

# WATER RIGHTS



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## ALASKA MOVES TO PROTECT IN STREAM FLOWS FEDS CANNOT

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**T**he Alaska Department of Fish and Game is trying to do what it says the federal government has been unable to do: protect in stream flows in the Indian River near Sitka. The department has asked the state for in stream water rights to as much as 101 cfs, in lieu of federal attempts to preserve the river under federal reserved rights.

It is not as if the federal government has not tried to preserve the in stream flows. The National Parks Service has administered the Sitka National Historical Park at the mouth of the river since well before the state even set up a mechanism for granting water rights. When such a mechanism was established, under Alaska's Water Usage Act of 1966, the Parks Service claimed it was entitled to water rights under a grandfathering provision in the act. The service even notified the state that it reserved these rights. But it never said just how much water it needed and what it needed the water for. Until about 1980 no one ever bothered to ask.

Then the city of Sitka asked that its water rights be boosted from about 2.5 million gpd to 6 million gpd for municipal and industrial uses. At about the same time, nearby Sheldon Jackson College, which owns a fish hatchery and small hydro plant on the river, asked for about 5 cfs of water.

### At Your Service

These requests worried the National Parks Service, which feared that the river could be excessively drained during low winter flows. The service began to press for its reserved water rights. Because there were only three potential users of water from the river, the Alaska Department of Natural Resources (ADNR), which approves water rights in the state, thought that the issues could easily be hammered out at the negotiating table. But the negotiations dragged on for years.

By 1984, the Parks Service hired the U.S. Fish and Wildlife Service to conduct a study of its needs. The results of this study became available in December 1987, but complains Chris Landis, the water resources officer handling the case for the ADNR, "To this day they have never come up with a quantity they were asking for."

### A Funny Thing Happened...

The Parks Service says the numbers are there, but the reason it never made a formal request for the water is that Alaska had never provided them with the appropriate forum. Owen Williams, chief of the service's Water Rights Branch based in Ft. Collins, says, "The McCarran Amendment, under which the U.S. waives its sovereign immunity and allows itself to be brought into an adjudication, requires a basin-wide adjudication. It requires the U.S. and all the parties with water rights claims to make their requests, and have them adjudicated at one time in one forum." Thus, he says, the U.S. could not participate in a piecemeal negotiation for rights on the river. As a result, talks between the state and the federal government "basically broke down over endless debates over procedural matters," says Landis.

So last March, ADNR Commissioner Judith Brady sent a letter to Department

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## **SOIL CONSERVATION SERVICE TO FOCUS ON WATER FOR THE POOR**

of Interior officials informing them that "unfortunately, our experience to date with a negotiated settlement of Indian River basin water rights is that this process will not be timely resolved...Accordingly, we have asked the [Alaska] Department of Fish and Game to file an application for reservation of in stream flows sufficient to protect the fishery resource." About a year later, the state filed the water rights reservation application the ADNR requested.

Since the controversy arose, however, Sitka has made arrangements to get water from an entirely different basin. It has dropped its efforts to get water from the Indian River, which comprised the lion's share of the applications. "But the state would still like to resolve this thing," says Landis.

### **Good Housekeeping**

Now that the ADNR has Fish and Game's application, Landis says the state will probably put the in stream flow rights in the state's hands, approve the college's request, and, in the interests of good housekeeping, deny Sitka's claims to the water that it no longer wants. It may also modify the college's water rights to limit the amount of water that it may divert at low flows.

Christopher Estes, the Alaska Fish and Game Department's statewide in stream flow coordinator, who developed the in stream flow request, says, "We're going to get the in stream flows for fishery protection, which is what the Parks Service has been trying to do anyway. But we're going to do it without going through the federal reserved water rights system."

Williams admits that the in stream flows Estes has requested "would adequately protect the fishery resource." But he says the federal government may insist on its own reservation of water anyway. While Alaska has asked for adequate flows, he says that the relatively junior priority date on the water could threaten the fish in the long run.

Further, he says, the federal government might challenge the appropriation and press for a basin-wide adjudication "if the U.S. feels its rights are being injured, and it affects the U.S.'s ability to meet its responsibilities." Such a decision would be up to the regional Parks Service employees in Anchorage. They declined to comment.

Over the years, the Soil Conservation Service has had to shift its priorities to conform to the outlooks of different administrations and the changing priorities of the nation. Now the service says it is shifting its focus again. Though federal funds for water development are drying up, the service says it is now willing to fund up to 50% of the cost of developing water in low income rural areas.

The service announced its new emphasis in an addition to its National Watersheds Manual, which guides the service in administering the 1953 Small Watersheds and Watershed Protection Act. According to Herman Calhoun, assistant director of the SCS's Watershed Projects Division, the service has always had the authority to share the cost of developing water in these areas, under act. It has, he says, decided to focus on them now in an effort "to stretch the federal dollar further." The federal Farmers Home Administration funds many similar projects. The new guidelines will help the two agencies combine some of their projects to avoid duplication of their efforts.

### **Mostly Small Projects**

Because the service is limited to working in watersheds of 250,000 ac or less, the projects will, by and large, be small. Calhoun says the number of projects

funded will be limited to those that serve fixed income, elderly and other low income rural households.

#### **First Time**

One of the first applications of the new policy could be on the Dynne Creek in east/central Alabama near the Georgia border. Sponsors of the Dynne Creek Watershed Project have already requested that their existing watershed management plan be modified so they can be eligible for the new federal funds.

Two flood control dams already exist. A third multiple use structure had also been proposed for flood control, recreation and municipal and industrial (M&I) use. Under the old policy, the federal government would have paid for about \$600,000 of the \$2 million structure.

In lieu of calling it M&I water, that share will be put toward rural water supply. "But it's more than just a name change," says Mason Dollar, water resources staff leader with the SCS's Auburn, Ala. office. "M&I is where you have an urban setting, no disadvantaged people, and income is derived from non-ag related industries. There are other programs available to help those people to obtain water."

The new criteria, he says, are designed to help poorer areas "where you have these aggregates of small industry. Its hard for the local folks to muster enough of a tax base to develop a water supply."

#### **Getting a Boost**

With the shift away from M&I water, the federal government's share of the project will be boosted to about \$1.15 million. "This will ensure the retention of jobs in the ag sector and ensure a more even dispersement of the population," Dollar says.

He anticipates that it will take about a year for the service to develop and approve a supplement to the existing plan, and says construction on the project could begin in 1992.

## **MONTANA MANAGEMENT PLAN COULD CLASH FISH AND FARMERS**

**T**he Bureau of Land Management (BLM) is now trying to determine just where and what will fall under a resource management plan it is preparing for Judith, Valley and Phillips Resource Management Areas in north/central Montana. At least a dozen tracts of land within these resource management areas already have been nominated for designation as Areas of Critical Environmental Concern. But several of these nominees, such as the Beaver Creek Ponds, are currently administered by the Bureau of Reclamation for irrigation use. The question could become how much of the water in these areas will be needed for agriculture and how much for wildlife, setting the stage for a classic battle between farmers and fish. The BLM will accept additional nominations until March 31; a draft resource management plan is scheduled for release at the end of July. For more information on the plan contact Wayne Zinne, District Manager, Lewistown District, 80 Airport Road, Lewiston, MT 59457-9699. Tel: 406/538-7461.

## **TEXAS FARMERS SECEDE FROM WATER DISTRICT**

**F**armers in two Texas counties, furious over a proposed management plan that would have limited their right to extract groundwater from the Edwards Aquifer, have voted to break away from the district that proposed the plan in the first place.

Under state law, land owners now have the right to "unlimited capture" of groundwater—that is, they can have as much water as they can pump. But the

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aquifer is being drained dry by excessive use from the rapidly growing city of San Antonio, agricultural interests to its west, and recreational users to the east. So the Edwards Underground Water District (EUWD), which administers the aquifer, and the City of San Antonio proposed legislation that would limit water withdrawals to "historic pumping levels."

#### **Hands Off**

All this has gone over rather poorly with the farming community in Uvalde and Medina counties (See WATER RIGHTS July 1988, August 1988 and November 1988). "If San Antonio needs more water and they see there's going to be a shortfall, they should proceed to develop or purchase more surface water sources. They shouldn't take it from someone else," says Maurice Rimkus, a Uvalde County farmer who opposed the plan. "This is not a water issue. It's a property rights issue."

The San Antonio City Council endorsed the proposal, but recently, in an effort to soothe the farmers, the district backed away from it before it could reach the Texas legislature. By then, however, it was too late to bring the farmers back into the district's fold. The referendum to secede from the district passed by almost three to one in Medina County and over 10 to one in Uvalde County. "Frankly, we just don't trust them," says John Poerner, president of Southwest Texas Property Rights Association, which was organized to fight the plan.

#### **Overstepping The Bounds**

Poerner and Rimkus say both counties are in the process of setting up their own management districts, though they have not determined whether each county will form its own or would join into a single district. Either way, for the EUWD to step in now and regulate water withdrawals in Uvalde and Medina Counties, it would have to step outside of its boundaries.

Russ Masters, acting general manager of the EUWD, says that new legislation may be drafted which would give a statewide body, such as the Texas Water Commission, the authority to limit aquifer withdrawals. "That would be unprecedented," says Rimkus, and would likely be fought by every small district across the state.

## **THE DROUGHT: IT'S NOT OVER 'TIL IT'S OVER**

**J**ust when you thought it was safe to go back into the water, it turns out that there might not be any water. Two reports prepared by the California Department of Resources say that the severe drought of 1987-1988 may not be over yet.

According to *Drought Contingency Planning Guidelines for 1989*, "Low rainfall, run-off and carry-over storage have produced conditions that do not meet the current water needs of many urban and agricultural areas...California's water supply is significantly below normal in most areas and critical in a few."

State-of-the-art, long-term weather forecasting is only slightly more accurate than Nancy Reagan's astrologer, so the report does not try to predict what 1989's weather will hold. However, it says, "If 1989 equates to 1987 or 1988, the shortages will be severe in specific areas."

#### **The Plus Side**

On the positive side, a corollary report, *Drought Assistance: A Report to the Legislature in Response to Senate Bill 32*, says that the first three months of the year have been encouraging, and California can expect full deliveries from the Colorado River in 1989.

The study identified several of the areas most vulnerable to another drought.

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Among them are the northern and central coastal areas, which rely heavily on groundwater that could become contaminated with salt water intrusion; the Central Valley farmers, whose water from the federal and state water projects would have to be curtailed; and the Tahoe-Truckee basin, which is still reeling from the effects of low waters in Lake Tahoe, which dropped below its rim in early October.

#### **Fixes**

The report recommends steps the state could take to alleviate problems in these areas. First, it says, the state should appeal to the federal government for increased disaster aid. It calls upon the state legislature to stiffen penalties for violating emergency drought regulations, and to authorize public agencies to execute contracts with the federal government without elections.

Copies of the reports are available from the Department of California Resources Publications Department, PO Box 942836, Sacramento, CA 94236-0001. Tel: 916/445-9371.

## **WASHINGTON STATE BACKS AWAY FROM EARLIER RECOMMENDATIONS**

A committee convened to update Washington state's water laws has backed away from two highly controversial recommendations made in its draft report. In the draft (See WATER RIGHTS January 1989), Washington's Joint Select Committee on Water Resource Policy had called upon the state legislature to tighten up in stream flow regulations, and to appropriate water only if it can be shown that the water will provide the "best overall benefit to society." Now the committee has released its final report, which says that both of these proposals "should be analyzed further before recommendations are made for legislative action."

According to Dave Monthie, staff counsel to the committee, "People didn't beat up on the concepts. People beat up on the speed. The nearly universal message we got was to slow down and 'take a look at the effects of what you're doing.'"

#### **Love/Hate Relationship**

Most groups involved seem to have a love/hate relationship with the final report. They hate it because it accomplishes so little. But they love it because it is devoid of everything and anything that was even slightly objectionable in the draft.

The best overall benefit to society standard tried to eliminate a number of conflicting standards to which water withdrawals may be put. But it was widely attacked as being as vague and unworkable as the standards it was designed to clarify. "You would have ended up with all those different groups fighting each other in the trenches trying to prove that they have a societal benefit," says Anne S. Blair, executive administrator of the Washington Association of Water and Wastewater, a group established by the legislature to represent the water user industry.

The in stream flow policy in the draft report also received mixed reviews. The committee wanted to halt any further degradation of the state's streams. But to do so, it said that flows should be sufficient to maintain resources at a level that existed during the past 10 years. While observers lauded the committee's efforts to come up with a non-degradation standard, even the environmental community took issue with its execution.

#### **How Would You Do It?**

"The problem is how would you do it?" says Judy Turpin, policy analyst for the Washington Environmental Council. She says most water is allocated through

small individual permits. She wonders how the permits could be issued without violating the standard set for an entire region.

Monthie admits that the committee members "did not understand the magnitude of the problem. Now they understand that it will take at least another two years."

Turpin says, "Any delay is a little disappointing, but it's better than having bad laws." Blair puts it more succinctly: "We're terribly relieved."

#### **What's Left**

What is left of the report is mainly an outline of the procedures the committee will take as it delves into the issue in the future. It will break up into small groups to examine the different issues involved. The committee will also establish a technical advisory group to provide scientific expertise and a public advisory group to provide more conceptual input.

But Monthie says that these subcommittees will probably use the board's original recommendations as starting points for future proposals. He says, "The people who criticized the recommendations will be able to develop their criticisms more. And we'll say, 'Okay, if you don't like them, how would you change them?'"

For now, the committee has put before the Washington legislature not legislation on changing water policy, but a bill that would allow the committee to use the remaining two years of existence to look at these problems further.

For a copy of the report, contact the Joint Select Committee on Water Resource Policy, 101 John A. Cherberg Building, Olympia, WA 98504. Tel: 206/786-7198.

## **BUREC PONDERES WHAT TO DO WITH EXCESS WATER IN UTAH**

**T**he Weber Basin Water Conservancy District faces something of an embarrassment of riches. The district's Weber Basin Project has almost 33,000 ac-feet of water that it cannot sell. So the U.S. Bureau of Reclamation (BuRec) has prepared and finalized an environmental impact statement that looks at the district's plans to sell it to thirsty cities in Weber and Davis Counties.

The water was originally developed for irrigation use. But the district has been unable to sell it to the farm community (it already has contracts to sell 120,000 ac-feet, and demand has leveled off), so it wants to convert it to municipal and industrial (M&I) use.

#### **Different Strokes**

Sportsmen and environmentalists had pushed for a different plan. Recreational users and wildlife had grown used to all of that extra water in the reservoir; they wanted to keep it there. "We are not in favor of converting the water use to commercial and urban use," wrote Jim Gilley, president of the Utah B.A.S.S. State Federation, in his comments on the plan. "Willard Bay must be maintained as a quality fishery and for recreational use."

Ivan Flint, general manager of the district, says the sale of the water is simply a fact of life, and has been since the impoundment was built. "You have to face up to the fact that irrigation was what the reservoir was built for, and the sale of the water has to have first priority," he says.

#### **An Act of Futility**

Michael Loring, an economist with BuRec in Salt Lake City, says that if the water had been kept in place, the fish would have died off eventually anyway. "It's relatively flat terrain out there. You just don't get that much from 33,000 ac- feet.

## **ARKANSAS TRIES TO EASE INTERBASIN WATER TRANSFERS**

In lean years you would have had enough of a draw down to kill the fish population," he says.

But there is also a problem with using water from the Willard Reservoir for culinary purposes. BuRec's environmental impact statement says that water from it is fine for irrigation, but picks up too much salt to be put to domestic use. Without expensive secondary and tertiary treatment, Willard water will have to be exchanged with suitable quality water from other sources. What is exchanged with whom depends on which cities sign up as customers for the water. Loring says that it is up to the district to figure out how to make the process work. "Exchanges for higher quality water are basically the district's problem," he says.

Flint says the district has no plans to exchange the water at all. "We've got some studies that say it's treatable. You might have to dilute it some, but that's our plan."

### **No Demand...Yet**

He adds that the district has no customers yet, anyway. "What this plan allows us to do is sell the water for M&I or irrigation use, wherever there is a greater need," he says. "Right now there isn't much demand for either."

**T**he Arkansas Soil and Water Conservation Commission has called on the state legislature to broaden the powers of local management districts over riparian water users. The action could make it easier for thirsty areas of Arkansas dependent upon groundwater to get surface water from other parts of the state.

The recommendations were among those issued in the newly released Arkansas Water Plan. The report notes that in areas dependent upon groundwater, some wells have been so overused "that as little as 20 ft of saturated thickness of the aquifer remains." Among the most seriously affected regions of Arkansas are Lonoke, Praise, Craighead, Poinsett, Drew and Ashley Counties. But it also points out that in normal years, Arkansas has an excess of surface water. Several plans are already in the works to transfer water from the White and Arkansas Rivers to some of the more parched areas of the state.

### **Out of Control**

The commission says it needs some way to control the transfers. According to the plan, "The authority to manage excess surface water at the local level is ambiguous." It has proposed clarifying the role of local water management districts. They currently exist, according to John Sweeney, deputy director/chief engineer of the commission, "but they were not originally created with the idea of transporting water from outside of their basins. The law under which they operate gives them the power to manage water as long as it's in facilities they constructed. If they built a canal or pipeline, their rights are clear. If they take other water and put it into an existing ditch or stream, claims of riparian owners could become complex without some clarification. The idea is to have language allowing them to regulate where and when the water that they developed can be used."

### **Riparian Problems**

A. Mark Bennett III, an attorney with the commission, explains that Arkansas is a riparian state. In riparian states, owners of land adjacent to the river are guaranteed free and unrestricted use of the water in the stream. "The problem is that as the water flows down the stream, existing riparians could say, 'That's my water.' The districts might need some sort of flowage easements to allow the water to be transferred over the riparians' property," he says.



## **MONTANA APPROVES FIRST FOUR WATER MANAGEMENT PLANS**

Legislation to decide these matters has not yet been finalized, and time is running out. The Arkansas legislature meets only every other year, and it is already more than halfway through its current session. Sweeney predicts it might be introduced by early March.

**T**he Montana Board of Natural Resources has approved the first four in a series of water management plans, including an in stream flow scheme and a water use efficiency proposal that, last summer, drew protests from more than 2,000 angry farmers. However, the board did not approve the plans intact; it bowed to pressure from the farmers and removed several of their more controversial planks.

As originally envisioned, the in stream flow report was designed to make it easier to obtain water for fish and wildlife. First, state law currently allows no more than 50% of a stream to be set aside for in stream flow rights. The report originally recommended removing that cap, but the final version did away with that notion.

Also stricken from the final plan were recommendations to allow for emergency purchases and transfers of offstream water for in stream uses; to look into how groundwater or inter-basin transfers might be used to supplement in stream flows; and to allow public entities to object to water uses that might endanger fish, wildlife, recreation or the public health.

The report still contained some fairly significant revisions to Montana's in stream flow law. It allows in stream flows to receive priority dates based on the time an application for them is received, not when the application is granted. At times, once an application was approved, all the water in a stream was snatched up by off stream users.

It also allows public entities to lease water rights from willing off stream users to supplement in stream flows during emergencies; calls on public entities to look into new storage projects, leases and purchases of water that might supplement dewatered streams; and calls for studies of return flows, available water and in stream flow quantification methods.

The section on agricultural water use efficiency also had the teeth in it ground down a bit. Removed from it were provisions similar to those in the in stream flow report, designed to make it easier to use agricultural water to benefit fish and wildlife. Also deleted was a section urging Montana to tighten up the laws prohibiting wasting water.

The much watered-down document now suggests that the legislature clarify who has the right to salvaged water; recommends a series of educational efforts to encourage water use efficiency; and urges Congress to use money set aside for the Pick-Sloan Missouri Basin Project on infrastructure improvements. The project was to have been built in exchange for the vast tracts of land inundated in the state to produce hydro power, control floods and enhance navigation. The benefits of these projects accrued to downstream states. But only about 5% of the irrigation projects promised to benefit upstream states were ever built. It is unlikely the balance will ever be completed, but Montana still wants to get something out of the deal. Infrastructure improvements could represent the state's fair share.

Two other plans approved by the board were less controversial. One calls upon the state to expand its water information data base. The other takes a swipe at the authority of the Federal Energy Regulatory Commission (FERC) to control state water rights (See WATER RIGHTS October 1988). It calls upon the states to challenge FERC's authority in the courts or Congress.