

## *Straight Talk - Our Water is Over-Allocated*

### *Impacts of Over-Allocation on Meeting State and Federal Regulations*

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I was asked to talk about federal impacts on an over-appropriated system. In trying to figure out what to say or what I knew about that, I thought maybe the best thing to do was to give you an example of what's happened on the Rio Grande with the Endangered Species Act because that's certainly one of the biggest federal impacts that we've had. Because I'm a lawyer and deal with litigation, I want to tell you about the litigation over the critical habitat for the Rio Grande silvery minnow.

I gave a different talk to the New Mexico Geological Society about the technical issues, and I talked to a bunch of lawyers about the legal issues, and this one will be more anecdotal. It's kind of the story of the clash of critical habitat and arid rivers, or, "How a little minnow swallowed the Rio Grande."

This case was one of two about the silvery minnow that were in federal district court. The one that made more headlines, I think, was the one, which still isn't quite over, and had to do with federal agencies complying with Section Seven of the Endangered Species Act and doing things to protect them. But this one was brought by the state of New Mexico, and it had to do with the designation of critical habitat for the silvery minnow.

There was a reason that that was particularly important to the state of New Mexico. When you list a species and declare it's endangered, it becomes illegal to 'take' the species. If you look at the Endangered Species Act, 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect the species. So that pretty much means you have to be chasing these minnows with a pitchfork or a shotgun—you have to really intend to do them some harm. But with critical habitat, it's illegal to adversely modify the habitat, and that's a much broader, much more general thing, and as it turns out, had much greater potential affects on a fully appropriated river.

In 1994, the U.S. Fish & Wildlife service listed the Rio Grande silvery minnow as endangered. They were required by the Endangered Species Act at that time to designate the critical habitat for the minnow, but they didn't do so until they were sued by environmental groups in 1999. So after doing nothing for five years, they rushed to comply with the court order, and the result, in the state of New Mexico's eyes, was incredibly ill considered. The Fish & Wildlife Service designated the entire 163-mile stretch of the Rio Grande from Cochiti Reservoir to Elephant Butte Reservoir, and in addition, they specified three primary constituent elements that must be present in the habitat at all times and in all places in this 163-mile stretch. Those three constituent elements were: stream morphology that supplies the flowing water to provide cover and sustain all life stages of the species; water of sufficient

quality to prevent water stagnation (elevated temperatures, decreased oxygen, carbon dioxide build-up, etc.); and water of sufficient quantity to prevent the formation of isolated pools. It was the third one that gave us all a major case of heartburn. Because any one who has ever paid attention to the Rio Grande realizes that—like is going on now, there's the spring runoff, the river gets very full, very wide, but as the snowmelt decreases, the river shrinks. As it shrinks, because in this area it's a relatively flat river, there are isolated pools formed along the edges.

What this meant, then, was that that couldn't happen. After the river had flooded, it couldn't be allowed to recede because that would form isolated pools. So that was a really big problem. The Fish & Wildlife Service's point was that fish get trapped in these isolated pools and they die as the water evaporates. Our point was that there was not then, there never has been, and there never will be enough water to keep those isolated pools from forming.

As Judge Meechem (the judge in the case, now deceased,) pointed out, in October of 2000, it took nearly a hundred thousand acre-feet of released water to achieve this, and there just isn't that much water stored upstream. If you take Heron, El Vado, Abiquiu, Cochiti and Jemez Canyon Reservoirs and combine them all, the maximum allowable storage is about 789,000 acre-feet, so you can see there's a train wreck coming.

The state saw that to comply with this would cause huge economic dislocation to the middle valley and to the state as a whole. It was going to severely impact the ability of our municipalities to provide water to the citizens, it was going to dry up agriculture, and it would likely cause the state of New Mexico to violate the Rio Grande Compact. And frankly, to the very limited extent that Fish & Wildlife Service had considered these things, they simply didn't give a darn. Incredibly, the Fish & Wildlife Service had concluded there would be absolutely no economic or other impacts to New Mexico and its citizens. So faced with that, we did the only thing we could do: we sued the Secretary of the Interior.

Now when things get into court they get weird. In litigation, matters that are really questions of science and hydrology get totally twisted, and they did in this case, too. In this case, what was really a question of hydrology became a matter of law and economics because of the way the Endangered Species Act is written. We had to prove that the Fish & Wildlife Service decision was "arbitrary and capricious," and that means we had to show there was not one shred of evidence—not one piece of evidence anywhere—that supported their conclusion. The particular thing we had to attack was their conclusion that there would be no economic or other impacts because the Endangered Species Act *required* them to consider those impacts.

And Fish & Wildlife Service had mountains of evidence. In doing these cases, they have to produce what is called the 'record of their decision.' There was about twenty shelf-feet of paper that was their 'record' and although it was incredibly tedious, we had to go through that page-by-page-by-page and read it all to show that there wasn't anything in these shelf-feet that supported their decision.

It turned out in the end that rather than making a decision relying on good, sound hydrologic evidence, Fish & Wildlife Service had avoided facing the hard questions with a bit of legal and economic trickery. They said, "When we listed the species, it was fully protected, and that caused all the economic consequences that there are. (You can't harm, harass, etc.) So everything happened *then*. Now we're just designating the critical habitat. The economic consequences have already happened, and therefore, this second step doesn't cause anything."

Well luckily that's not the law, but we had to go to court and argue it. The law actually does say that when Fish & Wildlife Service lists a species, they may not consider the economic consequences. Because it's so important to protect the species, you just have to look at whether or not it's endangered and forget about everything else. But the second part of that is that the law also says after you've listed a species, when you designate the critical habitat, you must consider all the economic and other consequences, including those that happened as a result of the listing.

Well, we won that case, and Judge Meechem, who was close to ninety years old and a native New Mexican, was actually quite eloquent in his decision. I'd like to read you parts of that decision because I think it addresses directly the question that you're facing here today about what you do with an over-allocated system. Judge Meechem said: "An expressed preclusion of isolated pools in a river notorious for its highly variable and natural depletions, together with periodic releases of water required solely for the purpose of maintaining a constant, bank-to-bank flow must inevitably result in staggering complexities and unavoidable economic and other consequences. Fish & Wildlife service avoids as well any discourse explaining why its determinations constitute a reasonable or suitable solution to the issues presented. Instead, the conclusions expressed in the final rule generalize and oversimplify the complex human and ecological circumstances without the slightest indicia of concern for the needless economic dislocation referred to by the U.S. Supreme Court in [?]. The final rule is inherently unrealistic, certainly in a region perpetually too dry, and a river which commonly loses water for a multitude of uncontrollable reasons, and there is not a semblance of logic in assuming that an unspecified and apparently unlimited amount of water will be available at all times and under any circumstances, and when it is not, it can be taken from full-appropriated and legally-protected uses without any consequence economic or otherwise. It appears from the final rule that the Fish & Wildlife Service started with a clear idea of where it would end up, and went directly to that point with little pause or process in between. The Fish & Wildlife Service dismisses out of hand what Reclamation puts before it, as it appears to do with everything else that counters what it had already decided to do. The Fish & Wildlife Service would have done better to acknowledge the meaning of a fully appropriated river system and deal with the existence of legally protected water rights."

I think that, as I understand it, the task that you'all have undertaken is to deal with the reality of a fully appropriated river system, and to figure out how to do that. But Judge Meechem had some words of caution and wisdom for us at the conclusion of his opinion that I think might also be helpful to you, so I conclude with his conclusion. He said, "I'm gravely concerned for the just and prudent weighing of difficult facts, and the fair and complete consideration of competing interests, many of which are alien to any legal or judicial solution. As the United States Supreme Court noted in *Texas v New Mexico*, "Some disputes are more likely to be wisely solved by cooperative study and by conference and mutual concession than by proceeding in any court, however constituted."

So I hope that's what you all can do—work cooperatively and solve these problems and keep the lawyers out of it.