



## Public Lands & Natural Resources

### ENDANGERED SPECIES ACT

Van Ness Feldman has extensive experience representing a broad range of client interests with respect to the Endangered Species Act (ESA). Our approach is to resolve the ESA problems of our clients in a manner that accommodates both their economic needs and the objectives of the Act. Increasingly, clients wish to “work things out” in a way that avoids public conflict over implementation of the Act, and it is toward that end that the majority of our representations are focused. However, when necessary, our attorneys litigate either to protect the rights of our clients or to improve their negotiating position with the agencies that implement the Act. We intervene on behalf of our clients in litigation against the federal government regarding their implementation of the ESA with regard to the activity of our clients.

Our attorneys and public policy professionals have been involved in the application of the Act in a variety of different ways, including:

- Implementing the ESA as attorneys for the Department of the Interior and other government agencies.
- Participating in Congressional debates over the Act as staff to the committees with oversight responsibility for the law or for individual Members of Congress.
- Litigating the Act on behalf of private sector clients.
- Counseling clients on complying with the Act in the most timely and cost-effective manner possible.

### *Regulatory Counseling*

We counsel clients on ESA issues pertaining to project planning, development, and regulatory compliance. This practice involves both “traditional” ESA regulatory compliance and the identification of alternative options for resolving ESA conflicts in a manner that works both for our clients and for particular species:

**Pre-Regulatory Counseling** — The firm assists clients in identifying potential ESA problems in advance of regulatory developments and in planning their projects to avoid or minimize ESA impacts.

**ESA Section 7 Compliance Issues** — Van Ness Feldman assists clients as the action agencies with whom they are working undertake formal and informal consultation with the U.S. Fish and Wildlife Service and NOAA Fisheries on a wide variety of § 7 compliance issues, including the development of biological assessments and biological opinions, responses to “jeopardy opinions,” development of reasonable and prudent alternatives, and development of incidental take statements.

**Habitat Conservation Plans** — We counsel clients on, and participate in, the development of ESA § 10(a) habitat conservation plans and applications for incidental take permits.

**Recovery Plans** — The firm represents clients in the development of single and multi-species recovery plans, including multi-state plans requiring coordination of federal, state and local interests.

**Critical Habitat Designation** — Our attorneys provide counsel on the effects of critical habitat designation and represent clients in the designation process.

**Listing and Delisting Species** — We advise clients on, and participate in, the process for adding and removing species from the lists of threatened and endangered species, and evaluate the probable impacts of species reclassifications. Congressional Representations

Our firm has represented clients before Congress on matters such as obtaining federal appropriations to assist in compliance with ESA requirements, lobbying for amendments to address specific aspects of the ESA or its application to specific fact situations, and participating in major debates over the reauthorization of the Act itself. For example, our firm has been instrumental in establishing the Pacific Salmon Restoration Fund and achieving substantial multi-year appropriations to assist the four Pacific Coast states in their effort to conserve threatened and endangered salmonids.

### *ESA Litigation*

The development of a defensible ESA compliance program requires an acute appreciation for the likely issues that may arise in any future litigation and the ability to foresee, identify, address, and then, if necessary, defend against any challenge.

The firm prides itself on being able to provide its clients with this type of strategic judgment and represent its clients in court, when necessary. The firm has appeared on cases involving endangered and threatened species in U.S. District Court in California, Oregon, Washington, and Washington, DC, and has argued ESA cases in the Ninth Circuit, the Eighth Circuit, and the DC Circuit. Most recently, the firm filed an *amicus curiae* brief with the U.S. Supreme Court in *National Association of Home Builders v. Defenders of Wildlife*.

- The firm also has represented electric utility interests in complex ESA litigation involving the operation of the Federal Columbia River Power System, as well as ESA litigation involving the operation of the Missouri River.
- Providing counsel regarding 60-day notices of intent to sue wind project developers, natural gas pipelines and hydroelectric facility operators for alleged “take” of endangered or threatened species in violation of ESA Section 9.
- Representing electric utility interests in complex federal district court litigation involving compliance with ESA Section 7 in relation to the operation of the Federal Columbia River Power System.
- Acting as strategic and litigation counsel to a consortium of municipal utilities in federal litigation involving the operation of USACE facilities on the Missouri River.
- Representing clients before appellate panels in proceedings including *National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224 (9<sup>th</sup> Cir. 2007); and *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).

### *Representative Projects*

Examples of our experience with ESA issues include:

- Representing the National Endangered Species Act Reform Coalition (NESARC), the only national advocacy group dedicated to legislative and administrative improvements of the ESA. NESARC is comprised of more than 200 organizations such as agricultural, mining, and forestry interests; rural electric power producers; irrigation and water districts; home builders; municipal governments, and others.
- Providing legal counsel to a major timber company regarding ESA compliance issues and northern spotted owl habitat designations in the Pacific Northwest. The matter involved working with the U.S. Fish and Wildlife Service in reviewing potential habitat protections around nesting sites of the spotted owl. The result was successful deference to state management guidelines.
- Representing Central Nebraska Public Power and Irrigation District as one party in developing a landmark ESA program for the management and protection of endangered and threatened species using the Platte River Basin.
- Assisting the City of Indianapolis to address ESA compliance issues with respect to the impact of an interchange (associated with an airport expansion) on the Indiana bat.
- Managing a careful interaction between the State and federal representatives (in the regional and Washington, DC offices), the firm successfully represented a project developer in California in securing the necessary state and federal approvals for a proposed development, including under the ESA and the U.S. Army Corps' Section 404 program. The project had been stalled for over two years. Among other issues, one of the principal challenges was to find a way for the project to coexist with sensitive vernal pool habitat for the endangered Burke's goldfields flower.
- A member of our firm, during prior employment, negotiated and developed a permit authorizing incidental take pursuant to Section 2081 of the California Endangered Species Act as well as a related joint consultation involving the U.S. Fish and Wildlife Service and National Marine Fisheries Service under Section 7(a)(2) of the ESA. The proposed project involved the conversion of 20,000 acres of agricultural land in the Sacramento-San Joaquin Delta into a water storage reservoir that would be mitigated through the conversion of 10,000 acres into managed habitat for endangered, threatened and other environmentally sensitive species.
- As part of a comprehensive FERC relicensing settlement for a hydroelectric project on the North Fork Feather River, the firm helped negotiate an off-site habitat expansion plan for listed salmon in lieu of the National Marine Fisheries Service's imposition of mandatory trap and haul fish passage under Section 18 of the FPA.
- In relation to a proposed coal-fired generation facility, the firm presently is providing counsel on the implications of the listing of the polar bear and elkhorn/staghorn coral.
- As a part of the representation of PacifiCorp hydroelectric facilities on the Klamath River in Oregon and California, the firm has addressed not only the myriad ESA-related challenges to the future operation of the facilities, but also has advised PacifiCorp on ESA issues regarding agricultural and federal Reclamation project operations in the Basin.

- The firm routinely acts as environmental counsel to several transmitting utilities and members of the firm are called upon to provide advice and counsel regarding ESA compliance matters involving the operation of existing transmission facilities as well as the potential conduct of Section 7 consultations regarding proposed transmission facilities.

### *ESA and Climate Change*

Certain interest groups have focused heavily on the impact climate change may have on global ecosystems and are attempting to leverage threatened and/or endangered species listings to accelerate regulation of industries seen as contributing to climate change. The electric power sector is squarely in the sights of these efforts and must now play both defense and offense on this sensitive and emerging subject.

For over a decade, our firm has provided regulatory analysis and strategic advice on climate change to a number of companies in the electric power industry and in other sectors. As a result, we understand how developing climate regulations will likely interact with existing environmental statutes and implementing regulations. Thus, by coupling our ESA and energy regulatory capabilities with our experienced climate change practice, Van Ness Feldman is uniquely situated to assist clients with these challenges.