Guest Editorial

Frank Dunkle
Director, U.S. Fish and Wildlife Service

The Endangered Species Act - Striving for Constructive Cooperation

Few laws have been more misunderstood than the Endangered Species Act. The law that passed in 1973, with its subsequent amendments, is one of the strictest and most unequivocal of U.S. statutes. But what has generated so much anguish and confusion among some portions of the public and private sectors is the apparent belief that the Endangered Species Act is the only law of the land. This just is not the case.

The Endangered Species Act is a law among many. When Congress enacted it, the goal of the law was to prevent the extinction of rare animals and plants. Why would the Congress of the United States enact such a law, and one so sweeping at that? The explanation for the existence of the Endangered Species Act is that the Congress perceived both the wishes and the long term needs of the American people.

Simply stated, the Endangered Species Act is a "people" act. Merging the very mission and charter of the Fish and Wildlife Service, the act is designed to ensure the continuation of rare species for the benefit of the American people.

Obviously, though, many people have developed different perceptions of the act over the past dozen years. Early on, a few factions in the environmentalist camp responded by using the act solely as a stopping device; their clear intent was to use the act more to stop projects than to enhance wildlife. They behaved as if the Congress had summoned them to the mountain top and handed down to them a stone tablet with but one commandment etched upon it: "Stop projects." Their zeal in carrying out this mission was swift and far-reaching — and quite well documented by the nation’s news media.

The response to the Endangered Species Act from the wide mainstream of America’s private sector was caution. Did the act foretell still more Government regulations, more intrusion, less productivity and lowered profits? Initially, the answer to all had to seem "yes." When the law that passed in 1973, with its subsequent amendments, is designed to ensure the continuation of rare species for the benefit of the American people. Under the Endangered Species Act, neither wildlife nor human concerns can be effectively addressed and advanced.

In my tenure with the U.S. Fish and Wildlife Service, both in Upper Colorado River Coordinator and currently as Director, I have been greatly impressed with the emerging spirit of cooperation I have witnessed not only in the Service, but among other development interests, both Government and in private business, saw tiny fish and strange-named plants threatening to halt millions of dollars worth of new construction starts, their collective "common sense" was, at least, bruised and wounded. Had indeed the Congress created law designed to impoverish significant portions of the U.S. economy? That type of questioning was none too surprising in light of the small-dollar-style confrontations of the mid and late 1970's. The Congress, too, indicated some misgivings: its avowed effort to safeguard such elements of our national heritage as the bald eagle, the grizzly bear and the alligator had been focused instead on the solution of various unknown invertebrates, many of which (coincidentally or not, one may guess) happened to reside in the path of an impending Federal-funded project. In 1978 and again in 1979, 1982, and 1985 the Congress responded to the needs of the times and clarified its intent under the Endangered Species Act. It amended the act, not so much to weaken wildlife protection as to strengthen its workability.

In amending the Endangered Species Act in 1982, Congress was sending important messages to conservationists and developers, and to public and private interests alike. Recognize the validity of human, of societal, needs; recognize that there are positive and compelling values to other laws, as well, including those authorizing developmental projects; and recognize that without cooperation under the Endangered Species Act, neither wildlife nor human concerns can be effectively addressed and advanced.

Continued on page 2

NEPA and the Project Proponent: Paying the Piper But How About A Different Tune?

by Gregory J. Hobbs, Jr.

When the National Environmental Policy Act (NEPA), 42 U.S.C. 4321, was passed in 1969, the era of significant federally funded public works projects was still in full bloom. For example, just the year before, in 1968, Congress passed the Colorado River Basin Act, 43 U.S.C. 1551, authorizing the Central Arizona Project as well as numerous other projects to be constructed in the Colorado River Basin. In other river basins the Bureau of Reclamation was pushing ahead with additional water projects for the West. East of the Hundredth Meridian, the Corps of Engineers was busy planning and constructing flood control and navigation works. The national interstate highway system was being extended and filled in coast to coast. Major urban transportation systems, like the Washington, D.C. subway system, and housing and redevelopment projects to revitalize decaying inner cities, were being pursued.

When NEPA was passed, the term "major federal action significantly affecting the human environment," often translated into large-scale federally financed and constructed projects. The courts, spurred on by newly-formed and highly active environmental interest groups, brought the gospel of NEPA to the development-oriented agencies, often by hitting the agencies over the head with a whole new chapter and verse.

Now, with some seventeen years of perspective, the operative NEPA words "major federal action" have assumed a quite different meaning. With the federal government having largely withdrawn from a primary role in funding capital construction projects, NEPA is ordinarily triggered through the national government's interests, both Government and in private business, saw tiny fish and strange-named plants threatening to halt millions of dollars worth of new construction starts, their collective "common sense" was, at least, bruised and wounded. Had indeed the Congress created law designed to impoverish significant portions of the U.S. economy? That type of questioning was none too surprising in light of the small-dollar-style confrontations of the mid and late 1970's. The Congress, too, indicated some misgivings: its avowed effort to safeguard such elements of our national heritage as the bald eagle, the grizzly bear and the alligator had been focused instead on the solution of various unknown invertebrates, many of which (coincidentally or not, one may guess) happened to reside in the path of an impending Federal-funded project. In 1978 and again in 1979, 1982, and 1985 the Congress responded to the needs of the times and clarified its intent under the Endangered Species Act. It amended the act, not so much to weaken wildlife protection as to strengthen its workability.

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Dunkle: Endangered Species Act amended in 1982

Continued from page 1

Federal, State and private groups as well. Since the early 1980’s I believe we have witnessed the steady replacement of distrust and acrimony with a spirit of cooperation and problem-solving. I am no Pollyanna; I do not expect perfect consensus overnight. I am realistic enough to acknowledge that there will always be a few individuals who want to “use” the Endangered Species Act to halt everything from water and transportation projects to hunting and fishing. But, then too, there will always be a few individuals who want to dam any gulf that he has drawn.

COtLORADO WATER RIGHTS

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...there will always be within Government agencies and outside them the handfuls of individuals who will want to “use” the Endangered Species Act to halt everything from water and transportation projects to hunting and fishing.

... protection of endangered fish species of the Upper Colorado River Basin threatened to embroil all interested parties in a confrontation between resource protection and resource development.

CWC 5th Annual Water Law Seminar

The 5th Annual CWC Seminar on Colorado Water Law will be held on September 11 and 12, 1986, at the Holiday Inn Northglenn, I-25 and 120th Avenue, Northglenn. The classes will be limited to State water rights specialists and will include coverage of basic legal and constitutional staff members. The registration fee is $400 for Colorado Water Congress members and $600 for non-members of CWC. The registration forms - plus the final program - are attached to this newsletter. CLE credits have been sought. In the past, this seminar has been awarded 16 CLE credits. Banquet reservations should be secured from the Holiday Inn Northglenn, 10 E. 12th Ave., Northglenn, Colorado 80234, or phone (303) 452-4100. Some observations about the seminar from several of last year’s class members are offered: A Consulting Engineer - absolutely terrific... I learned a lot and feel that it was well worth the expense. See Schedule on Page 5.
A Proposal: Resolving the Conflict between the Endangered Species Act and Water Development in the Upper Colorado River Basin

by
The Colorado Water Congress Special Project on Threatened and Endangered Species

Tom Pitts, P.E.
Project Coordinator

Following passage of the Federal Endangered Species Act in 1973, three native fishes in the Upper Colorado River Basin, the Colorado squawfish, housto Island, and humpback chub, were listed as endangered. In the mid-1970s, the U.S. Fish and Wildlife Service conducted consultations on several federally sponsored water projects under Section 7 of the Endangered Species Act. This section of the Act states that Federal agencies may take no action which might further jeopardize the continued existence of endangered species. "Actions" include construction, funding of projects, and issuance of 404 or right-of-way permits by Federal agencies.

In 1981, the Windy Gap Project was subjected to Section 7 consultation. The project sponsor, the Municipal Subdistrict, Northern Colorado Water Conservancy District, negotiated a settlement in which it would fund conservation measures to offset any potential adverse effect project depletions might have on endangered species habitat. The Windy Gap approach was used in forty subsequent Section 7 consultations by the U.S. Fish and Wildlife Service. Water project sponsors provide funding, based on a depletion formula, for conservation measures to offset project impacts. The approach provided a means for generating the funding necessary to conduct studies to define the needs of the species, and at the same time allowed water development to proceed.

In July, 1983, the U.S. Fish and Wildlife Service proposed a "Gap approach" to Section 7 consultations. The proposal was for the U.S. Fish and Wildlife Service defined minimum flows on the Colorado River, Green River, Yampa River, White River, and Gunnison River. Minimum flows were necessary to maintain endangered species habitat. Any project causing depletions below those minimum flow levels would receive a jeopardy opinion. The minimum flow levels had no scientific basis. They were based on the perceived need to maintain pre-1960 flows in the Upper Colorado River Basin. It was assumed by the Service that native fishes were better off prior to 1960. The proposal had the potential to disrupt State water rights law, and to deny water project sponsors of their legal right to divert water under State law. The proposal ignored the interstate compacts and the decrees of the States and interstate compacts. By the turn of 1983, there were concerns about the species in the Upper Colorado River Basin. The Technical Steering Committee established Biology. Through the end of May, 1984, a proposal has been developed which will meet the goals of water users, Federal agencies, environmental organizations, and the States in terms of future water development and protection of endangered fish species in the Upper Colorado River Basin.

The Basic Proposal

The approach agreed upon in a document entitled "Draft Recovery Implementation Program for Rare and Endangered Fish Species in the Upper Colorado River Basin," dated July 17, 1986, the proposal goes beyond merely protecting the endangered native fishes in the Upper Colorado River Basin. It calls for their full recovery and delisting within a fifteen year time frame, and provides a means of protecting endangered species habitat within the framework of State water law, while water development proceeds in the Upper Basin.

The question that immediately comes to mind is: Why should water conservation interests support a program to improve the condition of endangered species? In late 1984, the Colorado Water Congress Special Project faced the question of proposing a water project to the problem. After considerable thought, it was concluded that the only way to really solve the problem was to recover and delist the species, as called for in the Endangered Species Act. In February, 1985, the first draft of the Colorado Water Congress proposal entitled "Preliminary Conceptual Approach to Recovery of Endangered Fish Species in the Upper Colorado River Basin," was completed. The proposal was carefully reviewed by the Colorado Water Congress, Special Project committees, and endorsed as a viable approach. This proposal was released to the coordinating Committee in May, 1985. It did not contain all of the details presently contained in the draft recovery implementation program. These details were internally negotiated among water users, the States, Federal agencies, and environmental interests between August, 1985 and June, 1986.

Principles

For water users, the proposal offers a radical departure from the proposal of July, 1985, wherein the U.S. Fish and Wildlife Service initially proposed to provide water for endangered fishes simply by stopping water development at certain levels in the Upper Colorado River Basin. The proposal did not contain all of the details presently contained in the draft recovery implementation program. These details were internally negotiated among water users, the States, Federal agencies, and environmental interests between August, 1985 and June, 1986.

1. Provision and maintenance of instream flows at specified levels is necessary to protect and recover endangered species habitat and the Upper Colorado River Basin.
2. Water for instream flows will be provided as part of a comprehensive recovery program that addresses the Upper Basin and fish species habitat needs as a system.
3. Recovery and protection of rare species is to be a shared responsibility of the Federal government, the States, water and power users, and environmental organizations. This means, among other things, that the cost of providing instream flows and other recovery activities will be shared by these parties.
4. Water rights for instream flows established under this process will be appropriated, acquired, and administered pursuant to State law and will therefore be regulated pursuant to State water rights law. Where water rights for instream flows cannot be obtained, they will be protected through contracts or administrative agreements with holders of appropriate water rights. In no case shall the Federal government condemn water rights for the purpose of protecting endangered species.

These principles obligate the Federal government and the States to work within the interstate compacts to provide flows for endangered species. The program recognizes, as water users have long known, that water is not produced for any one use, but is developed for all uses. Part of the incentive for the Federal agencies' and environmental organizations' support for this approach is that rights acquired for endangered species will be protected under State law. Water users have the assurance that any rights will be acquired under State law, in accordance with State law, with legal recognition of other absolute and conditional decrees. No specific instream flow quantities or locations have been identified at this time. Flow needs will be identified as the recovery program progresses, and all interests will be involved in the process.

The draft recovery program recommends specific mechanisms for identification of water needs for endangered species, and establishment of rights under State programs. In Colorado, this program is envisioned as to be administered under Colorado's in-stream flow law by the Colorado Water Conservation Board, in accordance with the procedures established by the Board. Water rights acquired under this program will be transferred to the Colorado Water Conservation Board on the condition that such rights shall be held only for the protection of the required instream flows.

Section 7 Consultations on Water Projects

In accordance with the Endangered Species Act, which does not provide for a "Gap approach" to Section 7 consultations, water projects will still be subject to Section 7 consultation. However, under the recovery program, the following approach will be used:

1. Obtaining, administering, and protecting instream flows are part of an overall recovery program, and not as a responsibility of any particular water project sponsor.
2. Because the recovery program sets in place the mechanism and commitment to assure that instream flows are acquired and protected under State law, the Service will consider this, under any Section 7 consultation for a water project, as offsetting project depletion impacts. Therefore, project related depletion impacts on all river reaches will not jeopardize endangered species.
3. Since implementation of the recovery program requires funding of recovery measures, water project sponsors will make a financial contribution to the recovery program. This one-time contribution is intended to offset the average incremental depletion of the project at the rate of $10 per acre-foot to be adjusted annually for inflation.

4. For projects causing direct impacts in occupied habitat, such as obstruction to migration routes or adverse physical alteration of occupied habitat, the Secretary will, whenever possible, suggest reasonable and prudent alternatives to offset those impacts and avoid a jeopardy situation.

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Colorado Water Rights
It is anticipated that much of the water needed to provide habitat for endangered species for the Colorado River below the Gunnison and in the Green River by refining operations at existing Federal reservoirs such as Dallas Creek, Curecanti, and Flaming Gorge. However, the recovery program includes a proposal for seriously pursuing the introduction of non-native species into existing Federal reservoirs such as Upper Colorado River, and possibly changing the location of diversion structures elements, such as capital improvements for hatcheries, fish passages, and possibly changing the location of diversion structures. The proposed program is a conservation and management program for protected species pursuant to State law. Establishment of this fund is critical because it provides a guarantee that the resources will be available to implement instream flows.

The second capital fund which Congress will be asked to establish will be for $5 million to initiate other recovery construction elements, such as capital improvements for hatcheries, fish passages, and possibly changing the location of diversion structures. This proposal is not a legal contract. At any time, if the parties find that the commitments are too great, the terms become unreasonable, or if the principles are not upheld, the program may cease to exist. Before such drastic action is taken, however, the alternatives must be carefully considered.

Recovery Measures

During the fact finding process, it was determined that a number of factors have affected the status of endangered species in the Upper Colorado River Basin. These include channel blockage, predation and flooding, which are likely to cause divergence of fish species that have been stocked by Federal and State game management agencies, taking of endangered species by anglers, and a number of other factors.

The recovery program includes specific recommendations and proposals for dealing with each known cause and effect. It includes a proposal for seriously pursuing the introduction of three species of fish into existing Federal reservoirs such as Upper Colorado River, and possibly changing the location of diversion structures. The total estimated cost of these funds to direct impact consultations.

A cooperative agreement is recommended for signature by the Secretary of the Interior and the governors of Colorado, Utah, and Wyoming, implementing the recovery program. The Colorado Water Congress will enter into an agreement with numerous environmental organizations pledging support for the program.

Funding

Annual and capital funding needs for the recovery program have been identified. The annual funding needs are based on planning and land acquisition for projected hatchery facilities, habitat management, habitat management including obtaining instream flows, habitat development, hatchery rearing and stocking, non-native fish control and sport fishing control, and research, monitoring and data management. The total estimated cost of the program is $2.4 million per year. Funding sources must be reliable if the program is to be implemented.

Sources of funding include the U.S. Fish and Wildlife Service ($600,000 per year), U.S. Bureau of Reclamation ($1,500,000 per year from the Colorado River and Storage Project O & M Fund), and States of Colorado, Wyoming, and Utah ($300,000 per year total). In addition, water project proponents will contribute additional funding for the recovery program from the $10 per acre-foot contribution to the program. Donations from other sources, including environmental organizations, could also be part of the funding picture.

In addition to the annual operating fund, it is proposed that a second capital fund be established by Congress: A $10 million capital fund to be used exclusively for purchase of water rights to establish the recovery program. Additional funding for purchase of water rights to establish the recovery program. Donations from other sources, including environmental organizations, could also be part of the funding picture.

The proposal is a compromise. It does not represent a perfect solution from the perspective of any individual interest. However, it does contain substantial incentives for all interests to participate in an implementation program for the protection of water interests participating in the Colorado Water Congress Special Project are convinced that this program can work, and they are committed to making it work. It is their hope that all interested parties will review the proposal, give it serious consideration, and find it an acceptable starting point from which to achieve their goals for the Upper Colorado River Basin.

Tom Pitts is Principal of Tom Pitts and Associates. Consulting Engineers, Loveland, Colorado, and serves as Project Consultant for the Colorado Water Congress Special Project on Threatened and Endangered Species.
SEMinar on Colorado Water Law
September 11-12, 1986
Marabella Room
Holiday Inn Northglenn
I-25 & 120th Avenue
Northglenn, Colorado

Thursday, September 11, 1986
8:00 a.m. – Registration (Outside Marabella Room)
Presiding, Senator Fred Anderson of Loveland
8:30 a.m. – The History of Colorado Water Law – Glenn G. Saunders, Saunders, Snyder, Ross and Dickson, Denver.
11:00 a.m. – The Relationship Between the Federal Government and Colorado Water Law – Greg Hobbs, Davis, Graham & Stubbs, Denver.
12 Noon – LUNCH (Terrace Area)
1:15 p.m. – Water Distribution Organizations (mutual ditch companies, carrier ditch companies, special districts and municipal systems) – John U. Carlson, Attorney at Law, Denver.
2:00 p.m. – The Water Court System and Procedure – John U. Carlson, Attorney at Law, Denver.
3:45 p.m. – Water Conservancy Districts: Responsibilities and Roles in Water Matters – Larry D. Simpson, Manager, Northern Colorado Water Conservancy District, Loveland.
5:15 p.m. – RECESS FOR DINNER (Location to be announced)
6:30 p.m. – The Impact on Colorado of Interstate Compacts – Dr. Jeris A. Danielson, State Engineer, State of Colorado.
8:00 p.m. – The Colorado Division of Water Resources, Colorado, Ground Water Commission, and the Office of the State Engineer: Responsibilities and Roles in Water Matters – Dr. Jeris Danielson, State Engineer, State of Colorado.

Friday, September 12, 1986
8:15 a.m. – The Colorado Water Conservation Board: Its Responsibilities and Role in Water Matters – Bill McDonald, Director, Colorado Water Conservation Board, Denver.
9:00 a.m. – Historical Overview of the Denver Water System – Ed Ritz, Manager of Community Affairs, Denver Water Department; and Ed Polokomy, Coordinator of Community Affairs, Denver Water Department, Denver.
10:15 a.m. – The Colorado River, the Colorado River Water Conservation District, and Western Colorado Water Projects – Don Hamburg, General Counsel, Colorado River Water Conservation District, Glenwood Springs.
11:00 a.m. – Overview of Colorado Ground Water Law – David M. Brown, Moses, Witttemyer, Harrison & Woodruff, Boulder.
12:00 Noon – LUNCH (Terrace Area)
2:45 p.m. – The Colorado Water Quality Control Division: Its Responsibilities and Role in Water Matters – Gary G. Broetzman, Director, Colorado Water Quality Control Division, Denver.
3:15 p.m. – The Bureau of Reclamation: Its Responsibilities and Role in Water Matters – Billy E. Martin, Regional Director, Missouri Basin Region, Bureau of Reclamation, U.S. Department of Interior, Billings, Montana.
3:45 p.m. – Adjournment.

The Colorado Water Congress has recently published the “Colorado Water Almanac & Directory – 1986 Edition.” This 100 page – and greatly expanded – publication includes directory information, calendar of events, glossary of terms, current water projects, summary of 1986 water laws, etc. One copy of the Almanac/Directory will be mailed to each CWC member. In the event that additional copies of this directory are desired, it is requested that the form below be used for such requests.

Mail after 8/18/86 to: COLORADO WATER CONGRESS 1390 Logan Street, Suite 312 Denver, Colorado 80203


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... there seems to be no shortage of those in the environmental interest groups and sometimes in the agencies themselves who insist the NEPA requires detailed study of every conceivable hypothetical alternative or impact."

"... the combined cost of the systemwide and the site-specific EIS will be closer to $35 million, all borne by local public entities..."

"... agents of the 'public interest' cannot so neatly be categorized into 'good guy' environmentalists... and 'bad guy' developers..."
Hobbs: NEPA and the responsibility for paying the cost of the process

Continued from page 6

federal action nor significant environmental impact were in­
cluded in the project proponent's cost reimbursement proposal.

The BLM's authority to require repayment of the cost of a NEPA
impact statement. The Corps' decision was upheld on de­
cert. den. 449 U.S. 909, where the need for federal
agency authorization of a waste discharge pipeline was held not
to trigger the necessity of a NEPA statement. The decision
stands unless it is repeatedly upheld, if it is not upheld by the Court for
NEPA purposes, when no federal funds were involved and the project
was conditioned on state action.

If the portion of the project falling within the agency's permit
jurisdiction is of a magnitude sufficient to trigger NEPA prepara­
tions, then the EPA analysis should be predicated on decisions which are
within the agency's jurisdiction to regulate, utilizing the
Winnabego and Sawy Bay principle. In this way the NEPA
would not be a costly obstacle course with little perceptible value produced,
rather than becoming a device comprehensively governed what
essentially are non-federal actions. NEPA should not be utilized to
expand an agency's jurisdiction or powers beyond its statutory
enabling.

The BLM's authority to require repayment of the cost of a NEPA
preparation has been upheld wherein an application for a right-of-
way under the Mineral Leasing Act, 30 U.S.C. § 183(1), is
involved. Suhco Transportation Company v. United States, 766
F.2d 490 (9th Cir. 1985). The agency's charge to the non-federal
party in that instance was $2.5 million. If only the 17-mile
stretch of federal land involved in the right-of-way had been
the subject of a NEPA analysis in that instance, apparently only
remotely the cost of preparing the NEPA statement would have been
much less.

Like the Mineral Leasing Act, the Federal Land Policy
Management Act, 43 U.S.C. § 1701, contains specific statutory
authority for charges. The FLPA cost reimbursement provi­sion
contains a reasonable standard. Nevada Dept. of
Watt, 711 F.2d 913 (10th Cir. 1983). It is clear that the agency's
determination as to the scope of the impact statement and the
cost are subject to the agencies discretion and will be given
defence by the Courts. The time to raise the reasonable­
ness argument is after the project is advanced or when the pro­
ject refuses to pay, and the court is asked to determine whether
the public or the project opponent should bear the cost.

Since the BLM's NEPA actions have been upheld by the courts, the project
opponent's costs are incurred for the “benefit of the general
public interest” and which are for the “exclusive benefit of the applicant.”
Alamot v. Andrus, 607 F.2d 911 (10th Cir. 1979),
every effort should be made to delineate this appointment early.

While FLPA contains express cost reimbursement provi­sion
for FLMMS projects, the project proponent's cost is expected to pay the additional costs.

The time has come for the courts, agencies, and the Federal Land Policy to
recognize the importance of avoiding a NEPA process which will
not be stopped by endless pursuit of what "I" scenarios.

Fourth, the existing regulatory framework is vastly different than when NEPA was enacted, in 1969. Since that time the
Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Endangered Species Act, the Federal
Land Policy and Management Act, and numerous other federal
and state environmental statutes have come into exist­
ence and provide a substantive body of law and agency action to support NEPA actions. While the inherent time delay of the NEPA process has less justification
when viewed in a clustring of extensive environmental controls which
the project proponent must meet whether or not a NEPA
statement is prepared. The presence of such environmental reg­
ulation should be recognized at the environmental assessment stage of the NEPA process since many actions which
require major policy or legislative changes to implement
should be screened out at an early stage. City of New York v.
United States Department of Transportation, 715 F.2d 732 (2d Cir. 1983).
A familiar part of the NEPA game from the project
opponent's standpoint is to threaten the agency into examining
every hypothetical impact or alternative which can be imagined.
The developing case law shows that such efforts can be success­
fully resisted.

The criteria for selection of the reasonable alternatives to be
studied should turn upon whether the benefits of the project
early in the process and unrealistic alternatives screened out,
so that funds which can go into capital development and mili­
tary projects may not be held up by endless pursuit of what "I" scenarios.

Four environmental guidelines to keep the NEPA process
reasonably efficient are: (1) an energy and mining division from which two
project proposers should be expected to pay the cost of the environmental assessment, a NEPA statement should not be prepared.

The project proponent should be expected to pay the cost of the environmental assessment, which
includes the boon for a decision as to whether an environmental impact statement needs to be prepared.

Conclusion

The fact that NEPA is "procedural" only is both a blessing and a curse. The process can be a legitimate exercise in obtaining
government involvement, cooperation, and support for
helping to produce a better project and a better result for the envi­
ronment, or the experience can be a frustrating, nonproductive,
costly exercise on the line, in the hands of agencies who
except for those who are gainfully employed in playing NEPA "dungeons and dragons." The time has come for the courts,
agencies, and the Federal Land Policy to recognize the
time value is actually produced for the human and natural economies
by the investment made in the process. If cost reimbursement
for NEPA processes which do not contain a NEPA statement
proposers, Congress should enact limitations on the amount of
reimbursement which can be required and also provide statut­
ary guidelines to keep the NEPA process within reasonable

Gregory J. Hobbs, Jr., is an attorney with the Denver, Colorado
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Colorado Water Rights
Colorado Water Congress

Litigation Policy

The Colorado Water Congress may determine from time to time that litigation is required to assert or defend a position of significance to the membership. In order that this decision may be made in an orderly and timely manner with full consideration of the needs of the membership and the costs, opportunities and consequences of the litigation, this policy is adopted.

Litigation may be initiated by the Colorado Water Congress only upon the approval of the Board of Directors acting by resolution or motion. Such a resolution or motion shall describe the interest of the membership to be obtained or protected in the litigation, and it may provide direction to the Management and Budget Committee for the retention of counsel, negotiation of attorneys and expert witnesses fees and other litigation costs, the method of raising funds for the payment of those charges and the management and monitoring of the litigation. In the event that the Board does not provide direction, then the Management and Budget Committee shall assume the responsibilities of the retention of counsel, negotiation of attorneys and expert witnesses fees and other litigation costs, and the method of raising funds for the payment of those charges.

The Management and Budget Committee shall consult with and utilize the Litigation Advisory Committee for the primary purpose of determining whether litigation is recommended to assert or defend a position of significance to the membership. The Litigation Advisory Committee or Board may also be requested to assist in the selection of counsel, definition of the litigation assignment, negotiation of fees and monitoring or management of the assignment. The Management and Budget Committee may also consult with the Federal Affairs Committee, State Affairs Committee, or other appropriate committees of the Colorado Water Congress within whose jurisdiction lies the issue or position to be asserted or protected in the litigation. Special assessments of members or special fundraising shall assist the Management and Budget Committee specifically in recommending and carrying out special assessments of fundraising in order to pay the costs of litigation and reasonable Water Congress administration expenses as determined by the Management and Budget Committee.

The Litigation Advisory Committee shall be a standing committee of the Colorado Water Congress appointed by the Board of Directors and composed of five attorneys who are or who represent organizations which are members of the Colorado Water Congress. To the greatest extent possible, the lawyers of this Committee shall represent the various interests of the membership and be experienced in the role which litigation plays in representing the interests of the membership. In addition, the President of the Colorado Water Congress or such other officer of the Congress as he designates shall serve as an ex-officio member of the Litigation Advisory Committee. The Litigation Advisory Committee, after a meeting at which at least three of the five members are present in person, and after consultation with those members not present, shall make recommendations to the Management and Budget Committee for action by the Board of Directors and the Management and Budget Committee upon request.

The procedures which are established to implement the litigation policy of the Colorado Water Congress are intended to assure that no opportunities to protect the significant interests of the membership are lost and that no litigation is commenced without an appropriate determination of need and feasibility by the Board of Directors. While the Board and various committees who are responsible for taking actions in implementing this policy are required to act formally and in writing, no opportunity should be lost to conduct the type of prompt, verbal communication and coordination which is typical and required by the time constraints often imposed by judicial and administrative procedures. Finally, this litigation policy and the procedures to implement it are also designed to make sure that litigation commenced by the Colorado Water Congress is consistent with overall policies of the Congress and its members and conservation of their finances and is managed to achieve those objectives.

Adopted by CWC Board of Directors on January 23, 1986.