
ISSUE ALERT

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Legislators Call for ESA Reform After Silvery Minnow Court Decision

U.S. Senator Pete Domenici (R-NM) unveiled legislation on Friday that would prevent federal agencies from taking water owned by New Mexico cities, farmers and other users in order to give top priority to the *Rio Grande silvery minnow*. The bill would stop any wholesale seizure of water intended for cities or for farming interests in the middle Rio Grande. Domenici developed the legislation in response to an opinion by a three-judge panel of the Tenth Circuit Court of Appeals earlier this month that said that the Endangered Species Act (ESA) takes precedence over water contracts owned by the city of Albuquerque and the Middle Rio Grande Conservancy District.

Specifically, the Domenici legislation would do the following:

- Prevent enforcement of the 10th Circuit Court panel decision by decreeing that habitat requirements for the silvery minnow have been met based upon the March 2003 Biological Opinion issued by the U.S. Fish and Wildlife Service;
- Legislate that the San Juan-Chama project and the Middle Rio Grande project water contracts supercede the ESA;
- Limit the Bureau of Reclamation use of funds to implement changes to Rio Grande water contracts;
- Prohibit the use of inter-basin water transfers (San Juan-Chama water) to meet ESA requirements; and,
- Allow for the federal purchase of privately held water if there is a willing seller.

Domenici's introduction of legislation comes after a speech on the floor of the U.S. Senate last week calling for reform of the ESA. Domenici told his fellow Senators "we must amend this law," stating that "this is not what Congress intended when we passed the Endangered Species Act. This is not what I intended when I voted for the law." The Senator's remarks echoed the sentiment of federal, state and local legislators, in addition to the many people, businesses, and communities affected by the Tenth Circuit Court decision. "The ruling says the Endangered Species Act can preempt anything and everything, essentially," said Domenici.

"I believe we can amend this law to better protect struggling species, while still respecting the authority of this Government, States, localities and Indian tribes," Domenici said. "I believe we can amend this law to better protect struggling species, while still allowing people access to the resources we need to survive."

Domenici said he will now work to find a legislative vehicle that will allow for quick consideration of his New Mexico minnow legislation. The Senator serves as Chairman of the Senate Energy and Natural Resources Committee, as well as Chairman of the Senate Appropriations Subcommittee on Energy and Water.

Attached is a summary of the Tenth Circuit Court's *Rio Grande Silvery Minnow* decision.

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Summary of the Tenth Circuit's *Rio Grande Silvery Minnow* Decision

On June 13, 2003 the Tenth Circuit issued its much-anticipated decision in Rio Grande Silvery Minnow et al., v. Keys et al. (D.C. No. CIV-99-1320 JP/RLP), affirming a lower court judgment that the U.S. Bureau of Reclamation (USBR) must reduce its contract water deliveries to provide additional water for the protection of the silvery minnow, an "endangered species" listed under the Endangered Species Act (ESA). The court broadly construed the discretionary authority of USBR to reduce water deliveries in favor of endangered species protections. It also affirmed that the ESA's requirement that federal agencies conserve species and avoid jeopardy gives agencies the ability to modify existing government contracts absent an unmistakable waiver of sovereign acts by the federal government.

Governor Bill Richardson (D-NM) strongly opposes the ruling and has urged the Department of the Interior to challenge the court's decision.

SIGNIFICANCE:

The Tenth Circuit's opinion primarily focuses on the interaction of the ESA and USBR water supply commitments. For parties receiving water from USBR contracts, the court's interpretation of the so-called "shortages" clause calls into further question the reliability of water supply under such contracts where listed species are present in a watershed. Further, the circuit court rejected arguments relating to the nature of the water rights held by the USBR under New Mexico Law and the consequences of the *de facto* abrogation of existing priorities and reservations under state law.

For other resource users, the court's opinion sends mixed signals. The circuit court acknowledged the limitation on federal agency actions under the ESA to those activities within the agency's discretion under existing law. However, the court then circumvented this limitation by broadly interpreting the reclamation contracts and associated federal statutes governing USBR operations in the Middle Rio Grande basin to find that the USBR held the necessary discretionary authority to reduce water deliveries.

More importantly, the court held that simple administrative tasks in the management of a water supply contract such as the mathematical determination of water supplies to be delivered to a customer in a particular year was a "discretionary act constituting an agency action" subject to consultation under ESA Section 7(a)(2). This portion of the decision may have the most significant impact on resource users subject to the ESA since it could apply to many federal management decisions relating to public lands and ongoing federal responsibilities.

SUMMARY OF KEY RULINGS:

The circuit court affirmed the district court holding that USBR has discretion to reduce deliveries under its contracts to comply with the ESA as directed by the lower court's injunction. Among the holdings of note, was that the circuit court:

- Held that contract agreements in most water delivery contracts and federal water project acts contained sufficiently discretionary language to allow the USBR to restrict water delivery under the contract in order to comply with the ESA. For example, the court focused on an exception that provided that the United States shall not accrue any liability for a shortage in water “on account of drought or *other causes*.”
- Rejected an argument that federal water projects and Repayment Contracts consider use of water for endangered species protection secondary to use of water for human consumption. The court held, instead, that using water to protect endangered species constitutes “beneficial use” under both the federal water project acts, and most states’ laws.
- Rejected an argument that the USBR did not have discretion to curtail water from rivers other than that where the endangered species lived, holding instead that the water delivery contracts allowed water from the river in which the species lived to be diverted to replenish water taken from another river, thus making the two rivers connected, and both capable of harming the species.
- Rejected an argument that contractual rights constitute perpetual exclusive rights to a share of the water supply that are off-limits as a mechanism for ESA compliance, holding instead that the USBR may limit delivery for drought or other causes, which include fish and wildlife protection.
- Rejected an argument that because the federal government owns no rights to the water it stores for users of the water projects it lacks discretion to curtail that use for ESA compliance, holding instead that the ownership status of the water does not affect USBR’s obligation to consult with the Fish and Wildlife Service to comply with the ESA.
- Rejected an argument to apply “traditional equitable principles” when considering whether to afford the species the highest priority, holding instead that *TVA v. Hill* and subsequent case law precedent clearly strikes the balance in favor of the endangered species.