

Case No. 23-15499 and 23-15521 (Consolidated)
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,
Intervenor-Cross-Defendant and Appellant,

v.

YUROK TRIBE, et al.,
Plaintiffs and Appellees.

On appeal from the U.S. District Court for the Northern District of
California, San Francisco Division, Case No. 3:19-cv-04405-WHO

OPENING BRIEF

John P. Kinsey #215916
Nicolas R. Cardella #304151
WANGER JONES HELSLEY PC
265 East River Park Circle,
Suite 310
Fresno, California 93720
Phone: (559) 233-4800
Fax: (559) 233-9330

Nathan R. Rietmann #053630
RIETMANN & KIM, LLP
1270 Chemeketa Street NE
Salem, Oregon 97301
Phone: (503) 551-2740

Attorneys for Intervenor-Cross-Defendant and Appellant,
KLAMATH IRRIGATION DISTRICT

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	13
JURISDICTIONAL STATEMENT	14
ISSUES PRESENTED	14
CONSTITUTIONAL AND STATUTORY AUTHORITIES	16
STATEMENT OF THE CASE	16
SUMMARY OF ARGUMENT	31
ARGUMENT	33
I. Standard of Review	33
II. The District Court’s Ruling Violates the Fifth Amendment	34
A. Adjudication Has Conclusively Determined All Water Rights in UKL	35
i. KID Owns the Water Rights to Use Stored Water in UKL, Not Reclamation.....	37
ii. KID’s Water Rights Are Private Property Protected by the Fifth Amendment	39
iii. KID’s Property Interests Include the Right to Use, Right to Exclude, Right to Enforcement, and Right to Damages From Non-Enforcement.....	40
a. Right to Use	40

TABLE OF CONTENTS (CONTINUED)

	<u>Page</u>
b. Right to Exclude	42
c. Right to State Enforcement	43
d. Right to Damages for Non-Enforcement ...	44
iv. District Court’s Decision Judicially Takes KID’s Water Rights.....	45
v. Taking Is for Public Use	47
vi. Judicial Taking Is Without Just Compensation	48
III. The District Court Erred in Finding Obstacle Preemption.....	48
A. The District Court’s Analysis Overlooks Congress’s Intent Concerning the ESA’s Relation to State Water Laws and the McCarran Amendment.....	49
B. The Court’s Preemption Analysis Ignores the McCarran Amendment and Misconstrues the Reclamation Act and ESA	54
i. The Reclamation Act Requires Compliance With State Water Law and Prohibits Interference With Vested Water Rights	55
ii. McCarran Amendment Requires Reclamation to Comply With the Water Rights Determinations in the Klamath Adjudication and Bars Relief Here	56

TABLE OF CONTENTS (CONTINUED)

	<u>Page</u>
iii. Reclamation Is Required to Proceed in Conformity With State Laws and Vested Rights That Do Not Authorize It to Use Stored Water in UKL For Instream Purposes	63
iv. The ESA Does Not Grant Reclamation New Authority to Use Water.....	65
v. The District Court Erred in Holding <i>Patterson</i> Authorizes Diversion of Stored Water From UKL for Instream Use for ESA Purposes.....	72
IV. The District Court Erred in Granting Summary Judgment Because Genuine Issues of Material Fact Exist.....	75
V. Doctrine of Prior Exclusive Jurisdiction Bars This Claim	77
VI. Court Erred in Failing to Abstain Under Colorado River Doctrine.....	79
CONCLUSION	81
CERTIFICATE OF COMPLIANCE	82

TABLE OF AUTHORITIES**Page(s)****Federal Cases**

<i>American Forest and Paper Association v. EPA</i> , 137 F.3d 291 (5th Cir. 1998).....	69, 71
<i>Baley v. United States</i> , 134 Fed. Cl. 619 (2017)	17, 46, 75
<i>Berger v. City of Seattle</i> , 569 F.3d 1029 (9th Cir. 2009).....	34
<i>Blanchette v. Connecticut Gen. Ins. Corps.</i> , 419 U.S. 102 (1974)	57
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989).....	50
<i>Cal.-Or. Power Co. v. Beaver Portland Cement Co.</i> , 73 F.2d 555 (9th Cir. 1934).....	20
<i>California Oregon Power Co. v. Beaver Portland Cement Co.</i> , 295 U.S. 142 (1935)	51
<i>California v. United States</i> , 438 U.S. 645 (1978)	43, 51, 55, 56, 63
<i>Casitas Mun. Water Dist. v. United States</i> , 543 F.3d 1276 (Fed. Cir. 2008)	47
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063 (2021).....	42
<i>Chamber of Commerce of U.S. v. Whiting</i> , 563 U.S. 582 (2011)	50
<i>Cohen v. ConAgra Brands, Inc.</i> , 16 F.4th 1283 (9th Cir. 2021)	33

Colo. River Water Cons. Dist. v. United States,
424 U.S. 800 (1976) 79, 80

Decker Coal Co. v. Pehringer,
8 F.4th 1123 (9th Cir. 2021) 33

Desire, LLC v. Manna Textiles, Inc.,
986 F.3d 1253 (9th Cir. 2021) 33

Dolan v. City of Tigard,
512 U.S. 374 (1994) 42, 48

Envtl. Prot. Info. Ctr. v. Simpson Timber Co.,
255 F.3d 1073 (9th Cir. 2001) 70

FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.,
498 U.S. 269 (1991) 14

Gade v. Nat'l Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 50

Gier v. Am Honda Motor Co., Inc.,
529 U.S. 861 (2000) 50

Hansen v. United States,
65 Fed. Cl. 76 (2005) 39

Hines v. Davidowitz,
312 U.S. 52 (1941) 49

Ickes v. Fox,
300 U.S. 82 (1937) 18, 39, 73

In re Klamath Irrigation Dist.,
69 F.4th 934 (9th Cir. 2023) 79

Int'l Paper Co. v. United States,
282 U.S. 399 (1931) 47

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 42

Kandra v. United States,
 145 F. Supp. 2d 1192 (D. Or. 2001) 23, 24

Klamath Water Users Protective Ass’n v. Patterson,
 204 F.3d 1206 (9th Cir. 1999) *passim*

Marbury v. Madison,
 5 U.S. 137 (1803) 53

McClellan v. I-Flow Corp.,
 776 F.3d 1034 (9th Cir. 2015) 50

Morton v. Mancari,
 417 U.S. 535 (1974) 57

Nat’l Ass’n of Home Builders v. Defs. of Wildlife,
 551 U.S. 644 (2007) 52, 72

Nat. Res. Def. Council v. Houston,
 146 F.3d 1118 (9th Cir. 1998) 73

Nat. Res. Def. Council v. Patterson,
 791 F. Supp. 1425 (E.D. Cal. 1992) 73

Nebraska v. Wyoming,
 325 U.S. 589 (1945) 18, 72

Nollan v. California Coastal Comm’n,
 483 U.S. 825 (1987) 42

Nordstrom v. Ryan,
 856 F.3d 1265 (9th Cir. 2017) 34

*Oregon Coast Scenic R.R., LLC v. Oregon Dep’t of State
 Lands*,
 841 F.3d 1069 (9th Cir. 2016) 33

Pac. Live Stock Co. v. Lewis,
 241 U.S. 440 (1916) 20, 21, 36, 37

Platte River Whooping Crane Trust v. FERC,
 962 F.2d 27 (D.C. Cir. 1992) 68, 70, 71

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980)..... 40

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984)..... 54

Sexton v. NDEX West, LLC,
713 F.3d 533 (9th Cir. 2013)..... 77

Sierra Club v. Babbitt,
65 F.3d 1502 (9th Cir. 1995)..... 66, 67, 71

Soc. Techs. LLC v. Apple Inc.,
4 F.4th 811 (9th Cir. 2021) 34

*State Engineer v. S. Fork Band of Te-Moak Tribe of W.
Shoshone Indians*,
339 F.3d 804 (9th Cir. 2003)..... 77

*Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl.
Prot.*,
560 U.S. 702 (2010) 34, 45

Tennessee Student Assistance Corp. v. Hood,
541 U.S. 440 (2004)..... 25

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978)..... *passim*

Tulare Lake Basin Water Storage Dist. v. United States,
49 Fed. Cl. 313 (2001) 46, 48

*Turtle Island Restoration Network v. Nat'l Marine Fisheries
Serv.*,
340 F.3d 949 (9th Cir. 2003)..... 71

United States v. Adair,
723 F2d 1394 (9th Cir. 1983)..... 21

United States v. Braren,
338 F.3d 971 (9th Cir. 2003)..... 21

United States v. Diebold, Inc.,
369 U.S. 654 (1962) 76

United States v. Dist. Ct. In & For Eagle Cnty., Colo.,
401 U.S. 520 (1971) 59

United States v. New Mexico,
438 U.S. 696 (1978) 51

United States v. Oregon,
44 F.3d 758 (9th Cir. 1994)..... *passim*

Wardair Canada, Inc. v. Fla. Dep't of Revenue,
477 U.S. 1 (1986) 49

Washoe Cnty., Nev. v. United States,
319 F.3d 1320 (Fed. Cir. 2003) 46

Wyeth v. Levine,
555 U.S. 555 (2009) 49

State Cases

Cookinham v. Lewis,
58 Or. 484 (1911)..... 26, 38

Fort Vannoy Irr. Dist. v. Water Res. Comm'n,
188 P.3d 277 (Or. 2008) 19

Green v. Wheeler,
458 P.2d 938 (Or. 1969) 19

In re Waters of Willow Creek,
119 Or. 155 (1925)..... 20, 36, 59

Klamath Irrigation Dist. v. United States,
227 P.3d 1145 (2010)..... 17, 19, 21, 36

Masterson v. Pac. Live Stock Co.,
24 P.2d 1046 (Or. 1933) 20, 36, 59

Skinner v. Jordan Valley Irr. Dist.,
 137 Or. 480 (1931), *opinion modified on denial of reh'g*,
 137 Or. 480 (1931)..... 39

Staub v. Jensen,
 178 P.2d 931 (1947)..... 20

TPC, LLC v. Oregon Water Res. Dept.,
 308 Or. App. 177 (2020)..... 60, 61

Tudor v. Jaca,
 178 Or. 126 (1945)..... 41

Washington Cnty. Irr. Dist. v. Talboy,
 43 P.2d 943 (1935)..... 42

United States Constitution

Fifth Amendment *passim*

Federal Statutes

16 United States Code (“U.S.C.”) sections 1531-1544 13

16 U.S.C. section 1536..... 67

28 U.S.C. section 1291..... 14

43 U.S.C. section 383..... 15, 55, 65

43 U.S.C. section 498..... 17

43 U.S.C. section 666..... *passim*

State Statutes

Oregon Laws, Chapter 216 (1909) 19

Oregon Revised Statutes (“Or. Rev. Stat.”) Chapter 545 16

Or. Rev. Stat. section 536.037..... 43

Or. Rev. Stat. section 537.110..... 63

Or. Rev. Stat. section 537.120..... 19

Or. Rev. Stat. section 537.130..... 18, 43, 63, 74

Or. Rev. Stat. section 537.147..... 64

Or. Rev. Stat. sections 537.332 to 537.360..... 64

Or. Rev. Stat. section 537.336..... 64

Or. Rev. Stat. section 537.349..... 64

Or. Rev. Stat., Chapter 539..... 62

Or. Rev. Stat. section 539.010..... 20, 78

Or. Rev. Stat. section 539.130..... 59

Or. Rev. Stat. sections 539.130, 539.170 25, 36

Or. Rev. Stat. section 539.170..... 43, 60, 74

Or. Rev. Stat. section 539.180..... *passim*

Or. Rev. Stat. section 539.200..... 24

Or. Rev. Stat. section 539.210..... 21, 24, 36

Or. Rev. Stat. section 540.030..... 43

Or. Rev. Stat. section 540.045..... 60

Or. Rev. Stat. section 540.100..... 36

Or. Rev. Stat. section 540.210..... 30, 41, 65, 74

Or. Rev. Stat. sections 540.210, 540.530 44

Or. Rev. Stat. section 540.510..... 44

Or. Rev. Stat. section 540.523..... 44

Or. Rev. Stat. section 540.720..... 44, 63

State Regulations

Oregon Administrative Rules (“Or. Admin. R.”) section 690-077-0000.....	63
Or. Admin. R. section 690-077-0065	64
Or. Admin. R. section 690-077-0015	64, 65
Or. Admin. R. section 690-250-0150	41, 74

Other Authorities

77 Neb. L. Rev. 730 (1998)	42
Op. Att’y Gen. OP-6308 (1989).....	41

INTRODUCTION

This case arises from a longstanding dispute between the Klamath Irrigation District (“KID”) and the United States Bureau of Reclamation (“Reclamation”) concerning rights to the use of stored water in Oregon’s UKL. In 2014, this dispute was resolved in KID’s favor when the Klamath Adjudication conclusively determined that KID owns the rights to use stored water in UKL for irrigation and did not recognize Reclamation as having any right to use stored water in UKL for instream purposes. Nevertheless, the district court determined here that orders from the Oregon Water Resources Department (“OWRD”) enforcing KID’s water rights are preempted by the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”) because the ESA provides Reclamation a superior right to divert stored water for instream use.

As explained below, the court’s ruling is not merely erroneous: It violates the constitutional rights of KID and its landowners by judicially taking their constitutionally protected property interests in their water rights for public use without payment of just compensation in violation of the Fifth Amendment to the United States Constitution.

///

JURISDICTIONAL STATEMENT

The court's jurisdiction to hear this case is in dispute. *See infra* at § V. However, on February 6, 2023, the district court issued an Order on Motions for Summary Judgment, Motions to Strike, and Motions to Stay ("Order"). 1-KID_ER-000004-000037. On April 6, 2023, KID filed a notice of appeal pursuant to 28 U.S.C. § 1291 because the Order included an injunction (assuming jurisdiction otherwise exists). Final judgment was entered on August 15, 2023. 1-KID_ER-0000076-000080. At this time, KID's earlier notice became an effective appeal from the final judgment pursuant to 28 U.S.C. § 1291 (again assuming jurisdiction otherwise exists). Fed. R. App. P. 4(a)(2); *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269 (1991).

ISSUES PRESENTED

1. Did the district court judicially take KID's water rights for public use without payment of just compensation in violation of the Fifth Amendment to the United States Constitution by holding the ESA preempts OWRD orders enforcing KID's water rights against Reclamation?

2. Does the ESA grant Reclamation authority to divert stored water from UKL for instream use without a water right, given that (1) such diversion violates state law, (2) the rights to the water have been adjudicated to others pursuant to the McCarran Amendment (43 U.S.C. § 666), and (3) the Reclamation Act (43 U.S.C. § 383) mandates compliance with state law and protection of vested rights?
3. Did the District Court err in holding the ESA preempts the OWRD orders enforcing KID's water rights against Reclamation?
4. Did the District Court err in granting summary judgment when there were genuine issues of material fact for trial on whether, or to what extent, the OWRD order is an obstacle to Reclamation complying with the ESA?
5. Does the McCarran Amendment (43 U.S.C. § 666) bar Reclamation from collaterally attacking enforcement of water rights determined in the ongoing Adjudication

and thereby circumventing the state court's jurisdiction to decide whether or not the water rights should be enforced pursuant to Oregon Revised Statutes § 539.180?

6. Does the doctrine of prior exclusive jurisdiction bar Reclamation's claim asserting the OWRD order administering and enforcing KID's and Reclamation's water rights determined in the ongoing Adjudication?

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Relevant constitutional and statutory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Klamath Irrigation District ("KID") is a quasi-municipal district formed pursuant to Or. Rev. Stat. Ch. 545. 19-KID_ER-004570. In 1918, it assumed repayment obligations associated with the development of the Klamath Project, which the Secretary of the Interior Authorized in 1905 pursuant to the Reclamation Act of 1902. 3-KID_ER-000457; 9-KID_ER-001836. To facilitate the development of the Project, the Oregon Legislature enacted a state law allowing water to be appropriated for the

Project “for the benefit of those persons who the Reclamation Act contemplated would put the water to beneficial use.” *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1159 (2010); 9-KID_ER-001865.

Reclamation initially managed and operated the Klamath Project’s irrigation works. 3-KID_ER-000460. By 1954, however, KID had made sufficient repayment for the management and operation of certain irrigation works to be transferred to it pursuant to Section 6 of the Reclamation Act. *Id.*; 3-KID_ER-000477-000515; 43 U.S.C. § 498. The facilities transferred to KID included the main A-Canal headworks used to divert water directly from UKL. 3-KID_ER-000482. They did not include the Link River Dam, which was constructed so that water naturally flowing through UKL could be impounded and stored for later irrigation use. *Id.* Subsequently, KID “completed payment of all construction charges pursuant to its repayment contract on May 4, 1965.” 3-KID_ER-000516; *see also* 3-KID_ER-000518.

The contractual relationship between KID and Reclamation relative to ownership, management, and operation of irrigation works in the Klamath Project has no bearing on their respective water rights. *Baley v. United States*, 134 Fed. Cl. 619, 655 (2017), *aff’d*, 942 F.3d 1312

(Fed. Cir. 2019) (“The only purposes of the contracts appear to have been to have the Irrigation Districts assume the costs of repaying the United States for the construction of the Klamath Project and to transfer to the Irrigation Districts the operation of the Klamath Project works delivering the water to the lands within the Irrigation Districts. . . . Defendant has failed to meet its burden of demonstrating that plaintiffs’ rights have been altered by the November 29, 1954 contract between the Klamath Irrigation District and the United States.”). This is because ownership of water rights, not control over irrigation works, determines KID and Reclamation’s respective rights to the use of water in Oregon and elsewhere in the West. Or. Rev. Stat. § 537.130(2) (“[A] person may not use, store or divert any waters until after the department issues a permit to appropriate the waters.”); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (“The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals.”); *Ickes v. Fox*, 300 U.S. 82, 94–95 (1937) (“Although the government diverted, stored, and distributed the water . . . the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.”).

The water rights in UKL associated with the Klamath Project remained undetermined for over a century and remained outside the prior appropriation system. 9-KID_ER-001758. The undetermined nature of the water rights was attributable to the Klamath Project being authorized in 1905 before the adoption of Oregon’s Water Rights Act in 1909. *Id.*

Prior to the adoption of the Water Rights Act, Oregon lacked a comprehensive state regulatory system for water. *Fort Vannoy Irr. Dist. v. Water Res. Comm’n*, 188 P.3d 277, 293 (Or. 2008). The Water Rights Act codified the common law doctrine of prior appropriation and introduced a comprehensive permit system for obtaining new water rights. *Klamath Irrigation Dist.*, 227 P.3d at 1150; Or. Laws, ch. 216 (1909). Water is now “appropriable only ‘as provided in the Water Rights Act and not otherwise[.]’” *Green v. Wheeler*, 458 P.2d 938, 941 (Or. 1969) (quoting Or. Rev. Stat. § 537.120). To preserve water rights that had vested prior to 1909 but had never been judicially determined, the Act left these water rights intact as “undetermined vested rights,” *United States v. Oregon* (“Oregon”), 44 F.3d 758, 764 (9th Cir. 1994), but required that “all such rights shall be adjudicated” in a general stream

adjudication, Or. Rev. Stat. § 539.010(4). After the rights were adjudicated, these rights would be administered by the state along with post-1909 water rights in accordance with the doctrine of prior appropriation. *Staub v. Jensen*, 178 P.2d 931, 933 (1947).

General stream adjudications allocate specific quantities of water to those who prove their claims on the basis of prior beneficial use. *Cal.-Or. Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555, 558–59 (9th Cir. 1934). The Supreme Court has explained the important role of general stream adjudications as follows:

Each claimant [in a general stream adjudication] is . . . directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims. . . In such a proceeding the rights of the several claimants are so closely related that the ***presence of all*** is essential to the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined.

Pac. Live Stock Co. v. Lewis, 241 U.S. 440, 449 (1916) (emphasis added).

General stream adjudications are *in rem* proceedings. *Masterson v. Pac. Live Stock Co.*, 24 P.2d 1046, 1048 (Or. 1933); *see also In re Waters*

of Willow Creek, 119 Or. 155, 175 (1925) (similar). Therefore, once the process is commenced, anyone “claim[ing] legal title to a water right” is required to “file a claim in the adjudication or lose the right.” *Klamath Irrigation Dist.*, 227 P.3d at 1166; *see also* Or. Rev. Stat. § 539.210; *Pac. Live Stock Co.*, 241 U.S. at 447–48.

In 1975, the State of Oregon commenced a comprehensive general stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666, to determine all previously undetermined state and federal rights to the use of water in Oregon’s Klamath Basin (“Adjudication”). 9-KID_ER-001760; *Oregon*, 44 F.3d at 762. The Adjudication’s progress was delayed for decades as the United States vigorously pursued litigation in federal court to prevent Oregon from adjudicating the water rights claimed by the United States and the Tribes. *United States v. Adair*, 723 F.2d 1394, 1407 (9th Cir. 1983) (“[T]he case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe.”); *Oregon*, 44 F.3d at 770 (“We hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment”); *United States v. Braren*, 338 F.3d 971, 976 (9th Cir. 2003) (remanding

challenge to Adjudication’s determination of federal rights “to the district court to enter an order staying all federal proceedings pending completion of the Oregon Adjudication and related appellate review”).

While the United States delayed the progress of the Adjudication with collateral federal court litigation, it proceeded to list several species of fish in UKL and the Klamath River as threatened or endangered under the Endangered Species Act of 1973 (“ESA”). RJN, Exs. A, B. Thereafter, starting in the 1990’s, Reclamation began developing annual operations plans and consulting with the United States Fish & Wildlife Service (“USFW”) and National Marine Fisheries Service (“NMFS”) (collectively “Services”) on the operation of the Klamath Project in accordance with Section 7 of the ESA. *See, e.g.*, 3-KID_ER-000560; 4-KID_ER-000585.

When Reclamation began developing annual operations plans and consulting under Section 7 of the ESA, the water rights in UKL remained undetermined and were not enforceable by the state. 9-KID_ER-001758. Reclamation also exercised substantial physical control over stored water in UKL through its ownership of Link River Dam. *Klamath Water Users Protective Ass’n v. Patterson* (“*Patterson*”), 204 F.3d 1206, 1213 (9th Cir. 1999), *opinion amended on denial of reh’g*, 203 F.3d 1175 (9th Cir. 2000).

This physical control was not in any way constrained by water rights in UKL, which remained undetermined at that time. Consequently, Reclamation's operations plans and Section 7 consultations generally provided for Reclamation to keep the elevation of UKL above certain thresholds while diverting large quantities of water from UKL to augment flows in the Klamath River. *See, e.g.*, 3-KID_ER-000563-000565. This deprived farmers in the Klamath Project of the water to irrigate their crops. *Kandra v. United States*, 145 F. Supp. 2d 1192, 1196 (D. Or. 2001). The Oregon Attorney General did not believe Reclamation was authorized to do this, stating in a legal opinion:

The ESA does not confer additional authority on the Bureau to protect the fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way. I am unaware of any independent grant of statutory authority to the Bureau which would allow the transfer of water from the Klamath Project to protect endangered fish. The Bureau exercised its statutory authority when it filed for all unappropriated water necessary to develop the Klamath Project pursuant to state statute and the 1902 Reclamation Act. It has identified no independent authority to reallocate water legally obligated to that original purpose.

3-KID_ER-000545¹

¹ The Attorney General Opinion here was consistent with a prior opinion involving a different Reclamation reservoir. *See also* 3-KID_ER-000523.

Suddenly deprived of water, farmers in the Klamath Project brought a series of legal actions challenging Reclamation's new water distribution regime. *See, e.g., Patterson*, 15 F. Supp. 2d at 996; *Kandra*, 145 F. Supp. 2d at 1196. In this litigation, Reclamation maintained it owned all the water rights in UKL and that Project irrigators only had contractual rights to water. *Id.* Although the water rights had not yet been determined and an adjudication to determine them was ongoing, the federal courts began interpreting the ESA based on the government's assertions. *See, e.g., Patterson*, 15 F. Supp. 2d at 995.

In 2013, a final order determining all state and federal water rights in Oregon's Klamath Basin was entered in the Adjudication, which was amended in 2014 through the Amended and Corrected Findings of Fact and Final Order of Determination ("ACFFOD"). 9-KID_ER-001757. Consistent with Or. Rev. Stat. § 539.200, the ACFFOD provides that it is "conclusive as to *all prior rights* and *the rights of all existing claimants* upon the stream or other body of water lawfully embraced in the determination." 16-KID_ER-003901; Or. Rev. Stat. § 539.200. It also holds that "[p]ursuant to ORS 539.210, any potential claimant who has failed to timely file a claim in the Adjudication 'shall be barred and

estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.” *Id.* This finding is inherent in the nature of *in rem* proceedings, which are designed to “determine all claims that anyone, whether named in the action or not, has to the property or thing in question”—i.e., “[t]he proceeding is one against the world.” *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004).

The ACFFOD is now being reviewed in Klamath County Circuit Court. RJN, Exhibit C. The ACFFOD is in full force and effect, and water must be distributed in accordance with its water rights determinations while judicial review is ongoing. Or. Rev. Stat. §§ 539.130(4), 539.170. However, the Klamath County Circuit Court has jurisdiction to grant a stay of the ACFFOD’s water rights determinations, provided the party seeking the stay agrees to pay all damages that may accrue by reason of those water rights determinations not being enforced. Or. Rev. Stat. § 539.180.

Insofar as is relevant here, the ACFFOD determined that “[t]he United States is the owner of a right to store water in Upper Klamath

Lake to benefit the separate irrigation rights for the Klamath Reclamation Project.” 9-KID_ER-001894. This storage right authorizes Reclamation to store up to 486,828 acre-feet per year in UKL reservoir between the elevations of 4,143’ and 4,136’ “for agricultural irrigation, stockwater and domestic uses.” 9-KID_ER-001870.

The storage right does not give Reclamation the right to use the water that it stores for purposes of enhancing instream flows in the Klamath River. *Cookinham v. Lewis*, 58 Or. 484, 492 (1911) (holding that a primary storage right “does not include the right to divert and use stored water, which must be the subject of the secondary permit”); 9-KID_ER-001892-001893 (explaining the principle that “the right to store water is distinct from the right to use stored water”).

Instead, the right to use stored water is owned by KID and others within the Klamath Project. 9-KID_ER-001871 (“[T]he right of beneficial use of water in the Project is held by the beneficial users.”). The ACFFOD also did not recognize Reclamation as having any other right to use stored water to augment instream flows in the Klamath River. Further, the ACFFOD denied the claim the United States made on behalf of the Klamath Tribes for instream flows in the Klamath River and this finding

has since been affirmed by the Klamath County Circuit Court. 18-KID_ER-004513 (“The Tribes do not have reserved in-stream rights for completely off-reservation waters such as those they seek on the Klamath River.”).

Nearly concurrently with the issuance of the Adjudicator’s Findings, Reclamation accepted a 2013 Joint Biological Opinion (“2013 BiOp”) issued by the United States Fish and Wildlife Services and National Marine Fisheries Services (“Services”). 6-KID_ER-001145-001161; 7-KID_ER-001163-001459; 8-KID_ER-001461-001753. The 2013 BiOp was based on a proposed action Reclamation developed before the water rights were determined in the Adjudication and did not account for them. 7-KID_ER-001163. However, the 2013 BiOP acknowledged the water rights had just been determined and specifically provided that “[i]n the future, when the consequences of the adjudication are understood, the proposed action will be modified if necessary in accordance with the parties’ legal rights to beneficial use of water.” 7-KID_ER-001165-001166. Although the 2013 BiOP itself did not account for the Adjudication, Reclamation immediately took action to ensure the

proposed action set forth in the BiOP could be implemented consistently with the water rights determined in the Adjudication.

Specifically, in 2013, Reclamation applied for and obtained a limited license authorizing it to divert 175,703 acre-feet of stored water from UKL and use “for stream flow augmentation in support of instream resources, for the period May 15, 2023 through September 30, 2013.” 6-KID_ER-001137-001140. The license was granted. 6-KID_ER-001141-001144. In 2014 and 2015, Reclamation similarly complied with ACFFOD and the ESA by obtaining limited licenses authorizing it to divert and use hundreds of thousands of acre-feet of stored water in UKL for purposes of augmenting instream flows in the Klamath River. 12-KID_ER-002832-002835; 12-KID_ER-002877-002879.

Reclamation was able to obtain these rights because KID landowners and other water rights holders agreed to “idle their lands” (i.e. not exercise their water rights) in exchange for compensation, making stored water available for Reclamation to license and use for instream purposes. RJN, Ex. D, pp. 5–6 (“The Water Bank Program allows for surface water demand reduction to increase the water available in Upper Klamath Lake and Clear Lake Reservoir to meet

requirements for the endangered short-nose and Lost River suckers and in the Klamath River for the endangered coho salmon.”) (emphasis in original).

By 2016, however, these programs to reduce water demand were drawing scrutiny from the Office of the Inspector General (“OIG”). RJN, Ex. E. OIG was concerned these programs were not providing fish and wildlife benefits and were potentially wasteful because of *Patterson* and other federal court decisions’ assumption that Reclamation owned rights to use water stored in UKL:

Under the agreement KWAPA uses funds to pay farmers for ‘land idling,’ compensating them for not receiving water from the Klamath Project to which they apparently have a ***contractual right***. We further understand from discussions with OIG auditors, that Reclamation contends this benefits endangered species by leaving the water untapped and available as fish habitat. However, as discussed above, it appears that Reclamation is already required by the ESA to maintain appropriate water levels, so it is unclear how it further benefits wildlife to pay compensation to an irrigator to refrain from using water.

RJN, Ex. E, p. 10 (emphasis added).

This same year Reclamation ceased obtaining water rights to use stored water in UKL. Instead, it began diverting stored water from UKL—water KID owned the right to use—without a water right. Efforts

to resolve this situation directly with Reclamation were unsuccessful. 13-KID_ER-002938-002940. So, KID asked OWRD to resolve the dispute by taking exclusive charge of UKL and distributing the stored water to the persons owning the rights to use it pursuant to ORS § 540.210. When OWRD refused,² KID filed suit and thereafter obtained a series of judgments and orders requiring the agency to do so. 13-KID_ER-002941-002942; 19-KID_ER-004568.

Finally, in 2021, OWRD issued an order that Reclamation was to “immediately preclude or stop the distribution, use or release of stored water from the UKL, in excess of amounts that may be put to beneficial use under KA 1000 downstream of the Link River Dam.” 18-KID_ER-004540. OWRD subsequently issued notices of violation that Reclamation had diverted stored water from UKL for instream purposes in the

² KID has since learned through a public records request that OWRD’s refusal was likely attributable to an agreement it made with the Yurok Tribe shortly after the ACFFOD was entered. The agreement arose from a dispute with the Yurok Tribe concerning the fact that following the ACFFOD “OWRD does not recognize flows that the U.S. Bureau of Reclamation (‘BOR’) is required to release downstream in the Klamath River under applicable federal law as an authorized use of water, and that OWRD will require the BOR to cease releasing these flows under certain circumstances.” RJN, Ex. J, p. 1. The dispute was resolved by OWRD agreeing not to curtail flow “unless otherwise directed to do so by order of a court with proper jurisdiction.” See RJN Exs. I, K.

Klamath River in violation of the April OWRD order. 19-KID_ER-004578-004586; 19-KID_ER-004589

The United States responded to the Notices of Violation by commencing this federal court litigation in the State of California.

SUMMARY OF ARGUMENT

The court's decision violates the Fifth Amendment's guarantee that the government will not take private property for public use without payment of just compensation or due process of law. KID's adjudicated 1905 water rights in UKL are private property protected by the Fifth Amendment. By holding the ESA preempts enforcement of these rights, the court has effectively taken KID's water rights and given them to Reclamation. Since the ruling does this for the public purpose of protecting listed species, and without payment of just compensation, it violates the Fifth Amendment.

The court's violation of KID's constitutional rights stems from its failure to properly focus its analysis on whether Congress intended for the ESA to displace state water law and established property rights. It also flows from the court's failure to adhere to well-established precedents interpreting the Reclamation Act and the ESA.

The Supreme Court has squarely held that Reclamation must comply with state law in the control, use, and distribution of water. Under this precedent, Reclamation must comply with the OWRD order in the absence of the ESA. The only question here is whether the existence of the ESA changes the outcome.

Contrary to what the district court held, the ESA does not change the outcome because the ESA does not grant federal agencies new authority to take actions they otherwise lack power to take under their enabling acts. Instead, it directs agencies to use their existing authorities to protect species. It is undisputed that KID owns the right to use stored water and that Reclamation cannot use stored water for instream purposes in the absence of the ESA. The existence of the ESA does not change the equation, and preemption therefore cannot be found.

Furthermore, the court erred by granting summary judgment based on a finding of obstacle preemption when there are genuine issues of material fact regarding whether, or to what extent, the OWRD orders are an obstacle to Reclamation's ESA compliance. Additionally, the district court erred in granting summary judgment because the McCarran Amendment bars Reclamation from collaterally attacking the

Adjudication's water rights determinations as it is doing here. The constitutional violation resulting from the district court's ruling shows precisely why it should have dismissed the case for lack of jurisdiction or abstained, as KID argued below.

The district court has not merely erred. It has unconstitutionally taken KID's private property rights. Therefore, the decision should be reversed and remanded for a determination of the just compensation owing to KID for the court's temporary taking of its water rights.

ARGUMENT

I. Standard of Review

District court decisions to grant summary judgment in declaratory judgment actions involving constitutional questions, questions of law, and preemption are reviewed de novo. *See, e.g., Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 343 (2021); *Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016); *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1129 (9th Cir. 2021); *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021). A district court's determinations on mixed questions of law and fact implicating constitutional rights are reviewed de novo.

See *Nordstrom v. Ryan*, 856 F.3d 1265, 1269 (9th Cir. 2017); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009). On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See *Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021).

II. The District Court’s Ruling Violates The Fifth Amendment

The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” U.S. Const., Amend. V. The Fifth Amendment also provides that no person shall be “deprived of life, liberty, or property, without due process of law.” *Id.*

The Takings Clause prohibits the government “from taking private property without paying for it, no matter which branch is the instrument of the taking.” *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically

appropriated it or destroyed its value by regulation. [A] State, by *ipse dixit*, may not transform private property into public property without compensation.”) (emphasis in original).

Viewed through another lens, a judicial deprivation of constitutionally protected property interests may also violate the due process guarantees of the Fifth Amendment. *Id.* at 737 (Kennedy, J. concurring in the judgment) (“If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law.”).

Regardless of the lens used, the district court violated the Fifth Amendment by taking KID and its landowners’ constitutionally protected property interests in their water rights when it granted summary judgment, holding the ESA preempts OWRD enforcement of KID’s water rights and ordering injunctive relief.

A. Adjudication Has Conclusively Determined All Water Rights In UKL

The Klamath Adjudication has comprehensively determined all previously undetermined state and federal “rights to the use of water” in UKL in accordance with the McCarran Amendment. *Oregon*, 44 F.3d at

769 (“We reject the government’s argument. . . . [A]ll existing water rights in the river system will have been determined when the adjudication is finished.”). These determinations are “conclusive as to all prior rights and the rights of all existing claimants” in UKL. Or. Rev. Stat. § 540.100. This is necessarily true because the Klamath Adjudication is an *in rem* proceeding. *Masterson*, 144 Or. at 402 (“The proceedings adjudicating the rights of the waters . . . were in rem.”); *see also In re Waters of Willow Creek*, 119 Or. at 175 (similar). Anyone “claim[ing] legal title to a water right” in the Klamath Basin was required to “file a claim in the adjudication or lose the right.” *Klamath Irrigation Dist.*, 227 P.3d at 1166; *see also* Or. Rev. Stat. § 539.210; *Pac. Live Stock Co.*, 241 U.S. at 447–48.

Although the Adjudication is ongoing, the water rights determined therein are currently in “full force and effect” and water must be distributed in accordance with those determinations. Or. Rev. Stat. §§ 539.130(4), 539.170. The only exception is where a party obtains a stay from the adjudication court and is obligated to “pay all damages that may accrue by reason of the determination not being enforced.” Or. Rev. Stat. § 539.180. The Supreme Court has specifically affirmed Oregon’s process

of enforcing adjudicated water rights while judicial review is still ongoing. *Pac. Live Stock Co.*, 241 U.S. at 447–48 (“[I]t is within the power of the [State of Oregon] to require that, pending the final adjudication, the water shall be distributed according to the board’s order [i.e. Final Order of Determination], unless a suitable bond be given to stay its operation.”). It is undisputed that Reclamation has not moved the Klamath County Court to stay the enforceability of the Adjudication’s water right determinations pursuant to Or. Rev. Stat. § 539.180.

i. KID Owns The Water Rights To Use Stored Water In UKL, Not Reclamation

In the Adjudication, the threshold question for OWRD to resolve was whether state or federal law is applicable to rights associated with the Klamath Project. Applying federal law, the Adjudication held that state law determines ownership of water rights within a Reclamation Project unless there is a specific congressional directive to the contrary. 9-KID_ER-001884. Contrary to what the district court found here, the Adjudication held that state law governs ownership of water rights within the Klamath Project because “[t]here is no directive to the contrary with regard to the question of ownership of water rights.” 9-KID_ER-001885 (emphasis added).

Applying state law, the Adjudication determined that “the right to store water is distinct from the right to use stored water.” 9-KID_ER-001894. Therefore, two water rights are necessary to store water and apply it to beneficial use. *Id.* The first consists of the right to capture the natural flow and store it for authorized purposes. *Id.* The second consists of the right to divert the water that has been stored and apply it to authorized beneficial uses. *Id.*

Though the right to store and the right to use are at times united in a common owner, the Adjudication held the rights are bifurcated here. Reclamation owns the rights to store. 9-KID_ER-001894. KID and others in the Klamath Project own the right to use. 9-KID_ER-001871; 9-KID_ER-001892.

Reclamation’s storage right does not include a right to divert the water that is stored for instream use. *Cookinham*, 58 Or. at 492 (holding a primary storage right “does not include the right to divert and use stored water, which must be the subject of the secondary permit”). Nor was any other right to use stored water in UKL for instream purposes recognized for Reclamation in the Adjudication. While the United States made a claim for instream flows in the Klamath River on behalf of the

Klamath Tribe, the ACFFOD declined this claim and the Klamath County Circuit Court affirmed the denial. 18-KID_ER-004513 (“The Tribes do not have reserved in-stream rights for completely off reservation waters such as those they seek on the Klamath River.”).

ii. KID’s Water Rights Are Private Property Protected By The Fifth Amendment

KID and its landowner’s water rights to use stored water in UKL are property rights protected by the Fifth Amendment to the United States Constitution. *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491 (1931), *opinion modified on denial of reh'g*, 137 Or. 480 (1931) (“The right to the use of water constitutes a vested property interest.”); *Hansen v. United States*, 65 Fed. Cl. 76, 123 (2005) (“Water rights are property rights protected by the Fifth Amendment.”); *Ickes*, 300 U.S. at 95–96 (recognizing that in the Western states “it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied”).

iii. KID's Property Interests Include The Right To Use, Right To Exclude, Right To Enforcement, And Right To Damages From Non-Enforcement

“The term ‘property’ as used in the Takings Clause includes all rights inhering in owners, including the right to possess, use, and dispose of the property.” *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

a. Right to Use

KID's 1905 water rights include the right to beneficially use 3.5 acre-feet of stored water in UKL on each acre of irrigated land within the district from March 1 to October 31 for the purposes of irrigation, domestic use, and incidental stock watering. 9-KID_ER-001970; 9-KID_ER-001965.

These rights are not subordinate to any other water rights in UKL. While the United States was found to hold federal reserved water rights in trust for the Klamath Tribes, these rights do not curtail water rights in UKL prior to 1908. 12-KID_ER-002741 (“The water rights determined for Claims 616 and 622 (the ‘Tribal Water Rights’) shall not result in regulation curtailing use of water under any water rights having a priority date before August 9, 1908.”). KID's water rights in UKL have a

1905 priority date. 9-KID_ER-001885. The United States does not hold UKL water rights in trust for any other tribe.

KID's rights to the use of stored water are not subordinate to any water rights in the Klamath River. Under Oregon law and the doctrine of prior appropriation, stored water in UKL cannot be "called" or curtailed by any water rights—even senior water rights—in the Klamath River. "Once water from a natural source has been legally stored, use of the stored water is subject only to the terms of the secondary permit that grants the right to use of stored water." Op. Att'y Gen. OP-6308 (1989); *see also* Or. Rev. Stat. § 540.210(3) ("The distribution and division of water **shall** be made according to the relative and respective rights of the various users from the ditch or Reservoir.") (emphasis added); Or. Admin. Rules § 690-250-0150(4) ("Use of legally stored water is governed by the water rights, if any, which call on that source of water."); *Tudor v. Jaca*, 178 Or. 126, 147–48 (1945) (impounded water may only be used to satisfy the secondary right). Because of this, "legally stored water is **not** subject to call by senior rights to the natural flow, **even if** the stored water originated in that stream." Op. Att'y Gen. OP-6308 (1989) (emphasis added). This is consistent with the law in other Western

states. *See, e.g., Washington Cnty. Irr. Dist. v. Talboy*, 43 P.2d 943, 945 (1935) (“After the water was diverted from the natural stream and stored in the reservoir, it was no longer ‘public water’ subject to diversion and appropriation.”).

b. Right to Exclude

KID’s property interests protected by the Fifth Amendment’s Takings Clause also include the right to exclude. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (“The right to exclude is one of the most treasured rights of property ownership.”). The Supreme Court has consistently held the right to exclude is “universally held to be a fundamental element of the property right,” and is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979); *see Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987); *see also* Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the “*sine qua non*” of property).

KID’s water rights include the right to exclude junior water users and non-water right holders from diverting or using stored water that

KID owns the right to use. 9-KID_ER-001758 (“In times of water shortage, one possessing a senior water right has a right to obtain regulation in his favor by having the watermaster shut off (‘regulate’) junior water users.”); Or. Rev. Stat. §§ 539.170 (requiring water to be distributed in accordance with determinations in an adjudication), 537.130(2) (stating that no one may “use, store or *divert* any waters” without a water right) (emphasis added).

c. Right to State Enforcement

KID’s water rights also include the right to have OWRD distribute stored water in accordance with those rights. Or. Rev. Stat. §§ 536.037(1)(c) (“The Water Resources Director shall . . . [a]dminister and enforce the laws of the state concerning the water resources of this state.”), 540.030(2) (“The Water Resources Director shall . . . [e]xecute the laws relative to the distribution of water.”); *California v. United States* (“*California*”), 438 U.S. 645, 675 (1978) (Section 8 of the Reclamation Act “requires the Secretary to comply with state law in the control, appropriation, use, or distribution of water.”).

Furthermore, priority of use is not the only aspect of water usage that OWRD enforces. Oregon law expressly prohibits a water right

holder from changing his or her use of water under a right except in accordance with specified procedures. Or. Rev. Stat. § 540.510(1) (“[N]o change in use or place of use of any water for any purpose may be made without compliance with the provisions of Or. Rev. Stat. §§ 540.210, 540.530.”). OWRD has authority—and in fact does—enforce laws related to each aspect of water rights, which includes not only priority of use, but also place of diversion, place of use, purpose of use, and rate of use. OWRD is also responsible for enforcing laws making it a crime to “use without authorization water to which another person is entitled, or willfully waste water to the detriment of another.” Or. Rev. Stat. § 540.720. The requirement to obtain OWRD approval before changing the use of water rights is fundamentally designed to ensure that the change does not injure other water rights. *See, e.g.*, Or. Rev. Stat. § 540.523(5).

d. Right to Damages for Non-Enforcement

KID’s water rights included a right to enforcement against Reclamation *unless* Reclamation obtained a stay from the Klamath County Circuit Court and agreed to pay all damages that might accrue by reason of KID’s 1905 water rights not being enforced. Or. Rev. Stat. § 539.180 (requiring a party seeking a stay of water rights determined in

an adjudication to agree to pay all damages that might accrue from nonenforcement during the pendency of judicial review). The district court's ruling has deprived KID of this property interest by authorizing Reclamation to use for instream purposes stored water that KID owns the right to use without seeking a stay from the Adjudication court conditioned on payment of any damages that accrue to KID by reason of its rights not being enforced. *See* Or. Rev. Stat. § 539.180.

iv. The District Court's Decision Judicially Takes KID's Water Rights

A judicial taking in violation of the Fifth Amendment occurs when “a court declares that what was once an established right of private property no longer exists” or “transform[s] private property into public property without compensation.” *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 715–16 (2010). By holding that the ESA preempts the OWRD orders enforcing KID's water rights in UKL, the court has judicially taken KID's constitutionally protected property interests in its water rights—including its right to use, right to exclude, right to enforcement, and right to damages resulting from non-enforcement.

///

The right to use and the right to exclude are opposite sides of the same coin. By holding that the ESA preempts KID's right to exclude, the district court has taken KID's superior right to use water stored in UKL and given it to Reclamation. This transforms KID's exclusive right into public property that the government is entitled to use for ESA purposes without payment of just compensation. *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001) ("Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value.").

Under traditional takings analysis, the court's ruling constitutes a physical taking because it deprives KID of water it owns the right to use and exclude others from using by causing it to be physically diverted away from KID and used by others. *Tulare*, 49 Fed. Cl. at 320 ("[A] deprivation of water amounts to a physical taking."); *Washoe Cnty., Nev. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("[C]ourts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights."); *Baley*, 134 Fed. Cl.

at 663 (“[D]efendant’s argument that ‘instructions’ from the government that result in the diversion of water cannot result in a physical taking because they are not ‘physical actions’ is incorrect as a matter of law.”); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (“Casitas’ right was to the use of the water, and its water was withdrawn from the Robles-Casitas Canal and turned elsewhere (to the fish ladder) by the government.”); *Int’l Paper Co. v. United States*, 282 U.S. 399, 407 (1931) (“The petitioner’s right was to the use of the water, and when all the water that it used was withdrawn from the petitioner’s mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use.”).

v. Taking Is For Public Use

The district court’s holding that the ESA preempts the OWRD orders enforcing KID’s water rights grants the United States a superior right to use stored water in UKL for instream purposes. The law is well established that a taking of water for ESA purposes is a taking for public use. *Casitas*, 543 F.3d at 1292 (“[T]here is little doubt that the preservation of the habitat of an endangered species is for government

and third party use—the public—which serves a public purpose.”); *Tulare Lake Basin*, 49 Fed. Cl. at 324 (“The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so.”).

vi. Judicial Taking Is Without Just Compensation

The district court’s decision takes KID’s water rights for public ESA uses without payment of just compensation. “One of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Dolan*, 512 U.S. at 384. Contrary to this well-established constitutional principle, the decision below forces KID and its landowners to bear the costs of protecting species for the benefit of the public as a whole.

III. The District Court Erred in Finding Obstacle Preemption

The court made a decision that violates KID’s constitutional rights because it failed to properly focus its obstacle preemption analysis on whether Congress intended the ESA to displace state water rights and other federal laws Congress has directed Reclamation to follow. The court also erred by failing even to consider the McCarran Amendment and

ignoring well-established precedents interpreting the Reclamation Act and ESA.

A. The District Court’s Analysis Overlooks Congress’s Intent Concerning The ESA’s Relation To State Water Laws And The Mccarran Amendment

“[T]he first and fundamental question in any pre-emption analysis is whether Congress intended to displace state law. . .” *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 6 (1986); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[I]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (internal citations omitted).

The type of preemption found by the court, obstacle preemption, exists when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). While obstacle preemption is an implied form of preemption, “[i]mplied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in

tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 110–11 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). “[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.” *Id.*

“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989); *McClellan v. I-Flow Corp.*, 776 F.3d 1034, 1040 (9th Cir. 2015) (“[T]he presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes.”); *see also Gier v. Am Honda Motor Co., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

Here, the history of congressional intent regarding federal-state jurisdiction with respect to the allocation of water shows that Congress has consistently displayed “principled deference to state water law” and that “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.” *United States v. New Mexico*, 438 U.S. 696, 702 (1978). “The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.” *California*, 438 U.S. at 653 (“A principal motivating factor behind Congress’ decision to defer to state law was [] the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.”); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164 (1935) (“It is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States.”).

Although the preemption issue here arises against this backdrop, the district court’s preemption analysis does not even consider it. The court’s analysis does not consider whether, in enacting the ESA, Congress intended to displace state water rights or the state water laws that Congress directed Reclamation to follow in Section 8 of the Reclamation Act. Nor does it consider whether Congress intended to displace water rights determinations in adjudications the McCarran Amendment directs it to follow.³

Instead, the court made an unprecedented finding that the ESA preempts state water law by summarily citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978) for the proposition that Congress’s purpose in enacting the ESA was to preserve and restore endangered species “whatever the cost”—as if that somehow answers the question this case presents. It does not.

The Court’s observation in *Tennessee Valley Authority* that Congress intended the ESA to protect endangered species “whatever the

³ By ignoring these issues, the court has made an erroneous decision that runs headlong into Supreme Court holding the ESA does not impliedly repeal other federal statutes. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife* (“*Home Builders*”), 551 U.S. 644, 664 (2007).

cost” does not mean the ESA requires the federal government to steal from individual farms in the Klamath Basin to pay the cost of providing water to fish. On the contrary, what *Tennessee Valley Authority* stands for is that in enacting the ESA Congress intended “to halt and reverse the trend toward species extinction, whatever the cost” ***to the federal government***. 437 U.S. at 184. As the Court explained, “[i]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which ***Congress has expended more than \$100 million***. . . . We conclude, however, that the explicit provisions of the Endangered Species Act ***require precisely that result***.” *Id.* at 172–73 (emphasis added); *see also id.* at 174 (“Concededly, [our] view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of ***many millions of dollars*** in ***public*** funds.”) (emphasis added). Nothing in *Tennessee Valley Authority* suggests Congress intended for federal agencies to protect endangered species at the “cost” of KID and its landowners’ constitutional rights, as occurred in this case. After all, even

Congressional enactments are subordinate to the Constitution. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Consequently, consistent with *Tennessee Valley Authority*, the ESA should be interpreted to require Reclamation to make every effort to overcome obstacles involved in securing water for fish consistent with applicable law—including state law, the Reclamation Act, the McCarren Amendment, and the Fifth Amendment—even if it strains the public treasury. *See Tennessee Valley Authority*, 437 U.S. at 172–74; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (“[W]here [] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”) (internal quotations omitted); *See* 13-KID_ER-002939-002940 (2018 letter from KID to Reclamation making same point).

B. The Court’s Preemption Analysis Ignores The McCarren Amendment And Misconstrues The Reclamation Act And ESA

The court’s preemption analysis misconstrues the Reclamation Act as “a broad mandate that did not direct the Bureau to perform any specific non-discretionary actions but instead is better characterized as directing the Bureau to achieve particular goals.” 1-KID_ER000030.

However, the Reclamation Act expressly says precisely the opposite: Reclamation is, in fact, specifically required to follow state law in the “control, appropriation, use, or distribution of water.” 43 U.S.C. § 383.

i. The Reclamation Act Requires Compliance With State Water Law And Prohibits Interference With Vested Water Rights

Section 8 of the Reclamation Act, now codified at 43 U.S.C. § 383 (“Section 8”), states in relevant part:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

The Supreme Court already interpreted the meaning of this provision in *California*. “From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects.” *California*, 438 U.S. at 665. First, the Secretary of the Interior “would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law.” *Id.* “Second, once the waters were released from the Dam, their distribution to individual

landowners would again be controlled by state law.” *Id.* at 667. The Court specifically agreed that “a State may impose any condition on the ‘control, appropriation, use, or distribution of water’ through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project.” *Id.* at 672–75 (“Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights.”).

ii. McCarran Amendment Requires Reclamation To Comply With The Water Rights Determinations In The Klamath Adjudication And Bars Relief Here

In 1954, Congress waived the sovereign immunity of the United States and allowed itself to be joined to comprehensive state water rights adjudications by enacting the McCarran Amendment. 43 U.S.C. § 666. Therefore, Reclamation was required to participate in the ongoing Klamath Adjudication to preserve any state or federal water rights it claims in UKL. *Oregon*, 44 F.3d at 770. When join in a McCarran Amendment adjudication, the United States is deemed to have “waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.” 43 U.S.C. § 666. Additionally, the United States “shall be subject to the judgments,

orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.” *Id.*

In determining the rights associated with the Klamath Project, the Adjudication specifically determined that state law is controlling under Section 8 of the Reclamation Act because “state law governs in Reclamation Projects unless there is a specific congressional directive to the contrary” and “[t]here is no directive to the contrary with regard to the question of ownership of water rights.” 9-KID_ER-001885. Both the McCarran Amendment and the Reclamation Act require Reclamation to abide by this determination and there is no basis to conclude Congress intended to displace it in enacting the ESA. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. [Citations.] The courts are not at liberty to pick and choose among congressional enactments, and when [] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102,

134 (1974) (“A new statute will not be read as wholly or even partially amending a prior one unless there exists a ‘positive repugnancy’ between the provisions of the new and those of the old that cannot be reconciled.”).

In the Adjudication, the United States argued that it owned *all* water rights in the Project, asserting it “holds title to the vested water right.” 9-KID_ER-001867. But OWRD disagreed, concluding that, with respect to water stored in UKL, the irrigation districts and their members “hold a legal interest in the water right for the purpose of beneficial use.” 9-KID_ER-001893. Conversely, the United States was held to have *only* the right to store water in UKL—not the right to use such stored water. 9-KID_ER-001871.

Further, the United States actually sought a right to use stored water from UKL in the Adjudication—namely, the right to use water within the Lower Klamath and Tule Lake National Wildlife Refuges “for the benefit of wetland plants on permanently and seasonally flooded wetlands.” 9-KID_ER-001869. OWRD rejected this request, concluding “[t]his use is not consistent with the plain meaning of the term ‘reclamation.’” *Id.* Specifically, OWRD considered Reclamation’s authority under the Reclamation Act to appropriate water for such

purposes, and concluded that, the Reclamation Act’s goal was to “encourage homesteading and conversion of arid and semi-arid land to agricultural use.” *Id.* “Based on the text of the Reclamation Act, it is evident that ‘Reclamation Act’ purposes do not include application of water to wetland plants.”⁴ *Id.* Accordingly, OWRD denied Reclamation’s application to the extent it sought water rights for this purpose. *Id.*

In 2013, upon the rights being determined, the Klamath County Circuit Court obtained *in rem* jurisdiction over the proceeding. Or. Rev. Stat. § 539.130; *Masterson*, 24 P.2d at 1048; *see also In re Waters of Willow Creek*, 119 Or. at 175 (similar). While the state court is exercising *in rem* jurisdiction, “OWRD, and its water masters, are required by statute to regulate the distribution of water according to the water rights

⁴ Coincidentally, this also demonstrates that the Klamath County Circuit Court is fully equipped to hear and consider issues of federal law which relate to the adjudication of water rights in UKL. The ACFOD, with the Klamath County Circuit Court is reviewing, ***already*** considers issues of federal law—as Congress specifically intended. *See Oregon*, 44 F.3d at 770 (“As the Supreme Court has noted, in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court.”); *see also United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 525–26 (1971).

on record and the OWRD's stream determination orders.” *TPC, LLC v. Oregon Water Res. Dept.* (“*TPC*”), 308 Or. App. 177, 197 (2020). “[T]he statutes do not allow OWRD to regulate the distribution of water according to anything that is not part of the water rights on record (as defined by Or. Rev. Stat. § 540.045(4)) and stream determination orders.” Or. Rev. Stat. § 539.170. The only circumstance in which OWRD is to regulate water differently is where a party seeks a stay of the water right determinations pending judicial review and agrees to “pay all damages that may accrue by reason of the [water right] determination[s] not being enforced.” Or. Rev. Stat. § 539.180.

Since the Government is a lawful participant in the Adjudication, it may not circumvent the Klamath County Circuit Court—which, under state law, is the court that Reclamation must seek a stay from, *see* Or. Rev. Stat. § 539.180—by seeking to establish a right to use water outside of the Adjudication, in this Court. The McCarran Amendment waives the United States’ right “to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty.” 43 U.S.C. § 666. Yet that is precisely what Reclamation seeks a

declaration of here: that it need not comply with Oregon state law about who holds the right to use water stored in UKL.

Similarly, the McCarran Amendment expressly provides that the United States “shall be subject to the judgments, orders, and decrees of the court having jurisdiction, *and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.*” 43 U.S.C. § 666 (emphasis added). But under Oregon law, no private citizen could do what Reclamation is doing here.

As noted in *TPC*, a private individual under like circumstances to Reclamation *could not* seek relief from the OWRD Orders enforcing these determined water rights in any court *other* than the Klamath County Circuit Court—and most certainly not a federal District Court located far away in another state. The Court in *TPC* considered whether a certain agreement limiting rights determined in the Adjudication could be challenged in Marion County Circuit Court. *TPC*, 308 Or. App. at 200. Based on arguments advanced by the United States,⁵ the court concluded that, regardless of the specific legal issues involved, this was “part of the ongoing KBA litigation, and it is subject to Klamath County Circuit

⁵ See 13-KID_ER-002946-002989.

Court’s exclusive jurisdiction under ORS chapter 539.” *Id.* Because the relief was “irreconcilably bound up with the KBA,” *id.* at 197, the only court having jurisdiction was the Klamath County Circuit Court. Thus, a private citizen in Oregon would not even be permitted to go to another court in Oregon, let alone a federal court in *another State*, to adjudicate issues related to UKL water rights. Since Reclamation is bound by the judgments in the Adjudication and may only seek review of such judgments “in the same manner and to the same extent as a private individual under like circumstances,” it cannot ask a federal court to create a water right in a collateral proceeding outside of the Adjudication. 43 U.S.C. § 666. Nevertheless, that is precisely what the district court allowed here.

While the district court summarily disclaimed that it was granting Reclamation a water right, its order that the ESA preempts any attempt to enforce water rights against Reclamation is the same thing. A water right in a prior appropriation system is, by definition, the right to take water for one’s chosen purpose *before* all other junior users. The district court’s order authorizes Reclamation to divert stored water through the Link River Dam before any other rights-holders use any stored water in

UKL. This is the same thing as granting the most senior of water rights. Yet without ever considering this issue, the court granted summary judgment doing just that.

iii. Reclamation Is Required To Proceed In Conformity With State Laws And Vested Rights That Do Not Authorize It To Use Stored Water In UKL For Instream Purposes

The Supreme Court has held that Section 8 of the Reclamation Act “requires the Secretary to comply with state law in the control, appropriation, use, or distribution of water.” *California*, 438 U.S. at 675.

The Adjudication has determined that KID and others own the rights to use stored water in UKL, not Reclamation. Consequently, Oregon law prohibits Reclamation from diverting stored water in UKL for instream use. All water within the State of Oregon belongs to the public. Or. Rev. Stat. § 537.110. No one may “use, store or *divert* any waters” without a water right. Or. Rev. Stat. § 537.130(2) (emphasis added). Oregon law makes the diversion of water without a right unlawful. *See* Or. Rev. Stat. § 540.720. Use or diversion of water specifically includes use or diversion of water instream, as a water right can be granted for such use. *See* Or. Admin. Rules § 690-077-0000(3) (“Instream water rights are established by certificate from the Water

Resources Commission or by an order approving a time-limited instream transfer or lease, pursuant to Or. Rev. Stat. § 537.332 to 537.360, to maintain and support public uses within natural streams and lakes.”). Although existing water rights for purposes of irrigation may be leased instream, an OWRD-approved lease entered by mutual agreement between a lessor and a lessee is needed and water must be available or made available for such use. Or. Admin. Rules § 690-077-0065; Or. Rev. Stat. § 537.349, Sections 1 and 2, chapter 445, Oregon Laws 2015.

Similarly, one who intends to use stored water must “apply to the Water Resources Department for a water right permit to use stored water.” Or. Rev. Stat. § 537.147(1). This includes where a water user intends to use stored water for an instream use: “If the source of water for an instream water right is other than natural flow such as storage releases or inter-basin transfer, the source shall be developed or a permit for development approved prior to or coincident in priority with the instream water right.” Or. Admin. Rules § 690-077-0015(6); *see also*, Or. Rev. Stat.. § 537.336(4) (“Any request for an in-stream water right to be supplied from stored water shall refer to the reservoir for a supply of water...); Or. Rev. Stat. § 537.336(4). Instream water rights are subject

to the same system of prior appropriation to which all other Oregon water rights are subject. *See* Or. Admin. Rules § 690-077-0015(1).

OWRD is legally obligated to distribute water from a reservoir or other stored water source in accordance with the water rights therein. *See* Or. Rev. Stat. § 540.210. This is precisely what OWRD did in the OWRD Orders at issue here. 2-KID_ER-000640. Reclamation’s diversion of stored water for instream use without a water right to do so impairs KID’s water rights and violates Oregon water law. Because it violates Oregon water law, it also violates Congress’s directive in Section 8 that Reclamation must comply with state law “relating to the control, appropriation, use, or distribution of water.” 43 U.S.C § 383.

iv. The ESA Does Not Grant Reclamation New Authority To Use Water

It is well-established that the ESA does not expand the powers otherwise possessed by the action agency consulting under Section 7. Since the ESA does not expand the legal authority Reclamation otherwise maintains, the court could not find that the ESA preempts the OWRD orders that Reclamation was otherwise obligated to follow under Section 8 of the Reclamation Act and the McCarran Amendment.

The Ninth Circuit held this almost thirty years ago in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995). In *Sierra Club*, the Seneca Sawmill Company (“Seneca”) proposed to build a road over land owned by the Bureau of Land Management (“BLM”). *Id.* at 1505–06. Seneca was the successor-in-interest to a right-of-way agreement that allowed it to build a road, provided that BLM did not notify it that the proposed route was (1) “not the most direct,” (2) “would substantially interfere with existing or planned facilities,” or (3) “would result in excessive soil erosion.” 65 F.3d at 1505. Additionally, when BLM approved the assignment to Seneca, Seneca entered into an “environmental stipulation,” pursuant to which Seneca “agreed to conduct its operations under the permit so as to comply with all water quality standards, all pesticide use standards, and [a]ll other applicable State and Federal environmental laws, regulations and standards.” *Id.* at 1506. After a BLM biologist determined that the construction of a proposed Seneca road “may affect the threatened spotted owl,” BLM evaluated whether it needed to consult with the relevant service, FWS. *Id.* Ultimately, because the part of the operation that “may affect” the owl was on Seneca’s privately owned land, and the environmental stipulation “did

not ‘create additional discretion concerning [Seneca’s] basic right to construct a road over BLM land,’” BLM determined it lacked any discretionary authority that would require it to consult under Section 7. *Id.* at 1506–07. The Sierra Club then brought suit, alleging violations of the ESA, among other things. *Id.* at 1507.

The panel in *Sierra Club* unanimously agreed with BLM. It noted that “Congress chose to apply section 7(a)(2) to federal relationships with private entities only when the federal agency acts to authorize, fund, or carry out the relevant activity.” *Id.* at 1508. As the Court explained, “Section 7 and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.” *Id.* at 1509 (emphasis original). Since the right-of-way agreement allowed BLM to approve or disapprove the construction on only three grounds, none of which related to the owl, there was no need to consult, the Court held. *Id.* at 1510.

Sierra Club also argued BLM had an affirmative duty under 16 U.S.C. § 1536(a)(1) to “conserve listed species,” and that this duty gave BLM additional authority to void agreements that pre-dated the ESA. *Id.* This Court disagreed, noting the D.C. Circuit had just rejected a

similar argument that the Federal Energy Regulatory Commission (“FERC”) was obligated to alter a license agreement for the benefit of the protected species. *Id.*; see *Platte River Whooping Crane Trust v. FERC* (“*Platte River*”), 962 F.2d 27, 34 (D.C. Cir. 1992).

Platte River concerned the relicensing, on a temporary annual basis, of two hydroelectric facilities on the Platte River in Nebraska. *Platte River*, 962 F.2d at 30. FERC had determined it was authorized to require one of the two facilities to comply with additional environmental safeguards that the agency wished to put in place, but lacked such authority as to the other facility because it had not included “an express reservation of modification authority, or ‘reopener clause,’ in the original license.” *Id.* at 32. Various environmental groups argued that the ESA nevertheless required FERC to “do ‘whatever it takes’” to preserve the listed species, arguing “any limitations on FERC’s authority contained in the FPA are implicitly superseded by this general command [under Section 7 of the ESA].” *Id.* at 34. Rejecting this argument and describing it as “far fetched,” the court specifically noted that *Tennessee Valley Authority* did not support it: “[T]he statute directs agencies to ‘utilize their authorities’ to carry out the ESA’s objectives; it does not *expand* the

powers conferred on an agency by its enabling act.” *Id.* (emphasis original).

Similarly, in *American Forest and Paper Association v. EPA*, 137 F.3d 291 (5th Cir. 1998), the Fifth Circuit considered an ESA claim related to the transfer of permitting authority from the Environmental Protection Agency (“EPA”) to the State of Louisiana under the Clean Water Act (“CWA”). *Id.* at 294. Federal law required EPA to transfer permitting authority to the state, if the state met nine enumerated criteria. *Id.* Since the ESA consultation requirements apply only to federal agencies, not to states, EPA agreed to transfer permitting authority to Louisiana based on the state’s agreement to a tenth requirement: that it send approved permits to EPA to either approve or veto, based on the ESA. *Id.* at 294–97. The case therefore concerned “whether EPA enjoys the statutory authority to require Louisiana, before it may issue a discharge permit, to consult with federal agencies regarding the impact on endangered species.” *Id.* at 297.

After concluding that EPA lacked any authority under its own authorizing statutes for such a requirement, the Court turned to the EPA’s authority under the ESA. *Id.* at 298. EPA argued that the ESA

“compels [it] to do everything reasonably within its power to protect endangered species.” *Id.* at 298. “The flaw in this argument,” the Fifth Circuit observed, “is that if EPA lacks the power to add additional criteria to CWA § 402(b), nothing in the ESA grants the agency the authority to do so.” *Id.* As the Court explained, “Section 7 of the ESA merely requires EPA to consult with FWS or NMFS before undertaking agency action; it confers no substantive powers.” *Id.* In reaching this conclusion, the Fifth Circuit agreed with the D.C. Circuit’s holding in *Platte River*, noting that “the ESA serves not as a font of new authority, but as something far more modest: a directive to agencies to channel their *existing* authority in a particular direction.” *Id.* at 299 (emphasis in original). Thus, “EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized by the CWA.” *Id.*

This understanding—that the ESA does not expand the authority of agencies but rather directs that action agencies discharge what authority they do have to benefit listed species—is firmly established as a fundamental percept of ESA jurisprudence. *See, e.g., Env’tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1082–83 (9th Cir. 2001) (finding that EPA lacked discretion, because permit was already issued

prior to the listing of the species); *compare Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 949, 977 (9th Cir. 2003) (reconsultation was necessary because the action agency could condition newly issued permits on actions taken to preserve or protect endangered species). The common thread underlying these cases is that it is the agency's **authorizing** statutes that empower the agency to take actions to protect listed species. The ESA itself does not grant such powers.

Sierra Club, Platte River, and American Forest all explain, at a very basic level, why the Endangered Species Act cannot—and does not—preempt OWRD from enforcing water rights determined in the Klamath Adjudication. The ESA grants no powers to action agencies such as Reclamation which are not otherwise included in their authorizing statutes. Since the ESA does not grant Reclamation additional powers, it adds nothing new to Reclamation's authorities that could preempt OWRD's Orders enforcing the water rights determined in the Klamath Adjudication.

None of the cases the district court relied upon to support its preemption finding are to the contrary. While the district court cites *Tennessee Valley Authority*, 437 U.S. at 180 for the proposition that the

ESA provides a contrary congressional directive, the Supreme Court has specifically held “that case did not speak to the question whether § 7(a)(2) applies to *non*-discretionary actions, like the one at issue here.” *Home Builders*, 551 U.S. at 671. If Reclamation had authority that caused its actions to preempt OWRD from enforcing water rights determined in the Adjudication, such authority would be found in the Reclamation Act—the font of all Reclamation’s powers—not the ESA. The ESA does nothing to expand Reclamation’s authority. Therefore, it cannot be a source of preemption for Reclamation actions, as the district court found here.

v. The District Court Erred In Holding Patterson Authorizes Diversion Of Stored Water From UKL For Instream Use For ESA Purposes

To avoid this conclusion, the district court cited *Patterson* as controlling precedent establishing that Reclamation’s control of the Link River Dam grants it authority to divert stored water from UKL to comply with the ESA. *See* 204 F.3d at 1206. The district court’s reliance on *Patterson* and its progeny, however, is misplaced.

First, ownership of water rights, not physical control or ownership of diversion structures, controls diversion, storage, and use of water in Oregon and other western states. *Nebraska*, 325 U.S. at 614 (“The

property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals.”); *Ickes*, 300 U.S. at 94–95 (“Although the government diverted, stored, and distributed the water . . . the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.”).

Second, *Patterson* was decided more than a decade before the Adjudication determined water rights in UKL. Since the rights were undetermined and unenforceable at the time *Patterson* was decided, they imposed no constraint on Reclamation’s operation of the Link River Dam. Therefore, the court naturally concluded that Reclamation maintained discretion to meet ESA obligations to operate the dam to provide instream flows in the Klamath River.

But this is not the case today. Now that rights to stored water in UKL have been adjudicated, Section 8 requires Reclamation to operate the Link River Dam in accordance with the adjudicated water rights. *Nat. Res. Def. Council v. Patterson*, 791 F. Supp. 1425, 1435 (E.D. Cal. 1992), *aff’d and rem’d sub nom. Nat. Res. Def. Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (“Section 8 incorporates state statutes which affect both

dam operation and water impoundment or distribution and statutes which solely affect water impoundment or distribution.”); Or. Rev. Stat. §§ 537.130(2) (no one may “use, store, or *divert* any waters” without a water right) (emphasis added), 539.170 (water must be distributed in accordance with Adjudication’s water right determinations), 540.210 (OWRD shall take exclusive control of reservoir and distribute water to persons entitled to it under their water rights); Or. Admin. R. § 690-250-0150(4) (“Use of legally stored water is governed by the water rights, if any, which call on that source of water.”); *see also* Or. Admin. R. § 690-250-0150(1) (“Water which has been illegally stored is under the complete control of the watermaster.”)

Third, since the water rights in UKL were undetermined at the time *Patterson* was decided, the case was litigated on the assumption that all the water rights associated with the Klamath Project were owned by Reclamation, and that KID and others in the Klamath Project were only entitled to delivery pursuant to their repayment contracts. Now, however, the rights have been adjudicated, and it is evident these assumptions were wrong. Contrary to what was assumed in *Patterson*, it is KID, its landowners, and other beneficial users that own the rights to

use stored water in UKL, not Reclamation. Furthermore, KID's contract with Reclamation does not alter or limit its adjudicated water rights. *Baley*, 134 Fed. Cl. at 655.

In short, Patterson is not controlling precedent on the preemption issue this case presents.

IV. The District Court Erred in Granting Summary Judgment Because Genuine Issues of Material Fact Exist

The court erred in granting summary judgment because there are genuine issues of material fact regarding whether, or to what extent, the OWRD orders are an obstacle to Reclamation fulfilling its ESA obligations. In denying KID's Rule 56(d) request, the court reasoned discovery was not necessary because KID could have "brought in an expert testifying to the feasibility of diverting water from other river systems, or the availability of other water rights or licenses to the Bureau." 1-KID_ER000024. In doing so, the court acknowledged that "[e]ither may have shown a dispute of material fact as to summary judgment." *Id.* While KID did not engage an expert, it did present evidence that Reclamation used stored water from UKL for instream purposes for three consecutive irrigation seasons after water rights in UKL were determined in the Adjudication. 6-KID_ER-001137-001138;

12-KID_ER-002832-002835. KID also produced evidence showing that Reclamation acquires water and water rights through purchase elsewhere in the West, and KID has offered to lease water rights to Reclamation. 18-KID_ER-004294; 18-KID_ER-004332, 2-KID_ER-000308 (“Even now, despite the history of litigation regarding these matters, KID is willing to negotiate with Reclamation to lease or license its water rights to the extent necessary.”). Had the court viewed the evidence on this issue and others KID identified in its discovery requests in the light most favorable to the non-moving party, as it was required to do, *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), it would have recognized there are genuine issues of material fact for trial that preclude entry of summary judgment. 19-KID_ER-0004666-004692; 2-KID_ER-000289-000306; 2-KID_ER-000268-000288.

Significantly, the court determined that obstacle preemption exists without making any factual finding regarding the quantity of stored water, if any, the ESA “obligates” Reclamation to artificially inject into the Klamath River—or even identifying a factual basis on how this would be determined. Notably, the Biological Opinions currently applicable to the Klamath Project do not resolve this question as they are non-jeopardy

opinions that merely conclude one particular way Reclamation has proposed to operate the Project ***will not*** jeopardize the existence of any listed species. They do nothing to show whether there are other ways of avoiding jeopardy that do not infringe on KID's water rights. Nor do they provide evidence of what obstacle these would present to Reclamation, if any at all.

V. Doctrine of Prior Exclusive Jurisdiction Bars This Claim

The doctrine of prior exclusive jurisdiction precludes the federal courts from entertaining this collateral challenge. The *res* at issue in the Adjudication—the rights to the use of water in Oregon's Klamath Basin—is currently within the jurisdiction of the Klamath County Circuit Court, sitting *in rem*. “[I]f a state or federal court ‘has taken possession of property, or by its procedure has obtained jurisdiction over the same,’ then the property under that court’s jurisdiction ‘is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign.’” *Sexton v. NDEX West, LLC*, 713 F.3d 533, 536 (9th Cir. 2013) (quoting *State Engineer v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)).

All requirements are met for the application of this doctrine in this case. The Adjudication is an *in rem* proceeding. The *res* the Klamath County Circuit Court is currently adjudicating consists of all previously undetermined rights to the use of water in UKL and the Klamath River in Oregon. Or. Rev. Stat. § 539.010(7) (“The Water Resources Department may adjudicate . . . any federal water right.”). This suit expressly seeks a declaration that OWRD cannot enforce any water right in the Adjudication that impinges on Reclamation’s ability to use stored water in UKL for instream purposes. In doing so, it asks the federal courts to override the Adjudication’s explicit determination that there are not federal directives that override the application of state law. 14-KID_ER-001885. It also circumvents the Klamath County Circuit Court’s jurisdiction to resolve contentions that water rights determined in the Adjudication should be stayed while judicial review is ongoing. ORS 539.180

More fundamentally, Reclamation’s collateral challenge seeks a determination that Reclamation has a right to use stored water in UKL for instream purposes in the Klamath River, contrary to the adjudication’s determination that the rights to the use of stored water in

UKL are owned by KID, its landowners, and others in the Klamath Project. It also implicitly seeks to change the character of the state law storage right it was determined to have in the Adjudication by obtaining a collateral ruling implicitly authorizing the agency to store water for environmental purposes rather than to benefit the separate rights of KID and others. Because this claim impacts all water rights in UKL, including those of the Klamath Tribes and many who are not even parties to this litigation, the Court with jurisdiction to adjudicate the issue is the Klamath County Circuit Court. If Reclamation wishes to litigate this issue, it must do so in that court. To the extent this Court's holding *In re Klamath Irrigation Dist.*, 69 F.4th 934, 945 (9th Cir. 2023) suggests otherwise, the decision is wrong for the numerous reasons thoroughly explained in the dissent and should be reconsidered.

VI. Court Erred in Failing to Abstain Under Colorado River Doctrine

The district court abused its discretion in denying KID's motion to stay in this case pursuant to *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976). Indeed, the case for abstention is even stronger in this case than it was in *Colorado River*. Here, as in *Colorado River*, the United States seeks a federal district court ruling on matters

encompassed by a comprehensive water rights adjudication pending in state court. *Colorado River*, 424 U.S. at 805–07. In *Colorado River*, the United States sought quantification of its federal reserved rights; here, the United States seeks to establish a water right by obtaining a ruling that OWRD cannot prevent Reclamation from diverting stored water from UKL if doing so is necessary for environmental purposes. *Id.* In *Colorado River*, both courts had jurisdiction over the water rights in dispute. *Id.* at 806–07. Here, only the state court has jurisdiction to determine water rights.

The district court’s decision to expand Reclamation’s rights to the use of stored water in UKL and take KID’s has triggered many of the concerns set forth by the Supreme Court in *San Carlos Apache Tribe*—namely, duplicative litigation, tension and controversy between the federal and state forums, and confusion over the disposition of property rights. It is directly affecting the rights of non-parties to this litigation who are now bringing cases in which neither KID nor Reclamation is joined—even though the outcomes of those cases may in turn impact KID’s rights *see* RJN, Exs. F, G, H. This would not be occurring if all these interrelated issues concerning previously undetermined state and

federal rights to the use of water UKL were being litigated in the Adjudication as Congress intended, instead of being collaterally attacked in multiple different state and federal forums.

CONCLUSION

For the reasons above, the case should be reversed and remanded for a determination of the just compensation owing to KID and its landowners for the district court's unconstitutional taking of its water rights.

DATED: October 16, 2023

By: /s/ Nathan Rietmann
Nathan Rietmann
RIETMANN & KIM, LLP

John P. Kinsey
Nicolas R. Cardella
WANGER JONES HELSLEY
PC

Attorneys for Appellant
Klamath Irrigation District

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 40-1(a) of the Ninth Circuit Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,587 words.

DATED: October 16, 2023

By: /s/ Nathan Rietmann
Nathan Rietmann
RIETMANN & KIM, LLP

John P. Kinsey
Nicolas R. Cardella
WANGER JONES HELSLEY
PC

Attorneys for Appellant
Klamath Irrigation District

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 15. Certificate of Service for Electronic Filing

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form15instructions.pdf>

9th Cir. Case Number(s)

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Service on Case Participants Who Are NOT Registered for Electronic Filing:

I certify that I served the foregoing/attached document(s) on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case participants (*list each name and mailing/email address*):

Description of Document(s) (*required for all documents*):

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Case No. 23-15499 and 23-15521 (Consolidated)
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

KLAMATH IRRIGATION DISTRICT,
Intervenor-Cross-Defendant and Appellant,

v.

YUROK TRIBE, et al.,
Plaintiffs and Appellees.

On appeal from the U.S. District Court for the Northern District of
California, San Francisco Division, Case No. 3:19-cv-04405-WHO

ADDENDUM TO OPENING BRIEF

John P. Kinsey #215916
Nicolas R. Cardella #304151
WANGER JONES HELSLEY PC
265 E. River Park Circle, Suite 310
Fresno, California 93720
Phone: (559) 233-4800
Fax: (559) 233-9330

Nathan R. Rietmann #053630
RIETMANN & KIM, LLP
1270 Chemeketa Street NE
Salem, Oregon 97301
Phone: (503) 551-2740

Attorneys for Intervenor-Cross-Defendant and Appellant,
KLAMATH IRRIGATION DISTRICT

TABLE OF CONTENTS

	<u>Page</u>
<u>United States Constitution</u>	
Amendment V.....	5
<u>United States Code</u>	
Title 16, Chapter 35	
Section 1531.....	6
Section 1532.....	9
Section 1533.....	12
Section 1534.....	22
Section 1535.....	23
Section 1536.....	28
Section 1537.....	39
Section 1537a.....	41
Section 1538.....	43
Section 1539.....	48
Section 1540.....	57
Section 1541.....	63
Section 1542.....	64
Section 1543.....	66
Section 1544.....	67
Title 28, Chapter 83	
Section 1291.....	68
Title 43, Chapter 12	
Section 383.....	69
Section 498.....	70
Section 666.....	71

TABLE OF CONTENTS (Cont.)

	<u>Page</u>
<u>Oregon Revised Statutes</u>	
Title 45, Chapter 536	
Section 536.037.....	72
Title 45, Chapter 537	
Section 537.110.....	74
Section 537.120.....	75
Section 537.130.....	76
Section 537.147.....	77
Section 537.332.....	79
Section 537.336.....	81
Section 537.349.....	82
Section 537.360.....	83
Title 45, Chapter 539	
Section 539.010.....	84
Section 539.130.....	86
Section 539.170.....	88
Section 539.180.....	89
Section 539.200.....	90
Section 539.210.....	91
Title 45, Chapter 540	
Section 540.030.....	92
Section 540.100.....	93
Section 540.210.....	94
Section 540.510.....	95
Section 540.523.....	98
Section 540.530.....	100
Section 540.720.....	103

TABLE OF CONTENTS (Cont.)

	<u>Page</u>
<u>Oregon Administrative Rules Compilation</u>	
Chapter 690, Division 77	
690-077-0000.....	104
690-077-0015.....	106
90-077-0065.....	109
Chapter 690, Division 250	
690-250-0150.....	111

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy;
Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species

16 U.S.C.A. Ch. 35, Refs & Annos

Currentness

16 U.S.C.A. Ch. 35, Refs & Annos, 16 USCA Ch. 35, Refs & Annos

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1531

§ 1531. Congressional findings and declaration of purposes and policy

Currentness

(a) Findings

The Congress finds and declares that--

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to--
 - (A) migratory bird treaties with Canada and Mexico;
 - (B) the Migratory and Endangered Bird Treaty with Japan;
 - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
 - (D) the International Convention for the Northwest Atlantic Fisheries;
 - (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
 - (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
 - (G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

CREDIT(S)

(Pub.L. 93-205, § 2, Dec. 28, 1973, 87 Stat. 884; Pub.L. 96-159, § 1, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 9(a), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1013(a), Oct. 7, 1988, 102 Stat. 2315.)

16 U.S.C.A. § 1531, 16 USCA § 1531

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1532

§ 1532. Definitions

Currentness

For the purposes of this chapter--

- (1) The term “alternative courses of action” means all alternatives and thus is not limited to original project objectives and agency jurisdiction.
- (2) The term “commercial activity” means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.
- (3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.
- (4) The term “Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.
- (5)(A) The term “critical habitat” for a threatened or endangered species means--
 - (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 1533](#) of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
 - (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 1533](#) of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.
- (B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term “Federal agency” means any department, agency, or instrumentality of the United States.

(8) The term “fish or wildlife” means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term “foreign commerce” includes, among other things, any transaction--

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term “import” means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term “permit or license applicant” means, when used with respect to an action of a Federal agency for which exemption is sought under [section 1536](#) of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of [section 1536\(a\)](#) of this title to such agency action.

(13) The term “person” means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term “plant” means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term “Secretary” means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term “species” includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term “United States”, when used in a geographical context, includes all States.

CREDIT(S)

(Pub.L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub.L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub.L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub.L. 100-478, Title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

16 U.S.C.A. § 1532, 16 USCA § 1532

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: December 27, 2022

Currentness

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A)** the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B)** overutilization for commercial, recreational, scientific, or educational purposes;
- (C)** disease or predation;
- (D)** the inadequacy of existing regulatory mechanisms; or
- (E)** other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

- (i)** be listed as an endangered species or a threatened species, or
- (ii)** be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been--

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of Title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

(B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

(iii) The petitioned action is warranted, but that--

(I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

(II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

(C)(i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

(ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.

(iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7¹ to prevent a significant risk to the well being of any such species.

(D)(i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of Title 5](#), to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

(ii) Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of [section 553 of Title 5](#) (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3), the Secretary shall--

(A) not less than 90 days before the effective date of the regulation--

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5) (A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either--

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

(B)(i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

(ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor [section 553 of Title 5](#) shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

(c) Lists

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b).

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [section 1538\(a\)\(1\)](#) of this title, in the case of fish or wildlife, or [section 1538\(a\)\(2\)](#) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to [section 1535\(c\)](#) of this title only to the extent that such regulations have also been adopted by such State.

(e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that--

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

(f) Recovery plans

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as “recovery plans”) for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to chapter 10 of Title 5.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

(g) Monitoring

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c).

(2) The Secretary shall make prompt use of the authority under paragraph 7¹ of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

- (1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;
- (2) criteria for making the findings required under such subsection with respect to petitions;
- (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and
- (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3), the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

CREDIT(S)

(Pub.L. 93-205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub.L. 94-359, § 1, July 12, 1976, 90 Stat. 911; Pub.L. 95-632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub.L. 96-159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 2(a), Oct. 13, 1982, 96 Stat. 1411; Pub.L. 100-478, Title I, §§ 1002 to 1004, Oct. 7, 1988, 102 Stat. 2306; Pub.L. 108-136, Div. A, Title III, § 318, Nov. 24, 2003, 117 Stat. 1433; Pub.L. 117-286, § 4(a)(113), Dec. 27, 2022, 136 Stat. 4318.)

Footnotes

1 So in original. Probably should be “paragraph (7)”.

16 U.S.C.A. § 1533, 16 USCA § 1533

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1534

§ 1534. Land acquisition

Effective: December 19, 2014

Currentness

(a) Implementation of conservation program; authorization of Secretary and Secretary of Agriculture

The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to [section 1533](#) of this title. To carry out such a program, the appropriate Secretary--

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) Availability of funds for acquisition of lands, waters, etc.

Funds made available pursuant to chapter 2003 of Title 54 may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

CREDIT(S)

(Pub.L. 93-205, § 5, Dec. 28, 1973, 87 Stat. 889; Pub.L. 95-632, § 12, Nov. 10, 1978, 92 Stat. 3766; Pub.L. 113-287, § 5(d) (32), Dec. 19, 2014, 128 Stat. 3267.)

16 U.S.C.A. § 1534, 16 USCA § 1534

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1535

§ 1535. Cooperation with States

Currentness

(a) Generally

In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) Management agreements

The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of [section 715s](#) of this title.

(c) Cooperative agreements

(1) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program--

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife; and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened; or

that under the State program--

(i) the requirements set forth in subparagraphs (C), (D), and (E) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to [section 1533\(d\)](#) of this title or [section 1538\(a\)\(1\)](#) of this title with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program--

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program--

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to [section 1533\(d\)](#) or [section 1538\(a\)\(1\)](#) of this title with respect to the taking of any resident endangered or threatened species.

(d) Allocation of funds

(1) The Secretary is authorized to provide financial assistance to any State, through its respective State agency, which has entered into a cooperative agreement pursuant to subsection (c) of this section to assist in development of programs for the conservation of endangered and threatened species or to assist in monitoring the status of candidate species pursuant to [subparagraph \(C\) of section 1533\(b\)\(3\)](#) of this title and recovered species pursuant to [section 1533\(g\)](#) of this title. The Secretary shall allocate each annual appropriation made in accordance with the provisions of subsection (i) of this section to such States based on consideration of--

(A) the international commitments of the United States to protect endangered species or threatened species;

(B) the readiness of a State to proceed with a conservation program consistent with the objectives and purposes of this chapter;

(C) the number of endangered species and threatened species within a State;

(D) the potential for restoring endangered species and threatened species within a State;

(E) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species;

(F) the importance of monitoring the status of candidate species within a State to prevent a significant risk to the well being of any such species; and

(G) the importance of monitoring the status of recovered species within a State to assure that such species do not return to the point at which the measures provided pursuant to this chapter are again necessary.

So much of the annual appropriation made in accordance with provisions of subsection (i) of this section allocated for obligation to any State for any fiscal year as remains unobligated at the close thereof is authorized to be made available to that State until the close of the succeeding fiscal year. Any amount allocated to any State which is unobligated at the end of the period during which it is available for expenditure is authorized to be made available for expenditure by the Secretary in conducting programs under this section.

(2) Such cooperative agreements shall provide for (A) the actions to be taken by the Secretary and the States; (B) the benefits that are expected to be derived in connection with the conservation of endangered or threatened species; (C) the estimated cost of these actions; and (D) the share of such costs to be borne by the Federal Government and by the States; except that--

(i) the Federal share of such program costs shall not exceed 75 percent of the estimated program cost stated in the agreement; and

(ii) the Federal share may be increased to 90 percent whenever two or more States having a common interest in one or more endangered or threatened species, the conservation of which may be enhanced by cooperation of such States, enter jointly into an agreement with the Secretary.

The Secretary may, in his discretion, and under such rules and regulations as he may prescribe, advance funds to the State for financing the United States pro rata share agreed upon in the cooperative agreement. For the purposes of this section, the non-Federal share may, in the discretion of the Secretary, be in the form of money or real property, the value of which will be determined by the Secretary, whose decision shall be final.

(e) Review of State programs

Any action taken by the Secretary under this section shall be subject to his periodic review at no greater than annual intervals.

(f) Conflicts between Federal and State laws

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

(g) Transition

(1) For purposes of this subsection, the term "establishment period" means, with respect to any State, the period beginning on December 28, 1973, and ending on whichever of the following dates first occurs: (A) the date of the close of the 120-day period following the adjournment of the first regular session of the legislature of such State which commences after December 28, 1973, or (B) the date of the close of the 15-month period following December 28, 1973.

(2) The prohibitions set forth in or authorized pursuant to [sections 1533\(d\)](#) and [1538\(a\)\(1\)\(B\)](#) of this title shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention or otherwise specifically covered by any other treaty or Federal law) within any State--

(A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State); or

(B) except for any time within the establishment period when--

(i) the Secretary applies such prohibition to such species at the request of the State, or

(ii) the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary's finding and publication may be made without regard to the public hearing or comment provisions of [section 553 of Title 5](#) or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.

(h) Regulations

The Secretary is authorized to promulgate such regulations as may be appropriate to carry out the provisions of this section relating to financial assistance to States.

(i) Appropriations

(1) To carry out the provisions of this section for fiscal years after September 30, 1988, there shall be deposited into a special fund known as the cooperative endangered species conservation fund, to be administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund under [section 669b](#) of this title, and paid, transferred, or otherwise credited each fiscal year to the Sport Fishing Restoration Account established under 1016 of the Act of July 18, 1984.

(2) Amounts deposited into the special fund are authorized to be appropriated annually and allocated in accordance with subsection (d) of this section.

CREDIT(S)

([Pub.L. 93-205](#), § 6, Dec. 28, 1973, 87 Stat. 889; [Pub.L. 95-212](#), Dec. 19, 1977, 91 Stat. 1493; [Pub.L. 95-632](#), § 10, Nov. 10, 1978, 92 Stat. 3762; [Pub.L. 96-246](#), May 23, 1980, 94 Stat. 348; [Pub.L. 97-304](#), §§ 3, 8(b), Oct. 13, 1982, 96 Stat. 1416, 1426; [Pub.L. 100-478](#), Title I, § 1005, Oct. 7, 1988, 102 Stat. 2307.)

16 U.S.C.A. § 1535, 16 USCA § 1535

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [section 1533](#) of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [section 1533](#) of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) Opinion of Secretary

(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

(B) In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

(I) the reasons why a longer period is required,

(II) the information that is required to complete the consultation, and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2), the Secretary concludes that--

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological assessment

(1) To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the “Committee”).

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under [section 5703 of Title 5](#).

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) Promulgation of regulations; form and contents of exemption application

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications.

Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A)(i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A)(i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b)(1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4) and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) Review by Secretary of State; violation of international treaty or other international obligation of United States

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) Exemption decision not considered major Federal action; environmental impact statement

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality

(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) Notice requirement for citizen suits not applicable

The 60-day notice requirement of [section 1540\(g\)](#) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) Judicial review

Any person, as defined by [section 1532\(13\)](#) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in [section 2112 of Title 28](#). Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) Exemption as providing exception on taking of endangered species

Notwithstanding [sections 1533\(d\)](#) and [1538\(a\)\(1\)\(B\) and \(C\)](#) of this title, [sections 1371](#) and [1372](#) of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) shall not be considered to be a prohibited taking of the species concerned.

(p) Exemptions in Presidentially declared disaster areas

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

CREDIT(S)

([Pub.L. 93-205](#), § 7, Dec. 28, 1973, 87 Stat. 892; [Pub.L. 95-632](#), § 3, Nov. 10, 1978, 92 Stat. 3752; [Pub.L. 96-159](#), § 4, Dec. 28, 1979, 93 Stat. 1226; [Pub.L. 97-304](#), §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; [Pub.L. 99-659](#), Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; [Pub.L. 100-707](#), Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

16 U.S.C.A. § 1536, 16 USCA § 1536

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1537

§ 1537. International cooperation

Currentness

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of [section 1306 of Title 31](#), use foreign currencies accruing to the United States Government under the Food for Peace Act or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to [section 1533](#) of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of [section 1542](#) of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage--

- (1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to [section 1533](#) of this title;
- (2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and
- (3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may--

- (1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

CREDIT(S)

(Pub.L. 93-205, § 8, Dec. 28, 1973, 87 Stat. 892; Pub.L. 96-159, § 5, Dec. 28, 1979, 93 Stat. 1228; Pub.L. 110-246, Title III, § 3001(b)(1)(A), (2)(N), June 18, 2008, 122 Stat. 1820.)

16 U.S.C.A. § 1537, 16 USCA § 1537

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1537a

§ 1537a. Convention implementation

Currentness

(a) Management Authority and Scientific Authority

The Secretary of the Interior (hereinafter in this section referred to as the “Secretary”) is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions

The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions; determinations

(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention

If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife Preservation in Western Hemisphere

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the “Secretary”), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 982, hereinafter in this subsection referred to as the “Western Convention”). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to--

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

CREDIT(S)

(Pub.L. 93-205, § 8A, as added Pub.L. 96-159, § 6(a)(1), Dec. 28, 1979, 93 Stat. 1228; amended Pub.L. 97-304, § 5[(a)], Oct. 13, 1982, 96 Stat. 1421.)

16 U.S.C.A. § 1537a, 16 USCA § 1537a

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1538

§ 1538. Prohibited acts

Currentness

(a) Generally

(1) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of fish or wildlife listed pursuant to [section 1533](#) of this title it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [section 1533](#) of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of plants listed pursuant to [section 1533](#) of this title, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to [section 1533](#) of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if--

(A) such fish or wildlife is not an endangered species listed pursuant to [section 1533](#) of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) In general

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

(2) Requirements

Any person required to obtain permission under paragraph (1) of this subsection shall--

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) Regulations

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(4) Restriction on consideration of value or amount of African elephant ivory imported or exported

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported under such permission.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to [section 1533](#) of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of [section 668cc-4\(d\)](#) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

CREDIT(S)

(Pub.L. 93-205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub.L. 95-632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub.L. 97-304, § 9(b), Oct. 13, 1982, 96 Stat. 1426; Pub.L. 100-478, Title I, § 1006, Title II, § 2301, Oct. 7, 1988, 102 Stat. 2308, 2321; Pub.L. 100-653, Title IX, § 905, Nov. 14, 1988, 102 Stat. 3835.)

16 U.S.C.A. § 1538, 16 USCA § 1538

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1539

§ 1539. Exceptions

Currentness

(a) Permits

(1) The Secretary may permit, under such terms and conditions as he shall prescribe--

(A) any act otherwise prohibited by [section 1538](#) of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

(B) any taking otherwise prohibited by [section 1538\(a\)\(1\)\(B\)](#) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies--

(i) the impact which will likely result from such taking;

(ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and

(iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that--

(i) the taking will be incidental;

- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.

(C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) Hardship exemptions

(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to [section 1533](#) of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of [section 1538\(a\)](#) of this title to the extent the Secretary deems appropriate if such person applies to him for such exemption and includes with such application such information as the Secretary may require to prove such hardship; except that (A) no such exemption shall be for a duration of more than one year from the date of publication in the Federal Register of notice of consideration of the species concerned, or shall apply to a quantity of fish or wildlife or plants in excess of that specified by the Secretary; (B) the one-year period for those species of fish or wildlife listed by the Secretary as endangered prior to December 28, 1973, shall expire in accordance with the terms of [section 668cc-3¹](#) of this title; and (C) no such exemption may be granted for the importation or exportation of a specimen listed in Appendix I of the Convention which is to be used in a commercial activity.

(2) As used in this subsection, the term “undue economic hardship” shall include, but not be limited to:

- (A) substantial economic loss resulting from inability caused by this chapter to perform contracts with respect to species of fish and wildlife entered into prior to the date of publication in the Federal Register of a notice of consideration of such species as an endangered species;
- (B) substantial economic loss to persons who, for the year prior to the notice of consideration of such species as an endangered species, derived a substantial portion of their income from the lawful taking of any listed species, which taking would be made unlawful under this chapter; or

(C) curtailment of subsistence taking made unlawful under this chapter by persons (i) not reasonably able to secure other sources of subsistence; and (ii) dependent to a substantial extent upon hunting and fishing for subsistence; and (iii) who must engage in such curtailed taking for subsistence purposes.

(3) The Secretary may make further requirements for a showing of undue economic hardship as he deems fit. Exceptions granted under this section may be limited by the Secretary in his discretion as to time, area, or other factor of applicability.

(c) Notice and review

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an endangered animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(d) Permit and exemption policy

The Secretary may grant exceptions under subsections (a)(1)(A) and (b) of this section only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in [section 1531](#) of this title.

(e) Alaska natives

(1) Except as provided in paragraph (4) of this subsection the provisions of this chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by--

(A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska; or

(B) any non-native permanent resident of an Alaskan native village;

if such taking is primarily for subsistence purposes. Non-edible byproducts of species taken pursuant to this section may be sold in interstate commerce when made into authentic native articles of handicrafts and clothing; except that the provisions of this subsection shall not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing.

(2) Any taking under this subsection may not be accomplished in a wasteful manner.

(3) As used in this subsection--

(i) The term “subsistence” includes selling any edible portion of fish or wildlife in native villages and towns in Alaska for native consumption within native villages or towns; and

(ii) The term “authentic native articles of handicrafts and clothing” means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.

(4) Notwithstanding the provisions of paragraph (1) of this subsection, whenever the Secretary determines that any species of fish or wildlife which is subject to taking under the provisions of this subsection is an endangered species or threatened species, and that such taking materially and negatively affects the threatened or endangered species, he may prescribe regulations upon the taking of such species by any such Indian, Aleut, Eskimo, or non-Native Alaskan resident of an Alaskan native village. Such regulations may be established with reference to species, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the policy of this chapter. Such regulations shall be prescribed after a notice and hearings in the affected judicial districts of Alaska and as otherwise required by [section 1373](#) of this title, and shall be removed as soon as the Secretary determines that the need for their impositions has disappeared.

(f) Pre-Act endangered species parts exemption; application and certification; regulation; validity of sales contract; separability; renewal of exemption; expiration of renewal certification

(1) As used in this subsection--

(A) The term “pre-Act endangered species part” means--

(i) any sperm whale oil, including derivatives thereof, which was lawfully held within the United States on December 28, 1973, in the course of a commercial activity; or

(ii) any finished scrimshaw product, if such product or the raw material for such product was lawfully held within the United States on December 28, 1973, in the course of a commercial activity.

(B) The term “scrimshaw product” means any art form which involves the substantial etching or engraving of designs upon, or the substantial carving of figures, patterns, or designs from, any bone or tooth of any marine mammal of the order Cetacea. For purposes of this subsection, polishing or the adding of minor superficial markings does not constitute substantial etching, engraving, or carving.

(2) The Secretary, pursuant to the provisions of this subsection, may exempt, if such exemption is not in violation of the Convention, any pre-Act endangered species part from one or more of the following prohibitions:

(A) The prohibition on exportation from the United States set forth in [section 1538\(a\)\(1\)\(A\)](#) of this title.

- (B) Any prohibition set forth in [section 1538\(a\)\(1\)\(E\)](#) or (F) of this title.
- (3) Any person seeking an exemption described in paragraph (2) of this subsection shall make application therefor to the Secretary in such form and manner as he shall prescribe, but no such application may be considered by the Secretary unless the application--
- (A) is received by the Secretary before the close of the one-year period beginning on the date on which regulations promulgated by the Secretary to carry out this subsection first take effect;
 - (B) contains a complete and detailed inventory of all pre-Act endangered species parts for which the applicant seeks exemption;
 - (C) is accompanied by such documentation as the Secretary may require to prove that any endangered species part or product claimed by the applicant to be a pre-Act endangered species part is in fact such a part; and
 - (D) contains such other information as the Secretary deems necessary and appropriate to carry out the purposes of this subsection.
- (4) If the Secretary approves any application for exemption made under this subsection, he shall issue to the applicant a certificate of exemption which shall specify--
- (A) any prohibition in [section 1538\(a\)](#) of this title which is exempted;
 - (B) the pre-Act endangered species parts to which the exemption applies;
 - (C) the period of time during which the exemption is in effect, but no exemption made under this subsection shall have force and effect after the close of the three-year period beginning on the date of issuance of the certificate unless such exemption is renewed under paragraph (8); and
 - (D) any term or condition prescribed pursuant to paragraph (5)(A) or (B), or both, which the Secretary deems necessary or appropriate.
- (5) The Secretary shall prescribe such regulations as he deems necessary and appropriate to carry out the purposes of this subsection. Such regulations may set forth--
- (A) terms and conditions which may be imposed on applicants for exemptions under this subsection (including, but not limited to, requirements that applicants register inventories, keep complete sales records, permit duly authorized agents of the Secretary to inspect such inventories and records, and periodically file appropriate reports with the Secretary); and

(B) terms and conditions which may be imposed on any subsequent purchaser of any pre-Act endangered species part covered by an exemption granted under this subsection;

to insure that any such part so exempted is adequately accounted for and not disposed of contrary to the provisions of this chapter. No regulation prescribed by the Secretary to carry out the purposes of this subsection shall be subject to [section 1533\(f\)\(2\)\(A\)\(i\)](#) of this title.

(6)(A) Any contract for the sale of pre-Act endangered species parts which is entered into by the Administrator of General Services prior to the effective date of this subsection and pursuant to the notice published in the Federal Register on January 9, 1973, shall not be rendered invalid by virtue of the fact that fulfillment of such contract may be prohibited under [section 1538\(a\)\(1\)\(F\)](#) of this title.

(B) In the event that this paragraph is held invalid, the validity of the remainder of this chapter, including the remainder of this subsection, shall not be affected.

(7) Nothing in this subsection shall be construed to--

(A) exonerate any person from any act committed in violation of [paragraphs \(1\)\(A\), \(1\)\(E\), or \(1\)\(F\) of section 1538\(a\)](#) of this title prior to July 12, 1976; or

(B) immunize any person from prosecution for any such act.

(8)(A)(i)² Any valid certificate of exemption which was renewed after October 13, 1982, and was in effect on March 31, 1988, shall be deemed to be renewed for a six-month period beginning on October 7, 1988. Any person holding such a certificate may apply to the Secretary for one additional renewal of such certificate for a period not to exceed 5 years beginning on October 7, 1988.

(B) If the Secretary approves any application for renewal of an exemption under this paragraph, he shall issue to the applicant a certificate of renewal of such exemption which shall provide that all terms, conditions, prohibitions, and other regulations made applicable by the previous certificate shall remain in effect during the period of the renewal.

(C) No exemption or renewal of such exemption made under this subsection shall have force and effect after the expiration date of the certificate of renewal of such exemption issued under this paragraph.

(D) No person may, after January 31, 1984, sell or offer for sale in interstate or foreign commerce, any pre-Act finished scrimshaw product unless such person holds a valid certificate of exemption issued by the Secretary under this subsection, and unless such product or the raw material for such product was held by such person on October 13, 1982.

(g) Burden of proof

In connection with any action alleging a violation of [section 1538](#) of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.

(h) Certain antique articles; importation; port designation; application for return of articles

(1) [Sections 1533\(d\)](#) and [1538\(a\)](#) and [\(c\)](#) of this title do not apply to any article which--

(A) is not less than 100 years of age;

(B) is composed in whole or in part of any endangered species or threatened species listed under [section 1533](#) of this title;

(C) has not been repaired or modified with any part of any such species on or after December 28, 1973; and

(D) is entered at a port designated under paragraph (3).

(2) Any person who wishes to import an article under the exception provided by this subsection shall submit to the customs officer concerned at the time of entry of the article such documentation as the Secretary of the Treasury, after consultation with the Secretary of the Interior, shall by regulation require as being necessary to establish that the article meets the requirements set forth in paragraph (1)(A), (B), and (C).

(3) The Secretary of the Treasury, after consultation with the Secretary of the Interior, shall designate one port within each customs region at which articles described in paragraph (1)(A), (B), and (C) must be entered into the customs territory of the United States.

(4) Any person who imported, after December 27, 1973, and on or before November 10, 1978, any article described in paragraph (1) which--

(A) was not repaired or modified after the date of importation with any part of any endangered species or threatened species listed under [section 1533](#) of this title;

(B) was forfeited to the United States before November 10, 1978, or is subject to forfeiture to the United States on such date of enactment, pursuant to the assessment of a civil penalty under [section 1540](#) of this title; and

(C) is in the custody of the United States on November 10, 1978;

may, before the close of the one-year period beginning on November 10, 1978, make application to the Secretary for return of the article. Application shall be made in such form and manner, and contain such documentation, as the Secretary prescribes. If on the basis of any such application which is timely filed, the Secretary is satisfied that the requirements of this paragraph are met with respect to the article concerned, the Secretary shall return the article to the applicant and the importation of such article shall, on and after the date of return, be deemed to be a lawful importation under this chapter.

(i) Noncommercial transshipments

Any importation into the United States of fish or wildlife shall, if--

- (1) such fish or wildlife was lawfully taken and exported from the country of origin and country of reexport, if any;
- (2) such fish or wildlife is in transit or transshipment through any place subject to the jurisdiction of the United States en route to a country where such fish or wildlife may be lawfully imported and received;
- (3) the exporter or owner of such fish or wildlife gave explicit instructions not to ship such fish or wildlife through any place subject to the jurisdiction of the United States, or did all that could have reasonably been done to prevent transshipment, and the circumstances leading to the transshipment were beyond the exporter's or owner's control;
- (4) the applicable requirements of the Convention have been satisfied; and
- (5) such importation is not made in the course of a commercial activity,

be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter while such fish or wildlife remains in the control of the United States Customs Service.

(j) Experimental populations

(1) For purposes of this subsection, the term “experimental population” means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.

(2)(A) The Secretary may authorize the release (and the related transportation) of any population (including eggs, propagules, or individuals) of an endangered species or a threatened species outside the current range of such species if the Secretary determines that such release will further the conservation of such species.

(B) Before authorizing the release of any population under subparagraph (A), the Secretary shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.

(C) For the purposes of this chapter, each member of an experimental population shall be treated as a threatened species; except that--

- (i) solely for purposes of [section 1536](#) of this title (other than subsection (a)(1) thereof), an experimental population determined under subparagraph (B) to be not essential to the continued existence of a species shall be treated, except when

it occurs in an area within the National Wildlife Refuge System or the National Park System, as a species proposed to be listed under [section 1533](#) of this title; and

(ii) critical habitat shall not be designated under this chapter for any experimental population determined under subparagraph (B) to be not essential to the continued existence of a species.

(3) The Secretary, with respect to populations of endangered species or threatened species that the Secretary authorized, before October 13, 1982, for release in geographical areas separate from the other populations of such species, shall determine by regulation which of such populations are an experimental population for the purposes of this subsection and whether or not each is essential to the continued existence of an endangered species or a threatened species.

CREDIT(S)

(Pub.L. 93-205, § 10, Dec. 28, 1973, 87 Stat. 896; Pub.L. 94-359, §§ 2, 3, July 12, 1976, 90 Stat. 911, 912; Pub.L. 95-632, § 5, Nov. 10, 1978, 92 Stat. 3760; Pub.L. 96-159, § 7, Dec. 28, 1979, 93 Stat. 1230; Pub.L. 97-304, § 6(1) to (4)(A), (5), (6), Oct. 13, 1982, 96 Stat. 1422 to 1424; Pub.L. 100-478, Title I, §§ 1011, 1013(b), (c), Oct. 7, 1988, 102 Stat. 2314, 2315.)

Footnotes

1 Repealed by Pub.L. 93-205, § 14, Dec. 28, 1973, 87 Stat. 903.

2 So in original. No. cl. (ii) has been enacted.

16 U.S.C.A. § 1539, 16 USCA § 1539

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1540

§ 1540. Penalties and enforcement

Effective: May 13, 2002

Currentness

(a) Civil penalties

(1) Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than regulation relating to recordkeeping or filing of reports), (f) or (g) of section 1538 of this title, may be assessed a civil penalty by the Secretary of not more than \$25,000 for each violation. Any person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of any other regulation issued under this chapter may be assessed a civil penalty by the Secretary of not more than \$12,000 for each such violation. Any person who otherwise violates any provision of this chapter, or any regulation, permit, or certificate issued hereunder, may be assessed a civil penalty by the Secretary of not more than \$500 for each such violation. No penalty may be assessed under this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (1) of this subsection shall be conducted in accordance with section 554 of Title 5. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Notwithstanding any other provision of this chapter, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species.

(b) Criminal violations

(1) Any person who knowingly violates any provision of this chapter, of any permit or certificate issued hereunder, or of any regulation issued in order to implement subsection (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than a regulation relating to recordkeeping, or filing of reports), (f), or (g) of section 1538 of this title shall, upon conviction, be fined not more than \$50,000 or imprisoned for not more than one year, or both. Any person who knowingly violates any provision of any other regulation issued under this chapter shall, upon conviction, be fined not more than \$25,000 or imprisoned for not more than six months, or both.

(2) The head of any Federal agency which has issued a lease, license, permit, or other agreement authorizing a person to import or export fish, wildlife, or plants, or to operate a quarantine station for imported wildlife, or authorizing the use of Federal lands, including grazing of domestic livestock, to any person who is convicted of a criminal violation of this chapter or any regulation, permit, or certificate issued hereunder may immediately modify, suspend, or revoke each lease, license, permit, or other agreement. The Secretary shall also suspend for a period of up to one year, or cancel, any Federal hunting or fishing permits or stamps issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation, permit, or certificate issued hereunder. The United States shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any leases, licenses, permits, stamps, or other agreements pursuant to this section.

(3) Notwithstanding any other provision of this chapter, it shall be a defense to prosecution under this subsection if the defendant committed the offense based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual, from bodily harm from any endangered or threatened species.

(c) District court jurisdiction

The several district courts of the United States, including the courts enumerated in section 460 of Title 28, shall have jurisdiction over any actions arising under this chapter. For the purpose of this chapter, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

(d) Rewards and certain incidental expenses

The Secretary or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder (1) a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder, and (2) the reasonable and necessary costs incurred by any person in providing temporary care for any fish, wildlife, or plant pending the disposition of any civil or criminal proceeding alleging a violation of this chapter with respect to that fish, wildlife, or plant. The amount of the reward, if any, is to be designated by the Secretary or the Secretary of the Treasury, as appropriate. Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection. Whenever the balance of sums received under this section and section 3375(d) of this title, as penalties or fines, or from forfeitures of property, exceed \$500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 1535(i) of this title.

(e) Enforcement

(1) The provisions of this chapter and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this chapter.

(2) The judges of the district courts of the United States and the United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and any regulation issued thereunder.

(3) Any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating, to enforce this chapter may detain for inspection and inspect any package, crate, or other container, including its contents, and all accompanying documents, upon importation or exportation. Such person may make arrests without a warrant for any violation of this chapter if he has reasonable grounds to believe that the person to be arrested is committing the violation in his presence or view, and may execute and serve any arrest warrant, search warrant, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction for enforcement of this chapter. Such person so authorized may search and seize, with or without a warrant, as authorized by law. Any fish, wildlife, property, or item so seized shall be held by any person authorized by the Secretary, the Secretary of the Treasury, or the Secretary of the Department in which the Coast Guard is operating pending disposition of civil or criminal proceedings, or the institution of an action in rem for forfeiture of such fish, wildlife, property, or item pursuant to paragraph (4) of this subsection; except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit the owner or consignee to post a bond or other surety satisfactory to the Secretary, but upon forfeiture of any such property to the United States, or the abandonment or waiver of any claim to any such property, it shall be disposed of (other than by sale to the general public) by the Secretary in such a manner, consistent with the purposes of this chapter, as the Secretary shall by regulation prescribe.

(4)(A) All fish or wildlife or plants taken, possessed, sold, purchased, offered for sale or purchase, transported, delivered, received, carried, shipped, exported, or imported contrary to the provisions of this chapter, any regulation made pursuant thereto, or any permit or certificate issued hereunder shall be subject to forfeiture to the United States.

(B) All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving, carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

(5) All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeiture, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this chapter; except that all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this chapter, be exercised or performed by the Secretary or by such persons as he may designate.

(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof.

(f) Regulations

The Secretary, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating, are authorized to promulgate such regulations as may be appropriate to enforce this chapter, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this chapter including processing applications and reasonable inspections, and with the transfer, board, handling, or storage of fish or wildlife or plants and evidentiary items seized and forfeited under this chapter. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to [section 1535\(g\)\(2\)\(B\)\(ii\)](#) of this title, the prohibitions set forth in or authorized pursuant to [section 1533\(d\)](#) or [1538\(a\)\(1\)\(B\)](#) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [section 1533](#) of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section--

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section--

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under [section 1535\(g\)\(2\)\(B\)\(ii\)](#) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

(h) Coordination with other laws

The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the administration of this chapter with the administration of the animal quarantine laws (as defined in [section 136a\(f\) of Title 21](#)) and section 306 of the Tariff Act of 1930 ([19 U.S.C. 1306](#)). Nothing in this chapter or any amendment made by this chapter shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations or possession of animals and other articles and no proceeding or determination under this chapter shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture. Nothing in this chapter shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, including, without limitation, section 527 of that Act ([19 U.S.C. 1527](#)), relating to the importation of wildlife taken, killed, possessed, or exported to the United States in violation of the laws or regulations of a foreign country.

CREDIT(S)

([Pub.L. 93-205](#), § 11, Dec. 28, 1973, 87 Stat. 897; [Pub.L. 94-359](#), § 4, July 12, 1976, 90 Stat. 913; [Pub.L. 95-632](#), §§ 6 to 8, Nov. 10, 1978, 92 Stat. 3761, 3762; [Pub.L. 97-79](#), § 9(e), Nov. 16, 1981, 95 Stat. 1079; [Pub.L. 97-304](#), §§ 7, 9(c), Oct. 13, 1982, 96 Stat. 1425, 1427; [Pub.L. 98-327](#), § 4, June 25, 1984, 98 Stat. 271; [Pub.L. 100-478](#), Title I, § 1007, Oct. 7, 1988, 102

Stat. 2309; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 107-171, Title X, § 10418(b)(3), May 13, 2002, 116 Stat. 508.)

16 U.S.C.A. § 1540, 16 USCA § 1540

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1541

§ 1541. Endangered plants

Currentness

The Secretary of the Smithsonian Institution, in conjunction with other affected agencies, is authorized and directed to review (1) species of plants which are now or may become endangered or threatened and (2) methods of adequately conserving such species, and to report to Congress, within one year after December 28, 1973, the results of such review including recommendations for new legislation or the amendment of existing legislation.

CREDIT(S)

(Pub.L. 93-205, § 12, Dec. 28, 1973, 87 Stat. 901.)

16 U.S.C.A. § 1541, 16 USCA § 1541

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1542

§ 1542. Authorization of appropriations

Currentness

(a) In general

Except as provided in subsections (b), (c), and (d), there are authorized to be appropriated--

(1) not to exceed \$35,000,000 for fiscal year 1988, \$36,500,000 for fiscal year 1989, \$38,000,000 for fiscal year 1990, \$39,500,000 for fiscal year 1991, and \$41,500,000 for fiscal year 1992 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this chapter;

(2) not to exceed \$5,750,000 for fiscal year 1988, \$6,250,000 for each of fiscal years 1989 and 1990, and \$6,750,000 for each of fiscal years 1991 and 1992 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this chapter; and

(3) not to exceed \$2,200,000 for fiscal year 1988, \$2,400,000 for each of fiscal years 1989 and 1990, and \$2,600,000 for each of fiscal years 1991 and 1992, to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this chapter and the Convention which pertain to the importation or exportation of plants.

(b) Exemptions

There are authorized to be appropriated to the Secretary to assist him and the Endangered Species Committee in carrying out their functions under sections¹ 1536(e), (g), and (h) of this title not to exceed \$600,000 for each of fiscal years 1988, 1989, 1990, 1991, and 1992.

(c) Convention implementation

There are authorized to be appropriated to the Department of the Interior for purposes of carrying out [section 1537a\(e\)](#) of this title not to exceed \$400,000 for each of fiscal years 1988, 1989, and 1990, and \$500,000 for each of fiscal years 1991 and 1992, and such sums shall remain available until expended.

CREDIT(S)

(Pub.L. 93-205, § 15, Dec. 28, 1973, 87 Stat. 903; Pub.L. 94-325, June 30, 1976, 90 Stat. 724; Pub.L. 95-632, § 9, Nov. 10, 1978, 92 Stat. 3762; Pub.L. 96-159, § 8, Dec. 28, 1979, 93 Stat. 1230; Pub.L. 97-304, § 8[(a)], Oct. 13, 1982, 96 Stat. 1425; Pub.L. 100-478, Title I, § 1009, Oct. 7, 1988, 102 Stat. 2312.)

Footnotes

1 So in original. Probably should be “section”.

16 U.S.C.A. § 1542, 16 USCA § 1542

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1543

§ 1543. Construction with Marine Mammal Protection Act of 1972

Currentness

Except as otherwise provided in this chapter, no provision of this chapter shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

CREDIT(S)

(Pub.L. 93-205, § 17, Dec. 28, 1973, 87 Stat. 903.)

16 U.S.C.A. § 1543, 16 USCA § 1543

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1544

§ 1544. Annual cost analysis by Fish and Wildlife Service

Effective: May 18, 2000

Currentness

Notwithstanding [section 3003 of Public Law 104-66](#) (31 U.S.C. 1113 note; 109 Stat. 734), on or before January 15, 1990, and each January 15 thereafter, the Secretary of the Interior, acting through the Fish and Wildlife Service, shall submit to the Congress an annual report covering the preceding fiscal year which shall contain--

- (1) an accounting on a species by species basis of all reasonably identifiable Federal expenditures made primarily for the conservation of endangered or threatened species pursuant to this chapter; and
- (2) an accounting on a species by species basis of all reasonably identifiable expenditures made primarily for the conservation of endangered or threatened species pursuant to this chapter by States receiving grants under [section 1535](#) of this title.

CREDIT(S)

(Pub.L. 93-205, § 18, as added Pub.L. 100-478, Title I, § 1012, Oct. 7, 1988, 102 Stat. 2314; amended Pub.L. 106-201, § 1(a), May 18, 2000, 114 Stat. 307.)

16 U.S.C.A. § 1544, 16 USCA § 1544

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in [sections 1292\(c\) and \(d\)](#) and [1295](#) of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; [Pub.L. 85-508](#), § 12(e), July 7, 1958, 72 Stat. 348; [Pub.L. 97-164](#), Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3599)

28 U.S.C.A. § 1291, 28 USCA § 1291

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated

Title 43. Public Lands (Refs & Annos)

Chapter 12. Reclamation and Irrigation of Lands by Federal Government (Refs & Annos)

Subchapter I. General Provisions

43 U.S.C.A. § 383

§ 383. Vested rights and State laws unaffected

Currentness

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

CREDIT(S)

(June 17, 1902, c. 1093, § 8, 32 Stat. 390.)

43 U.S.C.A. § 383, 43 USCA § 383

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated

Title 43. Public Lands (Refs & Annos)

Chapter 12. Reclamation and Irrigation of Lands by Federal Government (Refs & Annos)

Subchapter XI. Maintenance and Operation of Works Generally

43 U.S.C.A. § 498

§ 498. Transfer of management and operation of works to water users generally

Currentness

When the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

CREDIT(S)

(June 17, 1902, c. 1093, § 6, 32 Stat. 389.)

Notes of Decisions (8)

43 U.S.C.A. § 498, 43 USCA § 498

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 15. Appropriation of Waters; Reservoir Sites

43 U.S.C.A. § 666

§ 666. Suits for adjudication of water rights

Currentness

(a) Joinder of United States as defendant; costs

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

CREDIT(S)

(July 10, 1952, c. 651, Title II, § 208(a) to (c), 66 Stat. 560.)

43 U.S.C.A. § 666, 43 USCA § 666

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 536. Water Resources Administration (Refs & Annos)
Water Resources Department (Refs & Annos)

O.R.S. § 536.037

536.037. Functions and powers of director

Currentness

(1) Subject to policy direction by the Water Resources Commission, the Water Resources Director shall:

(a) Be administrative head of the Water Resources Department;

(b) Have power, within applicable budgetary limitations, and in accordance with ORS chapter 240, to hire, assign, reassign and coordinate personnel of the department;

(c) Administer and enforce the laws of the state concerning the water resources of this state;

(d) Be authorized to participate in any proceeding before any public officer, commission or body of the United States or any state for the purpose of representing the citizens of Oregon concerning the water resources of this state;

(e) Have power to enter upon any private property in the performance of the duties of the director, doing no unnecessary injury to the private property; and

(f) Coordinate any activities of the department related to a watershed enhancement project approved by the Oregon Watershed Enhancement Board under [ORS 541.932](#) with activities of other cooperating state and federal agencies participating in the project.

(2) In addition to duties otherwise required by law, the director shall prescribe internal policies and procedures for the government of the department, the conduct of its employees, the assignment and performance of its business and the custody, use and preservation of its records, papers and property in a manner consistent with applicable law.

(3) The director may delegate to any employee of the department the exercise or discharge in the director's name of any power, duty or function of whatever character, vested in or imposed by law upon the director. The official act of a person so acting in the director's name and by the director's authority shall be considered to be an official act of the director.

Credits

Laws 1985, c. 673, § 8; Laws 1987, c. 734, § 14.

O. R. S. § 536.037, OR ST § 536.037

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
Appropriation Under 1909 Act; Limited Licenses (Refs & Annos)

O.R.S. § 537.110

537.110. Public ownership of waters

Currentness

All water within the state from all sources of water supply belongs to the public.

O. R. S. § 537.110, OR ST § 537.110

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
Appropriation Under 1909 Act; Limited Licenses (Refs & Annos)

O.R.S. § 537.120

537.120. Right to appropriate waters; vested rights protected

Currentness

Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.

O. R. S. § 537.120, OR ST § 537.120

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
Appropriation Under 1909 Act; Limited Licenses (Refs & Annos)

O.R.S. § 537.130

537.130. Necessity of permit; notification to affected landowners

Currentness

(1) Except for a use exempted under [ORS 537.040](#), [537.141](#), [537.142](#), [537.143](#) or [537.800](#) or under the registration system set forth in [ORS 537.132](#), any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation.

(2) Except for a use exempted under [ORS 537.040](#), [537.141](#), [537.142](#), [537.143](#) or [537.800](#) or under the registration system set forth in [ORS 537.132](#), a person may not use, store or divert any waters until after the department issues a permit to appropriate the waters.

(3) The department may not issue a permit without notifying the owner, as identified in the application, of any land to be crossed by the proposed ditch, canal or other work as set forth in the application filed pursuant to [ORS 537.140](#). The department shall provide the notice even if the applicant has obtained written authorization or an easement from the owner.

(4) If more than 25 persons are identified in the application as required under subsection (3) of this section, the department may provide the notice required under subsection (3) of this section by publishing notice of the application in a newspaper having general circulation in the area in which the proposed ditch, canal or other work is located at least once each week for at least two successive weeks. The cost of the publication shall be paid by the applicant in advance to the department.

Credits

Amended by Laws 1985, c. 310, § 3; Laws 1985, c. 673, § 25; Laws 1989, c. 509, § 3; [Laws 1991, c. 370, § 4](#); [Laws 1995, c. 365, § 1](#); [Laws 1995, c. 416, § 2a](#); [Laws 2005, c. 14, § 2](#); [Laws 2011, c. 52, § 2](#), eff. Jan. 1, 2012.

O. R. S. § 537.130, OR ST § 537.130

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
Appropriation Under 1909 Act; Limited Licenses (Refs & Annos)

O.R.S. § 537.147

537.147. Application to use stored water

Currentness

(1) Notwithstanding the process for applying for a water right permit established in [ORS 537.150](#) to [537.230](#), a person may, pursuant to this section, apply to the Water Resources Department for a water right permit to use stored water. A person applying under this section for a water right permit to use stored water shall submit:

- (a) A fee, in the amount required by [ORS 536.050](#) for applications to appropriate stored water.
- (b) A completed application for a secondary permit, in a form determined by the department, that contains the information required of applications under [ORS 537.140](#) and [537.400 \(1\)](#).
- (c) Evidence that the proposed use of the stored water is one of the authorized uses under the water right permit, certificate or decree that allows the storage of water.

(2) If an applicant provides, to the satisfaction of the department, the fee and the information required by subsection (1) of this section, the department may, after public notice and a 30-day opportunity to submit comments on the application, issue a water right permit upon determining that no public interest issues as identified in [ORS 537.170 \(8\)](#) have been raised through the comments submitted.

(3) If the department determines that public interest issues have been identified, then the department shall treat the application under this section as an application under [ORS 537.150](#) and perform the public interest review required by [ORS 537.153 \(2\)](#).

(4) At a minimum, a water right permit issued by the department for use of stored water under this section shall be conditioned to require:

- (a) Fish screens and by-pass devices and fish passage as may be required by the State Department of Fish and Wildlife; and
- (b) A measuring device at each point of diversion authorized under the water right permit.

(5) Within 10 days of issuing a water right permit under this section, the department shall provide notice of the permit issuance in the weekly notice published by the department and to persons who have submitted comments pursuant to subsection (2) of this section.

Credits

Laws 2005, c. 37, § 2.

O. R. S. § 537.147, OR ST § 537.147

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
in-Stream Water Rights (Refs & Annos)

O.R.S. § 537.332

537.332. Definitions

Currentness

As used in ORS 537.332 to 537.360:

- (1) “In-stream” means within the natural stream channel or lake bed or place where water naturally flows or occurs.
- (2) “In-stream flow” means the minimum quantity of water necessary to support the public use requested by an agency.
- (3) “In-stream water right” means a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use. An in-stream water right does not require a diversion or any other means of physical control over the water.
- (4) “Public benefit” means a benefit that accrues to the public at large rather than to a person, a small group of persons or to a private enterprise.
- (5) “Public use” includes but is not limited to:
 - (a) Recreation;
 - (b) Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values;
 - (c) Pollution abatement; or
 - (d) Navigation.

Credits

Laws 1987, c. 859, § 2; Laws 1995, c. 416, § 32.

O. R. S. § 537.332, OR ST § 537.332

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
in-Stream Water Rights (Refs & Annos)

O.R.S. § 537.336

537.336. Request by state agencies for certificates for in-stream water rights; request for rights from stored water

Currentness

(1) The State Department of Fish and Wildlife may request the Water Resources Commission to issue water right certificates for in-stream water rights on the waters of this state in which there are public uses relating to the conservation, maintenance and enhancement of aquatic and fish life, wildlife and fish and wildlife habitat. The request shall be for the quantity of water necessary to support those public uses as recommended by the State Department of Fish and Wildlife.

(2) The Department of Environmental Quality may request the Water Resources Commission to issue water right certificates for in-stream water rights on the waters of this state to protect and maintain water quality standards established by the Environmental Quality Commission under [ORS 468B.048](#). The request shall be for the quantity of water necessary for pollution abatement as recommended by the Department of Environmental Quality.

(3) The State Parks and Recreation Department may request the Water Resources Commission to issue water right certificates for in-stream water rights on the waters of this state in which there are public uses relating to recreation and scenic attraction. The request shall be for the quantity of water necessary to support those public uses as recommended by the State Parks and Recreation Department.

(4) Any request for an in-stream water right to be supplied from stored water shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the request.

Credits

Laws 1987, c. 859, § 4; Laws 1989, c. 904, § 68; [Laws 1995, c. 673, § 1](#).

O. R. S. § 537.336, OR ST § 537.336

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
in-Stream Water Rights (Refs & Annos)

O.R.S. § 537.349

537.349. Processing request for in-stream water right

Currentness

Except as provided in [ORS 537.343](#), the Water Resources Department shall process a request received under [ORS 537.336](#) for a certificate for an in-stream water right in accordance with the provisions for obtaining a permit to appropriate water under [ORS 537.140](#) to [537.252](#).

Credits

Laws 1995, c. 416, § 19.

O. R. S. § 537.349, OR ST § 537.349

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated
Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation
Chapter 537. Appropriation of Water Generally (Refs & Annos)
in-Stream Water Rights (Refs & Annos)

O.R.S. § 537.360

537.360. Priority of pending application for hydroelectric use permit or hydroelectric permit or license over application for in-stream water rights

Currentness

If an application is pending under this chapter for a water right permit to use water for hydroelectric purposes or under [ORS 543.010](#) to [543.610](#) for a hydroelectric permit or license at the time the Water Resources Commission receives an application for an in-stream water right under [ORS 537.336](#) for the same stream or reach of the stream, the commission shall not take any action on the application for an in-stream water right until the commission issues a final order approving or denying the pending hydroelectric application.

Credits

Laws 1987, c. 859, § 15.

O. R. S. § 537.360, OR ST § 537.360

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)
Water Rights Before 1909

O.R.S. § 539.010

539.010. Protection of water rights prior to February 24, 1909

Effective: January 1, 2022

Currentness

(1) Actual application of water to beneficial use prior to February 24, 1909, by or under authority of any riparian proprietor or the predecessors in interest of the riparian proprietor, shall be deemed to create in the riparian proprietor a vested right to the extent of the actual application to beneficial use, provided such use has not been abandoned for a continuous period of two years.

(2) Where any riparian proprietor, or any person under authority of any riparian proprietor or the predecessor in interest of the riparian proprietor, was, on February 24, 1909, engaged in good faith in the construction of works for the application of water to a beneficial use, the right to take and use such water shall be deemed vested in the riparian proprietor, provided that the works were completed and the water devoted to a beneficial use within a reasonable time after February 24, 1909. The Water Resources Director, in the manner provided in subsection (5) of this section, may determine the time within which the water shall be devoted to a beneficial use. The right to water shall be limited to the quantity actually applied to a beneficial use within the time so fixed by the director.

(3) Nothing contained in the Water Rights Act, as defined in [ORS 537.010](#), shall affect relative priorities to the use of water among parties to any decree of the courts rendered in causes determined or pending prior to February 24, 1909.

(4) The right of any person to take and use water may not be impaired or affected by any provisions of the Water Rights Act, as defined in [ORS 537.010](#), where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

(5) The director shall, for good cause shown upon the application of any appropriator or user of water under an appropriation of water made prior to February 24, 1909, or in the cases mentioned in subsections (2) and (4) of this section, where actual construction work was commenced prior to that time or within the time provided in law then existing, prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use. In determining said time the director shall grant a reasonable time after the construction of the works or canal or ditch used for the diversion of the water, and in doing so, the director shall take into consideration the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor and the income or use that may be required to provide fair and reasonable returns upon the investment. For good cause shown the director may extend the time.

(6) Where appropriations of water attempted before February 24, 1909, were undertaken in good faith, and the work of construction or improvement thereunder was in good faith commenced and diligently prosecuted, such appropriations may not be set aside or voided in proceedings under this chapter because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof.

(7) In any proceeding to adjudicate water rights under this chapter, the Water Resources Department may adjudicate federal reserved rights for the water necessary to fulfill the primary purpose of the reservation or any federal water right not acquired under ORS chapter 537 or [ORS 540.510](#) to [540.530](#).

(8) All rights granted or declared by the Water Rights Act, as defined in [ORS 537.010](#), shall be adjudicated and determined in the manner and by the tribunals provided therein. The Water Rights Act may not be held to bestow upon any person any riparian rights where no such rights existed prior to February 24, 1909.

Credits

Amended by Laws 1989, c. 691, § 6; [Laws 1993, c. 157, § 1](#); [Laws 2021, c. 97, § 65](#), eff. Jan. 1, 2022.

O. R. S. § 539.010, OR ST § 539.010

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)

Water Rights Before 1909

O.R.S. § 539.130

539.130. Findings of fact and determination; certification of proceedings; filing in court; time for hearing by court; notice; force of administrative determination

Currentness

(1) As soon as practicable after the compilation of the data the Water Resources Director shall make and cause to be entered of record in the Water Resources Department findings of fact and an order of determination determining and establishing the several rights to the waters of the stream. The original evidence gathered by the director, and certified copies of the observations and measurements and maps of record, in connection with the determination, as provided for by [ORS 539.120](#), together with a copy of the order of determination and findings of fact of the director as they appear of record in the Water Resources Department, shall be certified to by the director and filed with the clerk of the circuit court wherein the determination is to be heard. A certified copy of the order of determination and findings shall be filed with the county clerk of every other county in which the stream or any portion of a tributary is situated.

(2) Upon the filing of the evidence and order with the court the director shall procure an order from the court, or any judge thereof, fixing the time at which the determination shall be heard in the court, which hearing shall be at least 40 days subsequent to the date of the order. The clerk of the court shall, upon the making of the order, forthwith forward a certified copy to the department by registered mail or by certified mail with return receipt.

(3) The department shall immediately upon receipt thereof notify by registered mail or by certified mail with return receipt each claimant or owner who has appeared in the proceeding of the time and place for hearing. Service of the notice shall be deemed complete upon depositing it in the post office as registered or certified mail, addressed to the claimant or owner at the post-office address of the claimant or owner, as set forth in the proof of the claimant or owner theretofore filed in the proceeding. Proof of service shall be made and filed with the circuit court by the department as soon as possible after mailing the notices.

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by [ORS 539.180](#).

Credits

Amended by [Laws 1991, c. 102, § 7](#); [Laws 1991, c. 249, § 49](#).

O. R. S. § 539.130, OR ST § 539.130

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)

Water Rights Before 1909

O.R.S. § 539.170

539.170. Division of water pending hearing

Currentness

While the hearing of the order of the Water Resources Director is pending in the circuit court, and until a certified copy of the judgment, order or decree of the court is transmitted to the director, the division of water from the stream involved in the appeal shall be made in accordance with the order of the director.

O. R. S. § 539.170, OR ST § 539.170

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)

Water Rights Before 1909

O.R.S. § 539.180

539.180. Bond or letter of credit to stay operation of
administrative determination; notice to watermaster

Currentness

At any time after the determination of the Water Resources Director has been entered of record, the operation thereof may be stayed in whole or in part by any party by filing a bond or an irrevocable letter of credit issued by an insured institution as defined in [ORS 706.008](#) in the circuit court wherein the determination is pending, in such amount as the judge may prescribe, conditioned that the party will pay all damages that may accrue by reason of the determination not being enforced. Upon the filing and approval of the bond or letter of credit, the clerk of the circuit court shall transmit to the Water Resources Department a certified copy of the bond or letter of credit, which shall be recorded in the department records, and the department shall give notice thereof to the watermaster of the proper district.

Credits

Amended by [Laws 1991, c. 102, § 10](#); [Laws 1991, c. 331, § 79](#); [Laws 1997, c. 631, § 486](#).

O. R. S. § 539.180, OR ST § 539.180

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)

Water Rights Before 1909

O.R.S. § 539.200

539.200. Conclusiveness of determination of water rights

Currentness

The determinations of the Water Resources Director, as confirmed or modified as provided by this chapter in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination.

O. R. S. § 539.200, OR ST § 539.200

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 539. Determination of Water Rights Initiated Before February 24, 1909; Determination of Water Rights of Federally Recognized Indian Tribes (Refs & Annos)

Water Rights Before 1909

O.R.S. § 539.210

539.210. Appearance and submission of proof by claimants;
nonappearance as forfeiture; intervention in proceedings

Currentness

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant. Any person interested in the water of any stream upon whom no service of notice has been had of the pendency of proceedings for determination of the rights to the use of water of the stream, and who has had no actual knowledge or notice of the pendency of the proceedings may, at any time prior to the expiration of one year after entry of the determination of the Water Resources Director, file a petition to intervene in the proceedings. The petition shall contain, among other things, all matters required by this chapter of claimants who have been duly served with notice of the proceedings, and also a statement that the intervenor had no actual knowledge or notice of the pendency of the proceedings. Upon the filing of the petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable and thereafter shall have all rights vouchsafed by this chapter to claimants who have been duly served.

O. R. S. § 539.210, OR ST § 539.210

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Distribution of Water Generally; Water Districts; Watermasters

O.R.S. § 540.030

540.030. Director; general duties regarding water distribution

Currentness

The Water Resources Director shall:

- (1) Have general control over the watermasters.
- (2) Execute the laws relative to the distribution of water and perform other functions as may be assigned to the director.

Credits

Amended by Laws 1953, c. 395, § 3; Laws 1985, c. 673, § 82a.

O. R. S. § 540.030, OR ST § 540.030

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Distribution of Water Generally; Water Districts; Watermasters

O.R.S. § 540.100

540.100. Division of water among users; payment

Currentness

(1) When water users are unable to agree to the distribution or division of water, a majority of them may request the watermaster of the district in which the distribution or division is in dispute to make a just division or distribution of water among the parties entitled to the use of the water. The request shall be in writing and shall set forth the pertinent facts of the dispute.

(2) If no provision has been made for payment of the necessary assistant watermaster or expenses as provided by [ORS 540.080](#), the assistant shall be paid by the water users among whom the distribution or division is made.

(3) The expense of any assistant watermaster shall be paid by the water users in proportion to the area of land for which each water user is entitled to the use of water, so that each one shall pay the same rate per acre.

Credits

Amended by Laws 1957, c. 546, § 5; Laws 1961, c. 636, § 4; Laws 1979, c. 18, § 2; Laws 1985, c. 421, § 9.

O. R. S. § 540.100, OR ST § 540.100

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See [ORS 173.160](#). Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures

(Refs & Annos)

Distribution of Water from Irrigation Ditches and Reservoirs

O.R.S. § 540.210

540.210. Distribution among users from ditch or reservoir

Currentness

- (1) Whenever any water users from any ditch or reservoir, either among themselves or with the owner thereof, are unable to agree relative to the distribution or division of water through or from the ditch or reservoir, either the owner or any such water user may apply to the watermaster of the district in which the ditch or reservoir is located, by written notice, setting forth such facts, and asking the watermaster to take charge of the ditch or reservoir for the purpose of making a just division or distribution of water from it to the parties entitled to the use thereof.
- (2) The watermaster shall then take exclusive charge of the ditch or reservoir, for the purpose of dividing or distributing the water therefrom in accordance with the respective and relative rights of the various users of water from the ditch or reservoir, and shall continue the work until the necessity therefor shall cease to exist.
- (3) The distribution and division of water shall be made according to the relative and respective rights of the various users from the ditch or reservoir, as determined by the Water Resources Director, by decree of the circuit court, or by written contract between all of the users filed with the watermaster.
- (4) The circuit court having jurisdiction may request the watermaster of the district to take charge of any such ditch or reservoir, and to enforce any decree respecting such ditch or reservoir made under the jurisdiction of the court.

O. R. S. § 540.210, OR ST § 540.210

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Changes in Use of Water; Transfer of Water Rights; Exchange (Refs & Annos)

O.R.S. § 540.510

540.510. Appurtenance of water to premises; change of use or place of use or point of diversion; application for transfer of primary and supplemental water rights; severability of right to use conserved water

Effective: January 1, 2022

Currentness

(1)(a) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of [ORS 540.520](#) and [540.530](#). However, the holder of any water use subject to transfer may, upon compliance with the provisions of [ORS 540.520](#) and [540.530](#), change the use and place of use, the point of diversion or the use of the water without losing priority of the right. A district may change the place of use in the manner provided in [ORS 540.572](#) to [540.580](#) in lieu of the method provided in [ORS 540.520](#) and [540.530](#). When an application for change of the use or place of use for a primary water right is submitted in accordance with this section, the applicant also shall indicate whether the land described in the application has an appurtenant supplemental water right or permit. If the applicant also intends to transfer the supplemental water right or permit, the applicant also shall include the information required under [ORS 540.520 \(2\)](#) for the supplemental water right or permit. If the applicant does not include the supplemental water right or permit in the transfer application, the Water Resources Department shall notify the applicant that the supplemental water right or permit will be canceled before the department issues the order approving the transfer of the primary water right, unless within 30 days the applicant modifies the application to include the supplemental water right or permit or withdraws the application. The department may approve the transfer of the supplemental water right or permit in accordance with the provisions of [ORS 540.520](#) and [540.530](#). The department shall not approve the transfer of a supplemental water right or permit if the transfer would result in enlargement of the original water right or injury to an existing water right. If the department approves the transfer of the primary water right but does not approve the transfer of the supplemental water right or permit, the department shall notify the applicant of the department's intent to cancel that portion of the supplemental water right or permit described in the transfer application before the department issues the primary water right transfer order, unless the applicant withdraws the transfer application within 90 days.

(b) A holder of a water right certificate that authorizes the storage of water may change the type of use identified in the water right certificate, as described in paragraph (a) of this subsection, without losing priority of the right.

(2) Subject to the limitations in [ORS 537.490](#), any right to the use of conserved water allocated by the Water Resources Commission under [ORS 537.470](#) may be severed from the land and transferred or sold after notice to the commission as required under [ORS 537.490](#).

(3)(a) Any water used under a permit or certificate issued to a municipality, or under rights conferred by [ORS 538.410](#) to [538.450](#), or under the registration system set forth in [ORS 537.132](#), may be applied to beneficial use on lands to which the right is not appurtenant if:

(A) The water is applied to lands which are acquired by annexation or through merger, consolidation or formation of a water authority, so long as the rate and use of water allowed in the original certificate is not exceeded;

(B) The use continues to be for municipal purposes and would not interfere with or impair prior vested water rights; or

(C) The use is authorized under a permit granted under [ORS 468B.050](#) or [468B.053](#) and for which a reclaimed water registration form has been filed under [ORS 537.132](#).

(b) As used in this subsection, “municipality” means a city, a port formed under [ORS 777.005](#) to [777.725](#), [777.915](#) to [777.953](#) and [778.010](#), a domestic water supply district formed under ORS chapter 264, a water supplier as defined in [ORS 448.115](#) or a water authority formed under ORS chapter 450.

(4) Pursuant to the provisions of [ORS 540.570](#) or [540.585](#), any water used under a permit or certificate issued to a district may be applied to beneficial use on lands within the district to which the right is not appurtenant.

(5) The relocation of a point of diversion as necessary to follow the movements of a naturally changing stream channel does not constitute a change in point of diversion for purposes of [ORS 540.520](#) if:

(a) The diversion point stays within 500 feet of the point of diversion on record with the Water Resources Department;

(b) The change does not move the diversion point upstream or downstream beyond the diversion point of another appropriator; and

(c) The diversion is provided with a proper fish screen, if requested by the State Department of Fish and Wildlife.

(6) In the event that government action results in or creates a reasonable expectation of a change in the surface level of a surface water source that impairs or threatens to impair access to a point of diversion authorized by a water right permit, certificate or decree, the owner of the water right may change the point of diversion or add an additional point of diversion in accordance with the provisions of this section in lieu of complying with the requirements of [ORS 540.520](#) and [540.530](#). Before changing the point of diversion, the water right owner shall provide written notice of the proposed change to the Water Resources Department. Within 15 days after receipt of such notice, the department shall provide notice by publication in the department's public notice of water right applications. Within 60 days after the department receives notice from the owner, the Water Resources Director, by order, shall approve the change unless the director finds the changes will result in injury to other existing water rights. All other terms and conditions of the water right shall remain in effect.

(7) The sale or lease of the right to the use of conserved water under [ORS 537.490](#) does not constitute a change of use or a change in the place of use of water for purposes of [ORS 540.520](#).

(8) Ground water applied to an exempt use as set forth in ORS 537.141 or 537.545 may be subsequently applied to land for irrigation purposes under ORS 537.141 (1)(i) or 537.545 (1)(g) without application for a change in use or place of use under this section.

Credits

Amended by Laws 1987, c. 264, § 11; Laws 1989, c. 7, § 1; Laws 1989, c. 707, § 3; Laws 1991, c. 370, § 5; Laws 1991, c. 957, § 7; Laws 1993, c. 577, § 36; Laws 1993, c. 641, § 9; Laws 1995, c. 168, § 1; Laws 1995, c. 274, § 2; Laws 1995, c. 359, § 2; Laws 1997, c. 244, § 4; Laws 1997, c. 286, § 10; Laws 1999, c. 335, § 2; Laws 2003, c. 705, § 8, eff. Aug. 22, 2003; Laws 2021, c. 633, § 1, eff. Jan. 1, 2022.

O. R. S. § 540.510, OR ST § 540.510

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Changes in Use of Water; Transfer of Water Rights; Exchange (Refs & Annos)

O.R.S. § 540.523

540.523. Temporary transfer of water right or permit; terms;
revocation; status of supplemental water right or permit

Currentness

(1) In accordance with the provisions of this section, any person who holds a water use subject to transfer may request that the Water Resources Department approve the temporary transfer of place of use and, if necessary to convey water to the new temporary place of use, temporarily change the point of diversion or point of appropriation for a period not to exceed five years. An application for a temporary transfer shall:

- (a) Be submitted in writing to the Water Resources Department;
- (b) Be accompanied by the appropriate fee for a change in the place of use as set forth in [ORS 536.050](#);
- (c) Include the information required under [ORS 540.520 \(2\)](#); and
- (d) Include any other information the Water Resources Commission by rule may require.

(2) Notwithstanding the notice and waiting requirements under [ORS 540.520](#), the department shall approve by order a request for a temporary transfer under this section if the department determines that the temporary transfer will not injure any existing water right.

(3) All uses of water for which a temporary transfer is allowed under this section shall revert automatically to the terms and conditions of the water use subject to transfer upon expiration of the temporary transfer period.

(4) The time during which water is used under an approved temporary transfer order does not apply toward a finding of forfeiture under [ORS 540.610](#).

(5) The department may revoke a prior approval of the temporary transfer at any time if the department finds that the transfer is causing injury to any existing water right.

(6) Any map that may be required under subsection (1) of this section need not be prepared by a certified water right examiner.

(7) The lands from which the water right is removed during the period of a temporary transfer shall receive no water under the transferred water right.

(8) When an application for a temporary change of the place of use for a primary water right is submitted in accordance with this section, the applicant also shall indicate whether the land described in the application has an appurtenant supplemental water right or permit. If the applicant also intends to temporarily transfer the supplemental water right or permit, the applicant also shall include the information required under [ORS 540.520 \(2\)](#) for the supplemental water right or permit. If the applicant does not include the supplemental water right or permit in the temporary transfer application, the Water Resources Department shall notify the applicant that the supplemental water right or permit will be canceled before the department issues the order approving the temporary transfer of the primary water right, unless within 30 days the applicant modifies the application to include the supplemental water right or permit or withdraws the application. The department may approve the temporary transfer of the supplemental water right or permit in accordance with the provisions of this section. The department may not approve the temporary transfer of a supplemental water right or permit if the temporary transfer would result in enlargement of the original water right or injury to an existing water right. If the department approves the temporary transfer of the primary water right but does not approve the temporary transfer of the supplemental water right or permit, the department shall notify the applicant of the department's intent not to allow the temporary transfer of the supplemental water right or permit before the department issues the order for the temporary transfer of the primary water right. If the department does not allow the temporary transfer of the supplemental right, the supplemental right shall remain appurtenant to the land described in the application, but may not be exercised until the primary right reverts to the original water use. If the primary water right does not revert soon enough to allow use of water under the supplemental right within five years, the supplemental right shall become subject to cancellation for nonuse under [ORS 540.610](#).

(9) In issuing an order under subsection (2) of this section, the department shall include any condition necessary to protect other water rights.

Credits

[Laws 1995, c. 274, § 6](#); [Laws 1997, c. 42, § 4](#); [Laws 1997, c. 587, § 12](#); [Laws 2001, c. 788, § 3](#); [Laws 2001, c. 788, § 9](#), eff. July 1, 2005.

O. R. S. § 540.523, OR ST § 540.523

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Changes in Use of Water; Transfer of Water Rights; Exchange (Refs & Annos)

O.R.S. § 540.530

540.530. Order authorizing change of use, place of
use or point of diversion; new or modified certificate

Currentness

(1)(a) If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

(b) If, after hearing or examination, the commission finds that a proposed change in point of diversion cannot be effected without injury to existing water rights, upon receipt by the commission of an affidavit consenting to the change from every holder of an affected water right, the commission may make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

(c) If, after hearing or examination, the commission finds that a proposed change in point of diversion cannot be effected without injury to an in-stream water right granted pursuant to a request under [ORS 537.336](#) or an in-stream water right created pursuant to [ORS 537.346 \(1\)](#), the Water Resources Department may consent to the change only upon a recommendation that the department do so from the agency that requested the in-stream water right. The agency that requested the in-stream water right may recommend that the department consent to the change only if the change will result in a net benefit to the resource consistent with the purposes of the in-stream water right.

(d)(A) If an in-stream water right would be injured by a proposed change under paragraph (c) of this subsection, the department shall obtain a recommendation from the agency that requested the in-stream water right. If the recommendation of the agency is to consent to the change, the department shall provide public notice of the recommendation and, consistent with state laws regarding cooperation with Indian tribes in the development and implementation of state agency programs that affect tribes or rights and privileges of tribes, the department shall consult with affected Indian tribes.

(B) The recommendation of an agency under this paragraph must be in writing and, if the recommendation is to consent to the change, must describe the extent of the injury to the in-stream water right, the effect on the resource and the net benefit that will occur as a result of the proposed change. The recommendation may include any proposed conditions that are necessary to ensure that the proposed change will be consistent with the recommendation.

(C) In determining whether a net benefit will result from the proposed change, the recommendation of an agency must include an analysis of the cumulative impact of any previous changes under paragraphs (b) and (c) of this subsection that allow injury to the affected in-stream water right.

(D) A person may comment on the recommendation of an agency. The comment must be in writing and must be received by the department within 30 days after publication of notice under this paragraph. If a written comment received by the department requests a meeting on the proposed change, the department and the agency that requested the in-stream water right shall hold a joint public meeting within 90 days of the receipt of the comment requesting a meeting.

(e)(A) If, after review of public comments and consultation with the agency that requested the in-stream water right, the agency that requested the in-stream water right does not withdraw its recommendation to consent to the change, the department may approve the change consistent with the requirements of paragraphs (b) and (c) of this subsection.

(B) An order approving a change under paragraph (c) of this subsection shall include written findings on the extent of the injury to the in-stream water right, the effect on the resource and the net benefit that will occur as a result of the change. The order shall include any conditions necessary to ensure that the change will be consistent with the findings and ensure that the change will result in a continued net benefit to the resource consistent with the purposes of the in-stream water right.

(C) In determining whether a net benefit will result from the change, the order of the department must include an analysis of the cumulative impact of any previous changes approved under paragraphs (b) and (c) of this subsection that allow injury to the affected in-stream water right.

(f) The time allowed by the commission for completion of an authorized change under paragraphs (a) to (e) of this subsection may not be used when computing a five-year period of nonuse under the provisions of [ORS 540.610 \(1\)](#).

(2)(a) If a certificate covering the water right has been previously issued, the commission shall cancel the previous certificate or, if for an irrigation district, the commission may modify the previous certificate and, when proper proof of completion of the authorized changes has been filed with the commission, issue a new certificate or, if for an irrigation district, modify the previous certificate, preserving the previously established priority of rights and covering the authorized changes. If only a portion of the water right covered by the previous certificate is affected by the changes, a separate new certificate may be issued to cover the unaffected portion of the water right.

(b) If the change authorized under subsection (1) of this section is necessary to allow a change in a water right pursuant to [ORS 537.348](#), is necessary to complete a project funded under [ORS 541.932](#), or is approved by the State Department of Fish and Wildlife as a change that will result in a net benefit to fish and wildlife habitat, the Water Resources Department, at the discretion of the Water Resources Director, may waive or assist the applicant in satisfying any of the proof of completion requirements of paragraph (a) of this subsection. The assistance provided by the department may include, but need not be limited to, development of a final proof survey map and claim of beneficial use.

(3) Upon receiving notification of the merger or consolidation of municipal water supply entities, or the formation of a water authority under ORS chapter 450, the commission shall cancel the previous certificates of the entities replaced by the merger, consolidation or formation and issue a new certificate to the newly formed municipality or water authority. The new certificate shall preserve the previously established priority of rights of the replaced entities and shall allow beneficial use of the water on any lands acquired in the merger, consolidation or formation.

Credits

Amended by Laws 1975, c. 581, § 26b; Laws 1983, c. 807, § 2; Laws 1985, c. 673, § 95; Laws 1989, c. 707, § 4; Laws 1993, c. 577, § 37; Laws 1999, c. 664, § 3; Laws 1999, c. 804, § 1; Laws 2001, c. 299, § 1; Laws 2001, c. 299, § 2, eff. July 31, 2005; Laws 2005, c. 614, § 4, eff. July 22, 2005.

O. R. S. § 540.530, OR ST § 540.530

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West's Oregon Revised Statutes Annotated

Title 45. Water Resources: Irrigation, Drainage, Flood Control, Reclamation

Chapter 540. Distribution and Storage of Water; Watermasters; Water Right Changes, Transfers and Forfeitures
(Refs & Annos)

Prohibited Acts; Injunctions

O.R.S. § 540.720

540.720. Unauthorized use or waste of water

Currentness

No person shall use without authorization water to which another person is entitled, or willfully waste water to the detriment of another. The possession or use of such water without legal right shall be prima facie evidence of the guilt of the person using it.

O. R. S. § 540.720, OR ST § 540.720

Current through laws of the 2023 Regular Session of the 82nd Legislative Assembly, which convened January 17, 2023 and adjourned sine die June 25, 2023, in effect through December 31, 2023, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Oregon Administrative Rules Compilation
Chapter 690. Water Resources Department
Division 77. Instream Water Rights

OAR 690-077-0000

690-077-0000. Purpose

Currentness

(1) The purpose of this Division is to establish the policy, procedures, criteria, standards and definitions which shall be applied by the Department and Commission in the evaluation of applications for establishing instream water rights.

(2) This Division also provides for the conversion of existing minimum streamflows to instream water rights; for the instream transfer or lease of existing water rights for use as instream water rights; and for the enforcement of instream water rights which are held in trust by the Water Resources Department to protect the public uses.

(3) In 1987, the Legislature created a new type of water right called an instream water right. Instream water rights are established by certificate from the Water Resources Commission or by an order approving a time-limited instream transfer or lease, pursuant to [ORS 537.332 to 537.360](#), to maintain and support public uses within natural streams and lakes. These public uses include, but are not limited to, recreation, scenic attraction, aquatic and fish life, wildlife habitat and ecological values, pollution abatement and navigation. Instream water rights may also be established as a result of the allocation of conserved water under [537.455 to 537.500 and 540.510](#) (OAR chapter 690, division 18).

(4) In 2001, the Legislature authorized the split season use leasing of water rights for instream purposes. Under [ORS 537.348\(3\)](#), all or a portion of an existing water right may be used for the existing use and for instream use during the same year, provided that the uses are not concurrent and that the holders of the water rights measure and report to the Water Resources Department the use of the existing water right and the instream water right.

(5) Instream water rights differ from other water rights because control or diversion of the water is not required. Instream water rights are held in trust by the Water Resources Department but are regulated and enforced like all other water rights.

(6) Instream water rights do not take away or impair any legally established right to the use of water having an earlier priority date than the instream right.

Credits

Statutory/Other Authority: [ORS 536.025, 536.027, 536.220, 536.300, 536.310, 537.338 & 537.356 - 537.358](#)

Stats. Implemented: [ORS 537.332 - 537.360](#)

History: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 5-1995(Temp), f. & cert. ef. 8-4-95; WRD 1-1996, f. & cert. ef. 1-31-96; WRD 8-2001, f. & cert. ef. 12-14-01; WRD 4-2006, f. & cert. ef. 10-2-06

Current with rules filed through October 5, 2023. Some sections may be more current; see credits for details.

OAR 690-077-0000, OR ADC 690-077-0000

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Oregon Administrative Rules Compilation
Chapter 690. Water Resources Department
Division 77. Instream Water Rights

OAR 690-077-0015

690-077-0015. General Statements

Currentness

- (1) Instream water rights shall not take away or impair any permitted, certificated or decreed right to any waters or to the use of any rights vested prior to the date of the instream water right.
- (2) The implementation of the instream water rights law is a means of achieving an equitable allocation of water between instream public uses and other water uses. When instream water rights are set at levels that exceed current unappropriated water available the water right not only protects remaining supplies from future appropriation but establishes a management objective for achieving the amounts of instream flows necessary to support the identified public uses.
- (3) The amount of appropriation for out-of-stream purposes shall not be a factor in determining the amount of an instream water right.
- (4) If natural streamflow or natural lake levels are the source for meeting instream water rights, the amount allowed during any identified time period for the water right shall not exceed the estimated average natural flow or level occurring from the drainage system, except where periodic flows that exceed the natural flow or level are significant for the applied public use. An example of such an exception would be high flow events that allow for fish passage or migration over obstacles.
- (5) Unless the Director determines otherwise, for instream water rights established through instream transfers, leases, or allocations of conserved water, it is presumed that flows that exceed the estimated average natural flow or natural lake levels are significant for the applied public use, if the criteria in Subsection (5)(a) and (b), or in Subsection (5)(a) and (c) are met:
 - (a) The flow does not exceed the maximum amount of any instream water right application applied for under [OAR 690-077-0020](#) for the same reach or portion thereof, and for the same public use.
 - (b) For the specified time period that flows are requested to exceed the estimated average natural flow or lake level, the stream is in an ODFW flow restoration priority watershed.
 - (c) The stream is listed as water quality limited and DEQ has provided scientific information that demonstrates that increased flows would improve water quality.
- (6) If the source of water for an instream water right is other than natural flow such as storage releases or inter-basin transfer, the source shall be developed or a permit for development approved prior to or coincident in priority with the instream water

right. The development of environmentally sound multipurpose storage projects that will provide instream water use along with other beneficial uses shall be supported.

(7) Instream water rights in rivers and streams shall, insofar as practical, be defined by reaches of the river rather than points on the river.

(8) When instream water rights are established through instream transfers, leases, or allocations of conserved water of existing water rights, the order, and, where appropriate, the certificate shall define the appropriate point, reach or reaches to which the new instream water right shall apply. Normally, a new instream water right shall be maintained downstream to the mouth of the affected stream; however, it may be maintained farther downstream if the amount of the instream water right is a measurable portion of the flow in the receiving stream or for a point or shorter distance if needed to account for return flow or to prevent injury.

(9) Instream water rights shall conform with state statutes and basin programs. All natural lakes and streams in the state shall be considered classified to allow all instream public uses unless specifically withdrawn from appropriation for such use.

(10) Instream water rights shall be approved only if the amount, timing and location serve a public use or uses.

(11) The combination of instream water rights, for the same reach or lake, shall not exceed the amount needed to provide increased public benefits and shall be consistent with Sections (4), (5), and (6) of this rule.

(12) An instream water right created through the conversion of a minimum perennial streamflow shall not take precedence over any rights having an earlier priority date, including storage rights except where an individual permit or water right specifies that it shall be subordinate to future uses or appropriations.

(13) An instream water right created through the conversion of a minimum perennial streamflow, which consists in whole or part of waters released from storage, is enforceable only as to the waters released to satisfy the instream water right.

(14) Instream water rights created through the conversion of minimum perennial streamflows shall carry with them any and all conditions, exceptions or exemptions attached to the minimum perennial streamflow, unless modified through hearing.

Credits

Statutory/Other Authority: [ORS 536.025](#), [536.027](#), [536.220](#), [536.300](#), [536.310](#), [537.338](#) & [537.356 - 537.358](#)

Stats. Implemented: [ORS 536.025](#), [536.027](#), [536.220](#), [536.300](#), [536.310](#), [537.338](#), [537.356](#) & [537.358](#)

History: WRD 20-1988, f. & cert. ef. 11-4-88; WRD 1-1989(Temp), f. & cert. ef. 1-24-89; WRD 4-1989, f. & cert. ef. 7-11-89; WRD 9-1992, f. & cert. ef. 7-1-92; WRD 1-1995, f. & cert. ef. 2-14-95; WRD 4-2006, f. & cert. ef. 10-2-06

Current with rules filed through October 5, 2023. Some sections may be more current; see credits for details.

OAR 690-077-0015, OR ADC 690-077-0015

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Oregon Administrative Rules Compilation
Chapter 690. Water Resources Department
Division 77. Instream Water Rights

OAR 690-077-0065

690-077-0065. General Provisions

Currentness

- (1) The Department shall promote and facilitate potential instream transfers and leases under [ORS 537.348](#) that would provide benefits for public uses.
- (2) The Department encourages irrigation districts and other water purveyors to develop single lease applications that pool individual water rights and ownerships that are to be leased during the same term.
- (3) Department personnel shall review all instream transfer or lease applications pursuant to [OAR 690-077-0070](#) through [690-077-0079](#) to assure that they comply with these rules and, if possible, to develop conditions to prevent enlargement of the original right or injury to other water right owners.
- (4) Completed lease applications submitted pursuant to [OAR 690-077-0076](#), including signatures of lessor and lessee (if applicable), and all necessary attachments or exhibits, must be received by the Department's Salem office prior to July 1, or for year around uses, must be received prior to October 1. Completed lease applications received after this date shall be returned or, at the request of the applicant, be processed to be effective for the next calendar year. At the discretion of the Director, an application may be received and processed after this date during the current year.
- (5) The Department may compile descriptive information to assist all parties in addressing technical issues related to instream transfers and leases, including but not limited to describing injury and enlargement issues, determining whether a proposed instream water right would support a public use, setting the location of a proposed instream water right and making agreements for measuring and monitoring the instream water right. The descriptive information shall not restrict new leases, but shall offer options that have been used in earlier leases to ensure compliance with OAR chapter 690, division 77.
- (6) The Department may prepare lease application forms that include the requirements listed in [OAR 690-077-0076\(3\)](#) and any additional information the Department deems necessary to comply with the policies of OAR chapter 690, division 77 and to reflect the nature of the water rights subject to being leased instream. For example, a special form could be prepared for an irrigation district to sponsor a single lease application that involved multiple water right owners.

Credits

Statutory/Other Authority: [ORS 536.027 & 537.332 - 539.360](#)

Stats. Implemented:

History: WRD 1-1995, f. & cert. ef. 2-14-95; WRD 8-2001, f. & cert. ef. 12-14-01, Renumbered from 690-077-0078; WRD 4-2006, f. & cert. ef. 10-2-06

Current with rules filed through October 5, 2023. Some sections may be more current; see credits for details.

OAR 690-077-0065, OR ADC 690-077-0065

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

Oregon Administrative Rules Compilation
Chapter 690. Water Resources Department
Division 250. Water Distribution

OAR 690-250-0150

690-250-0150. Management of Stored Water

Currentness

(1) Water which has been illegally stored is under the complete control of the watermaster. When water has been illegally stored, the watermaster shall notify the owner of the reservoir containing the illegally stored water of how much was illegally stored and how it is to be released. If necessary, the watermaster may take control of the outlet controls to effect the appropriate release. Such release shall be done in a manner which will make the most effective use of the water for downstream uses. Releases recommended by the Oregon Fish and Wildlife Department to prevent damage to fish and wildlife resources may be considered.

(2) Downstream storage right holders can demand water from upstream storage right holders when the actions of upstream storage right holders, junior in priority, have prevented the fulfillment of the downstream, senior storage rights. When storable water is made available to downstream storage interests, any of the storable water which they fail to store shall be deducted from the amount that could be demanded from the upstream rights holders. While downstream senior rights must be protected, they have a duty to store when it is available. The senior right holder's failure to do so shall not work to the disadvantage of an upstream junior right. When releases from upstream storage are made, the recommendations of the Department of Fish and Wildlife may be considered to prevent damage to fish and wildlife resources.

(3) When physical circumstances permit, and when all interests involved agree, the watermaster shall coordinate the storage and release of waters from multiple reservoirs in a manner which results in the most effective use of the storage space available. However, such action shall not deprive any water right holder of water to which the holder would otherwise have been entitled. The purpose of this section is to allow the watermaster to deviate from the storage program dictated by the storage right holders involved when such deviation would result in mutual benefits to all parties, including the public. Such deviations may include water exchanges between consenting storage interests. Releases recommended by the Oregon Fish and Wildlife Department to prevent damage to fish and wildlife resources may be considered.

(4) Use of legally stored water is governed by the water rights, if any, which call on that source of water. Any legally stored water released in excess of the needs of water rights calling on that source of water shall be considered natural flow, unless such release is part of a water exchange under the approval and control of the watermaster.

Credits

Statutory/Other Authority: ORS 540

Stats. Implemented: ORS 540

History: WRD 24-1988, f. & cert. ef. 12-14-88

Current with rules filed through October 5, 2023. Some sections may be more current; see credits for details.

OAR 690-250-0150, OR ADC 690-250-0150

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.