



The Water Report™

Water Rights, Water Quality & Water Solutions in the West

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& More!

ESA UPDATE: A REVIEW OF 2005

by Cherise M. Oram, Stoel Rives LLP (Seattle, WA)

The following article is a review of significant Endangered Species Act (ESA) administrative decisions, judicial opinions and legislative activity in 2005. This review is intended to highlight those areas that may be of particular interest to those who focus on water-related issues.

Editor's Note: While The Water Report has previously covered many of the actions and issues covered in this article, we thought it would be useful to have the range of 2005 ESA activities discussed in one issue. The article provides an excellent compilation and summary of 2005 ESA activities for water professionals. Please access The Water Report's website at www.thewaterreport.com for additional information and references. The website's "Index of Articles" provides a subject matter listing of all the articles/issues covered to date and "TWR Contents" shows information contained in each issue.

ADMINISTRATIVE ACTIONS

NOAA Fisheries: Final Salmon Hatchery Policy and Revised Listings for 15 Salmon

On June 28, 2005, the National Marine Fisheries Service (NOAA Fisheries) published a final hatchery policy for use in listing salmon and steelhead populations, or evolutionarily significant units (ESUs), under the ESA. 70 Fed. Reg. 37,204 (Jun. 28, 2005). The final hatchery policy was issued in response to a September 21, 2001, US District Court of Oregon decision overturning the agency's Oregon Coast coho listing. NOAA Fisheries had defined the coho ESU to include certain hatchery fish, but had listed only the wild portion of the ESU. In overturning the listing, the court held that the ESA does not allow listing of units smaller than a distinct population segment or ESU. See *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001).

The hatchery policy states that NOAA Fisheries will consider hatchery fish as part of an ESU if the hatchery fish have "a level of genetic divergence relative to local natural populations that is no more than would be expected between closely related populations within the ESU." 70 Fed. Reg. at 37,206. The agency will now consider the extinction risk of the entire ESU, including any hatchery fish that meet the policy's standard, when it makes listing decisions.

In conjunction with the hatchery policy, NOAA Fisheries issued revised salmon listing determinations for 15 ESUs and one newly listed ESU that clarified which hatchery fish are considered part of each ESU. 70 Fed. Reg. 37,160 (Jun. 28, 2005). The revised listing also included a "4(d) Rule" exempting fish with clipped adipose fins that are part of a threatened salmon ESU from the ESA's Section 9 prohibition on "take." This will allow harvest of hatchery fish that are not intended for conservation. At the same time, NOAA Fisheries extended the due date for its listing decision on Oregon Coast coho and ten steelhead ESUs while it conducted further scientific review.

On November 4, 2005, NOAA Fisheries requested comments on an alternative approach for delineating steelhead ESUs that would apply NOAA Fisheries' and

ESA

Hatcheries

Critical
Habitat

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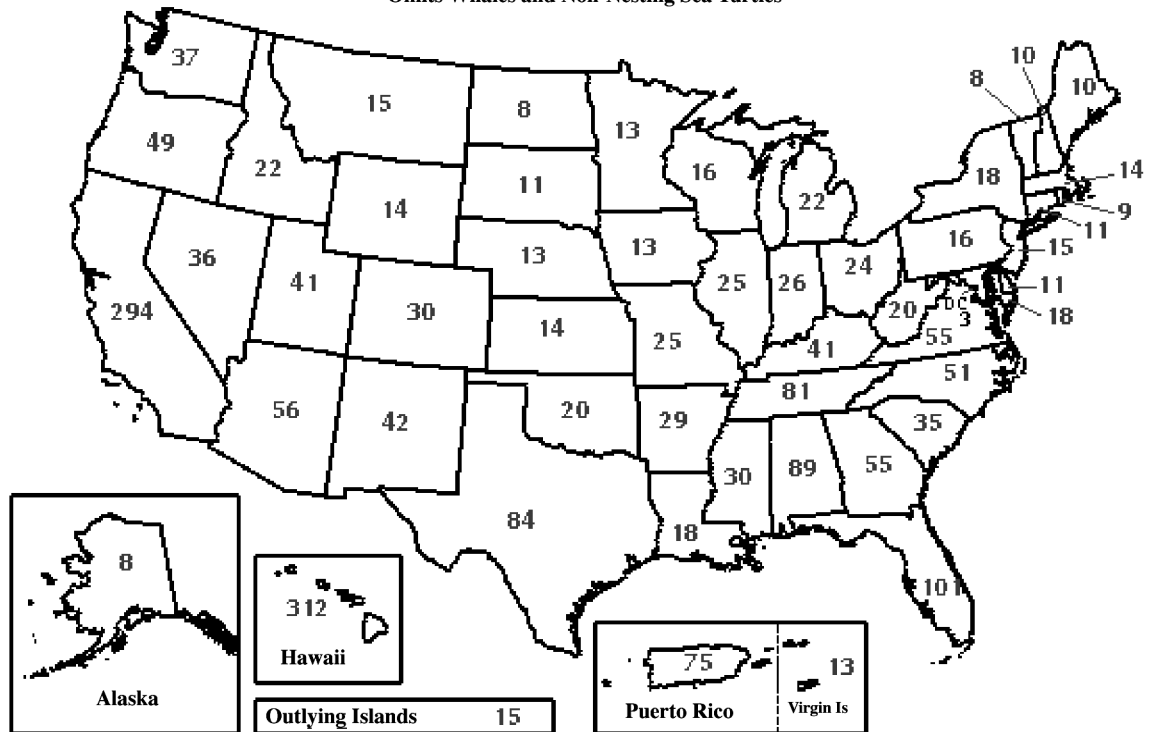
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USFWS's "distinct population segment" policy for defining listed populations to steelhead (*Oncorhynchus mykiss*) in order to address issues regarding resident *O. mykiss*, or rainbow trout. 70 Fed. Reg. 67,130 (Nov. 4, 2005). See Brief, this TWR, for additional information.

The hatchery policy is now the subject of a lawsuit filed by fishing and environmental groups claiming violations of the National Environmental Policy Act, Administrative Procedure Act and ESA. See TWR #1, #3, #4, #12, and #17.

ESA Listed Species by State/Territory as of 12/1/2005
Omits Whales and Non-Nesting Sea Turtles



Total US Species is 1272. Numbers are not additive, a species often occurs in multiple states

Critical Habitat Designated for Bull Trout, Salmon, and Steelhead

On September 26, 2005, the US Fish and Wildlife Service (USFWS) issued a new final rule designating critical habitat for bull trout throughout the coterminous United States. 70 Fed. Reg. 56,212 (Sept. 26, 2005). The designation comes after years of litigation over listing bull trout populations and designating their critical habitat, which culminated in USFWS's designation of critical habitat for bull trout in October 2004. USFWS was again sued, however, by environmental groups asserting that the agency had failed to provide notice and an opportunity for public comment on areas that had been proposed for designation but excluded in the final rule. To address this defect, USFWS provided notice of a renewed public comment period and issued the new final rule in September 2005. In the rule, USFWS clarified that it was making no exclusions for economic purposes. The new final rule did exclude certain military and tribal lands, all lands that are not occupied by bull trout (finding that those lands are not essential to the species' conservation), some areas that are the subject of habitat conservation plans (HCPs), areas within the Federal Columbia River Power System, and all reservoirs and pools behind dams where the primary purpose is energy production, flood control or water supply for human consumption. The rule added back some of the original areas that had been excluded from the October 2004 designation. Litigation continues over whether the economic analysis was sufficient. See TWR #14 and #20.

Similarly, on September 2, 2005, NOAA Fisheries issued new final rules designating critical habitat for 19 Pacific salmon and steelhead ESUs. 70 Fed. Reg. 52,630 (Sept. 2, 2005) (designating critical habitat for 12 ESUs in Washington, Oregon and Idaho); 70 Fed. Reg. 52,488 (Sept. 2, 2005) (designating critical habitat for 7 ESUs in California). The designation followed the agency's withdrawal in 2002 of critical habitat for most listed salmon pursuant to a consent decree issued by the US District Court for the District of Columbia. *National Association of Homebuilders v. Evans*, 2002 WL 1205743 (D.D.C.).

ESA**Economic
Impacts**

Issuing new critical habitat rules allowed NOAA Fisheries to consider the economic impact of its critical habitat designations consistent with a Tenth Circuit Court of Appeals decision against USFWS for failure to properly conduct an economic analysis on its designation of critical habitat for the southwestern willow flycatcher. *New Mexico Cattlegrowers' Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). The final designation excludes certain military and tribal lands, some areas where HCPs are located and where there is evidence that an exclusion would benefit the HCP holder, and 2058 stream miles where conservation benefits would be low compared to the economic impact of designation.

ONGOING LITIGATION AND JUDICIAL OPINIONS***Washington Toxics Coalition v. EPA*****Pesticides**

On June 29, 2005, the Ninth Circuit Court of Appeals held that the Environmental Protection Agency (EPA) has a duty to consult under Section 7 of the ESA before registering a pesticide under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024 (9th Cir. 2005). The court found that FIFRA and the ESA have different but complementary purposes, and as such FIFRA's requirements do not overcome EPA's independent obligation to consider threatened and endangered species. The court was particularly swayed by the fact that EPA has ongoing discretion to register pesticides and alter or cancel registrations, and that it has discretion in registering pesticides to "inure to the benefit" of listed species. See TWR #4, #5, #6, #11, #12, #17, #20 and #21.

Defenders of Wildlife v. EPA**NPDES Program
(Arizona)**

On August 22, 2005, the Ninth Circuit Court of Appeals held that EPA erred in relying on a USFWS biological opinion premised on the proposition that the EPA lacked authority to consider effects to threatened and endangered species and their critical habitat when transferring the Clean Water Act's National Pollution Discharge Elimination System (NPDES) permitting program to the State of Arizona. *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005). The court found that EPA relied on legally contradictory positions regarding its Section 7 obligations, namely that it had to consult regarding the transfer but in doing so could not take into account impacts to listed species. In addition, the court found that EPA did have the ability to consider impacts to listed species under the authority given it by the ESA itself, which the court found created "an obligation [toward listed species]

ESA Candidate Species Range by State/Territory as of 12/1/05
Distributions Reflect Known Historic Range



Total US Candidate Species is 283. Numbers are not additive, a species often occurs in multiple states.

ESA	<p>in addition to those created by the agencies' own governing statute." For those reasons, the Ninth Circuit held that EPA should have considered the effects to listed species from its NPDES program transfer decision, and that its decision otherwise was arbitrary and capricious. In doing so, the court recognized that its decision conflicts with decisions in the Fifth and D.C. circuits.</p> <p style="text-align: center;"><i>In re Operation of Missouri River System Litigation</i></p> <p>On August 16, 2005, the Eighth Circuit Court of Appeals held that the US Army Corps of Engineers (Corps) is required to consult under Section 7 of the ESA regarding management of its dam and reservoir system on the Missouri River pursuant to the Flood Control Act of 1944 (FCA). <i>In re Operation of the Missouri River System Litigation</i>, 421 F.3d 618 (8th Cir. 2005). The court reasoned that the FCA "does not mandate a particular level of river flow or length of navigation season, but rather allows the Corps to decide how best to support the primary interest of navigation in balance with other interests." Thus, the Corps can comply with conditions for threatened and endangered species while continuing to operate Missouri River dams consistent with the purposes of the FCA. See TWR #4, #5 and #6.</p> <p style="text-align: center;"><i>Texas Independent Producers and Royalty Owners Association v. EPA</i></p> <p>On August 26, 2005, the Seventh Circuit Court of Appeals, among other claims, considered the question of whether EPA violated Section 7 of the ESA by failing to consult upon receipt of a notice of intent seeking coverage under the general permit for stormwater discharges associated with construction activities. EPA had conducted informal consultation with USFWS under Section 7 when it issued the general permit. The court held that Section 7 is not triggered by the notice of intent because coverage under the general permit takes effect without EPA action. <i>Texas Independent Producers and Royalty Owners Association, et al v. Environmental Protection Agency</i>, 410 F.3d 964 (7th Cir. 2005).</p> <p style="text-align: center;">Federal Columbia River Power System Litigation</p> <p>2005 saw a series of decisions in the Federal Columbia River Power System (FCRPS) litigation. In 2000, NOAA Fisheries issued a biological opinion (2000 BiOp) in which it concluded that the action proposed by the Corps, US Bureau of Reclamation and Bonneville Power Administration (collectively, the Action Agencies) for the operation of the FCRPS would jeopardize listed salmon and steelhead. As part of the 2000 BiOp, NOAA Fisheries identified a reasonable and prudent alternative (RPA) that included a suite of 199 RPA actions required to avoid jeopardy. The RPA included the spill of water over the dams versus running the water through the hydroelectric turbines to generate power. The Action Agencies subsequently decided to implement the recommended RPA through their respective records of decision. Environmental and sport fishing organizations sued, and in May 2003, Oregon District Court Judge Redden held that NOAA Fisheries' 2000 BiOp relied on future activities that were not reasonably certain to occur in reaching a "no jeopardy" conclusion for the RPA. Judge Redden remanded the 2000 BiOp to NOAA Fisheries to cure these deficiencies, but did not set aside the 2000 BiOp. Instead, Judge Redden allowed the 2000 BiOp — and the RPA it required — to remain in place as deficiencies were addressed on remand.</p> <p>In 2004, NOAA Fisheries issued a new biological opinion (2004 BiOp) in response to Judge Redden's remand order. Instead of resolving the litigation, however, the 2004 BiOp expanded the scope of litigation and broadened the parties and issues involved in the dispute. In particular, the 2004 BiOp re-characterized the proposed action as the RPA from the 2000 BiOp, used a newly created reference operations scenario for purposes of comparison to the FCRPS action (the reference operations scenario consisting of the most that could be done within the action agencies' discretion to benefit salmon and steelhead). Most significantly, the 2004 BiOp included the dams as part of the environmental baseline so as to limit the effects analysis to an examination of the effects of <i>future</i> dam operations.</p> <p style="text-align: center;">Decision on 2004 BiOp</p> <p>On May 26, 2005, Judge Redden invalidated the 2004 BiOp on several principal issues. <i>National Wildlife Federation v. National Marine Fisheries Service</i>, 2005 WL 1278878 (D. Or.). First, he agreed with plaintiffs that NOAA Fisheries had improperly segregated and excluded from consideration ongoing effects from existing dams; NOAA Fisheries cannot restrict its jeopardy analysis by segregating non-discretionary actions (including the fact that the dams exist) into the environmental baseline.</p> <p>Second, citing the 2004 Ninth Circuit decision in <i>Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service</i>, 378 F.3d 1059, 1063 (9th Cir. 2004) (<i>Gifford Pinchot</i>), Judge Redden found that NOAA Fisheries' critical habitat analysis did not adequately consider how effects to critical habitat might impact the species' prospects for recovery. According to NOAA Fisheries' and USFWS's joint consultation regulations, an action "destroys or adversely modifies" critical habitat in an unacceptable manner if it "appreciably diminishes the value of critical habitat for <i>both</i> the survival <i>and</i> recovery of a listed species." The <i>Gifford Pinchot</i> court invalidated this regulatory definition of adverse modification on the basis that the conjunctive "and" fails to give full meaning to the recovery component of the critical habitat</p>
Missouri River Navigation	
Stormwater	
Columbia Hydropower	
"No Jeopardy" Analysis	
Environmental Baseline	
Ongoing Effects	
"Recovery"	

ESA	analysis since it would require both values to be diminished in order to be found unacceptable. Instead, the court concluded that the critical habitat analysis must consider the two different but complementary goals of survival and recovery. Judge Redden's decision followed that holding.
"Jeopardy Definition"	Third, Judge Redden extended the <i>Gifford Pinchot</i> reasoning to a consultation's jeopardy analysis. The 2004 BiOp focused exclusively on the extent to which the proposed action, when compared to the reference operations scenario, will reduce the reproduction, numbers, or distribution of listed species, and thus appreciably reduce the survival of the species. The 2004 BiOp did not consider whether the proposed action appreciably reduces the likelihood of species recovery. Judge Redden objected to this omission, and, following the reasoning of <i>Gifford Pinchot</i> , invalidated the joint consultation regulations' definition of "jeopardy" as resulting from an action that "reduce[s] appreciably the likelihood of <i>both</i> the survival <i>and</i> recovery" of the listed species. In a biological opinion's jeopardy analysis, Judge Redden explained, "recovery must be separately considered. The likelihood that recovery and survival will occur is reduced when the likelihood of either is reduced." See TWR #16 for further analysis of the decision.
Injunction Granted	<p style="text-align: center;">Spill Order</p> <p>On June 10, 2005, Judge Redden heard oral argument regarding plaintiffs' request for a preliminary or permanent injunction. Judge Redden ruled from the bench, directing the Corps and the Bureau of Reclamation (Reclamation) to spill water in excess of that required for station service at four dams on the Snake River and one dam on the Columbia River during the summer months of 2005. Judge Redden denied plaintiffs' further request that the Corps and Reclamation be ordered to operate dams to decrease water particle travel time by 10 percent. He did not vacate the 2004 BiOp and did not enter a remand order at that time. Instead, he asked the parties to collaborate on specific measures that should be included in a remand order. <i>National Wildlife Federation v. National Marine Fisheries Service</i>, 2005 WL 1398223 (D. Or.).</p>
Spill Order Upheld	The government filed an expedited appeal and request to stay the preliminary injunction in the Ninth Circuit Court of Appeals. The Ninth Circuit denied the stay and ultimately upheld Judge Redden's preliminary injunction order, finding that Judge Redden "had a more than sufficient basis upon which to conclude that summer spills would provide the best and safest alternative to the planned operations contemplated in the 2004 BiOp that was rejected by the court." <i>National Wildlife Federation v. National Marine Fisheries Service</i> , 422 F.3d 782, 797-98 (9th Cir. 2005).
Interlocutory Appeal	<p style="text-align: center;">Remand and Final Order</p> <p>On October 7, 2005, Judge Redden issued an order remanding the 2004 BiOp to NOAA Fisheries and directing NOAA Fisheries to issue a new biological opinion by May 26, 2006 correcting the deficiencies identified in his May 26 summary judgment order. <i>National Wildlife Federation v. National Marine Fisheries Service</i>, 2005 WL 2488447 (D. Or.). Judge Redden has since entered an amended final judgment order allowing immediate appeal of claims that NOAA Fisheries violated the ESA and Administrative Procedure Act in preparing the 2004 BiOp. The federal government is expected to appeal that decision.</p>
Klamath BiOp	<p style="text-align: center;"><i>Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation</i></p> <p>On October 18, 2005, the Ninth Circuit Court of Appeals rejected NOAA Fisheries' 2002 biological opinion (2002 BiOp) on the federal government's plan for operating hydroelectric dams on the Klamath River. <i>Pacific Coast Federation of Fishermen's Associations et al. v. United States Bureau of Reclamation, et al.</i>, 426 F.3d 1082 (9th Cir. 2005). A coalition of environmental and fishing interests had sued Reclamation and NOAA Fisheries under the ESA alleging that the agencies' plan for operating the Klamath Basin Project to protect the Southern Oregon/Northern California Coast coho salmon was arbitrary and capricious.</p>
Reclamation Responsibility	The plan itself was the result of a prior "jeopardy" biological opinion that included the plan as a "reasonable and prudent alternative" to originally proposed operations. The ten-year plan was divided into Phases I through III, with the first two phases designed to enable Reclamation to gradually develop resources in a water bank, begin an intergovernmental task force, and conduct scientific studies which, over time, would enable Reclamation to get 100,000 acre feet of water into the water bank and eventually provide 100 percent of needed flows for coho salmon. During Phases I and II, which covered the first eight years of the plan, Reclamation was required to provide at most 57 percent of the flow that NOAA Fisheries determined coho needed. Plaintiffs' primary contention was that the 2002 BiOp failed to analyze how the first two phases would avoid jeopardy to listed coho salmon. The Ninth Circuit sided with plaintiffs, holding that the 2002 BiOp was arbitrary and capricious because it did not adequately analyze whether the first eight years of the plan would avoid jeopardy to coho salmon. See TWR #11 for background on the science and policy debates in the Klamath Basin and TWR #21 regarding the 9th Circuit decision.

LEGISLATION: ESA REAUTHORIZATION

ESA

Pombo Bill

On September 29, 2005, the House passed the Threatened and Endangered Species Recovery Act, H.R. 3824, known as the “Pombo Bill,” to amend and reauthorize the ESA. The Bill passed the House by a vote of 229-193. It is expected to face significant challenges in the Senate.

While it is impossible to predict the likelihood that any or all of the provisions contained in the Pombo bill will survive in the Senate, at the same time, the Pombo bill provides good insight into several of the more controversial provisions of the ESA. Whether or not the ESA is ultimately amended and reauthorized in this session of Congress, the issues addressed in the Pombo bill are likely to continue to generate debate.

Revision
Proposals

AMONG OTHER THINGS, THE POMBO BILL SEEKS TO:

- Consolidate all ESA authority under the Department of the Interior
- Repeal the critical habitat requirement
- Provide new incentive and grant programs for private landowners
- Make practical changes to the federal Section 7 consultation process
- Codify the existing regulatory “No Surprises” policy for HCP permit holders
- Require the federal government to issue written determinations where an activity is not expected to “take” listed species.

These and other significant provisions of the Bill are summarized below.

Consolidation of Authority

The Bill would transfer all of the Secretary of Commerce’s duties, responsibilities and resources under the ESA to the Secretary of the Interior. This would end the role of the NOAA Fisheries in administration of the ESA for marine species, including salmon. This transfer would not affect any previous determinations or actions by the Secretary of Commerce, except that they would be treated as determinations and actions of the Secretary of the Interior. The Bill would give the President one year to make this transfer. The Secretaries of Commerce and the Interior would be required to jointly prepare detailed descriptions of the process by which a transfer of functions would occur.

Critical Habitat

The Bill would repeal all critical habitat requirements, including the requirement that the Secretary designate critical habitat and all subsequent Section 7 consultation obligations associated with affects to that habitat. A repeal would primarily affect proponents of activities in areas where critical habitat has been designated but where no listed species occur, because those activities would no longer be subject to the Section 7 consultation requirement. Activities that are no longer within a critical habitat area but affect listed species would still undergo consultation, and such consultations would still consider the extent to which any habitat modifications affect listed species.

Incentives, Grants and Reimbursements

Some of the more controversial aspects of the Bill are its incentive, grant and reimbursement programs.

SPECIFICALLY, THE BILL WOULD ALLOW THE SECRETARY OF THE INTERIOR TO:

- Enter into agreements with private landowners for periods of up to 30 years pursuant to which the Secretary would make annual payments or provide other compensation for implementation of species conservation measures on private lands, with the agreements acting as permits that insulate landowners from take liability
- Provide conservation grants to landowners to promote voluntary conservation measures and to alleviate the burden of measures imposed on private property pursuant to the ESA, including paying fair market value to compensate for the forgone use of property
- Reimburse owners of livestock for livestock losses due to reintroduced species.

Section 7 Consultation

IN ADDITION TO AFFECTING SECTION 7 CONSULTATIONS BY REPEALING CRITICAL HABITAT, THE BILL WOULD:

- Allow the Secretary of the Interior to develop alternative consultation regulations for categories of activities
- Clarify that, for purposes of consultation, the “baseline” to which a proposed action is compared includes all effects that have occurred or are occurring
- Require that the US Fish and Wildlife Service (USFWS) provide the action agency and any applicant with a draft biological opinion and consider their comments and, for a “jeopardy” biological opinion, require the Service to cooperate with the action agency and applicant in developing “reasonable and prudent alternatives” to jeopardy

Departmental
AuthorityCritical Habitat
Repeal

Compensation

Grants

Livestock Losses

“Baseline”

BiOp Comments

“RPAs”

**ESA
"Take"****"God Squad"****Disasters****HCPs****"No Surprises"****"No-Take"
Letters****Recovery
Deadlines**

- Provide that terms and conditions in a biological opinion's incidental take statement be "roughly proportional" to the impact of the incidental take, and further limit terms and conditions to those that are capable of successful implementation and are, to the greatest extent possible, consistent with the action agency or applicant's objectives;
- Eliminate the rarely used Endangered Species Committee or "God Squad" exemption process, pursuant to which certain activities may move forward despite their jeopardizing effects
- Allow the President to exempt projects from Section 7 consultation requirements as necessary during national disasters.

Habitat Conservation Planning

The Bill would codify the existing regulatory "No Surprises" assurances given to landowners who have developed habitat conservation plans (HCPs). In particular, these assurances provide that no additional commitments will be required to protect covered species affected by activities on covered lands. The federal government's No Surprises policy has been the subject of ongoing litigation. By codifying the policy, the Bill would likely put the No Surprises controversy to rest, allowing the Service to grant such assurances as appropriate. In addition, the Bill would clarify that revocation of an HCP permit is only appropriate when the Service determines that continuing the permitted activity will jeopardize listed species.

"No Take" Letters

The Bill would require the Secretary of the Interior, upon request, to make a written determination that an action will or will not violate the take prohibition of Section 9. Commonly referred to as a "no take" letter, such determinations can be very helpful to those without impacts to listed species, but the federal government has issued such letters on an infrequent, case-by-case basis. The Bill would require the Secretary of the Interior to issue such letters within 180 days of any request. If the Secretary fails to make a determination, the activity would be deemed to cause no take. Any action taken in reliance on a no take determination would not be subject to the Section 9 take prohibition.

Recovery Planning

The Bill would institute deadlines for recovery planning efforts. Specifically, for all future listings, the Bill would require the Service to develop a recovery plan within two years of a species listing. For species that are already listed but lack a recovery plan or for species with recovery plans that warrant revision, the Bill would give the Service 10 years to complete those plans on a priority basis.

FOR ADDITIONAL INFORMATION:

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Her prior legal experience includes: Attorney, National Oceanic and Atmospheric Administration, Office of the General Counsel, Southwest Regional Office (1998-2000); law clerk, National Oceanic and Atmospheric Administration, Office of the General Counsel, Headquarters (1996); law clerk, United States Attorney's Office, Seattle (1995).

Ms. Oram is Chair of the ABA Endangered Species Committee; Vice-Chair, ABA Hydropower Committee; a past participant in the Interagency Task Force to Improve Hydroelectric Licensing Process (1999-2000); and a member of both the National Hydropower Association and the Northwest Hydroelectric Association.

Klamath Decisions

KLAMATH DECISIONS

COURT RULINGS ON “TAKINGS” AND BIOP/RPA SUFFICIENCY
by Richard M. Glick, Davis Wright Tremaine LLP (Portland, OR)

Editors' Note: The following article has been adapted from materials first presented by Mr. Glick at the 14th Annual Oregon Water Law Conference (Portland, Oregon, November 3, 2005).

“Takings”

BiOp / RPAs

Two recent decisions handed down by federal courts have once again dashed the hopes of Klamath Basin irrigators and cheered their opponents. Both cases addressed the collision between the federal Endangered Species Act (ESA) (16 USC § 1531 et seq.) and water rights, but from different vantage points. In *Klamath Irrigation Dist. v. United States*, ___ Fed. Cl. ___, No. 01-591 L, (2005) the Court of Federal Claims held that denial of water deliveries to Klamath Project customers during the summer of 2001 in favor of listed species' needs did not constitute a “taking” under the Fifth Amendment. In a separate case, the Ninth Circuit held that the “reasonable and prudent alternatives” (RPAs) adopted under the 2002 biological opinion (BiOp), designed to allow continued water deliveries while safeguarding fish, is arbitrary and capricious. *Pacific Coast Federation of Fishermen's Assn. v. United States*, ___ F. 3d ___, No. 03-16718, (9th Cir. 2005).

This article briefly summarizes these two cases arising out of the troubled Klamath Basin. Both provide additional evidence, if any is needed, that the ESA is king in the battle over water use.

Klamath Irr. Dist. v. U.S. (Court of Federal Claims)

Court Rulings Conflict

In a 52-page opinion, the court held that stopping water deliveries in accordance with jeopardy opinions issued by the US Fish and Wildlife Service (FWS) and National Marine Fisheries Service (now NOAA Fisheries) did not result in a taking that requires just compensation. Judge Allegra made a lengthy and careful analysis of the Klamath Project contracts and takings jurisprudence, and came to the opposite conclusion of the same court, different judge, just a few years earlier in *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001). (see Marzulla, TWR #21) Judge Allegra did not so much distinguish the current case from *Tulare* as eviscerate the reasoning of the prior case.

Background

The case arises out of the April 5, 2001 BiOp issued by FWS that the US Bureau of Reclamation's (Reclamation's) proposed 2001 Operating Plan for the Klamath Project jeopardized endangered shortnose and Lost River sucker fish. The next day, NOAA Fisheries came to the same conclusion with regard to coho salmon. The BiOps recommended RPAs consisting of termination of water deliveries in 2001. Two of the affected irrigation districts immediately filed a breach of contract action in US District Court seeking a preliminary injunction. The District Court denied the districts' motion, and they then voluntarily dismissed their case. In October 2001, the irrigators filed the takings case.

Protectible Property Interest

The claim alleged that cessation of water deliveries deprived the districts and their members of their water rights under contract with Reclamation, and which were affirmed by the Klamath Basin Compact. The court rejected both these arguments, concluding that the plaintiffs lacked a protectible property interest in Klamath Basin waters under federal or state law. The court first rejected plaintiffs' assertion that the Reclamation Act creates a federal property right in the use of water on appurtenant lands, citing a long line of cases holding that the Reclamation Act is subject to state water law in the allocation of interests in reclamation waters:

Federal Authority

In the last analysis, to rule in plaintiffs' favor on this issue, this court would not only have to defenestrate [i.e. “throw out the window”—Editor] this authority. . .but also be prepared to flip the statute onto its head, treating the majority of the language therein not as the embodiment of an important principle of cooperative Federalism, but rather as an empty formalism. While plaintiffs may cling to such a *res ficta* [i.e. matter of fiction—Editor], it remains that Congress enacted no such fantasy.

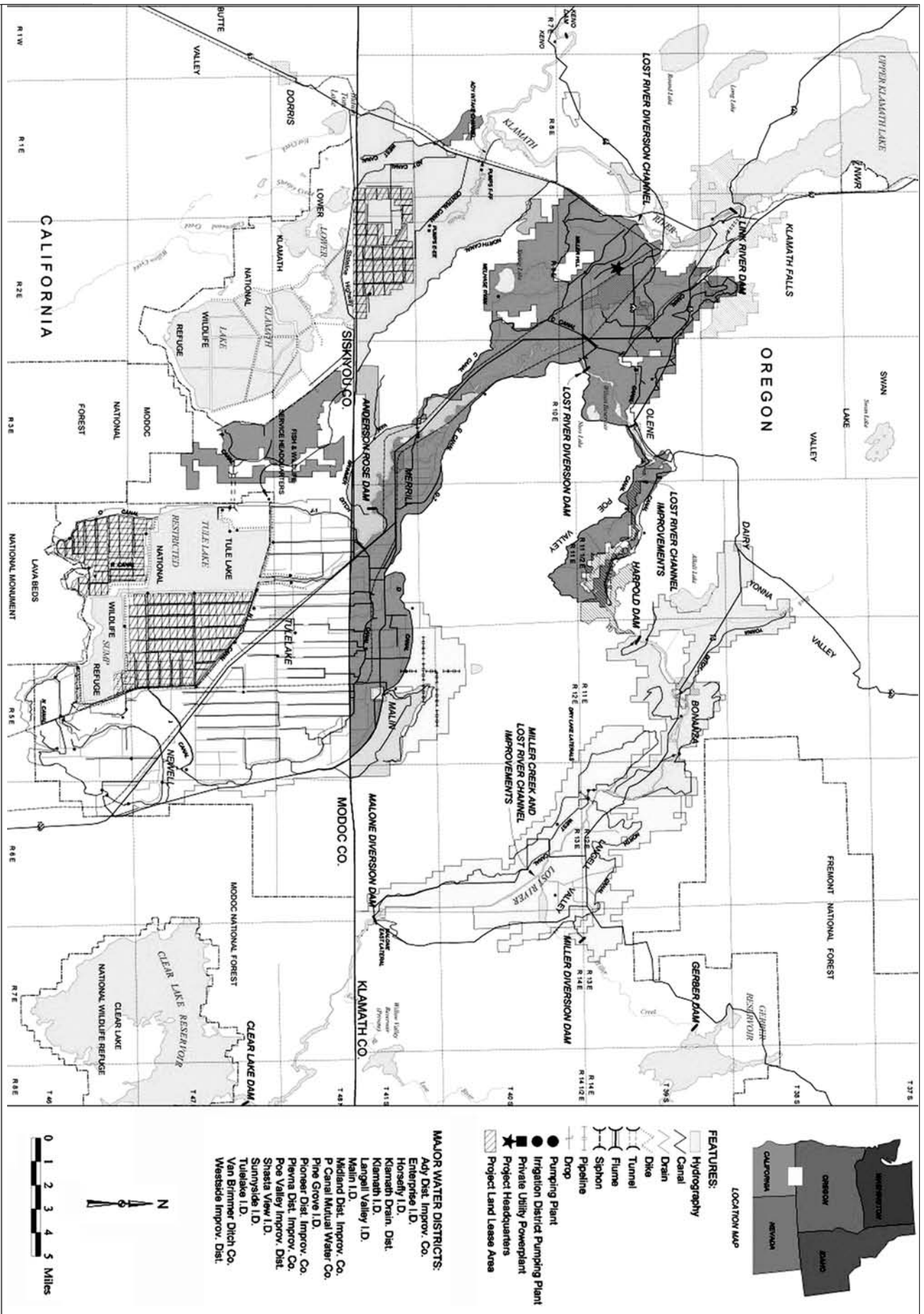
Klamath Irr. Dist., Slip Op. at 24.

State Water Law

Then the court examined state water law and found no basis for a property interest there either. The court concluded that through enabling state legislation, Reclamation had claimed water rights to all of the unappropriated water rights in the Klamath Basin in 1905. *Id.* at 28. The parties agreed that any pre-1905 rights were acquired by Reclamation soon thereafter, but the plaintiffs asserted a beneficial interest in these water rights that are reflected in the post-1905 contracts with Reclamation.

The court next turned to the property interests that might reside in the 250 or so of these contracts, many of which are still being administered by Reclamation today. Most of these contracts over time were

KLAMATH PROJECT: OREGON-CALIFORNIA



Klamath Decisions

Context

supplanted by contracts between Reclamation and the irrigation districts. They typically include language absolving the United States from liability for failure to supply water due to “drought or other causes.” Although a takings claim may sometimes be brought in a contractual context, the court refused to entertain one here:

Both of the rationales favoring the use of contractual remedies over takings remedies apply here—that is, the United States may be viewed as acting in its proprietary capacity in entering into the water contracts in question, and it appears that the affected plaintiffs retain the full range of remedies with which to vindicate their contract rights.

Id. at 37.

Irrigators & Districts

The same conclusion applies equally to the districts as to individual irrigators. The former because they are in direct contractual privity (mutual interest) with Reclamation, and the latter as third-party beneficiaries. The irrigators have no superior constitutional property interest to the districts:

Simply put, plaintiffs could not obtain an interest from the districts better than what the districts themselves possessed or once possessed—“*nemo dat qui non habet*,” the venerable maxim provides, “one who does not have cannot give.”

Id. at 41.

Contract Breach

“Plain Language”

The court acknowledges that the question of whether Reclamation breached its contracts with the districts is not at issue in this case, but offers several “observations” just the same. First, whatever beneficial interest the plaintiffs have is not an absolute right limited only by appurtenancy and beneficial use: the “plain language” of the contracts releases the United States from liability from water shortages of any kind. The court continues: “Notably, various courts have construed similar water shortage clauses as protecting the United States from damages based upon the enforcement of the ESA (citing *O’Neill v. U. S.*, 50 F.3d 577 (9th Cir. 1995)).” *Id.* at 42.

Second, even in contracts that do not contain this release language, the court suggests that halting water deliveries in the name of the ESA did not result in a breach under the “sovereign acts doctrine.” This doctrine holds that contracts with the Government are subject to the sovereign’s right to govern, either through executive or legislative action. If the impact to a contract of a governmental act is incidental to a larger governmental objective, the act will be found “sovereign.” The court notes:

If the contract rights possessed by the district were subject to the sovereign acts doctrine, and the ESA were viewed as a sovereign act under that doctrine, then the ESA could not effectuate a taking here, as it did not take a right that the district possessed (*i.e.*, the right to water as against the enforcement of the ESA).

Id. at 45, n. 58.

Sovereign Acts Doctrine

Tulare Rejected

The judge dismissed as persuasive precedent the recent decision of the same court in *Tulare*. On roughly the same facts, the earlier court ruled that a taking had occurred. Judge Allegra was emphatically unimpressed with the reasoning of that court: “But, with all due respect, *Tulare* appears to be wrong on some counts, incomplete in others and, distinguishable, at all events.” *Id.* at 45. The *Tulare* court assumed the districts’ contract rights to water to be absolute, without considering whether they are limited by their terms or by state law. That court failed to examine the contracts, nor did it consider whether the plaintiffs’ water use violated state doctrines for the protection of fish and wildlife. Since the state courts had not ruled, the *Tulare* court refused to rule. Thus, the underlying property interests under the contracts at issue were never examined and yet a taking was found. Finally, the *Tulare* court never reached the issue of whether the violation of contract rights should be seen as a breach, as opposed to a taking, and so never considered the sovereign acts and related doctrines.

Klamath Compact

The court makes similarly short work of plaintiffs’ claims based on patent deeds and state permits, which the court notes are junior in priority to Reclamation’s Klamath rights. Under the doctrine of Prior Appropriation, the junior appropriators have nothing to say about disposition of the federal water rights. For the same reason, the Klamath Basin Compact’s provisions recognizing vested rights in the basin do not help plaintiffs, as the Compact provides that its terms do not impair the rights of the United States. *Id.* at 47.

In summary, the court finds no basis for a taking claim based on the Klamath Project contracts or otherwise. The court concludes:

Klamath Decisions

Contract Claims

Like it or not, water rights, though undeniably precious, are subject to the same rules that govern all forms of property—they enjoy no elevated or more protected status. In the case *sub judice* [i.e. before the court—Editor], those rights, such as they exist, take the form of contract claims and will be resolved as such.

Id. at 48.

See also Marzula, TWR #21 and Briefs, TWR #19

Pacific Coast v. U.S. (9th Circuit)

Klamath BiOps

Science Review

Hoping to avert a repeat of the disastrous 2001 irrigation season, the National Research Council (NRC) was asked by the Department of the Interior to independently review the science underlying the government's BiOps that resulted in terminating water deliveries. The NRC concluded that there was insufficient information to support the contention that flows beyond historical levels would benefit coho, and questioned the validity of the 2001 BiOp. NOAA Fisheries did not adopt NRC's conclusions in full.

Minimum Flow

At about the same time, Phase II of the so-called Hardy Report was released in draft form [see Hardy & Vogel, TWR #11]. That report's recommended flow requirements differed from NRC's, and concluded that a minimum flow of 1,000 cubic feet per second (cfs) during the late summer is necessary to ensure low enough temperatures to avoid harm to coho. Against this backdrop, Reclamation proposed a ten-year plan in which flow regimes would be based on the type of water year, wet or dry. The flows would be based on minimum flows that prevailed during the previous ten years for that type of year. Water in excess of flow targets would be available for appropriation. The plan also featured a 100,000 acre-feet water bank to ensure flow targets would be met.

Responsibility Premise

Following ESA § 7 consultations, NOAA Fisheries issued a jeopardy opinion. The agency was concerned that using minimum flows over a ten-year period as the target for monthly flows would lead to lower average flows. Reduced flows would mean reduction of rearing habitat and would make downstream and return migration more difficult. NOAA Fisheries then issued a proposed "reasonable and prudent alternatives" document (RPA). This RPA became the subject of this litigation. The RPA covers operations from 2002-2012 and is premised on the principle that Reclamation should bear responsibility only for flow reductions caused by the Klamath Project. The RPA allocated 57% of responsibility to Reclamation as the Klamath Project irrigates 57% of the Basin. The source of the remaining 43% of flows would be developed by an interagency work group. The RPA included a water bank from which Reclamation would meet its obligation.

RPA Phases

The RPA is in three phases. Phase I, from 2002-2005, directs Reclamation to set up the water bank, work out the intergovernmental agreement and conduct studies. Interim flows were to be as provided in Reclamation's biological assessment (BA) and augmented in spring and summer as necessary through the water bank. During Phase II, from 2006-2010, Reclamation would increase water bank capacity to 100,000 acre feet and deliver its 57% allocation or the BA flows, whichever is greater. Phase III, from 2010-2011, called for flows at 100% of estimated coho needs through a combination of the 57% Reclamation share and the remainder from an unspecified source to be identified by the interagency group. NOAA Fisheries determined that during the RPA period, coho could survive a 20% reduction in habitat and calculated minimum flows accordingly. In the summer months, a minimum flow of 1,000 cfs was established.

Trial Court

Plaintiffs challenged the RPA as being arbitrary and capricious. They argued that Phase I flows were at the same level as those proposed in the BA and which NOAA Fisheries had rejected as inadequate, and Phase II flows were only at 57% of necessary flows. The trial court rejected this argument, reasoning that NOAA Fisheries had "implicitly" determined that the coho could survive short-term, sub-optimal flows during the ten-year ramping up period.

"Implicit" Reasoning Rejected

The Court of Appeals disagreed, concluding that implicit reasoning is not sufficient and that NOAA Fisheries needed to articulate its reasons why coho would not be harmed during Phases I and II:

We must determine whether the NMFS's decision to delay the provision of the full quantity of water for eight years is supported by the record before us. We conclude that it is not. The BiOp contains no analysis of the effect on the [Klamath] coho of the first eight years of implementation of the RPA, and thus we cannot sustain the agency's decision.

Pacific Coast Federation, Slip Op. at 14309.

Klamath Decisions

Baseline Analysis

Scope of Impact

The court then proceeded to analyze the BiOp in detail, taking NOAA Fisheries to task for failing to adequately explain how the interim measures would be protective. In its discussion of Phase II of the RPA, the court noted that the District Court accepted the interim allocation of 57% responsibility to Reclamation in Phase II, but struck down the 57% share in Phase III as inadequate. The reason is that the collaborative effort to find the remaining 43% flow was not “reasonably certain to occur.” *Id.* at 14313, n. 5, quoting 50 CFR § 402.02. However, the Court of Appeals took issue with the RPA’s expectation that only Reclamation’s 57% would be assured in Phase II. In what might be dicta, the court announced the following test:

The proper baseline analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts.

Id. at 14313.

This test suggests that the scope of impact for BiOp purposes, and for establishing RPAs, is broader than the proposed federal action that gave rise to the Section 7 consultation in the first place. If so, this case may place the entire burden for addressing basin-wide habitat problems on the party or agency that happens to be going through the consultation process. In other words, if the new proposed action would be the final straw, then its sponsor must pay the price, while early contributors to the problem are left alone. In the context of the 2002 BiOp, the impact of this test is upon Reclamation — and by transference to customers of the Klamath Project — but no one else. Needless to say, the aquatic habitat problems in the Klamath Basin are of many origins and highly complex. Expecting the RPA to guarantee the basin-wide solution could be viewed as both highly impractical and grossly unfair.

Summary

In conclusion, the two cases reviewed here make it clear that Klamath irrigators have few judicial remedies for continued reductions in irrigation water deliveries. The ESA will continue to circumscribe Reclamation’s operational flexibility in favor of preserving listed aquatic species, regardless of contract or water rights. Further, when Reclamation follows the direction of the courts to implement the ESA, there will be no compensation resulting from a taking under the Fifth Amendment. Ultimate resolution of this conflict between Government policies — which on the one hand encourage Klamath Basin agriculture while on the other hand limit irrigation water in favor of fish — lies with Congress.

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Utah Water Conservation

Colorado River Compact

District Responsibility

CENTRAL UTAH WATER CONSERVATION

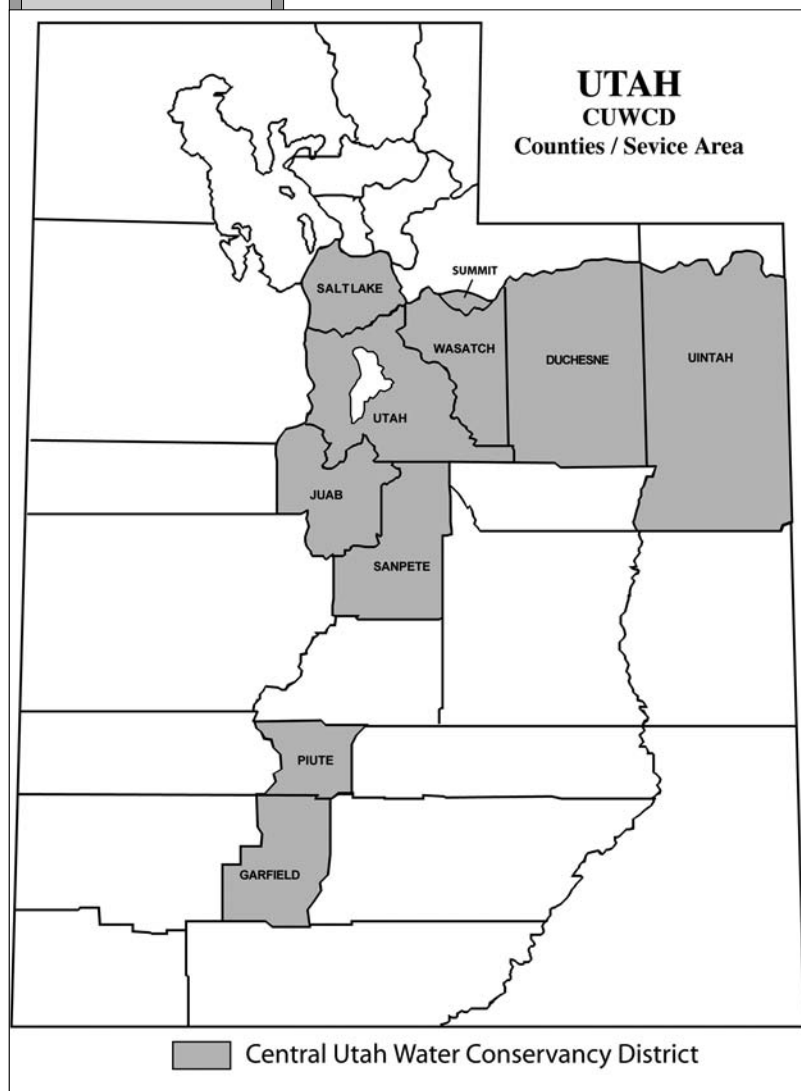
by Nancy Hardman, Central Utah Water Conservancy District

Overview & Background

The Central Utah Water Conservancy District (District) is a political subdivision of the State of Utah. It was formally established in 1964 to act as the local entity to contract with the United States of America in connection with the construction, operation, and financing of the Central Utah Project (CUP). The purpose of the CUP is to enable the State of Utah to beneficially use a substantial portion of its allotted share of the Colorado River water under the Colorado River Compact.

The District sponsors the CUP which includes five specific units. Each unit consists of a series of dams, pipelines, reservoirs, tunnels, and aqueducts designed to assist in meeting the water needs involved counties through approximately the year 2020. The District, primarily a wholesaler of water to other cities and agencies, has the responsibility to: plan, design, construct, operate and maintain project facilities; administer the sale and delivery of project water; and repay the federal government the reimbursable costs of the CUP. Federal law requires that the District levy property taxes to repay the State's obligation. The District has no such requirement of its customers, which pay for their water through sales revenues.

The District is governed by a board of 18 Trustees appointed by the Governor from ten District counties. Salt Lake, Utah, Wasatch, Duchesne, Uintah, Sanpete, and Piute Counties are entirely included within the District; Garfield, Juab, and Summit Counties are partially within its boundaries.



District Mission & Strategies

Since its inception in 1964, the District has fulfilled its conservancy mission with a variety of strategies designed to meet current demands and obligations while making far-reaching plans for future needs. Since 1992, when the Central Utah Project Completion Act (CUPCA) became law, the District has responded to a federal mandate to produce Water Management Improvement Studies, including a Water Pricing Policy Study and the Water Conservation Credit Program.

The ten counties within the District's boundaries range from populous Salt Lake and Utah Counties to the rural Uinta Basin and southern Utah's Piute and Garfield Counties. As a water wholesaler, the District is not in a position to address water conservation in the same way a municipal water purveyor would: in very few instances is the District anyone's sole supplier of water, and threats to raise prices or punish water waste coming from the District would be inappropriate and ineffective. Nevertheless, the District is in the unique position of having funding resources and broad perspective that can assist communities with their very real water conservation challenges.

Studies conducted for the completion of the Central Utah Project have shown conclusively that the growth of Utah's population will outstrip its water supply before 2050. These findings factor in the development of all known raw water sources, but without including Utah's recurring droughts. Only by reducing per capita water consumption by 25% over the intervening years can Utah reasonably expect to have adequate water for its burgeoning population.

Utah Water Conservation

Mandate

Purposes

Cost-Share

Piping Ditches

Urbanization

Future Projects

Conservation Goals

Water Conservation Credit Program

In 1992 as part of CUPCA, Congress took the unprecedented step of establishing a comprehensive water conservation program and in-stream flow obligations for the Bonneville Unit of the CUP. Section 207(b)(5) (CUP Completion Act, 1992) states that *the District shall establish a continuous process for the identification, evaluation, and implementation of water conservation measures*. The Act further clarifies that it is through this process that the District is to achieve its water conservation goal. The process must be applied to proposed conservation measures in order for them to be credited toward achievement of the goal. Meeting these obligations has resulted in the development of a Credit Program.

The Credit Program serves two purposes. The first purpose is to identify, evaluate, and implement water conservation measures so the District can achieve its goal. The second purpose is to allocate \$50 million in targeted funds as well as other unallocated federal funds (Section 202(c)) which may be made available for water conservation projects. This is a cost-share program, with federal funds covering 65% of project costs, matched by 35% local funding mechanisms. While not all conservation measures selected by the District may require federal funds, in order to be “credited” toward achieving the conservation goal, all conservation measures must be processed through the Credit Program (see *Water Conservation Credit Program Annual Report*, Central Utah Water Conservancy District (2004)).

While the CUP was originally conceived as an agricultural program, its mission has evolved with the changing demographics of the District. Projects funded by the Water Conservation Credit Program (WCCP) reflect that evolution. Piping ditches for the introduction of pressurized irrigation systems and the reduction of conveyance losses has resulted in annual water savings of well over 40,000 acre feet. However, recent applications for funding show a more urban character: Riverton City Secondary Water System; Pleasant Grove Pressure Irrigation & Telemetry System; and Provo Kiwanis Park Secondary System are among a dozen or more projects that convert agricultural irrigation water to landscape uses within municipalities. Significant funding has also been granted to a small number of education projects: Jordan Valley Water Conservancy District’s Water Conservation Program (including the building of a major demonstration garden) and the development of a Landscape Education Package are examples. In all, thirty-three projects have been funded to date, with seven projects selected for funding in FY-2006. Future water conservation projects to be developed under Section 207 to reduce the per capita water use within the District’s service area may include: construction of new water-saving delivery and storage facilities; recycling and conjunctive use; and reverse osmosis (see *Final Environmental Impact Statement - Utah Lake Drainage Basin Water Delivery System*, Central Utah Water Conservancy District (2004)).

Through Credit Program cost-sharing projects, the District is today “saving” well over 95,000 acre feet of water annually. The District then directs that saved water from inefficiency and waste over to enhanced stream flows and other beneficial uses.

Central Utah Project Completion Act Construction

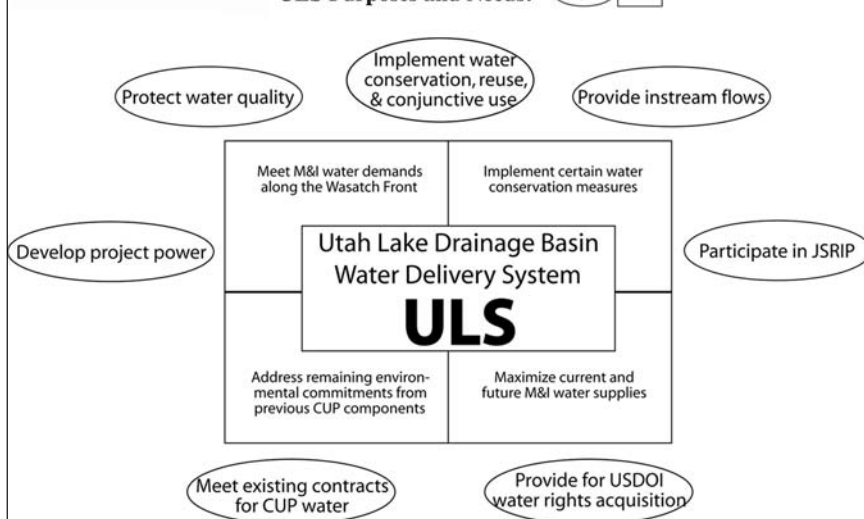
The Utah Governor’s Office has established water conservation goals consisting of a 12.5 percent reduction in per capita water use by 2020 and a 25 percent reduction in per capita water use by 2050, using 2000 water use as a comparison basis. District planning for the Utah Lake Drainage Basin Water Delivery System (Utah Lake System, or “ULS”) now being readied for construction, has included

water conservation as both a purpose and a need, and builds on the State water conservation goals, the CUPCA Credit Program, and the success of other municipalities (see Chart, this page).

The Joint-Lead Agencies for the ULS project (the District, the US Department of the Interior (USDOI), and the Utah Reclamation, Mitigation, and Conservation Commission) have established an average daily ‘Municipal and Industrial’ water usage ranging from 180 to 220 gallons per capita per day to be eligible for Bonneville Unit water. One of the criteria for receiving Bonneville Unit water under the ULS project is that entities requesting water must develop and implement an acceptable water conservation plan. Water petition contracts incorporating water conservation measures with

ULS Purposes and Needs:

Purpose Need



Utah Water Conservation

Contract Requirements

South Utah Valley Municipal Water Association, Jordan Valley Water Conservancy District, and Metropolitan Water District of Salt Lake and Sandy have been negotiated.

Repayment contracts between the District and USDOJ, as well as the water petition contracts listed above include such requirements as: 1) compliance with the State's water conservation goals; 2) annual reports to USDOJ on progress; and 3) surcharges for failure to comply with annual per capita water use reduction (see *Final Environmental Impact Statement - Utah Lake Drainage Basin Water Delivery System*, Central Utah Water Conservancy District (2004)).

Public Outreach

With virtually no retail customers, the District could have little or no direct contact with its service area residents. Sixty percent of those residents are concentrated in the Salt Lake Valley and are served by Salt Lake City Public Utilities. However, Metropolitan Water District of Salt Lake and Sandy, and Jordan Valley Water Conservancy District serve a half-million people scattered throughout the more rural parts of the District. These people do not live in municipalities with the resources to mount aggressive water conservation campaigns. People throughout the District, urban and rural alike, pay the same property taxes to the District, and their water usage is all monitored and counted toward District conservation goals. For these reasons, the District has deemed it appropriate to actively join statewide conservation efforts through the Governor's Water Conservation Team and to provide a variety of materials, services, incentives, and assistance to its citizens — particularly those in less populated areas of the state.

Rural & Urban

"Slow the Flow"

Perhaps the most visible of District conservation activities currently is the "Slow the Flow" Water Check Program. Based on research originally funded through Section 207, Dr. Earl Jackson of Utah State University Extension Service developed a simplified water audit to determine landscape water use. He has trained student helpers to conduct the "water checks" and provide customized watering schedules and numerous handouts. He constantly reviews water use records to determine the water check's effectiveness as a teaching tool.

Water checks were first conducted in Salt Lake Valley in 2000 and were sponsored by Jordan Valley Water Conservancy District. Since that time, the Central Utah Water Conservancy District has contracted with Dr. Jackson directly to provide water checks free of charge to residents outside Salt Lake. By far, the largest number of participants to date have been in Utah County, a formerly agricultural area becoming urbanized with a rapidly growing population (439,359 in 2002). To date, over 3500 residential water checks have been completed in Utah County, along with nearly 200 "large" water checks for schools, businesses, etc.

Water Savings

A comprehensive, multi-year report is currently being prepared, but indications from individual annual reports are that water savings, both in the year of the water check and subsequent years, range from 8% to 25% per year — particularly with large water users. Utah has experienced significant drought during the last five years, and that has certainly affected outdoor water use. The District, along with other members of the Governor's Water Conservation Team, is far from complacent about the positive results so far and will be exploring ways to enhance the program's apparent success.

Workshops

In tandem with the Water Check Program is a series of "Water Use Workshops" targeted toward large water users. Also designed and staffed by USU Extension personnel, the workshops offer classroom instruction, field exercises with catch-cup irrigation measurements, and calculations of precipitation rates and distribution uniformity. A modest registration fee is charged, but the bulk of the cost is borne by sponsors such as the District. Participants leave the five- to six-hour session with a comprehensive workbook, 24 catch-cups, and a soil probe. End-of-class evaluation and subsequent feedback has been uniformly positive.

Technology Grants

In 2002, the District started offering "Water Conservation Technology Grants" to address a need among large water users who seemed hesitant to invest in the latest technology available to reduce water use. The District had itself used soil moisture sensors on its seven-acre site but found schools, municipal parks, and homeowners associations slow to change out-dated or ineffective equipment, primarily because of capital costs. The grants are small — 50% up to \$5,000 — but recipients have been excited to take steps to show off their conservation leadership. To date, soil moisture sensor and weather station systems have been the most frequently funded improvements. One vendor is proudly using the grantee, a condo-development, as his number one example of water savings, claiming water savings of 5,700,000 gallons (close to 17 acre feet) in one season alone. A municipal cemetery is reporting an improvement of 13,852,800 gallons less water use (42.5 acre feet) in one year.

Homeowner Rebates

Starting in the summer of 2004, homeowners were offered rebates on irrigation equipment such as soil moisture sensors, weather station access, pressure regulators, and low precipitation stream spray

Utah Water Conservation

Demonstration Garden Website

Growth Limit

Long-Term Supply

sprinkler nozzles. Response was minimal the first year, but started to improve in 2005, with 38 participants and a total of \$3500 rebated by the District. The total rebate available is \$225 per household and can include fixed amounts for combination control clocks and sensors or weather station access and 50% cost-share for pressure regulators and specialized sprinkler nozzles. Drip irrigation components are being studied for possible inclusion in 2006.

On Site: Water-Wise Landscaping

As the District made dramatic changes to its headquarters site during 2003-2004, plans were begun to develop its expansive turf-covered grounds for a demonstration of more appropriate Utah water-wise landscaping. The removal of the administration building and the concurrent addition to the engineering facility created an open contiguous area of over two and a half acres. The project presented a valuable opportunity to show homeowners and community leaders "how to do it." As a concept plan was developed through 2004, enterprising college interns working for the District proposed a valuable accessory — a "Virtual Demonstration Garden" to assist homeowners with their plant choices and maintenance via the Internet. The website (see: gardens.cuwcd.com) has been popular and useful, but it will grow in size and importance as it is linked to the District's "Education Garden," scheduled for construction during 2006.

The District's location is ideal for encouraging visitors, and facilities to teach and demonstrate water-wise landscaping, appropriate plants, and proper irrigation techniques are included in the Garden plans.

Conclusion

As early as 1972, EPA raised concerns about the lack of incentive among the Wasatch Front communities to implement stronger municipal and industrial water conservation policies and programs. Through various cooperative state-wide, county, and local efforts, steady progress has been made toward correcting that perception and fault, particularly through the 1990s and up to 2005.

As the Central Utah Project nears completion, encouragement of efficient water use has become critical in responding to the competing and conflicting demands for water along Utah's Wasatch Front. Development and growth in Utah will ultimately be limited by water more than any other one resource, and as the owner/steward over a sizeable portion of available water, the District is increasingly required to maintain a fine political balance between purveyor and protector of the state's water.

Author Amy Vickers' observation is particularly apt in this context: "Water Conservation is no longer a standby or temporary source of supply invoked only during times of drought or other emergency water shortage. Conservation is a long-term supply option that has, in some cases, downsized or averted planned water and wastewater system expansions. Conservation can save considerable capital and operating costs, avoid environmental degradation, and build political bridges." (see Amy Vickers, *Handbook of Water Use and Conservation: Homes, Landscapes, Businesses, Industries, Farms* (WaterPlow Press, Amherst, MA, 2001))

As the largest Special District in Utah, Central Utah Water Conservancy District has accepted a leadership role in encouraging the downward trend in water use in the state. The District was given the mandate to manage and develop water resources within its boundaries upon its creation, and interprets that as water conservation in its best sense: the official care, protection, or management of natural resources.

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Nancy Hardman grew up in Utah but lived for about 20 years in the Midwest before "coming home" in 1991. She worked four years for the Environmental Quality Section of Utah's Department of Agriculture as their Nonpoint Source Pollution Program was instituted, and then joined Central Utah Water Conservancy District in 1996 as a technical writer and editor for their NEPA documents. She has served as Conservation Programs Coordinator since 2001. Mrs. Hardman has a B.A. in History and an MPA (Public Administration) from Brigham Young University.

**INSTREAM FLOWS TX
STUDY AUTHORIZED**

On October 28, Texas Governor Perry created an Environmental Flows Advisory Committee by executive order to develop recommendations on instream flows and freshwater inflows for Texas' rivers, lakes, bays, and estuaries. "Water is our most valuable natural resource, and how we manage our river and bay systems during low-flow conditions is of vital importance," Perry said. "The Advisory Committees will fully examine the environmental flows issue to ensure our river and bay systems are vibrant, and regional economies dependent on water resources are protected."

Texas has more than 191,000 river miles flowing through 23 major river basins, 9 major and 21 minor aquifers, 7 major estuaries, several minor estuaries, and 3,300 miles of bay and estuary lagoon shoreline. Section 11.0235 of the Texas Water Code expressly requires the Texas Commission on Environmental Quality (TCEQ), while balancing all other interests, to consider and provide for the freshwater inflows necessary to maintain the viability of the state's bay and estuary systems in the commission's regular granting of permits for the use of state waters.

The Advisory Committee will consist of nine members appointed by the Governor. The chairman of three state agencies – TCEQ, the Texas Water Development Board (TWDB) and the Texas Parks and Wildlife Commission (TPWD) – will be standing members of the advisory committee. The remaining six members will be chosen from among river authorities; municipalities; environmental, agricultural, industrial, and hunting and fishing interests or others with expertise in environmental flows issues; and the public.

It is anticipated that the Advisory Committee will examine between two and four major river and bay systems during its tenure, which should provide a sound basis for legislative recommendations in the 2007 regular session, according to the Governor's

press release. To assist the Advisory Committee, the Committee will appoint a local and regional stakeholder group for each river and bay system selected for consideration by the Committee. The Advisory Committee is also authorized to establish a science advisory council of five members to provide it with technical expertise. The TCEQ, TWDB and TPWD will provide staff support for the Committee.

The Governor's Executive Order referred to another recent study on environmental flows, stating that it "laid important groundwork for establishing a method to integrate the vital issues of economic development and the protection of instream flows and freshwater inflows to bays and estuaries..." The Study Commission on Water for Environmental Flows provided specific recommendations in its December 2004 report.

The Advisory Committee will submit a report with findings and legislative recommendations by December 31, 2006. Unless extended, the executive order establishing the advisory committee will expire on Sept. 1, 2007.

For info: A full copy of the executive order is available at www.governor.state.tx.us.

**HYDROPOWER LICENSES US
EXPEDITED HEARINGS**

As required by the Energy Policy Act of 2005, the Departments of Commerce (NOAA's National Marine Fisheries Service), the Interior (DOI), and Agriculture (USDA) are jointly establishing procedures for a new category of expedited trial-type hearings. The rules mark the first time that the three departments have established joint procedures for dispute resolution regarding hydropower licensing.

The hearings will resolve disputed issues of material fact with respect to conditions or prescriptions that the Departments develop for inclusion in a hydropower license issued by the Federal Energy Regulatory Commission under the Federal Power Act. The three Departments are also establishing procedures for the consideration of alternative conditions and prescriptions

submitted by any party to a license proceeding, as provided in the Energy Power Act. The rules enable hydropower license applicants and other parties to hydropower license proceedings to request trial-type hearings on disputed issues of material fact, such as whether fish were historically present in a river.

In accordance with the Act, the Interim Final Rules announced today provide for expedited hearings before an administrative law judge. The participating parties will be able to present evidence and examine witnesses as in similar administrative proceedings. The rules include details on how to request hearings, materials that are required and time frames.

The Act also allows applicants and other parties to license proceedings to submit alternative conditions or prescriptions for consideration by the respective federal departments, which will accept them unless they make specific findings as to why they cannot. Such alternatives might propose ways to lower costs to utilities and consumers while still protecting critical resources. The Interim Final Rules include details on how and where to submit alternative conditions or prescriptions for consideration. The new processes Congress has enacted are open to license applicants and other parties that may include Indian Tribes, states and other governmental units and non-governmental organizations, such as environmental groups. They apply to any current license proceeding before FERC, i.e., one in which a license has not yet been issued, as well as to all future license proceedings. Both the trial-type hearings and the process for the submittal and consideration of alternative conditions and prescriptions will be completed within the tight timeframe mandated by FERC's licensing rules.

The environmental organization American Rivers was extremely critical of the new interim rules, calling them a serious setback to America's rivers that provide a boon

to industry. The group asserted that the provisions will make it costly and difficult for states, tribes, and the general public to ensure river protection in the dam relicensing process. They are also alarmed that the new rules will create broad opportunities for industry to renegotiate past environmental protection measures and question and weaken future measures. The group also criticized the fact that the rules were established as interim final rules, rather than as proposed rules followed by public comment.

The Interim Final Rules became effective on November 17 so that interested parties could avail themselves of the new hearing right and alternatives process created by the Energy Power Act. The public will have 60 days to review and submit comments on the rules, which could result in changes in a revised Final Rule. Comments may be sent to: NMFS.Hydro@noaa.gov through Jan 0 17, 2006; include "RIN 0648-AU01" in the subject line of the message.

For info: Connie Barclay, NOAA, 301/ 713-2370; John Wright, DOI, 202/ 208-6416; or Dan Jiron, USDA, 202/ 205-0896

ESA PROPOSED POLICY US DELINEATING SPECIES

On November 4, NOAA Fisheries has re-opened the public comment period on its proposed rule regarding a policy that impacts how a specific species population should be determined for a listing decision. The policy would set how NOAA Fisheries delineates species for protection. Previously, NOAA Fisheries' policy was based primarily on genetics and the ability to interbreed as the determining factors when determining "Evolutionary Significant Units" (ESUs). The new proposed policy would take into account physical and biological characteristics, and could result in the finding that a "distinct population segment" (DPS) is warranted for listing *separate* from a population segment that is genetically similar and interbreeds.

The issue arose in the context of

NOAA Fisheries' proposed listings for steelhead in the Northwest. Steelhead and rainbow trout are both members of the same species, *Oncorhynchus mykiss*, and studies have found that the populations interbreed. Rainbow trout, however, are a resident fishery while steelhead migrate to the ocean (anadromous). Potential problems exist where the steelhead population is struggling even though the resident rainbow trout population may be healthy.

In the Federal Register notice NOAA Fisheries noted specific areas they are interested in: "We are particularly interested in receiving comment on the alternative approach to delineate and list steelhead-only DPSs of *O. mykiss*. Specifically, we seek comment on: the use of the DPS Policy as the basis for listing determinations with respect to *O. mykiss*; our proposed determination under the joint DPS Policy that the proposed steelhead DPSs are discrete from other such population groups of *O. mykiss*, and within these proposed DPSs that the anadromous and resident life forms are discrete and would not warrant delineation within the same DPS; our proposed determination under the DPS Policy that the proposed steelhead DPSs are significant to the *O. mykiss* species; our proposed conclusion that the BRT's risk assessments for *O. mykiss* ESUs directly inform the assessment of extinction risk for steelhead DPSs; and the proposed ESA listing determinations for the steelhead DPSs under consideration." The comment period closed on December 5. **For info:** Additional details are available by reviewing the Request for Comments in the November 4, 2005, Federal Register (Vol. 70, No. 213) at www.nwr.noaa.gov/Publications/FR-Notices/2005/upload/70frn67130.pdf

MTBE US NATURAL ATTENUATION EPA REPORT

EPA has recently produced a report titled Monitored Natural Attenuation of MTBE as a Risk Management Option at Leaking Underground Storage Tank Sites. The report reviews the current state of knowledge on the transport and fate of MTBE in groundwater, with

emphasis on the natural processes that can be used to manage the risk associated with MTBE in ground water or that contribute to natural attenuation of MTBE as a remedy. It provides recommendations on the site characterization data that are necessary to manage risk or to evaluate monitored natural attenuation (MNA) of MTBE, and it illustrates procedures that can be used to work up data to evaluate risk or assess MNA at a specific site.

For info: The report can be downloaded from EPA's website: www.epa.gov/ada/pubs/reports.html

WASTEWATER US HAZARDOUS TREATMENT FLEXIBILITY EPA RULE FINALIZED

EPA has finalized revisions to the Wastewater Treatment Exemptions for Hazardous Waste Mixtures — also known as the "Headworks Rule" — originally proposed on April 8, 2003. Headworks Rule exemptions are a part of the Subtitle C, Resource Conservation and Recovery Act (RCRA) that regulate hazardous waste. This rule, which became effective November 3, 2005, determines which methods of managing hazardous waste mixtures produce discharges that can safely be handled under nonhazardous waste standards.

Wastewater treatment systems receive many different kinds of waste. In certain instances, these wastes are a miniscule and treatable part of the wastewater mixture.

THE HEADWORKS RULE INCLUDES:

- Adding two solvents (benzene and 2-ethoxyethanol) to a list of solvents whose mixtures are exempted from the definition of hazardous waste
- Adding an option to directly measure solvent chemical levels at the headworks of the wastewater treatment system
- Exempting scrubber waters generated from the incineration of spent solvents from hazardous waste management
- Making listed hazardous waste (beyond discarded commercial chemical products) eligible for RCRA de minimus exemption as

WATER BRIEFS

well as allowing non-manufacturing facilities to qualify for the de minimus exemption

For info:

Lisa Lauer, EPA Office of Solid Waste, 703/ 308-7418 or email: Lauer.Lisa@epa.gov.

EPA WEBSITE: www.epa.gov/epaoswer/hazwaste/id/headworks/index.htm

FEDERAL REGISTER: October 4, 2005 (Volume 70, Number 191, pp 57769-57785)

SUPERFUND CLEANUP CA GROUNDWATER CONTAMINATION SAN GABRIEL VALLEY

Eleven settling defendants have agreed to pay EPA over \$8.25 million for the Puente Valley Operable Unit (Area 4) of the San Gabriel Valley Superfund site in Los Angeles, California. The consent decree, lodged on September 8, 2005 with the District Court for the Central District of California, resolves the liability of the settling defendants for the Interim Record of Decision (Interim ROD); the defendants allegedly contributed to groundwater contamination at the site. EPA can use funds received through the settlement to address the site cleanup, and the reimbursement of some past costs will help EPA to fund future cleanups. The site remedy calls for pumping and treating the groundwater and preventing further migration of the contamination; once complete, the groundwater treatment system will treat nearly 3.5 million gallons of water a day.

EPA is working with other potentially responsible parties to negotiate agreements to clean up the Puente Valley groundwater. On August 17, 2005, a consent decree with two other potentially responsible parties, Carrier Corporation and United Technologies, Inc., was lodged with the US District Court in Los Angeles. Carrier and United Technologies have agreed to spend approximately \$26.5 million to build a system to pump and treat shallow groundwater. They have also agreed to complete an innovative supplemental environmental project (SEP) which will use plants to help

address low-level contamination on a former duck farm that lies over the groundwater plume.

The Puente Valley Operable Unit is a groundwater plume underlying the City of Industry and parts of the cities of La Puente and Walnut. The groundwater is contaminated with volatile organic compounds (VOCs) from degreasing, metal cleaning and other activities. All four areas of the San Gabriel Valley Superfund site were added to the National Priorities List in 1984. Groundwater from the entire basin serves as the main domestic water supply to over one million people.

For info:

Dustin Minor, EPA Region 9, email: minor.dustin@epa.gov

WATER PROJECTS WEST STUDIED-NOT CONSTRUCTED RECLAMATION REPORT

The US Bureau of Reclamation has submitted a report to Congress that identifies nearly one thousand potential hydroelectric and water supply projects in the Western United States that have been studied but not constructed. To meet conditions of the Energy Act of 2005, Reclamation on November 8 submitted a comprehensive inventory of Western water storage and hydroelectric projects to the US House Committee on Resources and the Senate Committee on Energy and Natural Resources. The *"Report to Congress Implementing Provisions of Section 1840 of the Energy Policy Act of 2005 (Public Law 109-58)"* contains no recommendations. However, it does serve as a useful reference tool for understanding the magnitude and scope of historical study activities.

For info:

Reclamation Power Resources Office, email: power@do.usbr.gov

RECLAMATION WEBSITE: www.usbr.gov/power (Report available in pdf format)

ESA/PESTICIDES US EPA PROGRAM

On Nov. 2, EPA published in the Federal Register a notice that finalizes its approach to field implementation of the agency's ESA Program for pesticides. The goal of the program is to carry out EPA's responsibilities under FIFRA in

compliance with the ESA, while at the same time not placing an unnecessary burden on agriculture and other pesticide users. Under the approach described in the program, if EPA determines that use of a pesticide poses a risk of harm to listed species or their designated critical habitat that merits additional restriction, the pesticide label will refer the user to the Endangered Species Protection Bulletins, which contain the enforceable, geographically-specific use limitations for the pesticide. These bulletins, which will be available by web or phone, will generally include a map of the county or parish to which it applies, a description of the species being protected, a list of the pesticides of concern and their use limitations. This approach is intended to ensure that use of the pesticide will not jeopardize the species or adversely modify critical habitat.

For info:

Kerry Humphrey, EPA, 202/ 564-4355 or email: humphrey.kerry@epa.gov

EPA WEBSITE: www.epa.gov/espp

EXEMPT WELLS WA ECOLOGY REVERSAL

Washington State's Department of Ecology (Ecology) recently reversed its position on the use of water from exempt wells for irrigation purposes. During meetings concerning the proposed instream-flow rule for the Quilcene-Snow Basin on the northern Olympic Peninsula, Ecology had indicated that use of water from "exempt wells" for irrigation purposes was not allowed under Washington's statutes. That assertion met a firestorm of protest from small-scale farmers.

"Exempt wells" is a term applied to groundwater use where no permit is required from the state. In Washington, any use of surface water that began after 1917 (when the state water code was enacted) requires a water right permit or certificate. Likewise, groundwater use that began after the 1945 groundwater code was enacted requires state approval, unless the use is specifically exempt from state permitting requirements. While

WATER BRIEFS

“exempt” groundwater uses are excused from needing a state permit, they still are considered to be water rights subject to the Prior Appropriation Doctrine. There are four types of groundwater uses that were specifically exempted from the state water-right permitting requirements under RCW 90.44.050: livestock water (no gallon per day limit or acre restriction); non-commercial lawn or garden (one-half acre in size or less; no gallon per day limit); domestic use for a single home or groups of homes (limited to 5,000 gallons per day); and industrial purposes (limited to 5,000 gallons per day but no acre limit).

Joe Stohr, special assistant to Ecology Department Director Jay Manning, issued a statement reversing that position and indicating that farmers may use existing exempt wells to irrigation crops on a limited basis. The statement noted that Ecology “recognizes that the ‘Kim Case’ is settled law that allows for the use of 5,000 gallons per day in support of agricultural purposes.” Stohr’s reference was to the Washington Court of Appeals decision in *Kim v. Pollution Control Hearing Bd.*, 115 Wn. App. 157, 160, 61 P.3d 1211 (2003), which found that irrigation use should also be allowed on a limited basis under Washington’s exempt well statute provisions.

For info: Joe Stohr, Ecology, 360/407-6602

PARKING LOT TOXICS TX/US SEALANT RUNOFF

On Dec 2, US Geological Survey (USGS) scientist Peter Van Metre and Mateo Scoggins, biologist from the City of Austin, TX, provided a congressional briefing to discuss findings of recent studies by the USGS and Austin that identified sealcoating — the black, shiny surface often applied to asphalt pavement — as a significant and previously unrecognized source of extremely elevated concentrations of polycyclic aromatic hydrocarbons (PAHs) in streams.

PAHs can be toxic to aquatic life

and are suspected human carcinogens. Biological studies conducted by the City of Austin found a loss of species and decreased numbers of organisms at the PAH concentrations seen in Austin streams. Officials observed these effects at sites downstream from the points where sealed parking lot runoff enters the streams. Because sealants are used nationwide and the concentrations of PAHs in lakes and reservoirs across the country are increasing, this information raises important local and national policy questions about the use of sealants and methods to prevent contaminated runoff from reaching urban waters. Austin Council is currently considering a ban on the use of coal-tar sealants.

For info:

A.B. Wade, USGS Public Affairs, 703/648-4483 or email: abwade@usgs.gov

PERCHLORATE US ISSUES-OPTIONS ITRC DOCUMENT

The document: “*Perchlorate: Overview of Issues, Status, and Remedial Options*” (PERC-1), published by the Interstate Technology and Regulatory Council (ITRC), provides basic information regarding perchlorate and perchlorate contamination. Most perchlorate contamination has been associated with munitions manufacturing and handling. There are an estimated 2,000 munitions-contaminated sites located in all 50 states and territories that may affect more than 10 million acres. A variety of remediation technologies are currently commercially available and being used for perchlorate remediation. These remediation technologies fall into two broad categories: 1) ion exchange and 2) biological processes. The majority of these treatment technologies have been applied to remediation of groundwater; however, biological processes are also being applied to the remediation of soils. This document provides an overview of the commercially available technologies as well as summaries of emerging technologies still at the bench or pilot-scale stage.

For info: Download at: www.itrcweb.org/Documents/PERC-1.pdf

WATER MONITORING US

GROUNDWATER: DIRECT PUSH EPA GUIDANCE

The EPA guidance document: “*Groundwater Sampling and Monitoring with Direct Push Technologies*” (EPA 540-R-04-005) focuses on **direct push** technology (DPT) groundwater sampling issues. It addresses two groundwater sampling methods: 1) point-in-time and 2) grab sampling. The cost saving potential of DPT groundwater sampling technologies, coupled with a rapid method of analysis, provides new defensible opportunities for making site decisions and an efficient project management tool for on-site activities. This guidance summarizes DPT groundwater sampling methods; the relevant data quality objectives; recommended methods for collecting representative groundwater samples; and recommended methods for minimizing the potential for cross-contamination. It is intended for environmental professionals who have basic scientific understanding of groundwater sampling and DPT equipment and should be used with existing resources and initiatives that support the adoption of a dynamic field activity approach (August 2005, 78 pages).

For info:

View or download at: www.epa.gov/superfund/programs/dfa/dirtech.htm.

WATER INFORMATION US

FED WEBSITE

Federal agencies have partnered to create the US Water Monitor. The Water Monitor, also referred to by its Web address — watermonitor.gov — makes it easy to access current federal streamflow, reservoir, groundwater, snow, and river forecast products from a single website. This new website is a work in progress that will continue to evolve as more data sources become available. The site is a companion site to the US Drought Monitor.

For info:

Harry Lins, USGS, 703/648-5712 or email: hlins@usgs.gov.

WEBSITE: watermonitor.gov

WATER BRIEFS

CWA VIOLATION**CA****7 UP / RC BOTTLING CO**

In the largest Clean Water Act case ever taken against a soft drink bottler, the Seven-Up/RC Bottling Company of Southern California has agreed to pay more than \$1 million in criminal and civil fines for industrial stormwater and wastewater violations at its soft drink bottling plants in Vernon and Buena Park, CA.

Under the terms of this global settlement, which concludes three years of investigation into both Seven-Up facilities by the US Attorney's Office in Los Angeles and EPA, the Seven-Up/RC Bottling Company of Southern California will pay a \$600,000 criminal penalty and a \$428,250 civil penalty.

In 2002 and 2003, EPA investigated Seven-Up/RC Bottling Company of Southern California's bottling plant in Vernon and discovered that the facility had been discharging pollutants directly into the Los Angeles River. The pollutants — grease, petroleum by-products and acid drink product "rejects" — created a stain on the bank of the Los Angeles River.

In 2003, EPA discovered that the Seven-Up/RC bottling plant in Buena Park discharged acidic industrial wastewater into the Orange County Sanitation District sewer system. Acidic wastewater can corrode sewer pipes and damage the integrity of wastewater treatment plants.

Further investigations revealed that both plants failed to follow key Clean Water Act stormwater discharge permit requirements, resulting in prolonged discharges of polluted runoff to the San Gabriel River and the Los Angeles River. Both waterways are already contaminated with oil, nutrients, metals, and other pollutants commonly used by industrial facilities.

In 2004, EPA discovered that Seven-Up/RC Bottling Company of Southern California's Buena Park plant discharged industrial wastewater through a makeshift rooftop pipe into a tributary of the San Gabriel River.

The Seven-Up/RC Bottling Company of Southern California pled guilty to 12 misdemeanor violations of

the Clean Water Act. The company agreed to pay a \$600,000 criminal fine, half of which will be dedicated to supporting environmental projects administered by Channel Islands National Park, the National Marine Fisheries Service, Los Angeles County and the California Hazardous Materials Association.

For the civil settlement, in addition to paying \$428,250 in penalties, the Seven-Up/RC Bottling Company of Southern California must:

- designate an environmental director
- install a new treatment system at the Buena Park facility
- develop a stormwater control plan and conduct inspections of both facilities
- submit quarterly compliance reports to the EPA

On October 18, the Environmental Enforcement Section of the United States Department of Justice filed the consent decree and civil complaint on behalf of EPA in United States District Court in Los Angeles.

The Clean Water Act precludes any company that commits criminal violations from obtaining federal contracts. To avoid being precluded from obtaining federal contracts, the Seven-Up/RC Bottling Company of Southern California and its parent company, Dr Pepper/Seven-Up Bottling Group, have also entered into a suspension and debarment agreement with EPA to develop a corporate-wide environmental program, which will include an environmental inspection program and a "hotline" so employees can anonymously report environmental or safety violations.

The Regional Water Quality Control Boards in Los Angeles and Santa Ana, the Orange County Sanitation District, the city of Vernon, and the Los Angeles County Department of Public Works assisted the EPA and the United States Attorney's Office in its investigation.

For info:

Francisco Arcaute, EPA, 213/ 244-1815; Thom Mrozek, US Attorney's Office, 213/ 894 -6947 or email:

thom.mrozek@usdoj.gov

US DOJ WEBSITE: www.usdoj.gov/enrd/open.html — A copy of the consent decree is available.

SDWA VIOLATION**NM**

In November, EPA fined Andrew Saied \$40,000 for Safe Drinking Water Act (SDWA) and oil spill prevention violations at its facility located on the Navajo Nation near Shiprock, NM.

Andrew Saied, operating an oil extraction facility under the name of Hart Oil and Gas, failed to have in place a plan to prevent oil discharges at two units where drainage from the facility leads to intermittent streams or channels, including Salt Creek Wash, which is approximately 750 feet away and discharges into the San Juan River.

EPA also found that the facility failed to test underground injection wells to ensure the safety of the drinking water aquifer. The facility also failed to repair or close wells that failed mechanical integrity tests, failed to submit annual disposal and monitoring reports to the EPA, and failed to appropriately fund the financial responsibility trust to ensure proper closure and abandonment of injection wells.

The company has above-ground storage tanks that store 1,320 gallons of oil or oil products. Spill prevention regulations require such non-transportation related facilities that store large amounts of oil to have a spill prevention plan that addresses the facility's design, operation, and maintenance procedures to prevent spills from occurring. The plan must also include measures to control, contain, clean up, and mitigate any effects an oil spill might have on rivers and streams.

EPA issues underground injection control permits for a variety of purposes under the SDWA, including oil and gas-related wastewater disposal. UIC permits authorize the specific waste to be injected, as well as prescribe operating parameters to ensure protection of underground sources of drinking water.

The oil and gas production industry accounts for a large proportion of the fluids injected into the subsurface. When oil and gas are extracted, large amounts of oily salt water, or brine, are also brought to the surface.

Contaminated salt water can be very damaging when discharged into surface water, thus it is typically injected into similar formations from which it was extracted.

For info:

Wendy L. Chavez, EPA, 415/ 947-4248

EPA WEBSITE on oil spill prevention: www.epa.gov/Region9/waste/sfund/oilpp/index.html

EPA WEBSITE on underground injection permits: www.epa.gov/region09/water/groundwater/uic.html

WATER TRANSFERS ID PUBLIC INTEREST STANDARD

On November 23, the Idaho Supreme Court upheld the approval of a water right transfer by the Idaho Department of Water Resources (IDWR) that dealt with the statutory public interest standard. In *Chisholm and Halper v. IDWR and K&W Dairy*, 2005 Opinion No. 121 (November 23, 2005), the court affirmed the lower court's decision, which had affirmed IDWR's approval of a water right transfer to a proposed dairy outside of Jerome, ID. Appellants argued that because of odors that would have been emitted from the proposed dairy, the water rights transfer did not comport with the local public interest standard contained in Idaho Code §42-222 (1997).

The court explained how the "local public interest" standard should be applied in a water transfer situation. "Halper equates one narrow issue—the odor and its related negative effects—as the local public interest. This is too narrow a definition; the local public interest has many elements and the determination of which local public interests are impacted and balancing those impacts is left to the sound discretion of IDWR. *Shokal*, 109 Idaho at 338-39, 707 P.2d at 449-50. In a similar vein, Chisholm argues that there is simply no evidence in the record that the proposed dairy will not add to the existing problem. However, this is too strict a standard; there must only be evidence that the odors emitted will be reasonable and at such a level as to satisfy the local public

interest when balanced with other factors. See *id.* Here, the hearing officer weighed elements such as water conservation, the creation of jobs and generation of economic activity, and the non-injury to other water rights. Taking such a narrow view of the definition of local public interest and the standard required to meet it, Appellants have asked this Court to reweigh the evidence and mandate on remand that IDWR not approve this or additional transfer applications for dairies in the future. This the Court will not do. See *Barron*, 135 Idaho at 417, 18 P.3d at 222." *Chisholm*, Slip Op. at 8-9. To view the opinion, go to the Idaho Supreme Court's website: www.isc.idaho.gov/sccivil.htm

For info:

Chris Meyer (Attorney for K&W Dairy), Givens & Pursley, 208/ 388-1200

COLORADO RIVER SW MANAGEMENT IMPACTS - USGS REPORT

USGS has released the report: "The State of the Colorado River Ecosystem in Grand Canyon" — which details the impacts of the operation of Glen Canyon Dam and other management actions on downstream resources within Grand Canyon National Park. The 220-page report assesses scientific studies of aquatic, riparian, fish, sediment, recreation, and cultural resources from 1991 through 2004.

The report was prepared at the request of the Glen Canyon Dam Adaptive Management Work Group (AMWG), a federal advisory committee that makes recommendations to the Secretary of the Interior on the operation of Glen Canyon Dam and other management actions. The USGS report and other pertinent data will be used by the AMWG to assess current practices and make such recommendations.

REPORT FINDINGS INCLUDE:

- Under current dam operations, the Colorado River transports more sand out of the system than is supplied by tributaries on a seasonal to annual basis, preventing multi-year accumulation in the channel. As a result, erosion of channel and sandbar deposits from Marble and Grand Canyons continues.

- The number of federally endangered adult humpback chub in the Grand Canyon ecosystem has declined since at least the late 1980s, in part as the result of more young chub not reaching spawning age.
- Nonnative rainbow trout downstream as far as river mile 75 have proliferated under the modified low fluctuating flow alternative that governs day-to-day dam operations. Likewise, nonnative brown trout have increased dramatically around Bright Angel Creek and upstream to above the Little Colorado River confluence. Both species prey on native fishes.
- Restrictions on dam operations since 1991 have not produced the hoped-for restoration and maintenance of this endangered species.
- Archaeological sites in the river corridor and locations of traditional importance to Native Americans continue to receive negative impacts from side channel surface erosion and recreational visitors. These processes are aggravated by the diminishing supply of sediment.
- Between 1998 and 2003, the area available for camping at high-elevation campsites used by summer recreationists decreased by 55 percent. These areas appear to have benefited from the November 2004 High-Flow Experiment.

Since the report was finalized, scientists have continued to evaluate the results of the November 2004 High-Flow Experiment. One of the most surprising findings was the robust increase in sandbar area and volume in upper Marble Canyon, which has historically been one of the most sediment limited reaches of the river. These more recent findings suggest the use of short, strategically timed high-flow releases following sporadic sand inputs from tributaries is a possible strategy for rebuilding beaches and sandbars.

For info:

Stephanie Hanna, USGS, 206/ 331-0335 or email: shanna@usgs.gov

REPORT WEBSITE: To download the report go to www.gcmrc.gov/products/score/2005/score.htm

Please Note: An extended Calendar containing ongoing updates now appears on The Water Report's website: www.thewaterreport.com. Subscribers are encouraged to submit calendar entries, email: thewaterreport@hotmail.com

December 14-16 NV
Colorado River Water Users Association Annual Meeting, Las Vegas, Caesar's Palace. For info: CRWUA, 760/ 398-2651, or website: www.crwua.org

December 16 UT
Utah Water Quality Board Meeting, Salt Lake City, Cannon Health Bldg., Rm125, 9:30am. For info: Utah DEQ, 801/ 538-6146, website: http://waterquality.utah.gov/wq_board/wq_board.htm

December 19 WA
Water Resources Advisory Committee (WRAC) Meeting, Lacey, Ecology Hdqtrrs, 300 Desmond Drive. RE: Water Resource Management and Strategies (Agenda Varies). For info: Curt Hart, Ecology, 360/ 407-7139, email: char461@ecy.wa.gov, or website: www.ecy.wa.gov/programs/wr/wrac/wrachome.html

December 19-21 CA
Aquatic Ecological Assessment Workshops (Part 2), Davis, UC Davis. RE: Conducting Bioassessments in California, Bioassessment Protocols by SWAMP. For info: David Crane, email: dcrane@OSPR.DFG.CA.GOV; Inge Werner, email: iwerner@ucdavis.edu

December 22-23 OR
Oregon Environmental Quality Commission Meeting, Portland, DEQ Rm 3A, 811 SW 6th Ave. For info: Day Marshall, Office of DEQ Director, 503/ 229-5990, website: www.deq.state.or.us/news/events/asp

2006 January 3 WY
Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: Kirby Area Water Supply Project. For info: Wyoming State Engineer's Office website: <http://seo.state.wy.us/forum.aspx>

January 10-12 FL
North American Environmental Field Conference and Exposition, Tampa, Embassy Suites Hotel. RE: Advances in Environmental Site Characterization and Monitoring Technology. For info: Nielsen Environmental Field School, 740/ 965-5026 or website: www.envirofieldconference.com

January 12-13 OR
Oregon Water Resources Commission Meeting, Corvallis. For info: Cindy Smith (OWRD), 503/ 986-0876, website: www.wrd.state.or.us/commission/index.shtml

January 13-15 CA
4th Annual Wild & Scenic Environmental Film Festival, Nevada City, Miners Foundry, 325 Spring Street. For info: Kathy Dotson, 530/ 265-5961 x202, email: Kathy@syrcl.org, or website: www.wildandscenicfilmfestival.org

January 19-20 WA
13th Annual Endangered Species Act Seminar, Seattle, Red Lion on 5th. RE: DC Politics, ESA Litigation, Columbia river Hydropower Litigation, Listing & Critical Habitat, Agency Discretion & Clean Water Act, Takings Claims, Scientific Dialogue, Salmon Recovery, Comprehensive Irrigation District Management Plans, Conservation Banking, & Landowner Incentives. For info: The Seminar Group, 800/ 574-4852 or website: www.TheSeminarGroup.net

January 24-25 NE
NARD Legislative Conference (Nebraska Association of Resources Districts), Location TBA. For info: NARD, 402/ 471-7670, email: nard@nrdnet.org, or website: www.nrdnet.org

January 24-25 CO
Colorado Water Conservation Board Meeting, Denver, Holiday Inn Denver International Airport, 15500 East 40th Avenue. Held in conjunction with the Colorado Water Congress Meeting. For info: CWCB, 303/ 866-3441 or website: www.cwcb.state.co.us/

January 24-27 LA
Third International Conference on Remediation of Contaminated Sediments, New Orleans, Sheraton New Orleans Hotel. For info: Gina Melaragno, 614/ 424-7866, email: sedimentscon@battelle.org, or website: www.battelle.org/environment/er/conferences/sedimentscon/default.stm

January 25 WA
SEPA/NEPA: The Latest Word on Compliance, Seattle, Renaissance Seattle Hotel. RE: Legal Developments, Current Proposals for NEPA Reforms, Legal Exemptions, Administrative Appeals & Judicial Review. For info: Law Seminars International, 800/ 854-8009, website: www.lawseminars.com/seminars/06SEPAWA.php

January 25 OR
Salmon 2100 Project: Alternative Futures for Wild Pacific Salmon in Western North America, Conference, Portland, RE: 33 Salmon Scientists, Policy Analysts, & Salmon Advocates Discuss Outlook for Wild Salmon in California, Oregon, Washington, Idaho, and southern British Columbia. Keynote Speaker: William Ruckelshaus, Chairman of the Salmon Recovery Funding Board for the State of Washington. For info: Robert T. Lackey, EPA, 541/ 754-4607 or email: lackey.robert@epa.gov

January 26-27 CO
Colorado Water Congress 48th Annual Convention, Denver. For info: CWC, 303/ 837-0812, email: macravey@cowatercongress.org, or website: www.cowatercongress.org

February 2-3 CO
NEPA and Federal Land Development, Denver. Sponsored by Rocky Mountain Mineral Law Foundation. For info: RMMFLF, 303/ 321-8100, email: info@rmmlf.org, or website: www.rmmlf.org

(continued from previous page)

February 2-3 CA

Toxic Releases, Los Angeles.
For info: Law Seminars International, 800/ 854-8009, or website:
www.lawseminars.com/

February 5-9 TX

National Water Conference USDA-CSREES, San Antonio, Marriott Rivercenter. RE: Ag Best Management Practices, Rural Environmental Protection, Conservation & Resource Management, Watershed Assessment & Restoration. For info: USDA-CSREES website:
www.soil.ncsu.edu/swetc/waterconf/2006/main.htm

February 7 WY

Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: Instream Flow. For info: Wyoming State Engineer's Office website: <http://seo.state.wy.us/forum.aspx>

February 13-14 CA

2006 National Water Resource Symposium, La Jolla, Estancia La Jolla Hotel & Spa. RE: Market, Legal, Technical & Financial Components of Water Marketing and Water Resource Development. For info: Christa Riekert, WestWater Research, 307/ 742-3232 or website: <http://waterexchange.com/symposium2006/conference2006.html>

February 15-17 WA

Pacific Salmonid Recovery Conference, Seattle, Sponsored by the National Marine Fisheries Service's (NMFS/ NOAA Fisheries') Northwest Fisheries Science Center. For info: Conference website: www.nwetc.org/bio-500_02-06_seattle.htm

February 20-22 KS

Kansas Dam Safety Conference 2006, Wichita, Radisson Hotel. For info: Kansas Division of Water Resources, 785/ 296-3710, website: www.ksda.gov/Default.aspx?tabid=173

February 22-25 CA

24th Annual Salmonid Restoration Conference, Santa Barbara, CA. "Rediscovering Urban Creeks and Creating Healthy Watersheds" For info: Dana Stolzman, Salmonid Restoration Federation, 707/ 923-7501 or email: srf@calsalmon.org or website: www.calsalmon.org/

February 23-24 CA

24th Annual Water Law Conference (ABA), San Diego, Hotel Del Coronado. For info: ABA website, www.abanet.org/environ/committees/waterresources/home.html

March 2-3 AK

Brownfields Redevelopment, Anchorage. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

March 7 WY

Wyoming Water Forum Meeting, Cheyenne, State Engineer's Conference Rm, Herschler Bldg. 4E, 10am. RE: NHD and FEMA Map Mod Projects. For info: Wyoming State Engineer's Office website: <http://seo.state.wy.us/forum.aspx>

March 9-11 NM

11th Xeriscape Conference & Expo, Albuquerque, Convention Center. For info: www.xeriscapenm.com

March 9-12 CO

35th Conference on Environmental Law (ABA), Keystone, Keystone Resort & Convention Center. For info: ABA website, www.abanet.org/environ/programs/keystone/2006/

March 20-21 WA

Clean Water and Storm Water, Seattle. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/



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