Why Riparian Area Protection Is Like the War in Iraq

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The War in Iraq: A Short History

1. Smashing victory by U.S. wielding:
   - aircraft
   - missiles
   - tanks
2. Counterattacks by vaunted Iraqi Republican Guards failed miserably
3. Nonetheless, three years later, situation is far from satisfactory:
   - widespread, bloody insurgency
   - unclear whether stable, democratic institutions will emerge
   - unclear when, if ever, U.S. forces can safely leave

Riparian Protection: A Short (Legal) History

1. Smashing victories by conservationists wielding:
   - statutes
   - lawsuits
   - administrative regulations
2. Legal counterattacks by vaunted property rights advocates have (mostly) failed
3. Nonetheless, decades later, situation is far from satisfactory:
   - widespread failure to implement statutes and regulations
   - unclear whether widespread protection and restoration of riparian areas will be achieved
   - unclear when, if ever, riparian advocates can safely retire

Example 1: The Clean Water Act (1972)

Shock and Awe:

"The objective of this [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

"It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."

Example 1: The Clean Water Act (cont.)

Sweeping victory:

"Navigable waters" defined to mean "waters of the United States."

"Waters of the United States" defined by administrative regulations to include:

- tributaries of navigable waters
- wetlands adjacent to navigable waters or tributaries
- other wetlands"the destruction or degradation of which could affect interstate or foreign commerce"

Example 1: The Clean Water Act (cont.)

Counterattack:

United States v. Riverside Bayview Homes (1985)

Developer argued that:

- "waters of the United States" should only include wetlands that are periodically inundated with surface water
- wetlands that are hydrated only by groundwater are not "waters of the United States"
- broader interpretation of "waters of the United States" would constitute a "taking" of private property

Example 1: The Clean Water Act (cont.)

Counterattack foiled!

Supreme held that:

- regulatory definition of "waters of The United States" includes wetlands that are hydrated solely by groundwater
- broad definition of "waters of the United States" is reasonable and consistent with Clean Water Act
- imposition of permit requirement to protect wetlands is not a "taking" of private property

Example 1: The Clean Water Act (cont.)

Second Counterattack:

Solid Waste Agency of Northern Cook County (SWANCC) v. United States (2001)

SWANCC argued that:

- "waters of the United States" should not include isolated, intrastate wetlands whose only connection to commerce is their use by migratory birds
- broader interpretation of "waters of the United States" might exceed Congress' authority under the Commerce Clause of the Constitution

Example 1: The Clean Water Act (cont.)

Second counterattack succeeds!

Supreme court strikes down "migratory bird rule."

BUT:

- CWA jurisdiction still extends to tributaries of navigable waters
- CWA jurisdiction still extends to wetlands adjacent to navigable waters and tributaries
- contrary to dire predictions, lower courts have not extended SWANCC to further limit CWA jurisdiction

Example 1: The Clean Water Act (cont.)

Behind the front lines, the insurgency continues:

- Understaffed, underfunded Corps of Engineers sometimes slow or unwilling to assert jurisdiction
- Corps sometimes too willing to grant permits that seriously impact riparian areas
- These site-specific actions (or inactions) by the Corps can be difficult and expensive to track, challenge, and overturn

Example 2: The Public Trust Doctrine

Shock and Awe:

- California Supreme Court declares, in *National Audubon Society v. Superior Court* (Mono Lake case) (1983), that the Public Trust in navigable waters can trump even vested water rights.
- Court orders Water Resources Control Board to reconsider Los Angeles' rights to divert water from streams tributary to Mono Lake
- Board orders drastic reduction in diversions in order to restore level of Mono Lake

Example 2: The Public Trust Doctrine (cont.)

Sweeping Victory in Arizona:

- Arizona Court of Appeals , in *Center for Law in the Public Interest v. Hassell* (1991), holds that Public Trust Doctrine applies to navigable streams in Arizona.

- Court strikes down legislature's attempt to transfer title to riverbeds to private landowners.

Example 2: The Public Trust Doctrine (cont.)

Counterattack:

- Arizona legislature passes law defining "navigable" extremely narrowly
- Applying narrow definition, Arizona Navigable Stream Adjudication Commission (ANSAC) determines that *no* streams in Arizona are navigable

Example 2: The Public Trust Doctrine (cont.)

Counterattack foiled!

- Arizona Court of Appeals, in *Defenders of Wildlife v. Hull* (2001), strikes down legislature's narrow definition of "navigable"

- Court vacates determination that all streams are non-navigable and tells legislature to start over

Example 2: The Public Trust Doctrine (cont.)

Second counterattack:

- Legislature passes statute declaring that the Public Trust "is not an element of a water right."
- Legislature instructs courts adjudicating water rights "not [to] make a determination as to whether public trust values are associated with any or all of [a] river system or source."

Example 2: The Public Trust Doctrine (cont.)

Second counterattack foiled!

- Arizona Supreme Court, in *San Carlos Apache Tribe v. Superior Court* (1999), strikes down legislature's attempt to bar courts from considering Public Trust Doctrine.
- "The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people. The Legislature cannot order the courts to make the doctrine inapplicable to these or any proceedings. . . . The Legislature cannot by legislation destroy the constitutional limits on its authority."

Example 2: The Public Trust Doctrine (cont.)

Behind the front lines, the insurgency continues:

- ANSAC reconstituted, with same members as before
- so far all navigability determinations by the new ANSAC, including the lower Salt River, have been negative
- negative determinations may be challenged in court, but these complex, factually-intensive decisions may be much more difficult to overturn than were the Legislature's frontal assaults on the Public Trust Doctrine

Example 3: Public Lands Livestock Grazing

Shock and Awe:

- Rangeland Reform regulations (1995) purport to make ecological sustainability the primary focus of BLM rangeland management

- Fundamentals of Rangeland Health require that riparian areas be in “proper functioning condition”

Example 3: Public Lands Livestock Grazing (cont.)

Sweeping Victory:

- Grazing Advisory Boards, consisting exclusively of ranchers, replaced with Resource Advisory Councils, representing all interest groups
- Reform of grazing practices required within one year on grazing allotments determined not to be meeting Standards of Rangeland Health
- Government will retain title to future water rights and developments on public lands

Example 3: Public Lands Livestock Grazing (cont.)

Counterattack:

In *Public Lands Council v. Babbitt* (2000), livestock industry asserts that:

- Rangeland Reform regulations are contrary to Taylor Grazing Act
- Ranchers have "adjudicated forage" rights that must be protected
- Ranchers must have title to water rights and range improvements

Example 3: Public Lands Livestock Grazing (cont.)

Counterattack foiled!

- Supreme Court unanimously rejects all livestock industry claims.

- Rangeland Reform regulations affirmed.

Example 3: Public Lands Livestock Grazing (cont.)

Second counterattack:

"Takings" lawsuits by ranchers allege that:

- Historic water rights carry with them appurtenant "forage rights" on surrounding public lands
- When government cancels a grazing permit, it has "taken" the forage rights or the water rights and must compensate the rancher

Example 3: Public Lands Livestock Grazing (cont.)

Second counterattack foiled!

Most courts have resoundingly rejected "takings" lawsuits by ranchers:

– *Hunter v. United States* (9th Cir. 1967)

– *Diamond Bar Cattle Co. v. U.S.* (10th Cir. 1999)

– *Federal Lands Legal Consortium v. U.S.* (10th Cir. 1999)

– *Colvin Cattle Co. v. U. S.* (Court of Federal Claims, 2005)

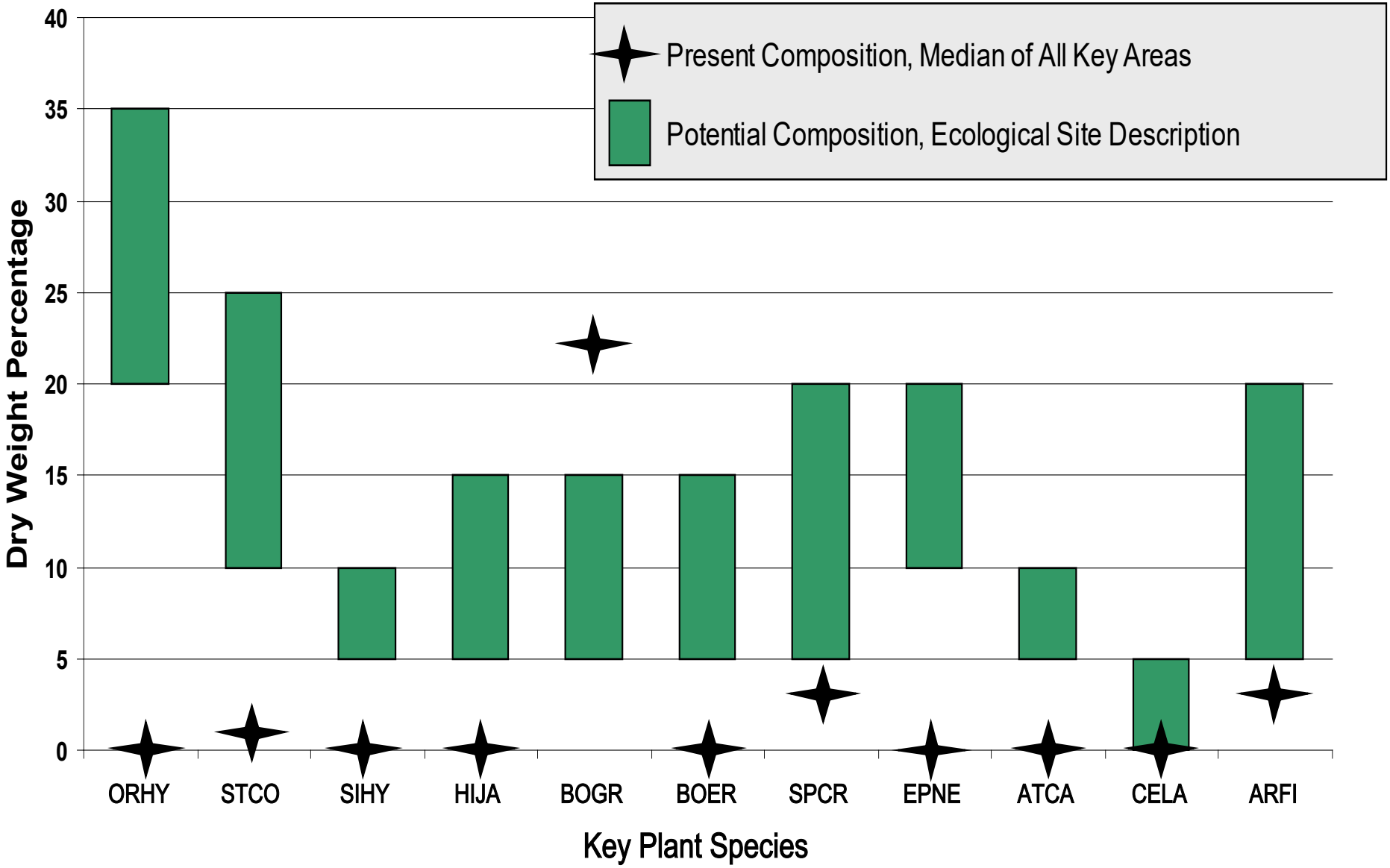
Example 3: Public Lands Livestock Grazing (cont.)

Behind the lines, the insurgency continues:

- In some states (e.g., Arizona), Resource Advisory Councils have been dominated by ranchers and their advocates and associates

- In some areas (e.g. Arizona Strip District), BLM allotment evaluations have made a mockery of Rangeland Reform

Figure 2. Median Composition, Key Plant Species, Sand Hills Allotment



Example 3: Public Lands Livestock Grazing (cont.)

Behind the lines, the insurgency continues:

Pending amendments to BLM grazing regulations will:

- Eliminate most requirements for public input in grazing decisions
- Effectively repeal Fundamentals of Rangeland Health
- Effectively suspend implementation of Standards and Guidelines
- Allow ranchers to have title to new water rights and range improvements on public

What Went Wrong in Iraq?

- False assumption that, once current regime was removed, stable democratic institutions would emerge spontaneously?
- Failure to appreciate strength and tenacity of opponents?
- Failure to understand the limits of what can be accomplished trough military force?
- Insufficient troops on the ground?
- Failure to prepare for long-term struggle?

Lessons for Riparian Area Protection

- Don’t assume that, once laws and regulations are in place, implementation and enforcement will occur without continued public vigilance.
- Don’t underestimate the tenacity of traditional agency loyalties and practices.
- Laws and regulations may be necessary, but are not sufficient, to protect riparian areas.
- Large numbers of dedicated activists are needed on the ground.
- Prepare for a long-term struggle!.