just compensation.”<sup>33</sup> In 1956, decades before the ESA became law, the U.S. and Casitas Municipal Water District entered into a contract in which the U.S. would build the Ventura River Project, and Casitas would pay for the construction costs.<sup>34</sup> The contract further provided that Casitas shall have the perpetual right to use all water that became available through the Project.<sup>35</sup> In 1997, almost 40 years later, the U.S. Bureau of Reclamation required Casitas to construct a fish ladder to protect endangered fish, and to divert water from the Project to the fish ladder.<sup>36</sup> The Ninth Circuit concluded that “[w]hen the government forces Casitas to divert water . . . to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water,” and that its actions must be “analyzed under a physical taking rubric.”<sup>37</sup> This case provides a cautionary note to regulatory efforts to restrict water rights holders diversions with in-stream flow requirements.

Therefore, while the ESA may lead to minimum stream flows for a protected fish species, it may also expose the public agency to takings liability.

## B. California Water Law

California water law requires the courts to strike a balance between the needs of the environment and the needs of people in allocating water.

- Public Trust Doctrine – in 1983, the California Supreme Court held that the public trust of environmental and recreational values in protecting Mono Lake and the City of Los Angeles' water rights to appropriate the flow of streams tributary to Mono Lake must both be accommodated.<sup>38</sup> Specifically, the Court recognized that “[t]he population and economy of this State depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values,” and at the same time, “[t]he State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”<sup>39</sup> This case set the framework for future conflicts over water allocation.
- Law of Reasonable Use – the California Constitution provides that the right to use water only extends to the reasonable use of that water.<sup>40</sup> Like the public trust doctrine, the reasonable use of water may require reductions in the diversions of water for environmental purposes. In Northern California on the Russian River, the State Board adopted a regulation that required diverters of river water for frost protection of crops to reduce diversions when the water levels dropped to a level that threatened endangered salmon species.<sup>41</sup> Under the rule of reasonableness, the court held that “[e]fficient regulation of the state's water resources in these circumstances demands that the Board have the authority to enact tailored regulations.”<sup>42</sup>

Although the public trust doctrine and law of reasonable use developed independently, they have converged to require an accommodation of competing needs. This balancing goes to the heart of the dispute over stream flows for fish and diversions for humans and likely requires consideration of many factors in setting stream flow requirements.

## Conclusion

Droughts and population growth have hastened the conflict over the allocation of water between endangered or threatened fish

and humans, but they have only accelerated a longstanding tension. Court decisions interpreting the CWA, ESA and California water law suggest that the regulators' efforts to set numerical minimum stream flow requirements will generate disagreement among the competing stakeholders. Resolving these disputes will require creative legal work.

## Notes

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3. A. Park Williams, et al., Contribution of Anthropogenic Warming to California Drought During 2012-2014 6819 (American Geophysical Union Publications, pub. online Aug. 31, 2015), <http://onlinelibrary.wiley.com/doi/10.1002/2015GL064924/full>.
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13. *Id.* at 7.
14. CAL. NATURAL RESOURCES AGENCY, ET AL., CALIFORNIA WATER ACTION PLAN 2016 Update 13 (2016) (brackets added), [http://resources.ca.gov/docs/california\\_water\\_action\\_plan/Final\\_California\\_Water\\_Action\\_Plan.pdf](http://resources.ca.gov/docs/california_water_action_plan/Final_California_Water_Action_Plan.pdf).
15. *Id.* at 13 (emphasis added).
16. PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 719 (1994).
17. 33 U.S.C. § 1251(g); see also, 33 U.S.C. § 1370(2) (CWA does not impair the States’ jurisdiction over their waters).
18. 33 U.S.C. § 1313.
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22. PUD No. 1 of Jefferson County, 511 U.S. at 719.
23. 33 U.S.C. §§ 1344(b), (c).
24. James City County v. EPA, 12 F.3d 1330, 1336, 1339 (4th Cir. 1993).
25. *Id.* at 1336.
26. 16 U.S.C. § 1536(a)(2).
27. *Id.*; 50 C.F.R. § 402.14(a).
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29. 16 U.S.C. §§ 1532(13) (“person” includes individuals, private entities and public agencies); 1532(19) (“take” includes to harass, harm, wound or kill); 1538(a)(1)(B) (makes it unlawful for any person to take an endangered species).
30. 16 U.S.C. § 1532(19) (“take” includes “harm” to species); 50 C.F.R. § 17.3(c) (“harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife. . .”).
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