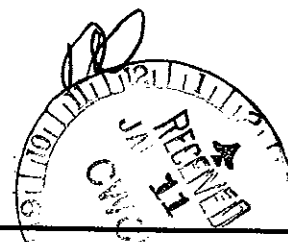




# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## ENVIRONMENT/WATER RESOURCES

### **Endangered Species Act/Fish and Wildlife**

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) have agreed to a significant change in their methods for listing animal and plant species as threatened or endangered under the Endangered Species Act (ESA). The changes, which come as part of the settlement of a lawsuit filed by the Fund for Animals, and other environmental groups, will result in expedited listing of plants and animals as endangered or threatened and will recognize a "multispecies, ecosystem approach." Since passage of the ESA, some 1,275 species have been listed; 750 in the United States and 525 in foreign countries. Of the domestic total, approximately 575 are endangered and 175 are threatened. Just over 400 recovery plans are currently in place, meaning that a plan exists for only about 55% of listed species. The typical wait between receipt of a petition for listing a species and listing has been two to three years.

Under the recently signed agreement, federal agencies will propose for listing some 400 species for which evidence exists to demonstrate the possible need for listing by September, 1996. Further, final consideration of 900 other species which may be worthy of protection, but for which no definitive information exists, will be handled more quickly. The number of protected domestic species could more than double in a relatively short period of time.

## WATER RESOURCES

### **National Water Policy**

The Natural Resources Law Center (NRLC) of the University of Colorado has published a list of recommendations developed by a selected group in hopes they will be useful to the new Clinton-Gore

Administration. The group, which consisted largely of environmentalists and academics, and included two Congressional staff representatives, developed 47 recommendations over the 2½ days of the meeting, held near Long's Peak, Colorado, on December 6-8. The report notes "a major movement toward water policy reform already afoot at the local, state, tribal, regional and federal levels," and advises the Clinton Administration to develop a national, rather than federal, water policy. However, its recommendations call for a significantly stronger federal role in water allocation, reallocation, management and protection. The report announces four objectives for sustainable water use: (1) water use efficiency and conservation, (2) ecological integrity and restoration, (3) clean water, and (4) equity and participation in decisionmaking. It then sets forth its recommendations which are divided into proposals for the first hundred days of the Clinton Administration and for the next four years.

For the first 100 days, the group recommends that the President seek Congressional approval of the Environmental Protection Agency as a cabinet level agency, and then sets forth seven recommendations by which the federal government could improve water use efficiency and conservation. With regard to ecological integrity and restoration, the group recommends that the President announce strong support for reauthorization of the Endangered Species Act, expansion of the National Wild and Scenic Rivers System, and strong support for the Clean Water Act Section 404 permit program. The group urges the Administration to support annual investments of \$2B over the next four years to assist communities in complying with the Safe Drinking Water Act. The group also urges the President to bolster the commitment of the U.S. to protect Indian water rights, both in implementing negotiated settlements, and representing tribes in litigation.

In the longer term, the group urges the President to make a major comprehensive address within the first year of his Administration incorporating the recommendations of the report, and to create a water task force of federal, state, and tribal governments to develop a strategy for better coordination in the development and implementation of national water policy. Federal agencies should be asked to look for opportunities to delegate management responsibilities, conditioned upon compliance with federal standards, and to study the imposition of fees for the diversion and use of water as a means of promoting more efficient use of this public resource. The Secretaries of Interior and Defense should reevaluate existing authorized projects in light of contemporary needs and standards, and "should seek reauthorizations and deauthorizations as appropriate." The Secretary of Interior should also conduct an ongoing federal project contract review process, with contracts being renegotiated to reflect contemporary water needs, pricing for efficiency, and facilitating reallocation of project water. The Secretary of Interior and Defense as well as the Administrator of EPA should be asked to develop incentives for water use efficiency and conservation. The group notes "reallocation of existing supplies should be preferred as an alternative to new storage." Federal hydropower pricing should reflect the full economic and environmental cost of producing power, and revenues should be used to assist in financing water conservation and ecosystem protection and restoration. The group calls for a report identifying important ecosystems and opportunities for restoring watersheds throughout the nation, and for the establishment of a national restoration trust fund. The new Administration, in consultation with the states and tribes, should encourage and facilitate the formation of new watershed management organizations for the purpose of integrating water management at the "problemshed" level. The Departments of Interior and Agriculture should assert rights to instream flows for federal lands and "encourage" states to adopt and strengthen instream flow programs by using authority to grant or withhold federal funds and certain federal permit approvals. Also, the Administration should support legislation that allows states and tribes to protect their outstanding river segments against hydropower development.

With regard to clean water, the group recommends that EPA work with the states to develop models by which water quality and quantity concerns will be

addressed in an integrated fashion. The Administration should also work with Congress to require enforceable polluted-runoff controls for agriculture, timber harvesting, and mining in non-compliance areas. Large dams creating water quality problems should be subjected to NPDES permit requirements, a clear statutory anti-degradation policy should be enunciated and a clean water fund should be established with an annual authorization of \$5B that would be available to states on a cost-sharing basis, to use on programs of their choosing designed to bring non-complying waters into compliance with water quality standards, but tied to a requirement to develop integrated resource plans. The group recommends establishment of a national discharge fee program to pay all the costs of monitoring and enforcement, a pollution prevention program, integrated resource planning procedures for applicants for financial assistance, and the establishment of basic water conservation requirements for Clean Water Act permits to help extend water supply or wastewater treatment capacity.

The group proposes an end to the agricultural exemption from the NPDES permit program in non-compliance areas. It also proposes incentives to states to develop and implement comprehensive ground water protection programs "with EPA assuming jurisdiction when the state fails to implement an adequate program." The report urges the Administration to establish broad-based local citizen advisory committees organized around federal water projects to advise federal project operation. An interagency taskforce should be appointed to support legislation to support locally based urban and rural stream restoration programs, and the President should convene summit meetings among interests in the Colorado River Basin and the Missouri River Basin, including state governments, Indian tribes and citizen groups, to explore formation of basin organizations for including all affected interests. Copies of the report may be obtained by contacting the NRLC in Boulder at (303) 492-1288.

#### PEOPLE

Dee C. Hansen, Executive Director of the Utah Department of Natural Resources, will leave the employment of the state to join Eckhoff, Watson and Preator Engineering. Newly elected Utah Governor Mike Leavitt has requested that Mr. Hansen continue to serve as a member of the WSWC.

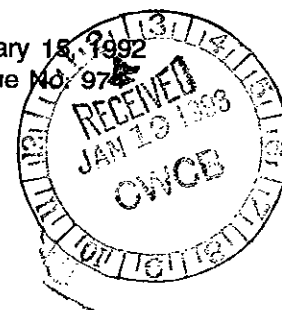
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# WESTERN STATES WATER

January 15, 1992  
Issue No. 97



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## ENVIRONMENT/WATER RESOURCES

### Endangered Species Act

The U.S. Fish and Wildlife Service (FWS) has issued a final biological opinion under Endangered Species Act (ESA) Section 7 to protect species in the Green River downstream from Flaming Gorge Dam. A five year plan will be implemented to benefit the endangered Colorado squawfish, humpback chub, bonytailed chub, and razorback sucker. In 1980 FWS requested ESA Section 7 consultation on reclamation projects in the Upper Colorado River Basin. In the early 1980's, and again in 1992, jeopardy opinions were issued for several projects. The reasonable and prudent alternative for each was operation of Flaming Gorge Dam to provide flows for the warm-water fishes. In 1988, concerned parties endorsed a recovery program for the Upper Colorado River Basin, a precursor to the recent biological opinion.

Under the recent opinion, the Bureau of Reclamation will refine operation of Flaming Gorge Dam to assure that flow and temperature regimes of the Green River more closely resemble historic conditions. Twice a year FWS will host meetings to review operations and discuss modifications. The program will include a five year research component. The Bureau will complete studies to determine the value of providing warmer water during critical life-history periods for the endangered fish. An important element of the program, according to the Bureau, will be developing a legal mechanism to assure that releases for the fish are delivered to certain downstream locations. At the end of the five year program, FWS will host discussions to determine if the release schedule should be modified. According to the Bureau, "The...program is aimed at recovering species of fish...while allowing water development to proceed."

On December 14, FWS listed as endangered or threatened five aquatic snails in southcentral Idaho located in a few isolated reaches of the middle Snake River. The listing notes that water quality continues to degrade in the Middle Snake, aggravated by recent drought-induced low flows and various point and non-point source pollution discharges. The listing also defines hydroelectric development as directly affecting the candidate species. For information contact Dr. Charles Lobdell, FWS, Boise, (208) 334-1931.

## WATER QUALITY/WATER RESOURCES

### California/Sacramento-San Joaquin Delta

Reaction to the California State Water Resources Control Board's rules to protect fish species habitat in the Sacramento-San Joaquin Delta released December 10 (WSW #970) have been varied. The Board's interim rules will reduce overall water exports from the delta by an average of 800,000 acre-feet annually for a five-year period. A spokesman for the California Farm Bureau said, "farmers are going to have less water in 1993 and likely at a higher price. We understand...that something needs to be done. We're not sure...this is the best way to go." Association of California Water Agencies Director Steven Hall said, "...this plan gambles with the water of the cities and farms of California. It directs water agencies to give up water supplies at an extremely critical time,...there is no guarantee that EPA or other agencies will refrain from attempts to control California water [in the future]." Environmentalists have been cautiously optimistic, while endorsing the plan as only temporary. "It will make a difference," said David Fullerton, of the Bay Delta Hearings Project, "but whether it will stabilize the system I can't tell you.... The needs of the estuary are enormous after decades of degradation. It's not clear to me that this is adequate. It's certainly not adequate for long-term

protection." The work of a 21-member Bay-Delta Oversight Council to negotiate a long-term set of rules for Bay Delta water deliveries is expected to begin soon.

## **WATER RESOURCES**

### **Water Exports/Alaska**

The State of Alaska has now released a discussion paper on water exports and sales (WSW #966) prepared by Ric Davidge, State Division of Water Director. Accompanying the paper are draft regulations to implement a new water conservation fee for any water removed from a hydrologic unit within the state. The intent is to offset public costs of water exports. The discussion paper asserts that: (1) marine transport of water to Mexico or California is possible before 1995; (2) the economic benefits of such transfers could be significant; and (3) cooperative work between interested parties could make water exports a reality. Concepts evaluated include the market for water, water sources, delivery systems, resource development economics, transportation and marketing, environmental and social impacts, other limitations, and strategies for development. For copies call (907) 762-2294.

In looking at water markets in the Southwest, the report finds the average cost of delivered water to California coastal communities from the state water project is about \$500 per acre-foot (ac/ft). The average cost of reclaimed wastewater in California is between \$700-\$1400 per ac/ft. The cost of connecting Santa Barbara to the state water system and delivering water was estimated at \$1200-\$5400 per ac/ft. Santa Barbara recently completed a desalination plant to treat emergency water supplies at \$1,965-\$1,312 per ac/ft. Outside of California, municipal purchases in Colorado of agricultural water cost about \$1,400-\$1,500 per ac/ft, while water rights in Reno, Nevada, for new subdivisions are valued at \$2,000-\$2,500 per ac/ft. To be competitive, Alaska officials believe they need to deliver water for less than \$1,500 per ac/ft. Sunbelt Water, Inc., has offered Baja officials in northern Mexico a ten year contract to deliver water for less than \$1,500 per ac/ft.

Alaska has also completed a strategic plan for developing water and other natural resources, while conserving Alaska's wild, scenic and cultural values.

The Division of Water is preparing tactical plans to implement the strategy, and identifying potential regulatory problems and solutions. For example, the Division of Water is negotiating a memorandum of agreement with the U.S. Forest Service to inventory and characterize potential water sources for export from southeastern Alaska.

## **WATER RESOURCES/WATER RIGHTS**

### **Colorado River/Indian Reserved Water Rights**

In a presentation to the Colorado River Water Users Association in December entitled "Tribal Leasing of Colorado River Waters: Federal Policies and Regional Realities" author Daniel H. Israel asserted, "had there been no 1922 [Colorado River] Compact, Upper Basin marketing might be the law of the river." He went on to say, "water leasing by Colorado River [Indian] tribes advances new federal policies and current regional realities." The assumption underlying these thoughts was that the 1922 Compact plan was to equitably develop the waters of each basin, but that while Lower Basin federal policies have secured full 1922 Compact depletions, Upper Basin federal policies have maximized Colorado River preservation, not development. The presentation explained the meaning of the phrase in the 1992 compact that nothing in it would affect the obligations of the United States to Indian tribes as "the United States has a trustee obligation to assist the tribes to fully develop their resources." The author concluded, "Interstate water marketing represents...an important economic opportunity. If properly structured, such transactions can restore the promise and commitments giving rise to the 1922 Colorado River Compact - namely, that each basin in the federal government pledge to secure the equitable development of the waters of the Colorado River." Mr. Israel may be reached at (303) 939-8180.

## **PEOPLE**

The National Water Resources Association Board of Directors has elected **Ivan W. Flint** as President for 1993-94. WSWC member **Fred N. Pfeiffer**, San Antonio River Authority General Manager, was elected Vice-President. WSWC member **Wayne P. Cunningham**, Agricultural Policy Analyst for the New Mexico Department of Agriculture, was re-elected treasurer.

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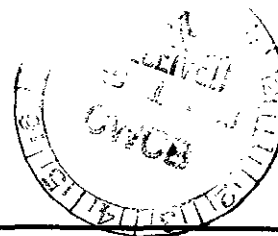
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001531

January 29, 1993  
Issue No. 976

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## ADMINISTRATION UPDATE/WATER RESOURCES

### **Western Water Policy**

Shortly before leaving office, President Bush appointed six members of the Western Water Policy Review Advisory Commission. The Western Water Policy Review Act authorized \$10M for a comprehensive review of federal activities in western states that directly or indirectly affect the allocation and use of water resources, both surface and ground waters. It is to be submitted by the President to the Congress by November 1995. The President will perform the review with the assistance of the federal agencies and in consultation with the Advisory Commission.

The commission is to be comprised of twelve members of the Congress (as ex-officio members) and ten members appointed by the President. Those ten members include the Secretaries of Interior and Army (or their designates), one member from a list submitted by the Western Governors' Association, and another from a list submitted by tribal governments. Neither of those lists have been submitted. The remaining six members named by President Bush are: Bob Broadbent, Nevada, former Commissioner of the Bureau of Reclamation and Assistant Secretary of Interior for Water and Science; former New Mexico Governor Garry Carruthers (who was also Assistant Interior Secretary for Land and Minerals Management and Director of New Mexico's Water Resources Research Institute); Gail Norton, Colorado Attorney General; Jack Robertson, Oregon, Deputy Administrator of the Bonneville Power Administration; Tom Sansonetti, Wyoming, current Interior Solicitor; and Ralph Tarr, California, former Interior Solicitor and a partner in the Andrews and Curth law firm. Bush appointed Sansonetti as Commission chair.

President Bush's choices have raised controversy, questions, and speculation that commission members would serve at President Clinton's pleasure. The statute reads, "The President shall appoint an advisory commission..." and shall "appoint one member...to serve as Chairman." It continues, "Any vacancy which may occur...shall be filled in the same manner in which the original appointment was made." There is no provision for removing Commission members. No funds have been appropriated for the commission.

## CONGRESSIONAL UPDATE

### **Committee Changes-Senate**

New Senate Committee assignments were made on January 7. Senator Max Baucus (D-MT) is now chair of the Environment and Public Works Committee, replacing interim chair Daniel Patrick Moynihan (D-NY), now chair of the Senate Finance Committee. Senator Moynihan will remain on the Environment Committee with Democrats George Mitchell (ME), Frank Lautenberg (NJ), Harry Reid (ND), Bob Graham (FL), Joseph Lieberman (CT), Howard Metzenbaum (OH), newcomers Harris Wofford (PA) and Barbara Boxer (CA), ranking Minority Member John Chafee (VT), and Republicans Alan Simpson (WY), David Durenburger (MN), John Warner (VA), Robert Smith (NH), and freshmen Lauch Faircloth (NC) and Derk Kempthorne (ID). Subcommittee assignments and chairs will be named soon.

Senator J. Bennett Johnston (D-LA) will continue to chair the Energy and Natural Resources Committee. Freshman Democrats Ben Nighthorse Campbell (CO), Harlan Mathews (TN), and Robert Kruger (TX) will join existing committee members Dale Bumpers (AK), Wendell Ford (KY), Bill Bradley (NJ), Jeff Bingaman (NM), Daniel Akaka (HI), Richard Shelby (AL), and Paul

Wellstone (MN), together with the ranking minority member Malcolm Wallop (WY), and Republicans Mark Hatfield (OR), Pete Domenici (NM), Frank Mirkowski (AK), Don Nickels (OK), Larry Craig (ID), Arlen Specter (PA), Trent Lott (MS), and newcomer Bob Bennett (UT). Senator Bill Bradley will continue to chair the Water and Power Subcommittee. Other subcommittee members are Senators Ford, Campbell, Bennett, and Hatfield. Subcommittee membership has changed substantially due to the elections (see WSW #964), and the moves of former vice-chair Kent Conrad (D-ND) to the Finance Committee and Conrad Burns (R-MT) to the Appropriations Committee. The Appropriations Committee, chaired by Senator Robert Byrd (D-WV), also added to its membership among others newcomers Patty Murray (D-WA), and Diane Feinstein (D-CA).

## **ENVIRONMENT**

### **Wetlands**

EPA issued notice of a change in wetlands policy effective the day before President Bush left office that will establish the 1987 federal wetlands manual as the tool the agency will use to delineate wetlands (58 FR 4995). The action culminates two years of internal Bush Administration discussion. The 1987 manual will be used at least until a current National Academy of Sciences wetlands study is complete. It will lay to rest use of a 1991 wetlands manual and a 1989 wetlands agreement among federal agencies which were, respectively, perceived by some observers as overly lax and unnecessarily strict in their scope of coverage. The Corps of Engineers also supports use of the 1987 manual to delineate wetlands.

## **WATER QUALITY/WATER RESOURCES**

### **California/Sacramento-San Joaquin Delta**

EPA Region IX has responded to the California State Water Resources Control Board's Sacramento-San Joaquin Delta interim rules and standards (WSW #970) by asserting that the standards are insufficient to protect the delta's ecology. The board's action would reduce overall water exports from the delta by an average of 800,000 acre-feet annually for five years. Some have viewed the standards as drastic and unworkable, while others have seen them as bold and innovative. EPA said that while the board's proposal

would mitigate the decline of the delta, it would not provide the enhancement needed to recover populations of endangered species. EPA noted specifically that the Board failed to establish a standard for saltwater intrusion in Suisun Bay, a nursery for Delta smelt, striped bass, and other fish and wildlife. If such standards were set, they could be met by further reducing exports from watercourses that feed the delta. This would enlarge the delta's outflow, and thus slow saltwater intrusion. However, it would also make less water available for other uses, especially in dry years. EPA requested the board to refine its plan to ameliorate EPA's concerns, or the agency will consider issuing regulations to mandate stronger protection for the delta.

### **Water Supply Outlook**

While January storms have brought much needed moisture to the West, water managers are only cautiously optimistic. Well above average precipitation must continue to restore water supplies depleted by six years of drought. Reservoir storage in most western states is below average and soil moisture content is low. Snowpack conditions are above to much above average west of the Rockies, but near to below average conditions prevail to the east. Most western streamflows projections are near to below average. Only continuing above average precipitation will ease the drought situation.

## **WESTERN STATES WATER COUNCIL**

### **State Water Right Permitting Report**

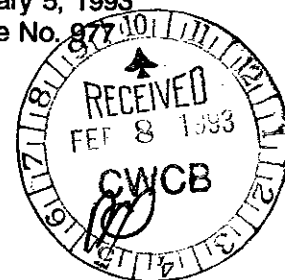
The Western States Water Council has recently published a report entitled Western State Water Right Permitting Procedures. It describes the mechanics of state water right permitting schemes. While such schemes follow a similar pattern, there are many differences. The report was compiled "with the hope that a better understanding of permitting procedures in the West will lead to better compliance with state water law, particularly in the context of federal programs...." The concise state-by-state permitting summaries are based on input from state officials. Copies of the report may be purchased for \$15.00, including postage and handling, by mailing a check to: Western States Water Council, Creekview Plaza, Suite A-201, 942 East 7145 South, Midvale, Utah, 84047.

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001591

February 5, 1993  
Issue No. 877

# WESTERN STATES WATER

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## CONGRESSIONAL UPDATE

### **Committee Changes - House**

The House Interior Committee has been reorganized by Chairman George Miller (D-CA), and will now be called the House Natural Resources Committee. Rep. Don Young (R-AK) remains as the ranking minority member. The new Committee will have 43 members. Fifteen are new, and twelve are freshmen. Further, the number of subcommittees has been reduced from six to five.

The Water and Power Subcommittee has been eliminated. Its duties will be assumed by a new Oversight and Investigations Subcommittee chaired by Miller with jurisdiction over water, the Bureau of Reclamation, the federal power marketing administrations, and Alaska public lands, including the Arctic National Wildlife Refuge. Rep. Bob Smith (R-OR) is the new ranking minority member on the subcommittee. A new Native American Affairs subcommittee has been created, chaired by Rep. Bill Richardson (D-NM), with Rep. Craig Thomas (R-WY) as the ranking minority member. The new Energy and Mineral Resources Subcommittee will be chaired by Rep. Richard Lehman (D-CA). Rep. Barbara Vucanovich (R-NV) is the ranking Republican. The subcommittee will have jurisdiction over hardrock mining, coal mining, mineral leasing, offshore oil and gas development, nuclear power and nuclear waste regulation. The National Parks, Forests and Public Lands Subcommittee will have jurisdiction over federal lands under the National Parks Service, U.S. Forest Service, and Bureau of Land Management, reserved water rights, conservation areas, urban parks, non-federal recreation and land use, and some historic preservation issues. Rep. Bruce Vento (D-MN) remains as chair, with Rep. Jim Hansen (R-UT) as the

new ranking minority member. Virgin Islands delegate Ron de Lugo (D) continues to chair the Insular and International Affairs Subcommittee, with Rep. Elton Gallegly (R-CA) as the top Republican member.

The House Public Works Committee has also changed substantially. Of its 63 members, 28 are freshmen. Rep. Norman Mineta (D-CA) is the new chair (see WSW #972), with Rep. Bud Shuster (PA) as the ranking Republican. During the 103rd Congress, the committee will address the superfund law, the Clean Water Act and wetlands issues, and an infrastructure bill that is a high priority with President Clinton. Of note, Chairman Mineta cosponsored a wetlands bill in the last session and committee member Rep. Jim Hayes (D-LA) plans to reintroduce wetlands legislation in this session. Interest in such legislation is expected to be high. A new Water Resources and Environment Subcommittee will be chaired by Rep. Douglas Applegate (D-OH), with Rep. Sherwood Boehlert (R-NY) as the ranking minority member. Rep. Nick Rahall (D-WV) will chair the Surface Transportation Subcommittee.

The House Merchant Marine and Fisheries Committee will be chaired by Rep. Gerry Studds (D-MA). Studds has been acting as chair since the death of Rep. Walter Jones (D-NC). The ranking minority member is Rep. Jack Fields (R-TX). Studds has split his old subcommittee into two -- one on Fisheries Management and the other on Environment and Natural Resources. Studds will continue to chair the latter, which will address coastal pollution, wetlands programs, and reauthorization of the Endangered Species Act. Rep. Solomon Ortiz (D-TX) is the new chair of the Oceanography Subcommittee, which will review Interior's offshore oil and gas leasing program. All six democrats on the panel are from either Texas or California.



Also of note, the House Energy and Commerce Committee has changed little. Chairman John Dingell (D-MI) will continue to serve, along with the same six subcommittees and their chairs. Only seven of 43 members are freshmen. Rep. Carlos Moorhead (CA) is the new ranking Republican member. The Health and Environment Subcommittee, again chaired by Rep. Henry Waxman (D-CA), has jurisdiction over the Safe Drinking Water Act. Rep. Al Swift (D-WA) continues to chair the Transportation and Hazardous Materials Subcommittee. Rep. Phil Sharp (D-IN) chairs the Energy and Power Subcommittee.

Because of ill health, Rep. Jamie Whitten, the longtime chair of the House Appropriations Committee, has surrendered that post to Rep. William Natcher (D-KY). The Housing and Urban Development and Independent Agencies Subcommittee, with jurisdiction that includes appropriations for the Environmental Protection Agency, will be chaired by Rep. Louis Stokes (D-OH), with Rep. Jerry Lewis (R-CA) as the ranking GOP member. Rep. Tom Bevill (D-AL) remains as chair of the Energy and Water Development Subcommittee.

## **ENERGY/WATER RESOURCES**

### **FERC/Bureau of Reclamation**

The Federal Energy Regulatory Commission (FERC) and Bureau of Reclamation have released a memorandum of understanding (MOU), dated last November, designed to help resolve concerns regarding which agency has authority to license non-federal hydroelectric power development at any given Reclamation project. The MOU establishes administrative processes and joint guidelines through which issues can be resolved in a legally sound fashion to ensure the timely development of renewable hydroelectric power resources. It pertains only to facilities owned and directly paid for by non-federal entities. The MOU does not cover development of federally-owned hydropower facilities (including rewinds and upgrades) utilizing Congressionally appropriated monies, monies made available by a power marketing administration, or monies available from non-federal entities pursuant to the Contributed Funds Act. Subject to applicable authorizing legislation, the Bureau is free under the MOU to proceed with the development of federally-owned power plants without involvement by the Commission,

except where federal power development takes place after the Commission has issued a license to a non-federal entity, in which case the subsequent development must respect the existing license.

The MOU outlines procedures whereby the Commission staff will ensure that Reclamation receives a copy of any application for a preliminary permit or license for hydroelectric development at or within a Reclamation project. Similarly, upon receipt of a request for a "lease of power privilege" for hydroelectric development at or within a Reclamation project, the Bureau will ensure that FERC receives a copy, together with a determination concerning whether power development is reserved under federal reclamation law. The Commission staff will review all requests for leases of power privilege. The document notes, "Nothing in this [MOU] shall be interpreted as modifying or limiting the legal rights and authorities of either agency...."

Where questions of jurisdiction remain unresolved the agencies have agreed on several evidentiary presumptions that will apply to arbitrating disputes. Greatest weight will be given to statutory language, then material incorporated by reference, House and Senate documents and reports, feasibility reports, definite plan reports, and other information.

## **WATER RESOURCES**

### **Water Policy**

The New Mexico Environmental Law Center (NMELC) has released a report entitled "Living Within Our Means: A Water Management Policy for New Mexico in the 21st Century" written, according to its introduction, "for those who are concerned about the availability and quality of [New Mexico's] water as we enter the 21st century. It is not meant to be a scholarly treatise; nor is it intended to examine every water issue. Rather, it is a citizens' handbook meant to address some of the most glaring problems with our current water management practices and to propose some changes to meet the challenges faced by this water-short state." The report contains chapters on New Mexico water law, allocating water in New Mexico, criteria for approving a water right, and protection of water resources. For information contact NMELC, 103 Cienega Street, Santa Fe, New Mexico 87501; (505) 989-9022.

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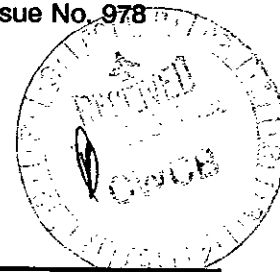




001593

February 12, 1993  
Issue No. 978

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## WATER QUALITY

### Alaska

Just before the Bush Administration left office it ordered EPA to create a new Region XI that would be comprised solely of the state of Alaska, according to Inside EPA. This action could have significant impact on numerous environmental decisions. Some observers believe that the move was a favor to Alaska Congressmen and Senators who have asserted the need for an approach to Alaska's environmental issues different from the approach used in the other states, especially with respect to wetland protection. There is, however, much speculation that the Clinton administration will reverse the order.

### Ground Water

Former EPA Administrator William Reilly released EPA's final "National Guidance for Comprehensive State Ground Water Protection Programs [CSGWPPs]" on January 19. The guidance is intended to "assist States in their efforts to comprehensively protect the nation's ground water resources, and provide a framework for a strong state-federal alliance." EPA has been working with state officials, and others, for approximately a year and a half to prepare the guidance.

The goal of CSGWPPs is to ensure comprehensive, systematic protection of ground water resources, with prevention of contamination as a primary objective, "by establishing priorities and approaches based on the unique and varying characteristics of ground water resources and potential contamination threats." Reilly's letter accompanying the guidance noted, "Comprehensive programs are intended to bring coherence to the diverse, and sometimes conflicting,

array of federal, state and local approaches to protecting ground water" and "...to empower States with the primary role in coordinating all ground water related programs...[which] will require changes in a number of key Federal programs."

It is unclear how the CSGWPP guidance will be viewed by new EPA officials. Mr. Reilly states, "As soon as possible, the EPA [Ground Water Policy] Committee will bring to the attention of EPA's new leadership the recent endorsements of the guidance's policy by the National Governors' Association Committee on Natural Resources...and several national associations of state executive branch officials, as well as individual State officials. The committee will point out that these endorsements are contingent upon a commitment by EPA, during implementation of the guidance, to recognize and address the longer-term issues of: securing greater State flexibility; achieving federal program consistency; seeking more effective State program funding; assuring a negotiated endorsement process; moving toward greater ground water and surface water program integration; and providing a means for State review and feedback to EPA on the agency's progress in supporting the comprehensive approach." For information call the EPA Ground Water Protection Publication Request Line at (202) 260-7779.

### Watershed Protection

EPA and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) have commenced a joint effort to examine state initiatives to adopt and integrate watershed management approaches into water quality programs. The effort is based on growing interest in watershed approaches evidenced by a number of changes that are underway in state water quality programs. The

objectives are to promote program integration, better target resources, enhance flexibility to carry out mandates, achieve innovation, transfer experiences nationwide, and test the hypothesis that the watershed approach is beneficial.

A recent letter was signed jointly by: Michael Cook, Director, EPA Office of Wastewater, Enforcement and Compliance; Robert Wayland, Director of EPA's Office of Wetlands, Oceans, and Watersheds; and Don Ostler, ASIWPCA President. It notes, "This venture is one of many efforts that EPA has supported in recent months to enhance states' abilities to incorporate a more resource-based approach to program management and decision-making. For example: [1] the 1991 Agency Operating Guidance has allowed states to pursue a basin approach to NPDES permitting...; [2] flexibility has been granted in the use of various grant resources, including wetlands, nonpoint source, and near coastal waters grants...; [3] demonstration projects for mapping state water bodies using Geographic Information Systems were initiated...; [and 4] a handbook presenting approaches for geographic targeting is being developed."

"These actions represent significant developments that will facilitate State efforts to manage water quality programs on a watershed basis. Nevertheless, it is clear that states -- the front-line managers of the nation's water resources -- are in the best position to identify those additional reforms and tools needed to advance watershed-based management even further. Consequently, EPA is offering States...an opportunity to try out more innovative, creative ways of doing business, recognizing that in so doing, States will need greater latitude and flexibility in certain areas. The goal is to improve the institutional relationship between EPA and the States so that we can better identify and meet the changing needs of our programs. Additionally, EPA is offering to assist in documenting the results from certain ventures so that other states may also benefit from the experience."

EPA and ASIWPCA are establishing a pilot program for states to demonstrate their experience in using a watershed management approach. Additional discussions between ASIWPCA and EPA will take place during ASIWPCA's Mid-Winter meeting on February 17-19, in Washington, D.C. This effort appears to have enough momentum to sustain it for some time. A number of groups have also expressed

interest in incorporating a watershed management approach into the Clean Water Act when the act is reauthorized (WSW #972).

## WATER RESOURCES/LITIGATION

### Texas/Ground Water/Sierra Club v. Lujan

A Texas federal judge has ordered the U.S. Fish and Wildlife Service and the Texas legislature to require the Edwards Aquifer to be managed to protect endangered species in the San Marcos and Comal Springs (Sierra Club v. Lujan, No. 91-CA-069 (Jan. 30, 1993)). The Texas legislature has until June 1, to adopt a permanent regulatory strategy "pursuant to new or existing State Law" to protect the flow of the springs. The strategy must protect against the taking of endangered species "even in a repeat of the drought of record." The U.S. Fish and Wildlife Service must determine the springflow necessary to protect the endangered species.

Historically, ground water in Texas has been subject only to the absolute ownership rule. More recently, some local ground water management districts have been formed. The state, however, has no authority to regulate use of the Edwards Aquifer, which is a primary source of drinking water for San Antonio. Some efforts at regulation have been made in response to gross overuse of the aquifer by certain individuals. These efforts, however, have been unsuccessful. Environmental groups filed suit in federal court to require regulation of the aquifer to protect endangered species habitat.

The recent ruling will allow the Sierra Club to return to the court for relief if the Texas legislature fails to act. Texas Water Commission Chair John Hall said, "The...requirement that a plan be developed that guarantees springflow...during a repeat of the drought of the 1950s is not good news for the 1.5 million people dependent upon the Edwards. Our biggest concern is whether the decision properly balances the needs of human beings with those of endangered species." Other reactions have varied widely, with concern for traditional water use patterns, fear of loss of private property rights, praise for protection of fish and wildlife, and calls for discussions that will lead to a long term solution to the controversy among the many concerned interests. Council staff have copies of the decision.

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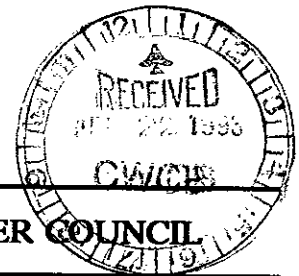
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001594

February 19, 1993  
Issue No. 979

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

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## ADMINISTRATION UPDATE

### Interior

Interior Secretary Bruce Babbitt is considering WSWC member Betsy Rieke as Assistant Secretary for Water and Science, Dan Beard as Commissioner of the Bureau of Reclamation, and Phil Cohen to replace retiring USGS Director Dallas Peck. Betsy is Director of the Arizona Department of Water Resources. She was an associate and partner in the law firm of Jennings, Strouss, and Salmon from 1987-1991. She has a key role in interstate negotiations over the use of the Colorado River, legislation affecting Arizona surface and ground waters, and statewide water planning activities. Dan Beard directs the House Interior and Insular Affairs Committee staff, under Chairman George Miller (D-CA). He has had a major role in reclamation and other federal legislation. From the state of Washington, Dan served on President Carter's Domestic Policy Staff, and then as Deputy Assistant Secretary of Interior for Land and Water. Phil Cohen is USGS' Chief Hydrologist and directs the Water Resources Division. He began his career in 1956 as a ground water geologist in the USGS cooperative program in the state of Nevada.

## WATER RESOURCES

### Colorado/Nevada/Roan Creek Project

Nevada Governor Bob Miller recently announced that the Colorado River Commission of Nevada has negotiated an agreement with Chevron Shale Oil Company and Getty Oil Exploration Company to acquire up to 175,000 acre-feet of Colorado River water in a reservoir to be built northeast of Grand Junction. The governor stated, "If southern Nevada is to continue to prosper, we need more water. The Roan Creek Project will give us the opportunity to obtain enough water at a very reasonable price to

support reasonable growth into the 21st century." Nevada would provide \$200M to construct the Roan Creek Project, and Southern Nevada would pay about \$200-250/acre-foot for 30-50 years, while seeking a more permanent supply. Developing and leasing the water would benefit the oil company consortium which holds adjudicated (unperfected) water rights for oil shale development.

Colorado would benefit from construction of the new storage project, which would bring jobs, recreation opportunities, additional firm water supplies to western Colorado, and greater flexibility to operate the river to protect flows for endangered species. The proposal would also provide Colorado with an annual income of \$50 per acre-foot for the water leased. The oil companies say necessary environmental permits have already been acquired, with the exception of a supplemental environmental impact statement, helping clear the way for construction. Still, Colorado officials have expressed several concerns.

In a February 1 letter, Ken Salazar, Executive Director of the Department of Natural Resources, Chuck Lile, Director of the Water Conservation Board, and Hal Simpson, State Engineer, said they were willing to listen, with an open mind to determine "whether your project is in the best interest of the state." However, "One of our major concerns is that any marketing or leasing of water or interest in water...could open up an unregulated water market on the Colorado River...not only in Colorado's unused entitlement, but also of present perfected irrigation uses on the western slope. We are concerned about the resulting social, environmental and economic impacts...." Another issue raised is whether or not Colorado River water is an article of commerce, and whether or not the Law of the River permits interbasin commerce, and if so, can it be regulated by Colorado.

The letter points out, "Over the years, as export proposals have been presented to the states by proponents such as Galloway and RCG, a great deal of thought has been given as to how such proposals can be undertaken consistent with the Law of the River. The conclusion of each of the Seven Basin States has been that such proposals are illegal." In the past, numerous basin water entities have opposed private interstate leasing plans. "Colorado wants to maintain a cooperative relationship with the other basin states [and with Indian tribes] on many issues involving water use and development."

The project would require Water Court proceedings to approve any change in the nature of use to deliver water to Nevada. Moreover, the letter explains, "Your proposal would result in the diversion and storage of water under relatively senior conditional water rights decrees, which are currently decreed for oil shale purposes. These decrees are senior to a number of existing and conditional water rights in the Colorado River Basin, including the Windy Gap Project, some of Denver's water rights, and a number of decrees held by the Colorado River Water Conservation District.... Moreover, development of these decrees may result in additional water rights calls against existing junior absolute water rights in western Colorado. This could result in increased releases of water from Green Mountain Reservoir in order to replace depletions under these rights, and may result in increased cost to existing west slope water users for the diversion and use of their water. We recognize and support the rights of your clients to develop their water rights under Colorado's priority system for their decreed purposes.... However, as a matter of public policy, how can the state justify supporting the development of these decrees, with the consequent adverse effect on existing Colorado water users, so that water can be leased downstream to Nevada?"

The letter also raises questions regarding the proposals compliance with Colorado's export statute, which requires that any proposed use of water outside the state be expressly authorized by interstate compact or credited as a delivery to another state, as well as that the proposed use not impair the ability of Colorado to comply with its compact obligations or be inconsistent with the reasonable conservation and beneficial use of Colorado's water.

The letter ends, "We believe these questions are of fundamental concern...and must be answered fully and satisfactorily before the state can determine the advisability of your proposal. Until we are convinced of the legality of your proposal, and that your proposal is in the best interests of the current and future citizens of the state, we can offer you no support."

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### **Drought**

With the exception of parts of Washington, Oregon, Idaho and Montana, winter precipitation has all but erased severe drought conditions as measured by the Palmer Index, which does not take into account depleted reservoir storage and ground water. While some local water supplies have recovered and some water use restrictions have been eased or eliminated, western water managers remain cautious. Dave Kennedy, Director of the California Department of Water Resources, notes that heavy rain and snowfall have added 5M acre-feet of water to total storage. However, the State Water Resources Control Board's Decision 1630 put new restrictions on exports from the Sacramento-San Joaquin River Delta. Kennedy says, "The last thing we want to do is send the message that we don't need to conserve...."

Elsewhere, Columbia River flows at the Dalles are projected at 82% of average, and Snake River flows are expected to be 65-85%. Alaska's interior is buried by a record-setting snow cover. The Arkansas River Basin water supply outlook is near average. Upper Colorado River Basin runoff should be near average, and much above average in the Lower Basin. Lake Powell inflow forecasts are about 8M acre-feet. Lower Colorado River streamflows are expected to range from 400-800% of the median. In Phoenix, the usually dry Salt River was running from bank to bank in January. Snow continues to pile up along the east slope of the Sierras and across northern Nevada and Utah in the Great Basin. In northern Utah, runoff forecasts range from 80-185% of average, and above average flows are expected from above average snowpacks in southern Utah. Missouri River Basin flows, with few exceptions, are expected to be 80-90% of average. The outlook for the Rio Grande Basin calls for streamflows from 95-150% of average in Colorado, and 140-175% in New Mexico.

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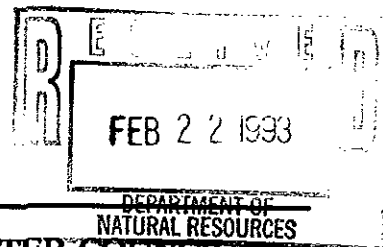


001595

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February 19, 1993  
Issue No. 979

# WESTERN STATES WATER



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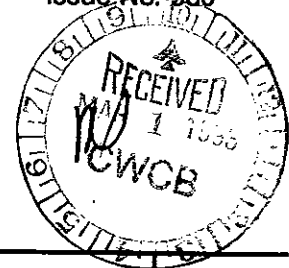


001596

February 26, 1993

Issue No. 980

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## ADMINISTRATION UPDATE

### Interior

The White House has announced nominations to fill Interior positions under Secretary Bruce Babbitt. WSWC member Elizabeth Ann (Betsy) Rieke was named Assistant Secretary for Water and Science. Robert Armstrong, aide to Texas Governor Ann Richards, was named Assistant Secretary for Land and Minerals Management. George Frampton, Jr., President of the Wilderness Society, will be Assistant Secretary for Fish, Wildlife and Parks. Bonnie Cohen, Senior Vice-President with the National Trust for Historic Preservation, will be Assistant Secretary for Policy Management and Budget. Jim Baca, a New Mexico Land Commissioner, will lead the Bureau of Land Management. Former law professor and Associate Interior Solicitor John Leshy will be Solicitor.

## LITIGATION

### South Dakota v. Bornhoft

A Montana federal district court has dismissed a suit filed by South Dakota, North Dakota and Montana against the Army Corps of Engineers which asserted that the Corps had improperly assigned downstream uses of Missouri River reservoir waters higher priority than recreation and fish and wildlife uses in upstream states, South Dakota...et al v. Bornhoft, No. Cv. 91-26-JDS-BLG (Feb. 3, 1993). The states asserted that as a result of the Corps' "erroneous interpretation and...unlawfully static priorities...set forth in the Master Manual and annually implement[ed] in the...operating plan...", the Corps was mismanaging the Missouri River. The plaintiffs sought an order from the court requiring development of a plan of operation that "reflects contemporary uses and needs of the basin."

The court found that the Corps had changed its official policy, giving consideration to all uses in the basin. It noted, "[d]uring the course of the present Master Manual review and the preparation of an environmental impact statement, 'all existing uses of the system will be considered in determining whether revisions to the current water control plan should be made.'... [T]he Corps has said that, during this review process, all uses are to receive equal consideration." Thus, the court concluded, "the present action is appropriate for dismissal because the issues raised in the complaint are no longer alive." Although the states had sought a stay until the Master Manual review is complete, they view the dismissed legal action as successful because of the Corps' apparent change of policy regarding the importance of upstream uses in basin management.

## LITIGATION/ENERGY

### Sayles Hydro v. SWRCB/Federal Power Act

The Ninth U.S. Circuit Court of Appeals has affirmed a California federal district court ruling that, under the Federal Power Act (FPA), the federal government occupies the field of licensing and regulation of hydropower projects, Sayles Hydro Assoc. v. California State Water Resources Control Board, No. Civ. 91-15934 (Feb. 1, 1993). In previous proceedings, Sayles Hydro filed a summary judgment motion, asking the district court to preclude the board from redetermining matters already decided in the FERC licensing process (WSW #876). The Board, however, asserted that the case was not judicially ripe until a water right permit was issued with terms that conflicted with the FERC license. The Board further argued that the FPA contemplates a "conflicts" approach to federal preemption, and not "occupation of the field" approach. While the district court seemed



to opt for the "occupation of the field" view, some language in its opinion followed the "conflicts" approach. The distinction is important because under the "conflicts" approach state law is not completely preempted.

The Ninth Circuit acknowledged the discrepancies in the district court opinion, but noted "[t]he dichotomy between the two types of preemption is not...sharp in practical terms..., so the mixed language has little significance." In so doing, the court said that the U.S. Supreme Court's ruling in California v. FERC (the "Rock Creek" case) "reaffirms First Iowa's narrow interpretation of the savings provision [of the FPA], so that the only authority states get over federal power projects relates to allocating proprietary rights in water." The court concluded, "In th[is] case..., it is clear that the federal laws have occupied the field, preventing state regulation. [M]ost or all of the State Board's concerns were considered by...[FERC] in granting the license, and conditions were imposed...to protect...multiple values." The court was careful to point out that stipulated facts showed there were no protests to the application based on injury to prior water rights, and that the State Board asserted no impact from the project on prior water rights.

## **WATER RESOURCES**

### **Alaska**

Last month, Governor Walter Hickel issued an administrative order creating the Alaska Water Management Council (AWMC) to promote state and federal agency cooperation in identifying and resolving water resource issues. The Council's activities will focus on: (1) collection, assessment and management of data concerning water resources; (2) allocation of water rights; (3) issuance of permits governing activities affecting surface and ground water resources; (4) coordination of public information; and (5) water resources development and conservation. The administrative order asserts that Alaska's water is an important economic resource not only to Alaskans, but the nation. "As population pressures increase..., it is recognized that major decisions will need to be made concerning Alaska's waters to ensure that environmental, economic, habitat, and health benefits are protected...." The order recognizes the complex nature of state and federal management of water resources, considering increasing demands and

diminishing financial resources. The AWMC will include an executive committee composed of WSWC members Ric Davidge, Director of the Division of Water and Mike Menge, Director of the Division of Environmental Quality, and Frank Rue, Director of the Division of Habitat. The full Council will be composed of director-level representatives from state and federal agencies, boards and commissions that have water management responsibilities. This includes the Energy Authority, Department of Commerce, Department of Transportation, Water Resources Board, Attorney General's office, and University Water Resources Center. Federal membership includes the Army Corps of Engineers, Bureau of Land Management, Environmental Protection Agency, Fish and Wildlife Service, Forest Service, Geological Survey, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, National Park Service, and the Soil Conservation Service.

The AWMC will meet quarterly at various locations around the state and will create working groups or task forces as appropriate. The executive committee will submit to the Governor an annual progress report, and goals and objectives for the next year. The Council will identify areas where mutual cooperation will create cost efficiencies. The AWMC may submit proposals for agreements concerning goals, procedures and other actions. However, it may not approve or implement such agreements, promulgate rules, regulations or standards, bind any agency, or purport to execute or enforce existing laws or regulations. The AWMC is intended as a forum for discussion and coordination, and will not create any third-party rights or modify the authority of the participating agencies.

## **WESTERN STATES WATER COUNCIL**

### **Water Law Conference**

The 11th Annual Water Law Conference cosponsored by the American Bar Association, the Western States Water Council, and the Conference of Western Attorneys General was held February 11-12 in San Diego, California. About 200 people attended. Issues discussed included takings law, Indian water rights matters, drought management, trends involving changes in water use, and the use of effective hydrologic models in the context of water rights litigation.

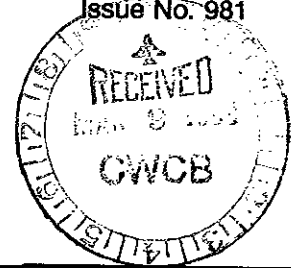
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001537

# WESTERN STATES WATER

March 5, 1993  
Issue No. 981

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## LITIGATION/WATER RIGHTS

### **Reserved Water Rights/Forest Service**

The Colorado District Court for Water Division No. 1 has denied the United States' claims to reserved water rights for instream flows to provide channel maintenance in the Arapaho, Pike, Roosevelt, and San Isabel National Forests, but has acknowledged a right to water for fire-fighting purposes and for administrative sites, In the Matter of...Application...for Reserved Water Rights in the Platte River..., Nos. W-8439-76..., (Feb. 12, 1993). The federal government claimed that U.S. Forest Service withdrawals implicitly reserved the appurtenant water necessary to maintain instream flows. The claims were based on the science of fluvial geomorphology. The issue was initially argued in the Colorado courts in the mid-1980s, but was not resolved. In 1987, the Colorado Supreme Court remanded the matter to the district court. After some delay and a lengthy trial, the district court recently handed down its decision.

The court found the case centered on the interpretation of the Creative Act of 1891 and the Organic Administration Act of 1897. It stressed that the purposes of the creation of national forests have been established by the U.S. Supreme Court, in United States v. New Mexico, as conserving water flows and furnishing a continuous supply of timber. The court quoted the Supreme Court as saying, "Congress intended that waters would be reserved [for national forests] only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law." "The term 'favorable water flows' was a considerable focus of the trial in this case," the court said, stressing that irrigation and domestic use were principle purposes for maintaining such flows.

The court asserted that the affect of granting the United States' claims would be to accentuate flood flows in the springtime, which is "the exact opposite of what was desired by people whose thoughts on the subject were influential at the time of the enactment of the Creative and Organic Acts." The court also noted that quantification of the requested reserved rights was at odds with the efficient use of waters from the forest for irrigation and domestic purposes and that there were alternative, less restrictive, methods of protecting the amount of water necessary to fulfill the purposes of the national forest reservations.

With respect to the nature of the streams in the forests, and the need to maintain channels to protect the streams, the court said the objectors to the United States' claims asserted that channel maintenance was irrelevant, while proponents said Congress intended the channels be maintained unimpaired. The court found "the truth is somewhere in between." It noted, however, that "unless the forests are converted into outdoor museums rather than places for use, work and recreation, processes which alter the natural environment will continue.... It is this court's view that channel maintenance is necessary to effectuate a purpose of the National Forests. But such maintenance is required only to a reasonable degree." The court continued, "...although...evidence showed some changes in stream characteristics which may be...a result of diversions..., those changes did not seriously impair the integrity of the stream channels... [and] are well within the bounds which a reasonably informed person must have contemplated when diversions in the national forests were [first] allowed...." The court went on to explain that the scientific methodology underlying the United States' claims failed to identify the minimum flows necessary for channel maintenance. The court did, however, uphold federal claims for firefighting and administrative sites.

In sum, the court seemed mostly unimpressed with the scientific theories proposed by the United States, and could not be convinced that the reservations of U.S. Forest Service lands supported the purpose for which the United States claimed the instream flow channel maintenance rights.

## **WATER QUALITY**

### **Ground Water**

EPA's final "National Guidance for Comprehensive State Ground Water Protection Programs" (WSW #987) released January 19 was unaffected by a Clinton Administration directive of January 22, issued by the Office of Management and Budget (OMB), which withdrew a number of regulations signed in the final days of the Bush Administration. OMB Director Leon Panetta said that new officials must "have an opportunity to review and approve new regulations" and ordered a halt to the Federal Register printing of all rules that had been approved by Bush appointees, but not yet printed. Because the groundwater document was issued as guidance, not as regulations, it was not affected by the OMB directive.

## **WATER RESOURCES**

### **WGA/WSWC Water Management Workshops**

The Western Governors' Association (WGA) and the WSWC cosponsored a fourth workshop on water management in the West on February 18-19. The workshop followed three earlier meetings in Park City, Utah. Approximately 60 people attended, representing a wide array of interests associated with water management in the West. Craig Bell, WSWC Director, began by introducing Keith Higginson, WSWC Vice-Chair, who provided an introduction and welcome on behalf of the Council. Mr. Higginson expressed the view that the workshop had a very appropriate focus: to assess current state capacity to achieve the goals developed at the earlier Park City workshops, to identify obstacles to enhancing this capacity, and to develop recommendations for overcoming these obstacles. Jo Clark, WGA Program Director, then provided some initial remarks concerning the opportune timing of the workshop and the chance to influence national policies. She also introduced Reese Peck who represented Governor Mickelson of South Dakota, WGA co-lead for water. Mr. Peck provided his

perspectives on the challenges facing his state and the West, and the hope that the workshop would be helpful in addressing those challenges.

Dave Getches, the workshop facilitator, then provided some further background and explained the goals of the workshop. A presentation by Norman Johnson, WSWC Legal Counsel, regarding a matrix on state water management which the Council had prepared in connection with its Albuquerque meetings followed. He explored both the evolution of state laws and policies respecting public interest criteria, instream flows, and watershed planning and management. Tom Bahr, Director of the Water Resources Research Institute at New Mexico State University, then presented a summary of a legal research project sponsored by the Powell Consortium, an alliance of western university institutes for the study of water and the environment. The main focus of the papers was to analyze how federal programs impact state water management and water use, as compared to the "Park City Principles" developed in the earlier workshops. Professor Charles DuMars, New Mexico Council member and member of the Powell Consortium, prepared a paper examining interstate compacts, the commerce clause and the adjudication of tribal water rights in the same context.

Starting with a brief examination of the results of a pre-workshop survey, Dave Getches led the group in a discussion of suggested recommendations consistent with the goals of the workshop. These recommendations were clustered and assigned to five workgroups, which spent time in the afternoon considering them, identifying obstacles to their implementation and, in some cases, suggesting ways the obstacles might be overcome. The work groups reported back to the larger group as the final matter of business on the meeting's first day. On the morning of the second day, a panel was asked to critique the recommendations. A discussion followed with the entire group on the recommendations in light of the comments of the panelists. This evolved into an effort to identify consensus recommendations from the group. As a final activity, participants were asked to identify appropriate follow-up strategies, in light of the group recommendations. A report summarizing the activities, findings, and recommendations of the workshop will be prepared to go along with a summary of the first three Park City workshops. This document will be available from WGA in the future.

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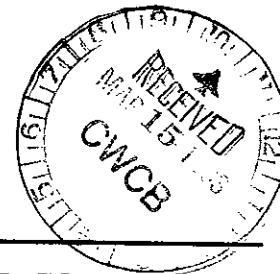
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001598

March 12, 1993  
Issue No. 982

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

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executive director - Craig Bell

## ENVIRONMENT/WATER RESOURCES

### **Endangered Species/Delta Smelt**

The U.S. Fish and Wildlife Service (FWS) listed California's Delta smelt as a threatened species under the Endangered Species Act on March 4. The final rule will take effect April 3. FWS noted that while the smelt's population has been relatively stable for five years, the number of fish has been as much as 90% lower than peak population. Further, population levels have been such that if certain conditions were present, a severe decline could occur within a very short time. Biologists acknowledge that the drought has hurt the smelt's habitat but maintain that other factors, including water resource management decisions and water use, have harmed the smelt as well. Existing restrictions on diversions from rivers that feed the Delta to protect the winter-run salmon will enhance the smelt's habitat. Thus, in the short term, the smelt listing will have only minor effect. However, completion of a study by spring of 1994 which could result in the Bay-Delta being declared "critical habitat" for the smelt could lead to increased restrictions on water use and management decisions in the future.

Reactions to the listing have been mixed. David Behar, Bay Institute Executive Director, called it "potentially the most significant event for environmental protection of the estuary." Stephen Hall, Association of California Water Agencies Executive Director, said "This decision raises several roadblocks in the state's efforts to boost the reliability of its water supply at a time when we can least afford it."

The California State Water Resources Control Board is in the process of revising its plan to protect the water quality in the Delta (WSW #970). The board is expected to adopt a proposal in the near future to

limit pumping that affects the Delta while the board considers a long term strategy for its protection. The board's preliminary proposal for this purpose was challenged by U.S. EPA (WSW #976).

## ENVIRONMENT/ENERGY

### **Federal Energy Regulatory Commission**

American Rivers and a national coalition of environmental and recreation organizations recently called on the Clinton Administration to reform the Federal Energy Regulatory Commission (FERC). This year, three of the five members of the commission, including the chair, will be replaced (WSW #969). American Rivers charges FERC is industry-dominated and routinely ignores statutory requirements to give to river conservation, recreation and environmental protection "equal consideration" with energy development and downplays fish and wildlife and watershed protection issues. The group also asserts that over the last 20 years FERC commissioners have had virtually no environmental experience, with four of the five current commissioners previously affiliated with energy or power interests.

This year FERC will consider renewing licenses (usually 30-50 year renewals) for 237 hydroelectric dams on 105 rivers. American Rivers points to a nationwide survey showing an overwhelming majority of respondents favor requiring power companies to set aside some hydroelectric revenues (5%) to protect and clean up rivers, and provide ladders and screens to protect fish. A large majority also favor shortening the term of federal power licenses to allow for more review of future operating requirements to improve efficiency and protect the environment. While FERC must relicense more projects in 1993 than in any other year, relatively few are in the West: WA - 6, OR - 3, UT - 3,

CO - 3, CA - 1, and MO - 1; compared to NY - 43, WI - 33, ME - 30, MI - 28, MN - 16, VT - 16, GA - 10, VA - 9, NH - 9, and MA - 7.

## WATER QUALITY

### **Clean Water Act-Reauthorization**

Both Houses of Congress have begun preliminary activities aimed at reauthorizing the Clean Water Act (CWA). The House Public Works Committee, which has primary House CWA jurisdiction, has started a series of clean water hearings, as has the House Merchant Marine Subcommittee on Environment and Natural Resources. Issues discussed so far include funding and other matters associated with rural wastewater treatment needs and the more general issue of the need for additional wastewater treatment projects nationwide.

Senate Environment Committee Chair Max Baucus (D-MT) announced at the Mid-winter meeting of the Association of State and Interstate Water Pollution Control Administrators that Senator Bob Graham (D-FL) will lead the effort to write a Senate CWA reauthorization bill, which is expected to be introduced by early summer. Important issues include non-point source pollution control, funding, and pollution prevention. Baucus suggested an annual funding goal of about \$5B, and said that meeting the funding needs of rural communities, and possibly allowing CWA state revolving-loan funds to be used to meet Safe Drinking Water Act (SDWA) requirements, should receive priority attention. He said that new approaches to non-point source pollution should be explored in cooperation with states, with attention to demonstrated successes and emphasis on providing additional funding. He also discussed combined sewer overflow issues and the need to emphasize a watershed-based approach in the CWA. Further, there was some discussion of combining provisions of the CWA and the SDWA.

## WATER RESOURCES/ENERGY

### **Drought/Pacific Northwest**

Below average snowpack in the Upper Columbia River Basin, regional weather forecasts of no substantial precipitation in the near future, and low streamflow and runoff forecasts portend one of the

worst water years in the history of the Northwest. Annual runoff from the Columbia River historically averages 88-188M acre-feet. Streamflows have been only 55% of average this winter, and regional reservoirs are only about 30% full, compared to an average of 70% for this time of year. Since the fall of 1986, the Northwest has suffered two of the driest two-year periods since 1929. The March 6 Palmer Index continues to show severe drought in many areas.

The Bonneville Power Administration (BPA) markets power from federal projects and controls most of the Northwest's power supply. BPA is also responsible for helping restore threatened salmon stocks, and last year raised its water budget for fish from 3.6M acre-feet (Maf) to 6.5 Maf, with streamflows dropping. This winter temperatures have also been well below average, raising regional electricity demands, and requiring BPA to purchase power.

Hydropower makes up 70% of the Northwest's power supply, and BPA usually has surplus power to sell. However, BPA's surplus power revenues have dried up, along with the weather. BPA has had to purchase power from regional thermal electric resources, and buy and import power on the open market from Canada and California. As a result last year BPA lost \$274M, and analysts project a FY93 shortfall of \$413M. Revenue projections have dropped \$82M since the last quarter. As of Jan. 31, the federal reservoir system held a little less than 4.4M megawatt-hours (mwh) of energy, which is less than is usually stored in Grande Coulee alone. Short-term power purchases from October through January totaled over 101M mwh, compared to about 42M mwh for the same period in FY92 (BPA Journal, March 1993).

## WESTERN STATES WATER COUNCIL/PEOPLE

In a recent letter to Executive Director Craig Bell, Utah's new Governor Michael O. Leavitt has reaffirmed that **Larry Anderson, Dee Hansen, and Thorpe Waddingham** will serve as Utah's WSWC members, while **Don Ostler** and **Dallin Jensen** will serve as alternates. Further, Governor Leavitt designated Larry Anderson as Utah's member on the Council's Executive Committee, "prompted by the retirement of Dee Hansen as Executive Director of the Utah Department of Natural Resources...." The Governor concluded that he "looks forward to working closely with the...Council."

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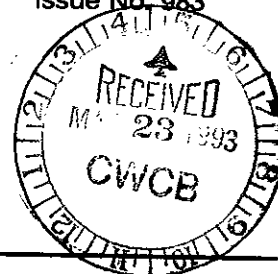
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001599

March 19, 1993  
Issue No. 983

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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editor - Tony Willardson

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## ADMINISTRATION UPDATE

### Interior

The White House has nominated Daniel Beard to replace Dennis Underwood as Commissioner of the Bureau of Reclamation. Beard has served as a chief aide to House Interior Committee Chair George Miller (D-CA). Reactions to the nomination have been mixed. Observers agree it signals continuation of the Bureau's efforts to redefine its mission. Also of note, contrary to reports, USGS Director Dallas Peck has announced he has no plans to retire (WSW #979).

## WATER QUALITY

### Water Quality Standards/Indian Tribes as States

A New Mexico congressman has recommended mediation to resolve differences between Albuquerque and the Pueblo of Isleta over the effects of the pueblo's new water quality standards (WSW #956). The pueblo is located on the Rio Grande downstream from Albuquerque. It adopted water quality standards under Clean Water Act Section 518, which were approved by EPA last December.

In January, Albuquerque sued EPA over its approval of the Isleta standards, claiming they were arbitrary, lacked supporting scientific evidence, and would cause a financial burden on the city's ratepayers without improving the quality of the Rio Grande. David Campbell, the city's attorney, said, "I want to emphasize we are not suing the Isleta Pueblo and not challenging whether they can adopt such standards, but we are challenging EPA's approval of those standards." The city has estimated it could cost as much as \$250M to meet the standards. EPA officials contend the costs should be \$50M or less.

Rep. Steve Schiff (R-NM) has requested that new EPA Administrator Carol Browner assign a member of her staff to help him achieve a mediated resolution of the dispute. He has taken initial steps in this regard, but warned the city to "recognize that there will be tightening water-emissions standards independent of the Isleta...standards."

## WATER QUALITY/PUBLICATIONS

### Water Quality Monitoring

The Intergovernmental Task Force on Monitoring Water Quality has published, "Ambient Water-Quality Monitoring in the United States: First Year Review, Evaluation, and Recommendations." The study contains preliminary recommendations on how to improve the effectiveness and coordination of monitoring activities conducted by federal, state, and local agencies. According to the report's forward, "Better ambient...monitoring is needed to assure that the decisions made and the actions taken achieve their...objectives effectively and economically...to allow better management of our natural resources." For information contact USGS, Office of Water Data Coordination, 417 National Center, Reston, VA 22092 (703) 648-5023.

## WATER RESOURCES

### Corps of Engineers/Kansas

The state of Kansas is considering paying up to \$25M to purchase available storage in Corps of Engineers' reservoirs in Kansas to gain more control over water management in the state. From 1974-91, Kansas executed contracts for storage space in ten major reservoirs. In 1985, Kansas and the Corps signed a memorandum of understanding (MOU)

regarding the purchase of federal storage reallocated from water quality to municipal and industrial purposes. The MOU, which expires in 1996, established an interim pricing policy allowing the state to purchase reallocated storage at the original construction cost and interest rates, in one lump sum. Given these favorable terms, compared to current federal policy, the state hopes to acquire more storage rights. The Kansas Water Office has recommended the state legislature modify state law requiring local repurchase commitments before the state may buy such rights. The legislature must also find a funding mechanism for the proposed acquisitions.

Kansas' original storage contracts with the Corps were negotiated under the 1958 Federal Water Supply Act, which allowed the state to add up to an additional 30% to the storage capacity of a proposed federal flood control project, at state cost, for "future" municipal and industrial needs. The state was allowed to repay the additional construction costs over 50 years, with interest at then current rates (2-4%). While contracts negotiated under the 1985 MOU require a lump-sum payment, capital costs are calculated based on original construction costs and interest rates. Under the MOU, Kansas created a Water Assurance Program, established a \$4M escrow account, obtained water quality reservation rights, and promised to protect water quality releases. The Corps agreed to conduct reallocation studies, and give Kansas a right of first refusal on storage eligible for reallocation.

While state municipal water supplies are currently adequate, the drought has raised concern over control of reservoir storage. In 1991, the Corps quickly drew down Milford, Tuttle Creek and Perry Lakes in the Kansas Basin to support Missouri River navigation. The navigation benefits appeared to be slim, while the impact on recreation and the threat of a multi-year drought led the state to consider purchasing the storage to remove it from Corps' control.

The state considered acquiring complete control of all storage and assuming all capital, operation and maintenance costs. State finances, however, were a constraint. Also, whereas the Corps has discretionary authority to reallocate up to 50,000 acre-feet, or 15% of total storage in a project, whichever is less, any additional reallocations require Congressional approval. Acquiring available storage within the discretionary authority of the Corps appears to be

practical and cost-effective in providing state control over some stored water.

Potential sources of funding include the Kansas State Water Plan Fund, with annual revenue of about \$16M, use of the general fund, revenue or general obligation bonds, or Kansas' state water marketing program, which includes a small development fund. Some combination of these sources will likely be used if the plan goes ahead, with purchases spread over the next 3-4 years. For more information contact the Kansas Water Office, (913) 296-3185.

## WATER RESOURCES/PUBLICATIONS

### Texas

Texas Auditor Lawrence F. Alwin, CPA, has presented a report to the Texas Legislative Audit Committee entitled "Texas Water Resources Management: A Critical Review." The transmittal letter says, in part: "Texas is not well prepared to respond to the emerging water resource management challenges posed by continued economic expansion, population growth, or a period of extended drought. The State needs a process to address the interrelated and often conflicting issues of water supply, water quality, and the environment." It opines, "Texas lacks clear statewide policies and goals for water resource management.... We recommend that the legislature create a state water resources coordinating council to formulate statewide policy recommendations and goals...." The letter concludes, "This review...highlights a number of critical issues and recommendations.... We wish to thank the Texas Water Development Board, the Texas Water Commission, and the numerous other agencies and individuals involved in water resource management for their cooperation and assistance." For information contact the Texas State Auditor, P.O. Box 12067, Austin, TX 78711-2067; (512) 479-4700. Refer to SAO Report No. 3-081.

### MEETINGS

The Western States Water Council's Fifth Biennial Water Policy Seminar and quarterly meetings will be held April 22-23 in Washington, D.C. at the Quality Hotel on Capitol Hill. The Seminar meeting will include roundtable discussions on federal/state relations in water resources and the reauthorization of the Clean Water Act. Speakers are being confirmed.

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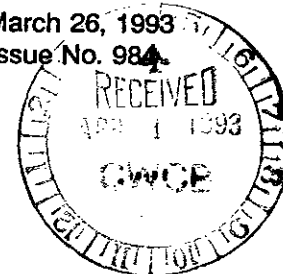
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001600

# WESTERN STATES WATER

March 26, 1993  
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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## ADMINISTRATION UPDATE/WATER RESOURCES

### **Western Water Policy**

The Western Water Policy Review Act of 1992 created the Western Water Policy Review Advisory Commission, which is to perform a comprehensive study of federal activities in nineteen western states that directly or indirectly affect water allocation and use. Twelve Congressmen will serve as ex-officio commission members, while the President will appoint ten members, including the Secretaries of the Army and Interior. Just before leaving office, President Bush named six members (WSW #976). The remaining positions will be filled from lists of nominees submitted by the governments of western Indian tribes and the Western Governors' Association (WGA).

In a March 4 letter to Interior Secretary Babbitt, Arizona Governor and WGA Chair, Fife Symington, wrote that the "work of the commission is something of keen interest to the western governors. We will be pleased to provide assistance and input to the commission, and I am sure you can count on the western governors making time available to the staff of the commission. For our part we are pleased to have a former member of WGA in charge. I know that you are fully familiar with the issues we face in Arizona and the other western states...." Governor Symington continued, "At a recent meeting in Washington, you asked [WGA]...to submit nominees for the... Commission. We are pleased to nominate the following individuals: Keith Higginson [Director of the Idaho Department of Water Resources and former Bureau of Reclamation Commissioner]; William Janklo [attorney and former South Dakota Governor]; Michael Brophy [a Phoenix attorney and WSWC member]; and Janet Newman [Professor, Lewis and Clark Law School]."

## WATER QUALITY

### **Watershed Management**

About 1,000 people gathered in Alexandria, Virginia for "WATERSHED '93 - A National Conference on Watershed Management" convened by the Terrene Institute and sponsored by many federal agencies and local entities in cooperation with various national organizations. On the final day of the meeting, the proceedings were satellite broadcast to locations throughout the country where smaller groups participated in the roundtable discussion by telephone. Conference themes included: Watersheds; Integrating Human Needs with Ecosystem Management; Addressing Multiple Interests in Watershed Management; and Diversity of Approach in Protecting Watersheds. Plenary and concurrent sessions, a resource fair, and field trips were held. About 175 papers were presented.

One important panel at WATERSHED '93 was comprised of Martha Prothro, EPA Acting Assistant Administrator for Water; Jimmy Powell, Senate Environment and Public Works Committee staff; Billy Frank, Chair of the Northwest Indian Fisheries Commission; Parris Glendening, a Maryland County Executive; and Steve Tedder, Chief of the North Carolina Water Quality Section. Panelists provided perspectives on the current status of watershed management, the optimum roles of different levels of government, and views concerning future protection strategies. Agriculture Secretary Mike Espy told participants, by way of a video tape, that the watershed approach should be emphasized because it "makes good sense - good managerial sense...good environmental sense...and good sense for rural America." EPA Administrator Carol Browner attended and said that the new administration plans to work

diligently towards enhanced coordination of federal programs to protect ecosystems. She noted that the agency's 1993 budget should spark innovation, explaining that \$47M is included in the FY93 economic stimulus plan for mitigation of non-point source pollution, demonstrating the administration's commitment to watershed protection and restoration. She praised Interior Secretary Babbitt for his proposal to develop a national biological survey, and noted that EPA is committed to "moving beyond strict application of standards...to ecosystem protection."

## **WATER RESOURCES**

### **Water Supply Outlook**

According to the Soil Conservation Service, spring and summer streamflows are expected to be near or well above average for much of the West, with the exception of the Missouri River Basin and the northern Columbia River Basin. Similarly, snowpacks are above to well above average in southwestern states, but are declining in northern states. Precipitation follows a similar pattern. Most western states report reservoir storage is less than half of average. Only Arizona, Colorado and New Mexico have above average storage. On March 20, the Palmer Index indicated extreme drought conditions continue in northeast Oregon and central Washington, while severe drought conditions remain in southeastern Idaho and northwestern Montana.

Two or three times average snowpack covers much of Alaska's interior from the headwaters of the Yukon to near Anchorage. Above average runoff is expected for the entire Arkansas River Basin ranging from 111% along the mainstem to 156% for some tributaries. Precipitation last month was 175% of average, snowpack about 136%, and reservoir storage about 118%. Precipitation across the entire Colorado River Basin has been well above average, and runoff forecasts have increased significantly. For the Upper Basin, inflow at Lake Powell should be over 10M acre-feet or 125% of average. In the Lower Basin, streamflow forecasts range from 400% to 1100%. Prior to recent rains, forecasts for the Columbia River Basin had declined 10-20% in the north, and also dropped slightly in southern Idaho and Oregon. Snake River flows are projected to be 90% in tributary basins, but only 60% in the mainstem. Columbia River runoff at the Dalles is forecast at 73% of average.

In the Great Basin, runoff along the east slope of the Sierra and in the Humboldt Basin will be above average. Lake Tahoe is expected to spill over its natural rim for the first time since September 1990. In Utah, with record snowpack, streamflow forecasts range from 80-130% of average in the north to 150-400% of average in the south. Missouri River Basin runoff is forecast at 70-80%, except for the Platte River Basin, where flows should be near average. In the Rio Grande Basin forecasts rose 25% above February figures with precipitation at 200-300% of average. Runoff projections range from 246% in the Upper Pecos Basin to 109% along the mainstem and central Valley tributaries.

In California, the best snowpack in a decade should produce up to 135% of average runoff along Sierra basins from the Feather River southward to the King River, with near average runoff expected in the extreme northern basins and the Kern River in the southern Sierras. Flood control releases have begun from Lake Oroville, a 3.5M acre-foot (Maf) reservoir that is part of the State Water Project. The state has increased projected water deliveries for the second time in two weeks, promising cities and farmers 85% of a record 3.85 Maf request. Early last December guaranteed deliveries were only 10%. The state project serves some 20 million people and 600,000 acres of farmland. Also, the larger federal Central Valley Project has increased firm deliveries for farmers and cities north of the Sacramento-San Joaquin River Delta to 65% and 90% respectively. However, south of the Delta, deliveries will be limited by efforts to protect endangered fishes. Pumping from the Delta was shut down for almost two weeks to protect the winter-run Chinook salmon. The National Marine Fisheries Service and California Department of Fish and Game set a "take" limit of 1% of the projected outgoing run from October 1 to May 31. Estimating total losses from fish salvaged at screens, about half the allowable "take" occurred during one week in February immediately before the shutdown. Pumping has been gradually resumed.

### **PEOPLE**

Tom Maddock, Boyle Engineering Corporation Chair, was recently elected to the National Academy of Engineering (NAE). NAE is an elite body of highly regarded engineers which operates in tandem with the National Academy of Sciences.

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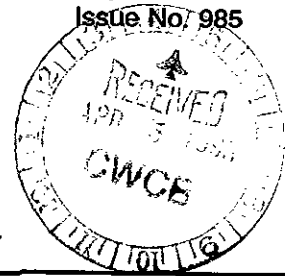
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001601

April 2, 1993  
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# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## CONGRESSIONAL UPDATE

### House Natural Resources Committee

The new House Natural Resources Committee, chaired by Rep. George Miller (D-CA), continues to draw western representatives, as did the old Interior and Insular Affairs Committee. Of 43 members, 24 represent 12 western states. Eight are from California. Western state committee members are: Democrats - Rep. George Miller (CA), Chair, Pat Williams (MT), Richard Lehman (CA), Bill Richardson (NM), Peter DeFazio (OR), Tim Johnson (SD), Larry LaRocco (ID), Neil Abercrombie (HI), Calvin Dooley (CA), Karan English (AZ), Karen Shepherd (UT), Howard Berman (CA), Patsy Mink (HI); and Republicans - Don Young (AK), Ranking Minority Member, Jim Hansen (UT), Barbara Vucanovich (NV), Elton Gallegly (CA), Bob Smith (OR), Craig Thomas (WY), John Doolittle (CA), Wayne Allard (CO), Ken Calvert (CA), Scott McInnis (CO), and Richard Pombo (CA). The committee's jurisdiction includes public lands, parks and natural resources generally, interstate water compacts, irrigation and reclamation, and Indian affairs.

### Senate Environment Committee Hearings

The Senate Environment and Public Works Committee has begun a series of hearings on the development of a consistent and unified national environmental strategy. Committee chair Max Baucus (D-MT) wants to determine whether an integrated approach can be taken to the reauthorization of a number of important environmental laws (such as the Clean Water Act (CWA), the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Endangered Species Act (ESA)). The hearings will investigate the interplay between provisions of the statutes, with an eye toward coordination. An

important issue will be whether improvement in reaching environmental goals can be achieved through an integrated approach to the statutes.

## LITIGATION

### Public Interest Protection

The Idaho Supreme Court has ruled that the director of the Idaho Department of Water Resources (IDWR) appropriately made local public interest determinations with respect to the proposed amendment of water permits issued before the state's public interest statute was enacted, Hardy v. Higgingson, S.Ct. No. 19262 (Mar. 25, 1993). The facts in the case were not disputed. Hardy filed an application with IDWR to amend two of his water permits by adding an additional point of diversion to each. The IDWR approved the application with conditions based on local public interest findings. Hardy appealed the conditions, arguing that IDWR improperly applied the local public interest standard because he sought only to amend a previously granted permit. Hardy also argued that the IDWR exceeded its authority in requiring him to maintain a measuring device at his new point of diversion because the diversion was located in an area which had no organized water district and no water masters.

The Idaho Supreme Court ruled that IDWR properly considered the local public interest in reviewing Hardy's application to amend his water permits, and that it was within IDWR's authority to require Hardy to install a measuring device at the proposed new point of diversion. The court, however, remanded the case to IDWR for further findings regarding the conditions intended to protect the local public interest. The IDWR director apparently based his public interest finding on an environmental

assessment performed in conjunction with the issuance of a BLM right of way for the changed point of diversion. The court's ruling will require the IDWR to independently substantiate its public interest finding.

## **WATER QUALITY**

### **Clean Water Act-Reauthorization**

The Water Resources and Environment Subcommittee of the House Public Works and Transportation Committee has begun a series of hearings to compile information to write a CWA reauthorization bill. Last session the House CWA hearings were focused by issue. This session they will be organized by the affiliation of witnesses. Although no reauthorization bill was introduced in the House last session, many hearings were held and much information was gathered.

Some House leaders view the CWA reauthorization as a high priority in the 103rd Congress, but no target date has been set for introduction of a reauthorization bill, and reauthorization of a number of other environmental laws will demand attention. One major issue is funding. Another is wetlands protection. In the last session, S. 1081, a Senate CWA bill, did not include Section 404 amendments. Determining whether to address the wetlands issue in the context of the CWA reauthorization will be an important first step for both the Senate and House this year. Many observers see this as inevitable. Thus, deciding how to approach Section 404 as part of the CWA reauthorization will likely be the subject of debate, and is certain to be contentious. The House is also expected to address nonpoint source pollution issues, combined sewer overflows, and stormwater runoff, among other matters.

## **WESTERN STATES WATER COUNCIL/MEETINGS**

The Western States Water Council's 110th Quarterly Meetings will be held in Washington, D.C. on April 21-23 at the Quality Hotel Capitol Hill in conjunction with the Council's Fifth Biennial Water Policy Seminar. Senator Mark Hatfield (R-OR), author of legislation creating the Western Water Policy Review Commission, will speak and federal officials and a number of House and Senate committee staffers will speak or participate in roundtable discussions.

To avoid conflicts with Congressional business, the seminar will be held Thursday morning from 8:30 to 10:30 with a roundtable discussion on federal/state relations in water resource management, and Thursday afternoon between 3:00 and 5:00, with a roundtable on the CWA reauthorization. The first roundtable will focus on improving federal/state cooperation by avoiding conflicts under ESA, and questions associated with transfer of federal water projects to states. The second will highlight how arid conditions that prevail in the West, and the sparse population in many areas, create special conditions that impact the control of water pollution, and how under these circumstances the goals of the act can best be met. A social hour will be held in the Senate Russell Office Building Room 385 Thursday evening.

On Friday morning, the Council meeting will include discussion on the opportunities and challenges represented by changes in the West and elsewhere regarding water resource policy. The meeting will feature Senator Hatfield's remarks.

### **Schedule of Meetings**

#### **Wednesday, April 21**

Management Subcommittee	6:00 p.m.
CWA Subcommittee	7:00 p.m.
ESA Subcommittee	7:00 p.m.
Executive Committee	8:00 p.m.

#### **Thursday, April 22**

Water Resources Committee/ Roundtable-Federal/State Relations	8:30 a.m.
Legal Committee	11:30 a.m.
Water Quality Committee/ Roundtable-CWA Reauthorization	2:00 p.m.
Social Hour	3:00 p.m.
	6:00 p.m.

#### **Friday, April 23**

110th Quarterly Meeting/ Discussion on Water Resources Policy in the West	8:30 a.m.
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## **MEETINGS**

The Association of State Dam Safety Officials (ASDSO) will hold a series of regional technical seminars from May to November of 1993. The initial training program, entitled Engineering Geology of Dams, is for the western region. It will be held May 19-20, in Breckenridge, Colorado. For information contact ASDSO at (606) 257-5140.

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# WESTERN STATES WATER

THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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editor - Tony Willardson

chairman - Dave Kennedy

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## ENVIRONMENT/WATER QUALITY

### **Watershed Management**

The state of Oregon's Governor's Watershed Enhancement Board (GWEB) has joined other state and local agencies to implement measures to protect the state's watersheds. Motivated by a desire to reverse the decline in migratory fish populations, GWEB, the Oregon Department of Fish and Wildlife's Salmon and Trout Enhancement Program, programs of the Oregon Farm Bureau, Oregon State University Extension Service, and soil and water conservation districts now have approximately 200 projects in various stages of operation. Most focus on stream dynamics, and how stream conditions can be modified to improve watershed attributes. Rocks, logs, and other obstructions are placed in waterways, with riprap on shorelines for stabilization. Efforts are made to increase water flows, reduce summer temperatures, improve spawning gravel quantity and quality, and trap vegetation. On agricultural land, fences are used to protect streams from grazing animals and screens are used to protect fish from irrigation works. Buffer areas are created in forests along streams, and old logging roads are re-vegetated.

Oregon officials report a change in attitude among many who are involved in watershed protection programs as they participate and their efforts begin to show success. Demonstration projects provide good examples and "hands-on" learning opportunities, while positive peer pressure, other types of education, and other incentives also exist. A number of showcase projects are currently in operation. Some observers hope that one outcome of President Clinton's summit on the spotted owl controversy might be funding to involve unemployed loggers in forest/watershed restoration projects.

## WATER QUALITY

### **Clean Water Act-Reauthorization/Non-point Source Pollution (NPSP)**

Rep. James Oberstar's (D-MN) staff is circulating a draft bill dated March 18 entitled "The Nonpoint Source Water Pollution Prevention Act of 1993" which builds on Clean Water Act (CWA) Section 319. The bill requires revision in state NPSP management programs to target high priority watersheds for special management efforts. EPA would be required to issue implementing regulations and guidelines. Following this, states would have two years to determine priorities for watershed protection. Five priority groups would be recognized. Using "site-level implementation programs," states would require landowners and operators to target watersheds for NPSP monitoring and abatement. The purpose of the implementation program would be "to achieve full restoration and protection...before the expiration of the four-year period beginning on the date of approval of the implementation program."

States would have enforcement responsibilities with respect to site-level programs. Each implementation program, however, would have to be submitted to and approved by EPA. States that do not have an approved NPSP program would be prohibited from issuing National Pollutant Discharge Elimination System permits and Section 404 wetlands permits, and would lose CWA Section 319 funds. After six years, states would be required to enforce more stringent protection measures for watersheds that were not yet fully restored. Where states failed to implement programs, EPA would design programs for them. Citizen actions programs would be established to help state officials with water quality monitoring. Also, NPSP abatement on federal lands would be

targeted by calling on the president to issue NPSP control regulations for such lands.

Rep. Oberstar has apparently floated the draft bill in hopes of gaining widespread support by requesting input from many interests. Some support is reportedly building around the proposal, which is expected to eventually be debated as part of the broader CWA reauthorization.

## **WATER RESOURCES**

### **Water Conservation**

The Texas Water Commission has adopted new water use efficiency standards, developed over the last two years with input from various interest groups, aimed at reducing the amount of water used by Texas urban areas. The regulations are expected to cut water use by 10% (from 175M gallons of water a day to 158M gallons a day) over a five year period. A 15% reduction is expected by the year 2020. State officials hope the measures will "make Texas the national leader in water conservation." They also predict financial benefits and a reduction in water pollution will result from the conservation efforts.

## **WATER RESOURCES/ENVIRONMENT**

### **California/Endangered Species Act**

California Governor Pete Wilson, citing "unacceptable" federal preemption of California water policy and the need to end short-term regulatory confusion, asked state water officials to halt work on interim standards and shift their focus to establishing permanent standards to protect the San Francisco Bay and the Sacramento-San Joaquin Delta. Wilson noted the Board's interim standards would be moot because federal agencies "for all practical purposes, have set interim standards under the authority of the Endangered Species Act [ESA]." He also said, "I believe the wisest choice is for the Board to turn to the effort of establishing permanent standards within the California Environmental Quality Act and parallel to the effort of the Bay-Delta Oversight Council." The National Marine Fisheries Service and the U.S. Fish and Wildlife Service have both sought to exercise jurisdiction on state water matters based on the ESA in their efforts to protect winter-run salmon and the Delta smelt (WSW #982, 976).

Federal agency personnel have informed California that reductions in water supply under federal standards will go beyond those offered in the Board's draft Bay-Delta decision. The Board proposed interim standards that would have reduced water exports from the delta by an average of 800,000 acre-feet annually for five years (WSW #976). Federal proposals envision possible supply reductions of one to three million acre-feet annually to protect the smelt. According to the California Department of Water Resources, reductions of this magnitude represent more than half of the water supplies jointly provided in California by the State Water Project and the Central Valley Project during a dry year.

Governor Wilson is concerned with the effect of implementation of the ESA on water resource management in California. He noted in his letter to the board, "This action by the federal government provides yet another illustration of why the...[ESA] needs to be amended to take into consideration social and economic factors.... It is my intention to conduct hearings in California in an effort to form a consensus around needed changes to the [ESA].... I call on President Clinton to join me in proposing common sense revisions to the...Act."

## **WESTERN STATES WATER COUNCIL/MEETINGS**

The Western States Water Council's 110th Quarterly Meetings will be held in Washington, D.C. on April 21-23 at the Quality Hotel Capitol Hill in conjunction with the Council's Fifth Biennial Water Policy Seminar. Senator Mark Hatfield (R-OR), author of legislation creating the Western Water Policy Review Commission, will speak and federal officials and a number of House and Senate committee staffers will speak or participate in roundtable discussions. For details see WSW #985.

### **MEETINGS**

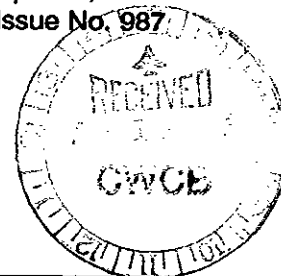
The Natural Resources Law Center (NRLC) of the University of Colorado Law School will offer a conference entitled "**Water Organizations in a Changing West**" June 14-16. The meeting will address issues facing urban and agricultural water supply and management organizations throughout the West. For registration materials or other information contact Kathy Taylor at NRLC (303) 492-1288.

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001608

April 16, 1993  
Issue No. 987

# WESTERN STATES WATER

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## ENVIRONMENT/WATER QUALITY

### Texas

Texas Governor Ann Richards has announced a series of public recognition environmental awards. Winners, which were selected by a committee from over 900 entries, included the El Paso Retired Seniors Volunteer Program (RSVP), a national pilot for wellhead protection. RSVP conducted door-to-door interviews and reviewed local tax records to identify 138 private drinking water wells in El Paso, together with 2000 potential pollution sources. This ground water protection program has been used as a model by many other states and communities. A high school parent volunteer was recognized as an individual award winner for designing "Classroom on the Creek." An EPA grant was used to stage a workshop for 25 teachers and 100 students from throughout the Little River Watershed and to underwrite a water quality testing program involving 60 students. Planning is underway for an event that could include dozens of schools in a day of water quality monitoring. The Governor also honored several cities and industries that met criteria to attain, respectively, the designations "Clean Cities 2000" and "Clean Industries 2000."

## LITIGATION/ENERGY

### Washington v. Public Utility Dist. No. 1 of Jefferson County/Federal Power Act

The Washington Supreme Court has affirmed a state district court opinion holding that the Federal Power Act (FPA) does not preempt the Washington Department of Ecology from including minimum streamflow conditions in a Clean Water Act (CWA) Section 401 certificate issued by the state in

conjunction with a hydropower project licensed by the Federal Energy Regulatory Commission (FERC), State of Washington v. Public Utility Dist. No. 1 of Jefferson County, No. 58272-6 (Apr. 1, 1993). The City of Tacoma and the Jefferson County Public Utility District No. 1 planned to build a hydroelectric facility on the Dosewallips River. The applicants were required to obtain a certificate from the Washington Department of Ecology under CWA Section 401 before beginning construction. Such a certificate sets forth "effluent...and other limitations...necessary to assure that the applicant...will comply with any applicable effluent...or other limitations,...standard of performance,...or prohibition, effluent standard, or pretreatment standard..., and with any other appropriate requirement of state law..." Ecology granted the certificate, but conditioned it upon maintenance of a minimum streamflow in an affected portion of the river to benefit the Dosewallips fishery. The applicants argued that federal law preempted Ecology from establishing the streamflow requirement, and that in any event Ecology was outside its authority because its suggested streamflow was calculated to enhance, rather than simply preserve, the fishery.

The court found that the CWA authorized Ecology to include baseflow requirements in the Section 401 certificate to ensure compliance with Washington's water quality standards. The applicant argued that the standards, and therefore the scope of the Section 401 certificate, should be limited to control of pollution discharges, and could not include streamflow levels. Ecology maintained that the Section 401 certification was an appropriate method of carrying out a provision of state law which provides that "perennial rivers and streams...shall be retained with baseflow necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values and navigational values." The court agreed that the



streamflow conditions were appropriate and necessary to assure compliance with state law, as envisioned under CWA. The court said, "the Section 401... certificate may include conditions to enforce all state water quality-related statutes and rules.... Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and baseflows, we...hold that [Washington law on baseflows] qualifies as an 'appropriate requirement of state law' for purposes of [CWA] Section 401."

The court next considered the contention that the FPA preempted Ecology's action. The applicants relied on the U.S. Supreme Court's decision in the Rock Creek case (WSW #836), where the Court held that FERC has exclusive power to establish bypass streamflows under the FPA. The Washington Supreme Court distinguished the Rock Creek holding, noting that it dealt with the scope of powers saved for states under FPA Section 27, whereas in issuing a CWA Section 401 certification Ecology derived authority to act directly from provisions of applicable federal law. The court noted that Section 401 of the CWA, "completely alters the legal context and renders untenable Tacoma's preemption argument." The court continued, "when the FPA and the [CWA] are considered together, the comprehensive scheme that emerges is one in which Congress left room for the state to supplement the FPA through the [CWA] Section 401 certification process." "Simply put," the court said, "federal preemption...does not apply...where a state is acting to fulfill its federally mandated role...."

The court also rejected the applicant's contention that Ecology's streamflow was inappropriate because it was established to enhance, rather than simply preserve, the Dosewallips fishery. The court said, "Our examination of the record leaves us with the... conviction that...Ecology's intent was clearly to preserve...the fishery."

The ruling may be appealed to the United States Supreme Court.

## **WATER QUALITY**

### **Clean Water Act - Reauthorization**

State and local officials testified March 31 and April 1 at CWA reauthorization hearings held by the

Subcommittee on Water Resources and Environment of the House Public Works and Transportation Committee. The hearings are the first in a series (WSW #985). Witnesses identified protecting the state and local role in water quality management, flexibility for state and local entities in carrying out CWA requirements, watershed protection and the related topic of controlling non-point source pollution (NPSP), funding, and wetlands management issues as particularly important.

Several witnesses described the need for flexibility in meeting the intent, rather than focusing on the specific requirements, of federal programs as essential to relieve administrative and financial pressure on overburdened state and local regulators. Regarding watershed management, several witnesses said such an approach should be taken to pursue the most efficient and least expensive avenue to improvement of overall water quality. Holistic and coordinated approaches to instigating and empowering grassroots, watershed efforts on many levels are needed, according to witnesses. Several witnesses also emphasized the need for increased funding to carry out existing federal requirements, as well as any new mandates that may be established. The plight of rural communities, with limited resources, and their inability to cope with large funding requirements of existing federal law, was stressed. Testimony on wetlands called for a more definite goal and direction in national wetlands policy and consolidation of regulation in a single regulatory entity.

## **MEETINGS**

The **Association of State Wetland Managers** (ASWM) and a broad range of cooperating parties will cosponsor two symposia in May and June: "Wetlands and Watershed (Water Resources) Management" will be held at the Nugget Conference Center, Sparks, Nevada, on May 10-12; and "International Wetlands Symposium - Improving Wetland Public Outreach, Training and Education,..." will be held at the Concourse Hotel, Madison, Wisconsin, June 15-19. Also, ASWM has available a broad range of technical publications dealing with wetland management, and plans to have more wetland publications printed in the next few months. For more information and meeting registration materials contact John Kusler, ASWM Executive Director, Box 2463 Berne, New York, 12023-9746; (518) 827-1804.

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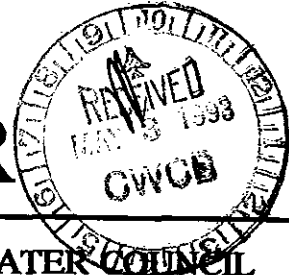
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001604

April 30, 1993  
Issue No. 989

# WESTERN STATES WATER



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## ADMINISTRATION UPDATE

### **Environmental Protection Agency**

In a March 31 hearing before the Senate Environment and Public Works Committee, EPA Administrator Carol Browner testified that EPA's relationships with state, tribal, and local governments "will make or break national environmental efforts." As the former director of a state environmental regulatory agency, she said that at times EPA has been reluctant to delegate authority to states, and that federal oversight has focused too much on assuring compliance with specific requirements and not enough on improving environmental quality. She stated that EPA/state relations historically merit a "B-minus grade," but the situation is improving as environmental protection is seen as more important at all levels of government. "I feel strongly," she said, "that we cannot reach national environmental objectives until we acknowledge the value of, and support the building of, strong state and local capacity to manage environmental programs."

Ms. Browner said that EPA personnel at headquarters and in the regions are more aware than in the past of the need for coordination with local, tribal, and state governments. She offered as examples the State-EPA Operations Committee, which focuses on issues relating to state-managed EPA programs, and the Local Dialogue Group, which has met with local governments and their national associations in Washington D.C. She also said EPA's Office of Regional Operations and State-Local Relations provides an important link between EPA Headquarters, EPA regions, states, localities and tribes, and noted that one of her priorities is to see that the office has the resources and status it needs to do its job effectively.

Regarding EPA/tribal relations, Ms. Browner said that "building sound environmental management programs in Indian Country is a major goal of the agency." She noted that EPA is committed to "promoting Indian self-government and working with tribes on a government-to-government basis." She added, "As tribal governments continue to develop their infrastructure and capacity, we look forward to their implementation and management of environmental programs including delegation and enforcement activities." She also recommended that states and Indian tribes be involved early in the process of reauthorizing federal environmental statutes, and promised to produce an analysis of options for achieving greater flexibility in the expenditure of funds for environmental protection.

Ms. Browner concluded, "We will establish as one of EPA's primary missions the building of a national environmental partnership with the states, tribes and local governments.... I ask you to assist EPA in not only improving EPA and state, tribal and local government relations, but in reinventing environmental protection as a critical endeavor in which state and local governments are equal partners."

## ADMINISTRATION UPDATE/ENERGY

### **Federal Energy Regulatory Commission**

Earlier this month the White House announced its intention to nominate four new members to the Federal Energy Regulatory Commission (FERC). The White House also named Elizabeth Moler as Chair, a position she has held in the interim since the departure of Martin Allday. The new members are Vicky Bailey, James Hoecker, William Massey, and Donald Santa. Santa and Moler served as Counsel to the Senate Energy and Natural Resources Committee,

chaired by Senator Bennett Johnston (D-LA). Santa was responsible for the national energy policy and natural gas issues. **Massey** is a partner in a Little Rock, Arkansas law firm and was a part of the Clinton Administration's transition team for the Department of Energy. He has also served on the staff of Senator Dale Bumpers (D-AR), covering consumer issues and wilderness. **Hoecker** is a Washington attorney and former FERC Assistant General Counsel for both Gas and Oil Litigation and Rulemaking and Legislative Analysis. He was an advisor to former Commissioner Georgianna Sheldon. He also served on the Clinton transition team, and during the campaign was an energy spokesman. **Bailey** has been a member of the Indiana Regulatory Utility Commission, and is active in national electricity issues.

Moler has noted the Commission has an "immense task ahead," with new policy initiatives, restructuring, and hundreds of hydropower relicensing applications. In announcing the nominations Clinton praised this "experienced and talented group of commissioners," which he expects to help meet his goal of a "sensible, comprehensive energy policy that serves our future energy needs, protects our precious environment and helps to build a growing economy."

## ENVIRONMENT/WATER RESOURCES

### **Rivers Conservation and Protection**

For 1993, American Rivers has listed ten endangered and fifteen threatened North American rivers and streams. The list "illustrates the urgent need to protect and restore the continent's rivers and streams, which are in serious decline due to poor land use practices, pollution, dams, and water diversions.... Each river has important natural, human health, and/or cultural values. Yet, they face imminent, often permanent, damage from pollution, ...diversions, dams, mining, dredging, and adverse land development."

The list of endangered rivers includes: the Rio Grande and Rio Conchos River System (Colorado, New Mexico, & Texas); Columbia and Snake River System, including the Yakima River (Idaho, Oregon & Washington); Virgin River (Utah, Arizona, & Nevada); Clavey River (California); Alsek and Tatshenshini River System (Alaska); and the Platte River (Nebraska). The list of threatened rivers includes: the Animas River (Colorado); Blackfoot River (Montana); Little Bighorn

River (Wyoming); Los Angeles River (California); Skokomish River (Washington); and the South Fork, Yuba River (California). For more information contact American Rivers, 801 Pennsylvania Avenue, S.E., Suite 400, Washington, D.C., 20003; (202) 547-6900.

## WATER RESOURCES

### **Drought**

While near to above average precipitation has returned to much of the West, some areas remain below average. Moreover, April reservoir storage remains below average in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming. Therefore, drought and its lingering impacts still concern some water managers. April snowpacks and streamflow forecasts are generally above average in Alaska, and the Arkansas, Colorado, Platte, Rio Grande, San Joaquin, and Sacramento River Basins, as well as California's North Coastal Basins and the Great Basin. Below average runoff is expected in the Columbia, Snake, Upper Missouri, and Yellowstone River Basins.

## ORGANIZATIONS

The South Dakota Department of Environment and Natural Resources and its Project SAVE have been recognized with Outstanding Achievement Awards from the U.S. Environmental Protection Agency! For the first time in thirteen years, EPA recognized the entire 186-member staff for its efforts in the creation, development, and implementation of South Dakota's Second Century Environmental Protection Act, which covers water, mining, solid waste and regulatory fees. Project SAVE is an environmental awareness program.

## PEOPLE

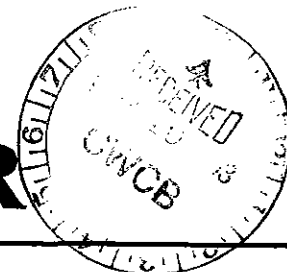
**Rita P. Pearson** has replaced **Elizabeth A. Rieke** as Director of the Arizona Department of Water Resources. Arizona Governor Fife Symington has also appointed Ms. Pearson to replace Ms. Reike as a member of the Western States Water Council and to represent Arizona on the Council's Executive Committee. Council members had the opportunity to meet Ms. Pearson when she attended the recent meetings in Washington, D.C. Ms. Rieke has been nominated to serve as Assistant Interior Secretary for Water and Science, and a confirmation hearing was held recently, but no vote was taken.

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## ADMINISTRATION UPDATE

### Interior Nominees

The Senate Energy and Natural Resources Committee held a confirmation hearing for five key Interior nominees on April 27. Appearing before the Committee were Jim Baca of New Mexico, the Administration's designee to be Director of the Bureau of Land Management, and four designated Assistant Secretaries: Robert Armstrong of Texas for Land and Minerals Management; Bonnie Cohen for Policy, Management and Budget; Leslie Turner for Territorial and International Affairs; and former WSWC member Elizabeth Anne Rieke of Arizona as Assistant Secretary for Water and Science. The Senators questioned each nominee on a number of topics. Reportedly, Ms. Rieke was very articulate, promising to strive to achieve a balance between protecting ecosystems and local economies. She stressed creativity, flexibility and coordination. All of the nominees are expected to be confirmed. Some committee members, however, have questions on the Clinton Administration's recusal policy. It is intended to avoid conflicts of interest, but apparently sets a higher standard for nominees from the private sector than those from the public sector. Also of note, an agreement has apparently been reached between the Administration and Senator Ben Nighthorse Campbell (D-CO) related to its support for the Animas-La Plata Project, clearing the way for Dan Beard to be confirmed as commissioner of the Bureau of Reclamation.

## LITIGATION

### Interstate Apportionment

The U.S. Supreme Court has ruled on summary judgement motions in a dispute among Colorado,

Nebraska, Wyoming, and the United States over water in the North Platte River, Nebraska v. Wyoming, No. 108, Orig. (Apr. 20, 1993). The Court entered a decree on the North Platte in 1945 imposing limitations on diversion and storage by upstream states Colorado and Wyoming, establishing priorities among federal reservoirs and certain Nebraska canals, and apportioning 75% of the river's natural flow during the irrigation season to Nebraska and 25% to Wyoming. In 1986, Nebraska petitioned the Supreme Court for an enforcement order and injunctive relief under the decree's "reopener" provision, alleging that Wyoming's intent to develop two projects on North Platte tributaries, Deer Creek and the Laramie River, violated the decree. Also, Nebraska objected to Wyoming's actions concerning the Inland Lakes in Nebraska. Wyoming counterclaimed that Nebraska was circumventing the 1945 decree by demanding and diverting water above the Tri-State Dam for uses not recognized by the decree. All parties moved for summary judgement.

The Court granted the summary judgment motion of Nebraska and the United States on their request for determination that the decree entitles the Bureau of Reclamation to continue its longstanding diversion and storage practices with respect to Inland Lakes, and their assertion that the lakes have the same priority date as other original components of the Bureau's North Platte Project. Wyoming's motion for partial summary judgement that the Inland Lakes do not have storage rights under either state law or the decree was denied.

Wyoming and Nebraska's motions for summary judgement with respect to their rights to water from the Laramie River were denied. Wyoming's contention that the waters were completely apportioned between it and Colorado by previous Supreme Court action

was rejected. Also rejected was Nebraska's claim that the North Platte decree apportioned the Laramie flows that historically reached the North Platte. Accordingly, the Court found that Nebraska must come forward with evidence sufficient to establish that a project on the Laramie would pose a threat of injury serious enough to warrant a modification of the existing decree.

Wyoming's motion for summary judgement on Nebraska's challenge to a proposed new storage reservoir on Deer Creek tributary was denied. The Court found that it did not need to adopt a definitive interpretation of a provision in the decree exempting further review of Wyoming's diversion of North Platte water for ordinary and usual municipal use, because the Deer Creek project may not qualify as such a use. Further, proof that such a project would cause substantial injury in Nebraska, which is necessary because the decree does not currently restrict Wyoming's use of Deer Creek, may depend on Wyoming's operation of such a project.

The Supreme Court found that most of Wyoming's, Nebraska's, and Colorado's requested rulings with respect to the "below Tri-State" issues were too theoretical and insufficiently developed to be dealt with in summary fashion. Nebraska, however, was granted partial summary judgement on its request for a determination that the 1945 decree did not impose absolute ceilings on water diversions through certain canals.

The Court noted that an important facet of its opinion was the principle that when proceedings involve an application for enforcement of rights under a Supreme Court decree, plaintiffs need not show injury to be successful. However, where plaintiffs seek modification of a decree to cover questions not decided in the original proceedings, a showing of substantial injury must be made to warrant relief.

Reactions to the ruling in this complicated case have been mixed. All parties have identified benefits that will flow from the court's decision. Indeed, the existence of the ruling itself, as opposed to further delay and uncertainty with respect to both procedural and substantive matters, is seen as an important and significant milestone. Proceedings in the case will continue.

## LITIGATION/WATER RIGHTS

### **Snake River System/General Adjudication**

The U.S. Supreme Court has reversed an Idaho Supreme Court decision and held that the McCarran Amendment's waiver of sovereign immunity is not sufficient to subject the United States to the payment of filing fees as envisioned under the Idaho general stream adjudication statute, United States v. Idaho, No. 92-190 (May 3, 1993). The case was remanded for further proceedings consistent with the opinion.

The Idaho Supreme Court held that the McCarran amendment expressed Congress' intent to subject the United States to all state court processes in general adjudication proceedings, including the payment of filing fees (WSW #936). On appeal, the United States contended that an appropriate construction of the McCarran amendment would require the United States to be subject to state substantive water law in general adjudications, but not state procedural law (including filing fee payment). Idaho countered that the McCarran amendment's waiver of sovereign immunity applies to all facets of general adjudication proceedings, including the payment of filing fees.

The Supreme Court was unable to accept either party's contention. It found the United States' argument to be "weak" allowing "the government to argue for some special federal rule defeating established state-law rules governing pleading, discovery, and the admissibility of evidence at trial. We do not believe that the Congress intended to created such a legal no-man's land in enacting the McCarran amendment." Idaho's argument was rejected, the Court said, on the basis that "several of our cases exemplifying the rule of strict construction of a waiver of sovereign immunity...reject efforts to assess monetary liability against the United States for what are normal incidents of litigation between private parties." The Court found no such specific waiver in the McCarran amendment. It concluded, "While we therefore accept the proposition that the critical language of the...McCarran Amendment submits the United States generally to state adjective [procedural] law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here."

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# WESTERN STATES WATER

THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## WATER RESOURCES

### **Water Project Transfers/Platoro Dam/Solano Project**

The omnibus Reclamation Projects Act of 1992, Title XXIII, authorized the transfer of "...operation, maintenance and replacement responsibility for the Platoro Dam and Reservoir to the Conejos Water Conservancy District." The district sponsored the project and also represents other local water rightholders. Located in Colorado's San Luis Valley, the dam was built in 1951, but for all practical purposes was unusable as an agricultural water supply project due to constraints imposed by the Rio Grande Compact. Therefore, the district was relieved of its original repayment obligation. In 1985, Elephant Butte Reservoir in New Mexico spilled, cancelling Colorado's compact debt, and in 1986-88, the district was allowed to purchase water through temporary water sales contracts that covered federal operation and maintenance costs. In late 1987, the district approached the Bureau of Reclamation offering to buy out its remaining repayment contract obligations, which were contingent on the availability of marketable water. (H.R. 429; S. Rpt. 102-267; P.L. 102-575)

H.R. 429 authorized the Secretary to accept a one-time payment of \$450,000 and enter into a transfer agreement that relieves the U.S. of further risk or obligations related to operation and maintenance of the project. However, title and any other liability related to the project will remain with the United States. Recreational use will be supervised by the U.S. Forest Service. Moreover, the district must maintain certain minimum streamflows and reservoir levels to protect fish and wildlife. Further, the Secretary of the Army retains exclusive authority for flood control purposes. The lump sum payment agreed to was negotiated based on the present worth

of required repayments, the value of the land, the district's assumption of operation and maintenance costs for flood control, and the minimum pool and required instream flow releases for fish and wildlife accepted by the district. (S. Rpt. 102-267)

During a recent hearing, Senator Malcolm Wallop (R-WY) asked designated Assistant Secretary of Interior for Water and Science Elizabeth Rieke: "What is your view with respect to the transfer of reclamation projects either to states or to the project beneficiaries assuming the federal government is repaid the allocable reimbursable cost of such a project?" She replied: "I generally support transferring ownership of federal reclamation facilities to states or to project beneficiaries after full repayment of reimbursable costs, assuming specific terms and conditions can be agreed upon which fully reflect the public interest in the project. I understand project transfers will require compliance with Federal statutes such as the National Environmental Policy Act and specific authority granted to the Secretary by the Congress."

Wallop continued asking: "The Goshen Irrigation District located on the North Platte River in southeastern Wyoming has paid for its canals and diversion facilities and would like them transferred to private ownership. Would you be supportive of such a transfer?" She replied: "I am not familiar with the Goshen Irrigation District; however, single purpose intrastate diversion and distribution facilities present the simplest facility transfer opportunities. I would be pleased to explore with the Congress and the Goshen Irrigation District possible terms and conditions for transfer of title for these project facilities."

The House's version of H.R. 429, Title XXVII, would have also authorized the transfer of title to the Solano project in California, but it was dropped from the final

bill. Located in Napa and Solano Counties, the project irrigates nearly 100,000 acres and furnishes municipal and industrial water. Completed in 1957, Monticello Dam impounds Putah Creek, an intermittent stream, with a 576 square mile watershed. Lake Berryessa stores 1.6M acre-feet. There is little natural storage due to the absence of snowpack or any appreciable ground water. The House proposed a transfer price calculated to include: (1) the remaining balance of the reimbursable capital costs of the project; (2) the book or "residual" value of the depreciable water supply facilities; (3) a capital/operations and maintenance adjustment for any repayments in arrears, plus accrued interest; (4) all administrative costs incurred by the U.S. to effectuate the agreement and transfer; and (5) a credit for dam safety and construction defects with the adjustment representing the estimated federal share of necessary safety of dams repairs. The proposal also set a minimum price "floor" equal to two-thirds of the original reimbursable capital costs. The original reimbursable capital cost was \$38M.

Of note, the House committee report stated, "The pricing methodology selected recognizes also that the unique nature of the local water rights permit for the Solano project necessarily precludes consideration of a market valuation for the facilities, since in this case, the Solano water users constitute the only feasible market." Moreover, "A key factor in the selection of a pricing formula based on the cost of construction was the fact that the public entities to whom the federal assets are to be transferred would be obligated to continue the existing public purposes of the Solano project. Further, it is apparent that transfer to local ownership will create a potential for enhancing public benefits, including enhanced efficiencies and economies in water usage at the local level, the ability to perform needed maintenance on project facilities without adversely impacting congressional efforts to reduce federal spending, and the increased ability to administer water supplies and costs to support other beneficial land use objectives...." (H. Rpt. 102-114)

The House rejected replacement cost as a basis for pricing the project as "...these public water supply facilities constructed over 30 years ago...constitute over 65% of the public water supplies of Solano County." Further, "Replacement cost valuation, in conjunction with the much higher prices Solano must already incur with development of additional public water supplies, would only make the [project] transfer

uneconomic and thus would thwart other worthwhile goals to be achieved by this legislation [which died]."

## WATER RESOURCES/ADMINISTRATION UPDATE

### **Western Water Policy**

Speaking on April 27 before the National Press Club, Interior Secretary Bruce Babbitt addressed the Administration's purpose for the use of market principles in natural resource allocation. They are straightforward: first, to raise revenue to meet budget targets; second, so everyone pays their fair share - including "miners, timber companies, ranchers and reclamation water users;" and third, to encourage conservation and the efficient allocation of limited resources. This emphasis has "major implications for the development and use of water in the West."

Babbitt stated, "For too long, the answer to every water issue in the West has been yet another Federally subsidized water project, repayable at below market interest rates, by proceeds from heavily discounted water charges. The search for more water from ever more distant sources with greater environmental destruction is a time honored Western tradition that must now give way to a simple reality: there is plenty of water developed and available in the West if only we will allow market principles to replace heavy handed bureaucratic allocations. By pricing water at its true cost, and thereby encouraging its conservation and wise use, there will be plenty of water for everyone."

Babbitt said that the Miller-Bradley Bill (H.R. 429) will be the vehicle for reform in the Central Valley of California, and added that the City of Las Vegas' water supply problems also illustrate the need for reform. "Rather than seeking Federal help to increase its draw from the Colorado River, which runs nearby, the City has developed a multi-billion dollar plan to drain remote Federal lands of their groundwater -- thereby imperiling the remaining wetlands of the Great Basin. The City has also approached Congress to finance a billion dollar desalting plant to take water from the Virgin River, a remote, brackish tributary of the Colorado River. Why? Because Las Vegas...under existing law...cannot take more water from the Colorado River, which runs right by its own doorstep.... and I pledge to find a market mechanism to help Las Vegas...into a new era of water management."

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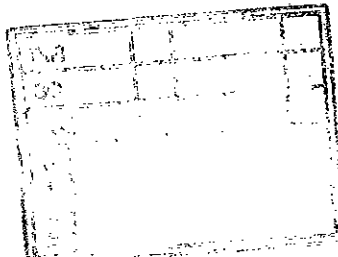
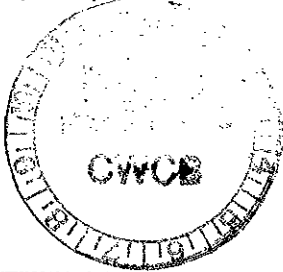
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MEETINGS

The Western States Water Council's 111th Quarterly Meetings will be held in Alaska on July 14-16, at the Anchorage Hilton. A block of rooms is only being held at the hotel until May 30. Please call the Hilton at (800) 245-2527 or (907) 272-7411 for reservations as soon as possible. Specify you are with Western States Water Council. At this peak tourist time, the rate is \$150 a night for single or double.

The state of Alaska has planned several optional activities in conjunction with this meeting. You should have received a package from Alaska. Further information will be forthcoming on those activities. If you have any questions, contact David Asman in Alaska at (907) 762-2297.





001689

# WESTERN STATES WATER



May 28, 1993

Issue No. 993

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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## CONGRESSIONAL UPDATE/WATER RESOURCES

### **FY94 Budget/Water Use Fees**

The budget reconciliation package moving through Congress sets out spending guidelines for Congressional committees. To meet budget targets, each committee must cut programs or raise offsetting revenues. The House Natural Resources Committee was directed to reduce outlays by \$131M in FY94 and nearly \$2B through FY98. The Committee plans to achieve the target by increasing hardrock mining fees (\$41M), park and recreation user fees (\$40M), and communication and utility rights-of-way fees. Another \$35M would be saved by deducting half of the administrative costs of collecting mineral receipts before distributing the states' share. This may reduce the amount of money earmarked for the Bureau of Reclamation, as 40% of federal mineral receipts are deposited in the Reclamation Fund.

The Committee also approved a \$10M surcharge on the delivery of water from federal reclamation projects. Receipts will be deposited in a new Natural Resources Restoration Fund. Findings in the legislation approved by the Committee provide that: "(1) the construction and operation of federal reclamation projects have contributed to the depletion of streams, the alteration of riparian habitat, and the degradation of water quality; (2) such impacts have had adverse impacts on fish and wildlife resources; and (3) the restoration of fish and wildlife and related habitat affected by...federal reclamation projects is a continuing responsibility of the beneficiaries of such projects." The intent of the proposed change is to incorporate the cost of fish and wildlife resources restoration into the annual operation and maintenance costs of reclamation projects, and to "establish a fair and equitable mechanism" for beneficiaries to pay for

projects to "accelerate the rate of restoration and recovery of depleted populations of indigenous fish and wildlife...." The new surcharge is also expected to "encourage more efficient use of water resources by beneficiaries of federal reclamation projects."

The Interior Secretary is directed to prescribe such "terms, conditions and procedures" as may be necessary to yield \$10M annually through FY96, and \$15M annually thereafter. The surcharge will be paid by individuals or non-federal entities "that receive delivery of water (including by exchange) which is stored in or transported through federal reclamation projects or project facilities...constructed by the Secretary of the Army," that meet certain conditions specified in the Reclamation Reform Act of 1982. The required repayments are to be made "without reduction or deferral by the Secretary under any provision of reclamation law and without regard to whether an individual or entity has discharged its repayment obligation.... The payment shall be in addition to any other repayment owed or made to the United States and shall not be applied or credited to an individual's or entity's repayment of project construction costs...or reduction of any contractual obligation...."

The Central Valley Project (CVP) in California is exempted from the new surcharge, because last year's omnibus reclamation package created a \$50M CVP restoration fund. It authorized a surcharge of up to \$6 per acre-foot on agricultural water service, and \$12 per acre-foot on municipal water use. Also, a \$25 per acre-foot surcharge will be assessed annually on any water transfers to non-CVP contractors.

Details of the implementation of the new westwide irrigation surcharge will be determined by the Secretary. The Bureau delivers annually nearly 20M

acre-feet of water. Exempted CVP facilities deliver about 7M acre-feet. Thus, if a flat surcharge were otherwise applied westwide, it would amount to between 77¢ and \$1.15 per acre-foot. Concern has been expressed by some water user groups because the surcharge applies to all reclamation projects, whether or not they are paid out.

## LITIGATION/WATER RIGHTS

### **Reserved Rights/Washington**

The Washington Supreme Court has affirmed a state trial court decision establishing the quantity of reserved water rights to which the Yakima Indian Nation is entitled by treaty, Washington v. Yakima Reservation Irrigation District, No. 57798-6 (Apr. 2, 1993). The court noted the case involves thousands of parties and will "significantly impact the economy and future of those living in the Yakima River Basin." The trial court had previously divided the case into four "procedural pathways," one of which was the federal reserved rights for Indian claims.

On motions for summary judgment the trial court found that the Yakima Indian Nation's rights to water from the Yakima River for irrigation purposes were: (1) 147 cubic feet per second with an 1855 priority date by an order of the Secretary of Interior dated 1906; (2) 573 cubic feet per second with an 1855 priority date by order of an act of Congress in 1914; (3) 250,000 acre-feet per year with a 1905 priority date under a 1921 "Warren Act" contract between the Bureau of Indian Affairs and the Bureau of Reclamation; and (4) 100,000 acre-feet per year with a 1905 priority date under a 1936 "Warren Act" contract that was ratified by Congress in 1940. The trial court also found that the Yakima Indian Nation's diversions of water (in addition to those just described) for commercial, industrial and other non-agricultural purposes were not in fulfillment of the primary purposes of the treaty, and therefore were limited to quantities that may be established under state law.

The trial court held that the Yakima Indian Nation's reserved water rights for fish have been substantially diminished. The Washington Supreme Court said, "The maximum quantity to which the Indians are entitled as reserved treaty rights [for fish] is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual

prevailing conditions. This diminished reserved right...has a priority date of time immemorial. Additional instream flow for fish...is subordinate to vested irrigation water rights." Finally, the trial court held that a consent judgment entered in federal court in 1945 is binding on all parties to that judgment including the Yakima Indian Nation, which was represented in the proceeding by the United States.

The Washington Supreme Court was faced with a number of challenges to the trial court's decision, and thus addressed a number of issues on appeal. Its opinion outlines a chronology of legislation, litigation, and administrative action affecting water rights in the Yakima River Basin and describes pertinent background legal principles. Based on this review, the supreme court affirmed the trial court's ruling.

## WATER QUALITY

### **Watershed Protection/EPA**

EPA's Office of Water has recently published "The Watershed Protection Approach - Annual Report 1992." It notes that "Watershed protection...is an integrated, holistic strategy for more effectively restoring and protecting aquatic ecosystems and...human health (e.g., drinking water supplies and fish consumption). This approach is a renewed effort by [EPA] to focus on hydrologically defined drainage basins - watersheds - rather than on areas arbitrarily defined by political boundaries." The report explains that EPA is pursuing a five-pronged strategy for adopting watershed management. The components are: (1) try it out; (2) advertise it; (3) align programs; (4) develop tools; and (5) measure success. For more information on the report (EPA840-S-93-001, Jan. 1993), or for general information on EPA's watershed protection approach, contact Policy and Communications Staff, Office of Wetlands, Oceans, and Watersheds, U.S. EPA 401 M Street S.W., Washington, D.C. 20460; (202) 260-9108.

## PEOPLE

The Metropolitan Water District of Southern California has named **John R. Wodraska** as general manager. He replaces **Carl Boronkay**, who retired in March after nine years as general manager. Wodraska was Executive Director of the South Florida Water Management District.

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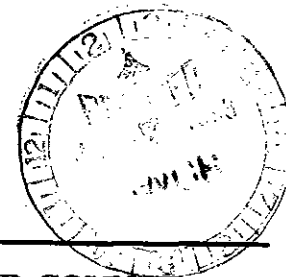
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# WESTERN STATES WATER



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## ADMINISTRATION UPDATE

### Interior/Federal Energy Regulatory Commission

The Senate has confirmed by voice vote the nomination of a number of individuals to fill top Interior Department posts, including Elizabeth Rieke as Assistant Secretary for Water and Science, John Leshy as Solicitor, Jim Baca as Bureau of Land Management Director, and Daniel Beard as Bureau of Reclamation Commissioner (WSW #990). The Senate has also confirmed four new members of the Federal Energy Regulatory Commission: Vicky Bailey, James Hoecker, William Massey, and Donald Santa (WSW #989).

## ENVIRONMENT/WATER RESOURCES

### Endangered Species Act/Edwards Aquifer/Texas

The Texas legislature has passed and sent to Governor Anne Richards a compromise bill (SB 1477) creating a new Edwards Aquifer Authority with powers to permit, meter, and limit ground water withdrawals. However, the new act specifically recognizes existing landowners' water rights as private property that can not be taken without just compensation. The Authority also has the power of eminent domain, but may not condemn ground water. Still, for the first time in Texas, a new system of ground water rights has been created with the Authority defining and administering regular, term, interruptible, and emergency rights that limit maximum rates of withdrawal and the total volume of water to be taken from the aquifer. Also, the Authority may acquire and hold or retire permitted water rights. Further, it may enforce the Texas water code, within the boundaries of the Authority, which include requiring conservation and reuse plans.

The Authority is to be governed by a nine-member board, representing various counties and other public bodies. One member is to be appointed from a new

separate South Central Texas Water Advisory Committee. The Board may "implement and enforce water management practices..." necessary to achieve a phased reduction in existing use from 450,000 acre-feet (af) by 2007 to 400,000 af thereafter. It will prepare a comprehensive water supply and demand management plan -- and install and maintain meters on all wells producing over 25,000 gallons per day, finance water conservation measures, contract for the construction of water supply facilities, and approve ground water recharge activities. Its programs will be financed from user fees.

The new legislation is in line with the Texas Water Commission's suggested plan for limiting pumping (WSW #992). In April, Interior Secretary Bruce Babbitt wrote Governor Richards saying, "...I support the Commission's plan, and believe it provides a fair and reasonable framework for managing the Edwards Aquifer.... As a former governor, I believe that management of ground water resources is first and foremost a state responsibility. I know firsthand the difficult choices involved when a state legislature has to come to grips with an ever-declining ground water resource...."

Babbitt pointed out, "Absent state legislative resolution of the problem of overdrafting of the Edwards, the Endangered Species Act and the courts require that certain steps be taken to protect the federally listed species...." Section 7 prohibits any federal agency action that might jeopardize any endangered species, and Babbitt noted one possible result could be "a significant reduction of federal program spending...." He also explained Section 9 provides for civil and criminal penalties for the unauthorized "take" of a listed species, and said, "When the water level of the aquifer drops to the point where the species is harmed or habitat is modified, we

would look at remedies available to us under that Section, which could include civil injunction actions to stop pumping."

On the other hand, Babbit added that state legislation "...could provide a basis for the Service's issuance of a permit pursuant to Section 10...which would authorize the incidental 'take' of some endangered species during periods of drought... provide relief from the potential consequences...and could give the state greater flexibility in the management of the Edwards aquifer system, as long as the level of take will not appreciably reduce the likelihood of the survival and recovery of the species." Babbit concluded, "I want to assure you that it is not my desire to place the Department in a central role in what is more appropriately a matter requiring state action. The management of the Edwards aquifer is as much a human resource issue as one involving endangered species...."

### LITIGATION/WATER RIGHTS

#### **Reserved Rights/New Mexico**

The New Mexico Court of Appeals has handed down a decision concerning the scope of the Mescalero Apache Tribe's reserved water rights, New Mexico v. Lewis, No. 11,718 (May 12, 1993). The case is a continuation of the general adjudication of the Rio Hondo River system. The appeals court reviewed a trial court holding that the United States, on behalf of the tribe, is entitled to a diversion of 2,322 acre-feet per year with a priority date of 1873, the date of the first executive order delineating boundaries of the Mescalero Apache Reservation. On appeal, the United States and the tribes contended that the tribe was entitled to a 17,750 acre-feet per year diversion under the practicably irrigable acreage theory, with a priority date of time immemorial based on an aboriginal water right. In the alternative, the tribe claimed its priority date was 1852, based on a federally reserved water right implied under a treaty between the tribe and the United States.

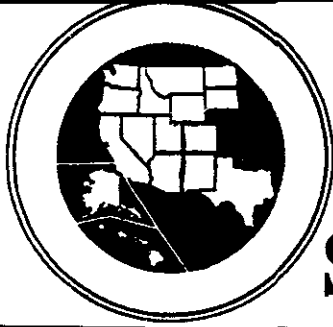
The court dismissed the tribe's contention that an aboriginal water right with a time-immemorial priority date should be recognized, noting that the difference between a priority date of 1852 and an earlier date would afford no practical relief, because the area was not settled by non-Indians until after 1852. "We will not issue advisory opinions," the court said of the

earlier date. Regarding whether the tribe's 1852 treaty (which established peace between the tribe and the federal government) or a set of executive orders which began in 1873 (which actually set aside the tribe's reservation lands) should be the basis for the priority date, the appeals court reversed the trial court and held that the priority date should be 1852. The court acknowledged the apparent anomaly in declaring a priority date earlier than the date the boundaries of the reservation were established, given that it would be impossible to quantify the reserved water right without related lands. "Regardless of difficulties with quantification," the court noted, "which was not attempted for over 100 years in any event, pertinent cases do not focus on such exacting measures." The "lynch pin" is "whether the documents have...an unmistakable meaning," the court found. "As we have said," it continued, "they do not, and that is what compels us to rule in accordance with the cannons governing liberal construction in favor of the Indians."

"This same liberality, however," the court said, "is neither necessary nor desirable in our review of the trial court's decision applying the [PIA] standard." The court found that, "This case turns on whether the trial court erred in its essential conclusion that [certain] acres were not irrigable at reasonable cost.... The trial court found that under generally accepted standards for economic feasibility analysis, the projects are infeasible.... The...reasons for this finding included: (1) the Tribe's reliance on specialty crops did not comport with appropriate economic procedures, which consider the proper ratio of specialty crops to basic crops; (2) the tribe's analysis of markets for these specialty crops was faulty; (3) the tribe's estimates of crop yield were overstated and unrealistic; (4) the terrain and location of the reservation dictated high-quality, top-level management for which the tribe failed to adequately budget; (5) the tribe failed to adequately address risks such as weather, insects, and disease; (6) the tribe failed to include factors such as storage, transportation, supply and demand, and market structure in its budgets; (7) the tribe understated its labor costs; and (8) the tribe's accounting system was inadequate." Thus, the trial court applied the PIA standard and held that fewer acres were practicably irrigable than the number the tribe claimed, and that certain proposed water storage projects were infeasible "[e]ven making all favorable assumptions." This portion of the trial court's ruling was affirmed.

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# WESTERN STATES WATER

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## ENVIRONMENT

### **Endangered Species Act-Reauthorization**

House Merchant Marine Committee Chair Gerry Studds (D-MA) recently said, "There is a misconception that the [ESA]...is somehow broken and needs fixing. Nothing could be further from the truth." On the other hand, there is interest in exploring potential amendments to the Act. The Committee held a general oversight hearing on ESA issues on May 27. It was the first in a series. Discussions over ESA reauthorization are expected to be long and involved, with the House taking the lead in the debate.

A number of House bills have been introduced, including H.R. 2043, sponsored by Studds and some 50 other House members. A companion bill (S. 931), was introduced in the Senate by Environment Committee Chair Max Baucus (D-MT) and ranking minority member John Chafee (R-RI). H.R. 2043 would increase emphasis on species recovery, while attempting to minimize economic and social impacts, facilitate protection of interrelated species and their habitats, improve consultation between government entities, and establish species conservation inducements for private land owners.

Separate legislation (H.R. 1490), has been introduced by Reps. Jack Fields (R-TX), the ranking Minority member on the Merchant Marine Committee, Billy Tauzin (D-LA), Chairman of the Committee's Coast Guard and Navigation Subcommittee, and some 40 cosponsors. No companion bill has been introduced in the Senate. H.R. 1490 would make a number of procedural amendments and increase the consideration given to the economic effects of species conservation efforts "to ensure balanced consideration of all impacts of decisions implementing the Act." It

would require consideration of the cumulative economic impact of habitat designation and would provide compensation to property owners where ESA implementation substantially reduced property values.

Other ESA bills include: H.R. 1414, introduced by Rep. Jim Hansen (R-UT), to require consideration of economic and social factors in listing species; H.R. 1992, introduced by Rep. Bob Smith (R-OR), to provide that species may be listed only when there are actual threats to their existence; and H.R. 2207, introduced by Rep. Bill Brewster (D-OK), to prohibit trapping, fishing, and hunting in ESA enforcement. Also, Senator Howard Metzenbaum (D-OH) has introduced S. 74 to protect the standing of certain groups and individuals to bring suit to force the federal government to protect listed species.

## WATER RESOURCES

### **Virgin River**

Last March, the Southern Nevada Water Authority filed permit applications to appropriate and "divert" essentially the entire flow of the Virgin and Muddy Rivers as they enter Lake Mead. Protests or letters of concern have already been filed with the Nevada State Engineer by the Arizona Department of Water Resources, the Central Arizona Water Conservancy District, and the Colorado River Board of California. "Wheeling" the appropriated and "diverted" water through Lake Mead is the central issue. The authority's filings have also been protested by the Mesquite Farmstead Water Association, which supplies domestic water, and the Bunkerville Irrigation Co. Under a Nevada state court decree, some 17,000 acre-feet of water is used for irrigation along the Virgin. Lastly, the Moapa Indian Reservation has also filed a protest.



Three separate permit applications have been filed. First, the authority seeks to change the point of diversion for a 1989 permit application that was filed by the Las Vegas Valley Water District for 60,000 acre-feet of water from the Virgin River and an additional 10,000 acre-feet of ground water. At that time, the district also filed on ground water rights throughout southern Nevada, raising vigorous protests from environmental interests and rural communities that viewed the applications as a threat to their future.

The Southern Nevada Water Authority is a joint powers agency formed by the district and major local entities responsible for public water supply and sewage treatment in the Las Vegas area (WSW #903). Patricia Mulroy manages both the district and the authority. The authority filed to change the district's original point of diversion from the Virgin, which was to have been some 10 miles southwest of Bunkerville. The original proposal, under study by the Bureau of Reclamation, would have been to desalinate the water for delivery to Las Vegas by pipeline.

However, the authority has now filed for 700 cubic feet per second or up to 150,000 acre-feet per year. Essentially any remaining unappropriated water would be "diverted" at the mouth of the Virgin where it enters Lake Mead. The authority proposes storing up to 500,000 acre-feet in Lake Mead and actually diverting the water downstream at its intake just below Las Vegas Wash near Saddle Island.

Similarly, the third permit filed is for 30,000 acre-feet of water from the Muddy River, which flows through the Moapa Indian Reservation and into Lake Mead.

Under the Colorado River Compact, the Lower Basin was apportioned 7.5M acre-feet of water, and "given the right to increase its beneficial consumptive use" by another 1M acre-feet. Arguably, that provision was included to address Arizona's use of Gila River water. However, once a state's waters reach the mainstem of the river, they appear subject to use restrictions imposed by the law of the River, which allocated 300,000 acre-feet of water from the system to Nevada for its "exclusive...consumptive use." Therefore, while Nevada may under state law divert, treat and transport water from the Virgin to Las Vegas, it arguably can not take the same amount of water from Lake Mead using existing facilities without addressing limits in the Compact and federal law.

A prehearing conference on Virgin River issues and the Las Vegas Valley Water District/Southern Nevada Water Authority's filings will be scheduled by the State Engineer no earlier than August.

## WATER RESOURCES/WATER QUALITY

### Ground Water

The Natural Heritage Institute has completed work on a report entitled, "Managing Groundwater Quality and Quantity in the Western States." The study, carried out under a contract with EPA, "...is a preliminary examination of groundwater management issues in the [West].... The purpose...is to identify issues presented by the management of ground water for [quantity and quality]...purposes, and to explore approaches that would forward the development of public policies in this area. Proposals for legal and institutional reform are to be identified in the second stage of the project." Denise Fort is the principal author. Call the Natural Heritage Institute for more information, (415) 288-0550.

## WATER RIGHTS

### Federal Reserved Rights/Montana

The Montana Reserved Water Rights Compact Commission has successfully negotiated a compact with the federal government to settle federal reserved water rights claims for the Glacier and Yellowstone National Parks and the Big Hole National Battlefield. Related negotiations are continuing for the Big Horn Canyon National Recreation Area and the Little Big Horn Battlefield National Monument.

The Montana legislature created the Compact Commission in 1979 as part of the statewide general stream adjudication process. It is authorized to negotiate settlements with federal agencies and Indian tribes that claim federal reserved water rights in Montana.

The recent compact was reached after more than a year of intense technical work and negotiation. It was ratified by the Montana legislature on April 20, and is now awaiting official federal approval. For information contact the Reserved Water Rights Compact Commission at 1520 E. 6th Avenue, Helena, Montana, 59620-2301; (404) 444-6841.

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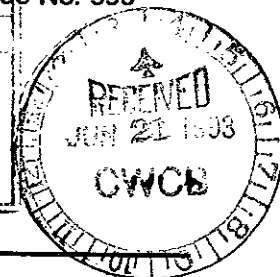
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# WESTERN STATES WATER

June 18, 1993  
Issue No. 996



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## WATER QUALITY

### **Safe Drinking Water Act-Reauthorization**

Two House committees have approved competing legislation to create a state revolving loan fund (SRF) under the Safe Drinking Water Act (SDWA, WSW #992). The bills are similar in their overall funding authorizations - some \$600M for FY94, and \$1B each for FY95 and FY96, plus one version authorizes an additional \$1B for FY97 - but have a number of other differences. The jurisdictional dispute between two committees requires House leaders to sort out differences between the bills. As part of this effort, House speaker Thomas Foley (D-WA) requested the views of EPA Administrator Carol Browner on SDWA issues. The result was a reply from Browner to Foley containing an EPA statement of principles concerning the need for an SDWA SRF.

The EPA statement advises that funding of some \$600M in FY94, with \$1B each for FY95-98, be provided for the SDWA SRF. The SRF funds would be available for a number of purposes to assist in construction or capital improvement projects including the arrangement of guarantees for local bonds or other debt obligations, various loan guarantees, and different types of loans, including some with no interest. Disbursement of funds would be on a letter-of-credit basis, rather than cash. Allocation to states would be made using a formula similar to that used for SDWA Public Water System Supervision state grant funds, with a 1.5% set-aside for Indian tribes and Alaska native villages. One important provision in the EPA statement of principles is a recommendation that states be denied SDWA SRF capitalization grants if they do not have SDWA primacy. Although almost all states have such primacy, some have recently questioned whether to continue to hold it. The EPA

document notes, "Providing capitalization grants only to States with primacy would provide States with a tremendous incentive to maintain and adequately fund primacy and...encourage State legislatures to adopt fee bills and increases to the States' general appropriations to operate state public water supply system primacy programs."

## WATER RESOURCES

### **Water Conservation/Washington**

Washington has enacted legislation expanding its water conservation law. Since 1989, beginning in the Yakima River Basin only, the state has offered funds to irrigation districts and other public entities to implement conservation measures. Conserved water becomes a "trust water right" that is conveyed to the state Department of Ecology to enhance the state's overall effectiveness in water management. In 1991, the program was expanded beyond the Yakima Basin (WSW #887), but was carried out on a limited basis using regional pilot planning areas while the state developed implementing guidelines. The guidelines were adopted in September 1992.

During the recent legislative session, the program and guidelines were applied statewide. The state had solicited suggestions on designating water resource inventory areas under the 1991 expansion of the program. These areas will now be high priority for implementing the trust water rights program throughout the state.

In a related matter, the legislature passed a bill directing the state Department of Ecology, in cooperation with Indian tribes and the Department of Fisheries and Wildlife, to develop, by the end of this year, a statewide list of priorities for evaluating

instream flows. Achievement of wild salmonid production is the primary goal of the program. In addition, the bill requires that methods of applying the trust water rights program to high priority streams be recommended to the legislature. For information about Washington's trust water rights program contact Cynthia Nelson at (206) 459-6116.

### **Water Storage/California**

The Metropolitan Water District (MWD) of Southern California has begun a water pricing program to help provide water storage insurance against future dry periods. MWD will offer water agencies in its six-county service area reduced water rates to encourage the storage of available imported supplies in ground water basins and surface reservoirs in 1993. It will sell untreated water at a discounted rate of \$138 per acre-foot (full price for untreated water is \$269 an acre-foot and will increase to \$318 in July). The district's treated water will be sold at a reduced rate of \$163 per acre-foot (the current rate for treated water is \$322 per acre-foot and will increase to \$385 in July). Agencies participating in the program will purchase the supplies under the agreement to store equivalent amounts for up to ten years and then be prepared to provide that water at Metropolitan's call.

### **ORGANIZATIONS/MEETINGS**

#### **Native American Rights Fund/Western States Water Council**

Planning continues for the third Western States Water Council/Native American Rights Fund Symposium on the Settlement of Indian Reserved Water Rights Claims, to be held September 7-9, in Bismarck, North Dakota, at the Radisson Inn (701) 258-7700. We invite all interested parties to circle these calendar dates and plan to attend. Agenda and registration materials will be available shortly.

The symposium will be held immediately before the United Tribes International Powwow, which is scheduled for September 9-12 in Bismarck. The powwow is one of the largest in the nation. Plans for this year's symposium reflect input received from last year's meeting, which was held in Albuquerque, New Mexico, and attended by just over 300 participants representing state, tribal, federal, and local governments, water user and environmental groups,

and many other interests. This year, background sessions will be held the first afternoon for those who are relatively new to the negotiation process. The second day communication issues will be stressed, including a presentation by an expert on environmental dispute resolution. The program will then focus on some of the more difficult and pivotal issues associated with negotiated settlements: water rights management in Indian country and the proposed sale and lease of Indian reserved rights in the Colorado and Missouri River Basins. Morning sessions on the last day will provide an opportunity for the Administration to discuss its policy and program with regard to Indian water rights settlements, followed by a panel discussion to shed light on the process of getting settlement bills through Congress.

Top Interior Department officials have been invited to participate during the last two days of the program. The wrap-up from the 1992 symposium is scheduled for publication this summer in Volume 33, No. 3 of the Natural Resources Journal. We look forward to another very successful meeting in September.

### **PEOPLE**

The law firm of Westover, Choules, Shadle and Noble has announced the retirement of Tom Choules, a partner and experienced water lawyer. Tom has been associated with a number of water organizations. He represented Arizona on the Western States Water Council from 1970 to 1983, and was reappointed and served from 1987 to 1991. He was an active Council member, and served as the Legal Committee Chair. We wish the best to Tom and his family.

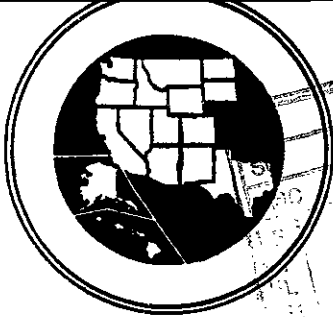
Joe D. Hall, veteran Deputy Commissioner of the Bureau of Reclamation, will reportedly retire from service with the Bureau on July 1.

### **POSITION OPENING**

Montana State University seeks a full time Director of the Montana University System Water Resources Center responsible for the center's water research program, information transfer, and educational activities. An advance degree is required; salary range is \$35-45,000. Applicants must request and complete application materials from the Water Center Search Committee, VP for Research, Montana State University, Bozeman, MT 59717-0246; (404) 994-2891.

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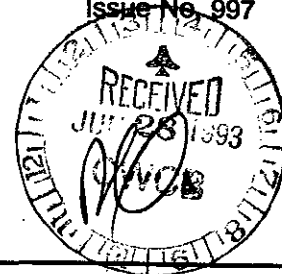


001612

June 25, 1993

Issue No. 997

# WESTERN STATES WATER



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## WATER QUALITY

### **Clean Water Act-Reauthorization**

The Senate Clean Water Act (CWA) reauthorization effort took an important step forward June 15 when S. 1114, a bipartisan bill, was introduced by Senators Max Baucus (D-MT) and John Chafee (R-RI). Chairman Baucus intends to have a bill out of the Environment Committee this year. The committee will hold weekly CWA hearings during the summer. The "Water Pollution Prevention and Control Act of 1993" (S. 1114) aims at consensus, according to its sponsors. Baucus said, "It will not satisfy those on the extremes. If you are looking for a bill that will guarantee the elimination of water pollution at any cost...[or]...that permits a business-as-usual approach, ignoring...real... problems, this bill is...not for you." In developing the bill, committee staff sought technical advice from EPA.

S. 1114 contains titles on water program funding, toxic pollution prevention, watershed planning and nonpoint source pollution control, municipal pollution control, permit program and enforcement, and program management. Regarding funding, the bill authorizes State Revolving Loan Fund (SRF) capitalization grants at an annual rate of \$2.5B for FY 1995-2000. In any year when 1993 deficit reduction goals are met, authorized amounts increase by \$500M increments up to \$5B in FY2000. Also, the bill expands eligibility for SRF fund use to include combined sewer overflow (CSO) and stormwater control programs, and watershed management plans.

The bill revises CWA provisions that regulate industrial pollutant discharges. New requirements would be added to ensure that highly toxic, persistent, or bioaccumulative pollutants are eliminated from industrial waste processes. The ban would be

phased-in over five years. Also, new requirements for toxic pollution prevention by industry are provided.

Title III of S. 1114 deals with watershed planning and nonpoint source pollution (NPSP) control. It expands authority for monitoring waters and creates a voluntary watershed management program. States would designate watershed areas and management entities responsible for developing plans to protect water quality. The plans would assure that water and sediment quality standards are attained within ten years. Within 2½ years, states would be required to revise CWA Section 319 NPSP plans to be consistent with guidelines developed by EPA. Approval of Section 319 plans would be a condition of grant assistance. Site-specific water quality plans would be the primary means of implementing NPSP controls in impaired watersheds. Where plans do not result in sufficiently improved water quality, revised plans must be created. The NPSP program would thus be transformed from reliance on essentially voluntary plans incorporating best management practices to the implementation of management measures or site-specific water quality plans consistent with EPA guidance. However, a state could exempt a category of sources if it can show no impairment to waters within the state. The state could also, with EPA approval, adopt alternative requirements relative to specific types of NPSP based on a showing by the owner or operator of the source that the modified requirements will "represent the maximum use of management measures and practices within the economic capability of the owner or operator and result in reasonable further progress toward elimination of pollution." The bill authorizes increased Section 319 grant funding, starting with \$300M in FY95, and increasing to \$600M, provides for EPA coordination with other federal agencies, and directs federal agencies to control NPSP on federal lands.

S. 1114 Title IV addresses two urban water pollution sources: CSOs and municipal separate stormwater discharges. The bill endorses the EPA draft policy on CSO control practices, but provides new authority to grant the long-term permits needed to implement the policy. The bill eliminates the obligation of most small communities (100,000 or less) to have permits for discharges of stormwater and provides for the development of permits for larger communities based on both minimum program elements and compliance with water quality standards. Also, under new authority, EPA would coordinate federal policies on municipal, industrial, commercial, and residential water conservation.

Title V of S. 1114 changes several CWA point source permit requirements and clarifies permit issuance procedures. It would also require states to assess permit fees to support their water quality programs. A number of amendments are made to enforcement provisions to clarify administrative, civil, and criminal penalty elements of the law. Further, citizen suits would be allowed as a remedy against repeat offenders. And, states would be required to adopt authorities for administrative penalties, or face loss of CWA Section 106 grant funding.

The bill's title on program management contains authority to demonstrate improved water pollution control practices, technologies, and processes. CWA provisions are clarified concerning state certification under Section 401 of activities or projects affecting a state's water quality laws. A national program of water quality information and education is established. Increased funds would be available under Section 518 to Indian tribes for wastewater treatment works and NPSP management, and tribes would receive funds directly from EPA.

S. 1114 lacks wetlands provisions. Staff, however, have indicated the committee's intent to introduce a wetlands bill in the near future. This bill may eventually be incorporated into the larger CWA reauthorization legislation.

## **WESTERN GOVERNORS**

### **Western Governors' Association-Annual Meeting**

The Western Governors' Association (WGA) held its annual meeting in Tucson, Arizona June 19 - 22. The

Governors, under the leadership of Chairman Fife Symington of Arizona, addressed several issues important to the West, including the North American Free Trade Agreement, Grand Canyon visibility issues, national economic policy, and environmental technologies and regional development. On Monday morning, June 21, Dave Kennedy, WSWC Chairman and Director of the California Department of Water Resources, reported to the governors on Council activities, along with the respective chairs of the Western Interstate Energy Board and the Western Interstate Commission on Higher Education. Following this business meeting, a plenary session was held entitled "Our Lands: New Strategies for Protecting the West." It began with remarks by Robert Armstrong, Assistant Interior Secretary for Land and Minerals Management, Elizabeth Rieke, Assistant Secretary for Water and Science, and Jim Baca, Director of the Bureau of Land Management. In that portion of her remarks devoted to water issues, Assistant Secretary Rieke described the Colorado River as a river of controversy, which is "locked up in the law of the river." She said, this situation "prevents us from moving forward" regarding cost effective salinity control measures, endangered species protection, and serving burgeoning populations. She concluded, "figuratively speaking, we need to melt these chains." She described this as an extremely difficult challenge, but noted that the Administration sees an opening. "Others have solutions, we don't, but there is an opportunity," she said. She also referred to the challenges associated with the salmon issues in the Northwest. She described resolving these issues as an even bigger task than that posed in the Colorado River Basin. "Here," she noted, "we don't have a good idea about what must be done, but we must try."

Ms. Rieke's comments regarding the Colorado follow earlier remarks by Interior Secretary Babbitt, given at the National Press Club, where he noted that Las Vegas is forced to turn to much more costly solutions, "[B]ecause Las Vegas...under existing law...cannot take more water from the Colorado River, which runs right by its own doorstep.... I pledge to find a market mechanism to help Las Vegas enter a new era of water management" (WSW #991).

Governor Bob Miller of Nevada was elected WGA Chairman to succeed Governor Symington, and Governor Mike Leavitt of Utah was elected Vice-Chairman.

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# WESTERN STATES WATER

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## WATER QUALITY

### **EPA-Appropriations**

The House passed its Veterans' Affairs, Housing and Urban Development, and Independent Agencies' FY94 Appropriations Bill (H.R. 2491) on June 29. No bill has been passed by the Senate. In H.R. 2491, EPA's total appropriation is \$6.6B, down \$259M from current spending levels but up \$269M from President Clinton's budget proposal. EPA's operating budget is \$2.64B of the \$6.6B total, which is about the same as FY93. The water quality portion of the appropriation is \$2.48B, down \$73M from current spending levels. The water quality funding will be spread between a wider variety of projects than under the current program.

The water quality spending under H.R. 2491 breaks down as follows: (1) \$1.218B for the state revolving loan fund (SRF) for sewage and water treatment plants; (2) \$599M for a proposed SRF for drinking water projects; (3) \$500M for grants to hardship communities; (4) \$100M for projects under Clean Water Act (CWA) Section 319 to control rainwater runoff pollution; (5) \$25M for Section 104 (b)(3) water quality agreements; and (6) \$35M for wastewater treatment in San Diego. Only a small portion of the SRF funding "lost" with the defeat of the President's original stimulus package (WSW #992) was restored in the streamlined stimulus package (as this newsletter went to press, sources differed concerning whether \$35M or \$70M was restored). The \$500M for hardship communities is for construction of wastewater treatment facilities which are authorized before April, 1994. If the money is not spent by then, it reverts to the SRF. Essentially, this means that a total of some \$1.8B would be appropriated for wastewater construction in FY94, which is down from the approximate \$1.9B appropriated in FY93.

## WATER RESOURCES

### **Publications**

The Environment and Energy Study Institute (EESI) has recently published two reports relating to western water management. One is entitled "New Policy Directions to Sustain the Nation's Water Resources." According to EESI, it is based on a series of Congressional briefings "focused on the need for a holistic water policy which takes into account the interconnections between groundwater and surface waters and the interrelationships between water use, water quality and related concerns. The briefings did not advocate enactment of an omnibus federal water law or creation of a super federal water agency or establishment of a top-down federal water policy. Instead, the series explored a number of policy options to maximize the effectiveness of existing laws and programs at all levels of government...." Among the issues the report discusses are pollution prevention, nonpoint sources of contamination, and watershed approaches to water management and protection.

The second report, "EPA's Role in Water Use Efficiency in the Western States," was prepared for EESI by Bruce Driver, a water lawyer and consultant. It summarizes findings from interviews and discussions with 60 representatives of western states, local governments and interest groups. EESI notes, "Competitive pressures on U.S. water resources are growing.... Increasing the efficiency of water use and management is often seen as a cost-effective means to help meet all of these needs. Water use efficiency also can contribute to the attainment of water quality objectives; reduce water supply and wastewater treatment costs; and reduce energy use associated with the pumping, treatment and heating of water."

Included among the report's conclusions are that: (1) individuals at all levels of government and in the private sector in the West are increasing their efforts to enhance water use efficiency and conserve water, but much more could be done; (2) EPA is perceived to have neither the staff nor regional political support to launch, by itself, a major new water conservation initiative; and (3) there is support, if not consensus, in the West for an expanded role for EPA in promoting water conservation if EPA sticks to supplementing the work of state and local agencies, other federal agencies, and private citizens. The author noted, also, that he had expected to find some who believed that EPA should preempt or take over state and local conservation efforts so as to increase instream flow. No one believed, however, this was an appropriate role for EPA in 1992.

Copies of the reports may be obtained by contacting EESI, 122 C Street N.W., Suite 700, Washington, D.C. 20001. The cost for "New Policy Directions..." is \$25; the second report is \$15.

## WATER RIGHTS

### **Indian Water Rights Settlements**

The House Appropriations Committee has approved \$179M for Indian land and water settlements for FY94. In so doing, the committee decreased by \$101M a separate "settlement fund" for Indian water and land claims. The decrease included \$20M for water rights studies/negotiations, which was transferred back to the Operation of Indian Programs account where this activity had previously been budgeted. There was also a decrease attributable to a transfer of the following projects to the construction account: Navajo Indian Irrigation Project-\$34M; Southern Arizona (Tohono O'odham)-\$3.21M; Salt River-\$1.43M and Fort McDowell-\$895,000. The committee also approved a decrease of \$41.7M for the Ute Indian settlement fund, because "As of this time, the tribe has not yet held the referendum on whether to accept this legislated settlement." However, the committee provided \$17.2M for farming operations and water improvement projects.

A primary purpose of the initial proposal to establish a separate \$200M fund was to assure sufficient funding at that level each year, without taking money away from other Indian programs and services,

to be used in reaching settlements of Indian water rights claims. However, there is no indication that the money appropriated by the committee comes at the expense of other such programs, although the ultimate outcome remains to be seen.

## WESTERN STATES WATER COUNCIL/MEETINGS

The Western States Water Council and the Native American Rights Fund will cosponsor their Third Symposium on the Settlement of Indian Reserved Water Rights Claims on September 7-9 in Bismarck, North Dakota (WSW #996). All interested parties are encouraged to attend. For more details, see the enclosed announcement and registration form. An agenda for the meeting will be available soon.

The Western States Water Council will hold its 111th Quarterly Meetings in Anchorage, Alaska on July 14-16 at the Anchorage Hilton. Alaska Governor Walter J. Hickel will address Council members at a state dinner on July 15. Other Alaska representatives will speak to the Council on July 16. The Council meeting will also feature a panel discussion comparing state efforts to integrate water quantity and quality considerations. Other matters to be discussed during the Council's committee meetings include a proposed MOA between FERC and western states designed to improve working relationships, a western state position on the CWA reauthorization, implementation of the Endangered Species Act, efforts to regulate ground water in Texas, and several recent court decisions.

### **Schedule of Meetings**

#### Wednesday, July 14

Management Subcommittee	6:00 p.m.
Clean Water Act Subcommittee	7:30 p.m.

#### Thursday, July 15

Legal Committee	8:00 a.m.
Water Quality Committee	10:15 a.m.
Executive Committee	12:30 p.m.
Water Resources Committee	2:00 p.m.
State Dinner	6:00 p.m.

#### Friday, July 16

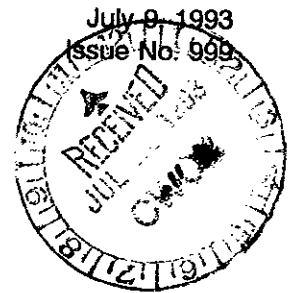
111th Quarterly Meeting	8:30 a.m.
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001614

# WESTERN STATES WATER



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## WATER QUALITY

### **Appropriations**

The House and Senate have passed H.R. 2118, the FY93 Supplemental Appropriations bill. Although the House recommended funding, no money lost to EPA's Clean Water Act (CWA) State Revolving Fund (SRF) with the defeat of the President's original stimulus package (WSW #992, 998) was restored in the supplemental appropriations bill (also referred to as the "streamlined" stimulus package). However, the U.S. Department of Agriculture (USDA) received related funding. Additional appropriations were made to USDA of \$3.3M for watershed and flood prevention activities, \$35.5M to subsidize additional obligations under the water and sewer facility loan program of the Rural Development Assurance Fund, and \$35M for rural water and waste disposal grants.

In their report on the supplemental appropriations bill, the conferees took note of the need for more SRF funding. The conference report explains: "The... agreement does not include the \$280M provided by the House...for wastewater treatment [SRFs] because there was difficulty in finding suitable offsets for these additional funds as well as the severe outlay costs associated with this expenditure for [FY94]." The report continues, "The conferees recognize the enormous need for water infrastructure activities. The construction of wastewater facilities not only provides environmental protection, but also leads to the creation of thousands of jobs nationwide. It is hoped that during deliberations on the VA, HUD, and Independent Agencies appropriations bill for 1994 additional monies will be available for water infrastructure activities. The conferees will make every effort to provide additional funds during conference on this legislation."

### **Clean Water Act-Reauthorization**

Section 602 of S.1114 (to reauthorize the CWA; WSW #997) deals with state certification under CWA Section 401 that activities or projects affecting water quality will not result in violation of state requirements. The bill would amend Section 401 by inserting the following language: "And that any such activity will comply with water quality standards adopted under Section 303 and allow for the protection, attainment, and maintenance of designated uses included in the standards." The purpose of this change is to enhance state authority to control the water pollution effects of a number of activities, especially the licensing of hydroelectric power generation facilities.

The Federal Power Act (FPA) contains provisions which appear to give states a substantial role in the licensing of hydropower projects. A series of Supreme Court decisions (WSW #836) beginning with the First Iowa case in the 1940's, however, have defined these provisions very narrowly. A recent Washington Supreme Court decision (WSW #987) dealt with the interplay between the narrow state role in hydrolicensing under FPA and the state certification role under CWA Section 401. The court held that the FPA did not "preempt" the Washington Department of Ecology from including minimum streamflow conditions in a Section 401 certificate issued by the state as applied to a hydropower project licensed by the Federal Energy Regulatory Commission. Thus, the court found that the narrow definition of state authority under the FPA did not prevent state certification of compliance with water quality requirements under CWA Section 401.

The language contained in Section 602 of S.1114, if enacted, would make such a result more likely in other states. Although the language is not as broad



as some observers had hoped, it will be supported by state officials, particularly the western governors who recently passed a resolution endorsing it, and others. On the other hand, it is likely to be opposed by hydropower developers, and the electricity industry in general. A hearing on this provision is scheduled for August 4.

## WATER RESOURCES

### **Utah/Jordanelle Dam**

Early completion of the Jordanelle Dam, a major component of the Central Utah Project (CUP), has allowed storage of heavy spring runoff this year, saving residents of four Utah counties from extensive potential flood damage. Above average precipitation during 1992-3 caused the flow of the Provo River to crest at 3100 cubic feet per second (cfs) on May 25. By comparison, the river peaked at about 2500 cfs during 1983-4, and substantial flooding occurred. The storage capacity of the new reservoir, which is located on the Provo's mainstem, allowed control of the river's flow for flood prevention purposes. A tunnel and other diversion works that can bring water into the Provo from the Duchesne and Weber Rivers also helped control flooding in those drainages.

Stage I filling criteria for the reservoir have allowed it to reach a depth of 120 feet. This was achieved on June 17. Safety requirements preclude further filling until after July 17, if water is available. In addition to flood control and water storage, the Bureau of Reclamation and the State of Utah project that benefits from operation of the dam will include improved management of the Provo River to protect fisheries, enhancement of wildlife and waterfowl habitat through wetlands construction, protection, and maintenance, and creation of various recreation opportunities. Legislation that allowed completion of CUP contained "landmark" environmental protection provisions (WSW #936). In addition to benefits from the dam itself, the provisions will guarantee minimum flows for 240 miles of Utah rivers and streams, establish an ongoing mitigation and conservation fund, and lay the ground work for settlement of the water rights claims of the Ute Indian tribe in eastern Utah. The Jordanelle Dam site was visited by many WSWC members as part of the quarterly Council meetings held last July in Salt Lake City.

## WATER RESOURCES/CONGRESSIONAL UPDATE

### **Water Use Fees/FY94 Budget**

Both the House and Senate have passed budget reconciliation bills. The House bill includes a \$10M surcharge on the delivery of water from federal reclamation projects with receipts deposited in a new Natural Resources Restoration Fund (WSW #993). The surcharge will apply to projects whether or not they are paid out. In the Senate, the Energy and Natural Resources Committee was not specifically directed to act on the irrigation surcharge, and the Senate bill has no surcharge provisions. This difference in the bills must be reconciled by a conference committee. Both the House and Senate have named conferees, but no date has been set for the conference committee to begin its work.

### PEOPLE

California Governor Pete Wilson has appointed **James Stubchaer** as an alternate WSWC member. He will replace **Eliseo Samaniego**. Mr. Stubchaer is a member of the California State Water Resources Control Board. He graduated from the University of Southern California and Delft (Netherlands) Technological University. He is a former member of the California Water Commission and the Central Coast Regional Water Quality Control Board. We welcome him.

Former WSWC Chair **Bill Young** is no longer with the Oregon Executive Department. As of July 1, he has accepted a position in the Water Quality Division of the Oregon Department of Environmental Quality. He may be reached at (503) 229-5279. We wish him well.

### MEETINGS

The Colorado Water Resources Research Institute at Colorado State University has issued an announcement and second call for papers for a meeting entitled **"Seeking an Integrated Approach to Watershed Management in the South Platte Basin."** It will be held October 27-28, at the University Park Holiday Inn in Fort Collins, Colorado. For information on the meeting or to submit papers call Kathleen Klein, (303) 491-6308.

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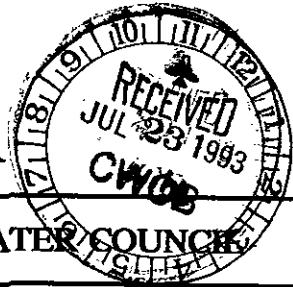
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001615

July 20, 1993  
Issue No. 1000

# WESTERN STATES WATER



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## WESTERN STATES WATER COUNCIL

### Quarterly Meeting

The 111th WSWC quarterly meetings were hosted by the state of Alaska in Anchorage on July 14 - 16. Ric Davidge, Director of Alaska's Department of Water, hosted the meetings and arranged many memorable activities including tours of the TransAlaska pipeline and terminal facilities at Prudhoe Bay and Valdez, the Alyeska Ski Resort and Portage Glacier. At a state dinner with many of Alaska's legislative and executive officers, Governor Walter Hickel addressed members and lauded Alaska's abundant, high quality water and opportunities for its use on a national and international scale. He referred to Alaskans' vision of big projects, like the oil pipeline, and the state's determination to overcome obstacles to their realization.

The Council's standing committees met and addressed a number of topics. The Legal Committee discussed several recent court decisions including United States v. Idaho (WSW #990), New Mexico v. Lewis (WSW #994), and two cases interpreting Section 401 of the Clean Water Act (WSW #987). Next, a discussion was held on Endangered Species Act matters. The Committee determined to prepare an issue paper on opportunities to improve coordination and consultation between state and federal agencies. The committee also approved preparation of an issue paper on intrastate water transfers in the West, and discussed its third symposium, cosponsored with the Native American Rights Fund, on the Negotiated Settlement of Indian Reserved Water Rights Claims (WSW #996).

The Water Quality Committee discussed S. 1114 (WSW #999) and the Council's proposed position on the Clean Water Act (CWA) reauthorization. An

amended position statement was recommended to, and later approved by, the Council. Another topic was wetlands regulation and the many differences between the number and type of wetlands in Alaska compared to the lower 48 states, as well as attempts to respond to those differences and the need for further action. The meeting concluded with a discussion of the WSWC/Western Governors' Association (WGA) meeting on CWA watershed management issues.

The Executive Committee accepted the budget report, and discussed the status of state membership and dues. Of note, Julia Doermann reported that during the WGA annual meeting Texas was admitted as a WGA member. Texas became a WSWC member in 1978, after participating for many years as an observer. Texas' membership was delayed because the state was not then affiliated with the Western Governor Conference. The Executive Committee also discussed future Council meetings and determined to survey member states regarding the advantages and disadvantages of different alternatives.

The Water Resources Committee discussed work on a draft hydropower licensing memorandum of agreement, prepared by Keith Higginson of Idaho. The draft has been sent to the Federal Energy Regulatory Commission (FERC) for comment, but as four new commissioners were recently named, FERC has yet to respond. Keith asked member states for their comments. Next, staff reported that a cooperative study of the Bureau of Reclamation's Ground Water Recharge Demonstration Program will be extended through September 1994, and that work on the water conservation report was continuing. Further, Ric Davidge discussed a number of questions to be addressed in a study of state water use fees. Members also briefly discussed the Western Water Policy Review Commission, the proposed federal

irrigation water service surcharge and natural resources restoration fund, and a report on federal water project transfers. Lastly, Lorna Stickel explained Oregon's watershed management program, and then a special panel of Texas members, including state representative Ron Lewis, Fred Pfeiffer, Pam Reed, Charles Jenness and Mark Jordan, representing various Texas agencies, discussed the recently enacted Edwards Aquifer management legislation.

Lt. Governor Jack Coghill addressed members during the full Council meeting on water resource management in an arctic environment. A number of other state officials also addressed specific issues, including wetlands, instream flows, data and fisheries management issues, and the Alaskan Native Village Safe Water Program. The Council also heard a panel discussion on the integration of water quantity and water quality issues under state law, with viewpoints expressed by California, Oregon and Alaska members.

The Council approved a position statement on CWA reauthorization legislation that will be sent to members of Congress and others. It addresses funding, watershed management, non-point source pollution, effluent dominated waters and water reuse, stormwater, and water quality controls on tribal lands, among other matters.

The Council reelected Dave Kennedy as Chair, Keith Higginson as Vice Chair, and Larry Anderson as Secretary-Treasurer. The Council also honored Roland Westergard of Nevada, Myron Goodson of Wyoming and Thorpe Waddingham of Utah for over 25 years of service as members. Chairman Kennedy noted the "remarkable nature of such an accomplishment in a multistate organization where members serve at the pleasure of their governors."

The next quarterly meetings will be hosted by the state of Idaho in Coeur d'Alene on October 6-8.

## **Western States Water - #1000**

Under the direction of Jack Barnett, then the new Executive Director, Western States Water's first issue was published on May 14, 1974. After 1000 issues, it continues as a brief weekly summary of national and regional news, items of interest from particular states, and authoritative comments concerning various water-related issues. It also provides a means of reporting

on many forthcoming meetings and water-related publications. Moreover, it is a reference for quickly researching information on a particular issue. Over the years, its purpose has remained the same, but its format and content have been modified slightly.

The first issue reported on a number of water and related energy issues. Looking back, President Richard Nixon had signed legislation creating the Federal Energy Administration to "prepare a comprehensive plan for achieving the goals of project independence--the capacity for energy self-sufficiency by 1980.... We need continued conservation and major new initiatives to expand our energy supplies for the future." Western Governors had also received letters from the Water Resources Council asking that they designate a representative to participate in hearings regarding the availability of water for energy development. Rep. Morris Udall (D-AZ) had also sponsored federal land use legislation, and President Nixon had expressed his support for passage of "responsible and effective" legislation that would maximize state and local responsibilities and minimize the role of the federal government.

Further, the U.S. Supreme Court ruled that an environmental impact statement prepared on the New Melones Dam in California satisfied requirements of the National Environmental Policy Act. Next, some 60 dissident Ute Indians attempted to intervene in a lawsuit brought by environmentalists to prevent the opening of bids for construction of a portion of the Central Utah Project, arguing they had not properly been represented by their tribal counsel. Further, Congressional hearings were held on legislation supported by the seven Colorado River Basin states to address salinity problems. Separately, the House addressed funding for state grants under Title III of the Water Resources Planning Act. The Council and many WSWC member states sent letters urging the appropriation of \$5M in fiscal year 1975.

Western States Water continues to be one of the Council's most well-received and visible products. Its purpose is still to provide governors, members and others with accurate and timely information on water issues. It is a tool to improve water management and promote western states' interests. We welcome suggestions and comments from members and others, and express our appreciation to all those that have provided information and otherwise helped make this publication successful.

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July 22, 1993  
Issue No. 1001

# WESTERN STATES WATER



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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## WATER QUALITY

### **Clean Water Act-Reauthorization**

Rep. DeFazio (D-OR) has introduced H.R. 2580, the Clean Water Compliance Act, to give EPA authority to regulate radioactive discharges into ground and surface water at federal sites. The bill would close a loophole in last year's Federal Facilities Compliance Act by clarifying that radioactive materials regulated under the Atomic Energy Act are defined as pollutants under the Clean Water Act. The legislation would help deal with water quality problems at the Hanford Nuclear Reservation in Washington and the National Engineering Laboratory in Idaho.

## WATER RESOURCES

### **Texas**

The Texas Water Commission has released an overview of its Trans-Texas Water Program (TTWP), included as part of the state water plan. Under the Texas Water Code, the Board is directed to prepare and maintain a comprehensive state water plan as a flexible guide to water management. The plan was updated in 1992 to include population and water demand projections through 2040 and to identify areas of projected water supply deficits. Immediate needs exist in southeast Texas areas served by the San Jacinto River Authority and in south-central Texas, particularly in Corpus Christi and San Antonio. Long-term water supply problems are projected for Houston and Austin. The TTWP is intended to address the water needs of these growth centers.

The TTWP goal is to identify the most cost-effective and environmentally sensitive strategies for meeting current and future water demands. It began as an 18-

month study to examine both short and long-term needs and strategies for reducing them through promoting conservation and reuse, increasing water supplies, and transferring water from areas of abundance to areas of potential shortage. Alternatives will be evaluated based on technical feasibility, cost, and environmental acceptability. The program was initiated after a water planning "summit" held by the mayors of Houston, San Antonio, and Corpus Christi.

Water conservation, innovative management, environmental needs, and public participation are key TTWP features. Progress in water conservation has been factored into baseline water demand projections, but the potential for additional water savings will be evaluated. Other strategies to be considered include expanded water reuse, desalination, ground water recharge enhancement, conjunctive management of surface and ground water, and demand management during drought. In addition to examining local water supplies, the study will evaluate options for sharing water among river basins and water "wheeling" arrangements involving either water rights exchanges or physical water transfers. One alternative to be studied would bring water from the Toledo Bend Reservoir in East Texas to the Houston area to free up water supplies that could be provided to Austin, Corpus Christi, or San Antonio. The state has forged a partnership with local and regional water agencies that serve the metropolitan centers. Technical advisory committees in each study area will be open to interested parties.

TTWP Phase I involves program initiation and conceptual planning to "screen" a full range of water management strategies in terms of technical feasibility, cost, legal and institutional issues, environmental criteria, water quality, and other factors. Under Phase II more in-depth feasibility studies will be undertaken.

Also, environmental assessments will be completed in sufficient detail to support Phase III preliminary project design and to assure compliance with state/federal permitting requirements. At this point, a preferred water management plan for each study area will be developed, and an implementation program will be finalized. Phase IV will focus on property acquisition and final design of recommended projects. Phase V consists of bidding and construction, with initial start-up and operation support.

Currently, a schedule has been developed only to carry out Phases I and II over 18-24 months. Overall guidance and coordination is provided by a Policy Management Committee (PMC) chaired by the Executive Director of the Texas Water Development Board, with representatives from the Texas Water Commission, the Texas Parks and Wildlife Department, and each of the local program sponsors. Regional PMCs have also been formed to guide program activities in each study area, and technical advisory committees have been established. Funding is being provided by the state through the board, and by various local program sponsors. The board has committed \$1.3M in loans for Phase I, along with significant state staff support. Local program sponsors have committed more than \$1M, and the Texas legislature has authorized the use of \$3M in state funds, beginning with September 1.

### **Water Conservation**

The Global Cities Project has recently published a series of water use efficiency case studies based on the experiences of local governments. The case study format profiles a community or agency, describes the innovative program it implemented, and discusses the program's success. Case study features include overview and facts, policy options, step-by-step procedures, financial considerations, and contact information. The range of water efficiency topic areas is very broad, including water system efficiency, reclamation and gray water use, landscaping, residential issues, system-wide issues, commercial/industrial issues, and public education. Response to the project, according to Global Cities, has been very positive. To request an order form for the case studies, or for more information on these and other water-related publications, contact Julie Taylor at the Global Cities Project, 2962 Fillmore Street, San Francisco, CA 94123; (415) 775-0791.

## **WATER RIGHTS/PUBLICATIONS**

### **General Adjudication**

Complex general adjudications are being carried out in nearly every western state. Two new publications deal specifically with general adjudication matters, one in Arizona, and another in Idaho. The first is entitled, "Arizona General Stream Adjudication Bulletin." It contains a calendar, proceedings update, answers to commonly asked questions, "how-to" tips, and other features. It is published ten times a year by the office of the Special Master. For information contact the Special Master's Office at (602) 542-9600 or write to Special Master, Arizona General Stream Adjudication, Arizona State Courts Building, 1501 W. Washington, Suite 228, Phoenix, AZ 85007.

The second periodical, published every other week, is entitled "Snake River Basin Adjudication Digest." Among other things, it contains sections on adjudication issues, subcases, editorial perspective, and a docket sheet and calendar. For information contact Randy Stapilus (208) 338-9700 or write P.O. Box 2276, Boise, ID 83701.

### **PEOPLE**

WSWC member Richard Simms of New Mexico has been named a Special Master for the Snake River Basin General Adjudication Proceeding. Simms, former counsel for the New Mexico State Engineer's office, has been actively involved in water law and policy for some twenty years. He joins special masters Brigitte Bilyeu, of Idaho, and Terry Dolan, of Wyoming.

### **MEETINGS**

The Association of State and Interstate Water Pollution Control Administrators will hold its 32nd annual conference August 22-25, 1993 at the Savery Hotel and Spa in Des Moines, Iowa. For information call (202) 898-0905.

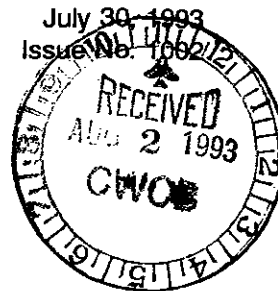
The Western States Water Council and Native American Rights Fund will cosponsor their third symposium on the Settlement of Indian Reserved Water Rights Claims on September 7-9 in Bismarck, North Dakota (WSW #996). All interested parties are encouraged to attend, and to register early for the event. For information call (801) 561-5300.

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# WESTERN STATES WATER



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## WATER QUALITY

### **Clean Water Act-Hearings**

On July 27, the Senate Environment and Public Works Committee's Subcommittee on Clean Water, Fisheries, and Wildlife, chaired by Bob Graham (D-FL), held a hearing on Title III of S. 1114, dealing with comprehensive watershed planning and management in connection with reauthorization of the Clean Water Act (CWA). Lorna Stickel, Chief Planner for the Portland Water Bureau, the Oregon Water Resources Commission Chair, and Western States Water Council (WSWC) member, testified for Oregon Governor Barbara Roberts, the Western Governors' Association (WGA), and the WSWC. Also testifying on a panel addressing the watershed provisions were: Steve Tedder, from North Carolina, representing the Association of State and Interstate Water Pollution Control Administrators; Blake Anderson, representing the Association of Municipal Sewage Agencies; Charles Gauvin of Trout Unlimited; and Curt Spalding, Executive Director of "Save the Bay," located in Providence, Rhode Island.

Ms. Stickel testified that watershed management is complex with many interests and values to be considered. She noted that the WGA and WSWC had explored the issue and prepared position papers (enclosed with her testimony), which emphasize that a watershed approach offers a great opportunity to focus on critical problems. Further, watershed management can foster cooperative problemsolving and improve the environment cost-effectively. She referred to the WGA paper, stating that the CWA should not obstruct the ability of states to deal with other interests and values in a watershed beyond water quality, and ideally should facilitate a state's ability to deal with them holistically.

She referred to the WSWC's position listing nine points that should govern any effort to encourage the use of a watershed approach to achieve water quality benefits under the CWA. The first point says that states should be encouraged, but not required, to utilize the watershed approach for water quality and resource management. She added that Title III, as proposed, addresses the principles enunciated in the WSWC position very well and therefore the Council supports the proposed amendment. In her written statement, and in response to questions, she expanded on Oregon's successful experience with watershed-based natural resource management (see related article below). She noted that the program in Oregon is evolving rapidly, and that passage of S. 1114 could give the state an additional boost.

The hearing is one in a series to be held by the Subcommittee through Aug. 5th. The last hearing will address proposed changes to CWA Section 401 (WSW #999), among other things. S. 1114 would explicitly clarify the meaning of Section 401 and insure that states would be able to base their decision -- to certify or deny certification for any proposed activity or project -- not only on compliance with water quality standards, but also on the "protection, attainment, and maintenance of designated uses included in the standards." The WSWC plans to present a statement at this hearing.

## WATER RESOURCES

### **Oregon/Watershed Management**

Last year, a strategic water management policy workgroup composed of representatives from several state agencies, non-governmental organizations, and interest groups developed A Watershed Management Strategy for Oregon. The proposal was submitted to

the state's strategic water management group on August 11, 1992. The strategy is based on a belief that watersheds represent the infrastructure for complex ecological systems and that improved coordination of existing governmental programs, rather than new initiatives, can best "protect, enhance and restore the state's watersheds."

The proposal notes that, "the cornerstone of the strategy is the establishment of watershed partnerships among local residents, state and federal agency staff, and other citizens interested in the improved management of a particular watershed." The proposed framework has four major components: (1) a goal statement and listing of objectives and principles; (2) criteria for identifying target watersheds in need of enhancement, restoration or protection; (3) a flexible process to guide activities at the watershed level; and (4) a set of watershed management tools.

Last month, Oregon Governor Barbara Roberts released a watershed health/salmon recovery proposal targeting the Grande Ronde and South Coast/Rogue River Basins. Both areas face significant watershed problems, including the listing of anadromous fish and other species as threatened or endangered. The proposal emphasizes actions to improve watershed and ecosystem health through "streamflow, water quality, wetland and riparian enhancement, fish passage and habitat improvement, and reforestation." The governor has asked for \$10.2M from state lottery revenues to: (1) pinpoint specific watershed improvement needs; (2) reach a consensus on how to address these needs; and (3) fund recovery actions and monitor results.

The Oregon Water Resources Department would manage and coordinate the watershed health project, which involves nine agencies participating through a core team and two field action teams, working with local participants. Twenty-three new positions would be created in six of the agencies. State agencies would receive \$3.4M, and the remaining \$6.8M would be directed towards contracts and grants to compile information and assist in designing and implementing recovery projects. Specific benchmarks for evaluating progress would include: (1) miles of assessed streams meeting water quality standards; (2) percentage of key streams meeting instream flow needs; and (3) the percentage of key subbasins with increasing or target-level salmon populations. State funding is expected to

serve as a catalyst for substantial additional financial support and participation from federal, local and private sources.

Bill Bradbury, President of the Oregon Senate, has introduced and helped pass Senate Bill 1112, authorizing and directing the Water Resources Department to administer and coordinate a program regarding watershed and salmon restoration and enhancement. The bill specifically declares, "It is the policy of the state of Oregon to protect and restore the viability of Oregon's watershed ecosystems and the viability of the salmonid fish species that depend on them...to promote and enhance sustainable, harvestable salmonid fish populations for the environmental, economic and social benefit of all Oregonians." The bill further notes the need to avoid listing such species under provisions of the Endangered Species Act. The bill also addresses voluntary and incentive-based local involvement in watershed restoration and partnership programs to maximize opportunities to leverage federal grants and private funds to match state contributions.

The Water Resources Department, in cooperation with other agencies, is to administer a program and provide grants, as well as: (1) contract or otherwise provide for compiling and disseminating research data; (2) identify high priority watersheds; (3) cooperate in developing restoration objectives, implementation strategies, and evaluation methods; and (4) implement restoration, rehabilitation and protection projects. Of note, the Bradbury bill also establishes an operating account within the state treasury to pay for program administration using certain dedicated fees, as well as any money received from gifts, grants, appropriations or other sources.

House Bill 2215 has also been introduced, at the request of Governor Roberts and the strategic water management group, to encourage the formation of voluntary partnerships and local watershed councils, as well as pilot watershed action programs.

#### WSWC/NARF SYMPOSIUM

The WSWC and the Native American Rights Fund will cosponsor their 3rd Symposium on the Settlement of Indian Reserved Water Rights Claims in Bismarck, North Dakota on September 7-9 (WSW #996). An agenda and registration form are enclosed.

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August 4, 1993

# WESTERN STATES WATER

Issue No. 1003	
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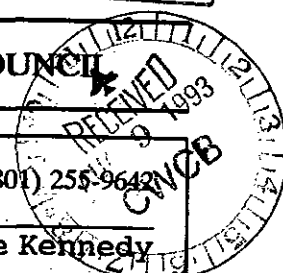
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## ADMINISTRATION UPDATE

### **Environmental Protection Agency**

President Clinton has nominated a number of individuals to fill vacancies in top policy level positions at the Environmental Protection Agency, even as the Congress considers changes to the Clean Water Act, superfund program and other important environmental legislation. Robert Perciasepe has been named as Assistant Administrator for Water. Perciasepe most recently served as Secretary of the Department of the Environment for the State of Maryland. He has also worked as Chief of Planning for the City of Baltimore.

Other nominees include Mary Nickols as Assistant Administrator for Air and Radiation, a former Natural Resources Defense Council Attorney; Jonathan Cannon as Assistant Administrator for Administration and Resources Management, a special advisor to Administrator Carol Browner; Elliot Laws as Assistant Administrator for Solid Waste and Emergency Response, an attorney formerly with the Department of Justice and EPA's Enforcement Division; Shelly Metzenbaum as the Associate Administrator for Regional Operations and State and Local Relations, formerly Undersecretary for Management and Budget in the Massachusetts Office of Environmental Affairs; and as EPA General Counsel, Jean Nelson, now Tennessee's Chief Deputy Attorney General.

### **Interior/National Biological Survey**

On July 15, the House voted 278-138 to approve a \$13.4B FY94 Interior Appropriations bill. The House proposal includes \$1.2B more than FY93, including \$164M for a new national biological survey, about \$16M less than requested. Interior Secretary Babbitt has promoted the new agency as a means to provide

the science needed to support resource management decisions. Last April, Rep. Jerry Studds (D-MA), Chairman of the Merchant Marine and Fisheries Committee, introduced H.R. 1845 to authorize the Biological Survey within the Department of Interior.

The new agency would: (1) assess biological resources; (2) provide information to be used to protect and manage ecosystems and their plant, fish and wildlife; and (3) assist the Secretary to anticipate and avoid or resolve conflicts arising from the implementation of the Endangered Species Act and other fisheries and wildlife conservation laws. The director would be appointed by the President, confirmed by the Senate, and work under the direction of the Assistant Secretary for Fish and Wildlife.

The director would be in charge of: (1) assessment and study of the biological resources; (2) testing, development, and monitoring of methods to manage ecosystems and conserve biological resources and diversity; (3) preparing an inventory of the "distribution, abundance, health, status, and trends of biological resources and ecosystems;" (4) development of methods for the consistent and systematic collection and analysis of data; (5) disseminating information to resource managers, scientists and the public; (6) providing technical assistance in legislative, regulatory and resource management decisions; and (7) performing international management activities.

### **U.S. Geological Survey**

On July 29, Secretary Bruce Babbitt reassigned U.S. Geological Survey Director, Dallas Peck (WSW #983 and #979), saying, "Dallas has served the Department and the Survey with distinction and honor over...his entire 40-year career. In April, Dallas informed me that he would welcome the opportunity to

return to the Geologic Division." He will become a scientific advisor to the Chief Geologist for Igneous and Geothermal Processes. USGS Associate Director, Doyle Frederick, will take a short-term assignment with the National Biological Survey, before becoming an advisor to the Chief of the National Mapping Division.

A number of highly qualified candidates for the director's position have been interviewed. While no final decision has been made, Babbitt expects a new director to be nominated and confirmed by November. In the interim, the Secretary named Robert M. Hirsch as Acting Director and Bonnie A. MacGregor as Acting Associate Director. Bob is Assistant Chief Hydrologist for Research and External Coordination in the Water Resources Division, and Bonnie is a career scientist in the Geologic Division. The changes take effect on August 16. Babbitt hopes that a smooth transition will allow the new director to "hit the ground running."

Secretary Babbitt has also created a transition team to be named from the USGS divisions and regions, and asked them to develop a new mission statement for the agency and a report presenting a series of options for addressing critical issues and concerns about the Survey's future. Assistant Secretary for Water and Science, Betsy Rieke, will make budget decisions until a new director is confirmed. Deputy Assistant Secretary for Water and Science, Debra Knopman, will chair a budget committee of the transition team and division chiefs to evaluate programs and prepare budget options.

Babbitt praised USGS as a "vibrant interdisciplinary institution, responsive to the Nation's need for good science to support wise resource management decisions." He added, "Earth science information is vital to the protection of the environment and to the renewal of the Nation's economy.... The transition, which I know many of you have anxiously awaited, will require everyone's full support and cooperation.... I am confident that the plan I have laid out will begin to build momentum for positive change in the Survey."

#### ENVIRONMENT/WATER QUALITY

##### **Wetlands/Clean Water Act (CWA)**

On July 28, the Wetlands Conservation and Regulatory Improvements Act (S. 1304) was introduced by Senator Max Baucus (D-MT). The bill

will likely be blended into S. 1114, Clean Water Act reauthorization legislation (WSW #1002). Among other things, the bill declares, "...it is the national policy to achieve, through regulatory and nonregulatory strategies involving all levels of government -- the restoration of...the quality and quantity of the wetlands resource base of the United States; and no overall net loss of the remaining wetlands...." It address the definition and processes for delineation of wetlands, and directs the use of the -- Corps of Engineers Wetlands Delineation Manual, January, 1987 -- until other guidelines are issued under Section 404(a), as amended by the bill. Funding is authorized for wetland delineation training, certification and outreach, as well as assistance for small private landowners.

Other sections address regulated and exempted activities, permit processing improvements, general permits, and interagency cooperation. Some other significant changes include the establishment of mitigation banks, with rules for their use and oversight, funding and criteria for the development and implementation of state wetlands conservation plans, designation and approval of state wetlands and watershed management plans, and development of a cooperative wetlands restoration strategy. Of note, there are no new incentives for states to assume responsibility for the Section 404 permitting program.

#### WATER RESOURCES

##### **Drought/Flooding**

While devastating flooding afflicts the Midwest, concerns over drought in the West are disappearing, though it will take some time to replenish surface and ground water supplies. The Palmer Drought Index still shows severe and extreme drought conditions along the central California coast, northeastern Sierras and western Nevada, parts of northeastern Colorado, the southwest corner of Wyoming and southeast corner of Idaho, northeastern Oregon, central Washington and the usually soggy Olympic Peninsula. Of note, the coastal rainforests of southeast Alaska are also drier than average. The towns of Wrangell and Petersburg have received only about half their usual rainfall, depleting local reservoirs in the Tongass National Forest. Both towns are on islands accessible only by air or sea. Voluntary water conservation measures have been taken, and mandatory rationing is a possibility.

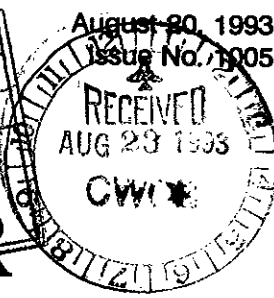
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001619

# WESTERN STATES WATER



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## LITIGATION/WATER RIGHTS

### **Ground Water/Arizona**

The Arizona Supreme Court has vacated a state trial court's order defining appropriable ground water in the state and remanded the matter to the trial judge for a new determination (*In Re the General Adjudication...[of] the Gila River System...*, Ariz. Sup. Ct., No. WC-90-0001-IR, July 27, 1993). The case dealt with the second of six issues accepted for interlocutory review in 1991. The issue was whether the trial court erred in adopting its "50%/90-day" test for determining whether underground water is subject to appropriation under Arizona statutes. The test found ground water appropriable if its withdrawal reduced the flow of any surface water source by half of the total volume pumped over a 90-day period.

The Arizona Supreme Court's decision relied heavily upon its 60 year old ruling in a case called *Southwest Cotton*, which held that ground water is appropriable if it tends to "diminish appreciably and directly...the flow of the surface stream." The court found no such connection under the *Southwest Cotton* facts. In its recent decision, the court recognized that the *Southwest Cotton* ruling led to other decisions implying a lack of connection between ground water and surface water in Arizona. But, the ruling has been relied upon for many years, it noted, and thus deserved substantial deference.

The Arizona Supreme Court found that the "50%/90-day" rule formulated by the trial court was arbitrary and inconsistent with *Southwest Cotton* and therefore could not be used. However, the court said that insufficient facts were brought before it to allow it to articulate a different rule. The court also said, "We recognize the line between surface and ground water

drawn by...*Southwest Cotton*...and reaffirmed...today is, to some extent, artificial and fluid.... However, we do not feel free to redraw or erase that line." But, the court indicated a willingness to consider expanding upon *Southwest Cotton*, saying, "Differences in geology and hydrology from location to location may require that different criteria be given more or less emphasis depending on the area..." It said further, "Part of a [well's] production may be appropriable subflow and part of it may not."

## WATER QUALITY

### **Clean Water Act-Reauthorization**

EPA Administrator Carol Browner said recently that the agency will likely provide Congress with proposed legislation to reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Water Act, and, at a minimum, a revolving loan fund program for the Safe Drinking Water Act. Among the agency's CWA priorities are expanded flexibility in the state revolving loan fund, control of diffuse sources of pollution, pollution prevention, watershed protection, and wetlands. The Senate Environment Committee hopes to have a bill on the Senate floor by the end of this year, while a bill has not yet been introduced in the House. The implications of EPA's intended actions on CWA reauthorization timing are unclear.

## WATER RESOURCES

### **Utah/Little Dell Dam**

In anticipation of the dedication of the U.S. Army Corps of Engineers' Little Dell Dam former Utah Senator Jake Garn said, "If I have to crawl on my hands and knees, I'll be there.... After 25 years, I feel

like you do about your children when they grow up." As a Salt Lake City Commissioner, Jake Garn unsuccessfully approached Congress for money to build the dam. Later, he was instrumental in securing funding as a member of the Senate Appropriations Committee. Little Dell is a rolled earthfill dam with an impervious clay core. It is 224 feet high and 1,700 feet long. While smaller than originally planned, the \$60M dam and 20,500 acre-foot reservoir will supply water to the Metropolitan Water District of Salt Lake City (MWD), the primary project sponsor, and provide flood protection and some recreation. Little Dell Lake began filling in March, storing heavy 1993 runoff and helping avoid flooding in parts of Salt Lake City.

A brief history of this modest federal project illustrates some of the many hurdles that must be overcome and delays that result over time due to changing values and various fiscal and regulatory requirements facing proponents of any new water development project as part of a management plan. Little Dell's construction was authorized in 1960 and again in 1968 by federal Flood Control Acts. Congress enacted the National Environmental Policy Act (NEPA) in 1969. A final environmental impact statement was completed in 1975, and project modifications were again authorized in 1976. Support for sufficient funding didn't materialize until after Salt Lake City's serious floods in 1983, when the project was reexamined. Despite firm local support and the commitment of Utah's Congressional delegation, completing Little Dell took another ten years. A new federal cost sharing policy was being debated in 1986 when the Corps recommended post-authorization changes to meet the "functional requirements and financial capability of the non-Federal sponsors." In 1975, the estimated project cost was \$48.8M. In 1985 it was \$96.3M. Faced with rising costs and new cost sharing mandates, MWD considered building a smaller project without federal help, but agreed to construction of a downsized \$46.6M federal project.

The Corps financed 58% of the final \$60M cost, and several local sponsors covered 42% of the cost. Salt Lake City donated the land. Salt Lake County added \$7.6M for flood control. MWD provided \$14.3M through a revenue bond, and the Utah Department of Water Resources contributed \$1.6M for an interest buy-down. The Utah Department of Transportation relocated highways. Two oil pipelines and other utilities were also moved. Further, Sandy City financed

a related \$12M expansion of MWD's water treatment plant as part of an annexation agreement. MWD will repay 100% of the federal costs allocated to water supply and will operate the project. Without local financing, the project could not have been built. According to Garn, "Cost sharing was the key because of the changing attitudes in Congress about water projects...and the growing budget problems." He added Little Dell is a sign of the "new age of water development." (*Salt Lake Tribune*, August 5, p. D-1)

## MEETINGS

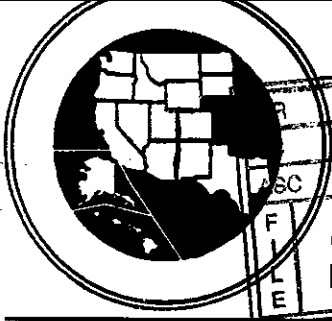
The Interamerican Dialogue on Water Management sponsored by the South Florida Water Management District and Interstate Council of Water Policy will be held October 27-30 at the Hotel Inter-Continental in Miami, Florida. At the meeting water resource professionals, policymakers, business executives, and related interest groups from throughout the western hemisphere will share perspectives and formulate new directions for the sustainable development of water resources. The meeting sponsors are also circulating an "Interamerican Survey of Water Resource Professionals," to help identify water management networks in the western hemisphere and information sources and services. The purpose is to assess the potential benefits and services of an expanded Water Resource Partnership linking existing networks, associations, government agencies, businesses, organizations, and institutions in the western hemisphere. Such benefits and services may include enhanced communication, technical cooperation, sharing of management expertise, data base exchanges, and training regarding water resource policies, practices, and applications in the context of sustainable development. For information regarding the meeting or the survey call (407) 687-6105.

## PEOPLE

Bureau of Reclamation Commissioner Dan Beard has announced that Donald R. Glazer has been appointed as the Bureau's Deputy Commissioner in Denver, Colorado. Beard noted that "...Don will provide the career leadership to achieve my goal of making reclamation the preeminent water management agency in the world and to manage water resources in an economically and environmentally sound manner." Glazer will leave his current position as Director of Denver Operations.

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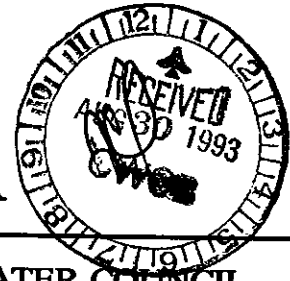
The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of member states - Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming, and associate member state Oklahoma.



001620

August 27, 1993  
Issue No. 1006

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## ADMINISTRATION UPDATE/ENVIRONMENT

### **Wetlands**

The White House Office on Environmental Policy has announced the new Administration's policy on national wetlands protection. It refers to a plan developed by a White House-directed task force that included nine federal agencies and that incorporates some 40 changes in past policy. Among other things, the new policy policy: (1) affirms the national goal of no net loss of wetlands; (2) rejects the exemption of one percent or 1.7M acres of Alaskan wetlands from federal protection as the Bush Administration had proposed; (3) outlines development of a new appeals process for permit applications that are rejected by the Army Corps of Engineers under Section 404 (but apparently, the same appeal process will not be available to environmentalists and others desiring to challenge the granting of a permit); (4) exempts 53M acres of former wetlands drained and converted to agricultural use before 1985; (5) grants authority for the Soil Conservation Service to determine which agricultural lands are wetlands; (6) eases the permit review requirements for small projects; (7) establishes a standard procedure for identifying wetlands, using a 1987 manual, until after completion of a report on wetlands delineation to be prepared by the National Academy of Sciences; (8) encourages wider use of wetland mitigation banks; (9) expands the USDA's Wetlands Reserve Program to restore wetlands on private lands; and (10) provides incentives for states, tribes and localities to utilize watershed planning, not "piecemeal permit-by-permit decisions on wetlands."

Kathleen McGinty, Director of the Office of Environmental Policy, said, "By bringing together the interested parties, we have moved beyond polarization and paralysis and arrived at a plan that is flexible and

effective." The plan has received mixed reviews. While the National Wildlife Federation called the package "a net loss for America's wetlands," the National Association of Conservation Districts commended the policy as "fair, flexible and technically feasible." Senator Max Baucus (D-MT), Chairman of the Senate Environment and Public Works Committee, has introduced a wetlands protection bill. He said the plan "addresses the legitimate concerns of both those who work our lands and those who care about them."

## WATER RESOURCES

### **Oregon/Watershed Management**

On August 5, Oregon Governor Barbara Roberts signed H.B. 2215, which the legislature enacted to authorize the governor's new watershed management proposal (WSW #1002). The act encourages the formation of voluntary partnerships for watershed management among local, state and federal interests. It authorizes creation of local watershed councils and directs the state's Strategic Water Management Group, in cooperation with the Governor's Watershed Management Enhancement Board, to initiate a program and projects to "focus state resources on the achievement of sustainable watershed health..." High priority watersheds have already been identified.

Related legislation, S.B. 1112, was shortened and included in a measure adopted by the legislature that allocates state lottery revenues (S.B. 81). Specific water management sections direct the Oregon Water Resources Department to administer a watershed management program to coordinate various agencies' activities and provide project grants. The act directs that the Department "...where practicable and feasible, shall foster and encourage cooperation with joint public and private ventures, including local watershed

councils or other entities....," which include state, interstate and federal agencies, local governments, non-profit organizations and volunteer groups. S.B. 81 created a water resources department operating account within the state treasury to pay for administrative program expenses and allocated \$10M from state lottery funds. S.B. 81 authorizes funding through 1994, but then requires a report on the operations, costs and results of the program. The authority under H.B. 2215 extends through 1996.

## **WATER RIGHTS/WATER RESOURCES**

### **Indian Reserved Rights/Nevada**

The Pyramid Lake Paiute Tribe of Indians and the Nevada Department of Conservation and Natural Resources entered into an important memorandum of understanding (MOU) in July. It deals with the tribe's claim to remaining waters of the Truckee River, which are not subject to vested or perfected rights, and with related land claims. The tribe agrees to pursue the claims to the river's flow under Nevada water law, while the state agrees that the tribe's proposed instream uses are beneficial under Nevada law.

The tribe's right, if granted, would be junior in priority to existing vested rights. The parties also agreed that the tribe's claim, once perfected, would be recognized in the Truckee River Operating Agreement and enforced by the federal watermaster pursuant to the terms of the Orr Ditch decree and subject to de novo review by the Orr Ditch court. The parties intend to petition the Orr Ditch court to amend its decree to provide that the waters of the Truckee River in Nevada are fully appropriated, and closed to any new filings.

In addition, the parties agreed to jointly support implementation of legislation by the state legislature to relinquish any claim Nevada may have to ownership of the bed and banks of the Truckee River and Pyramid Lake, within the boundaries of the Pyramid Lake Indian Reservation, so that the bed and banks would also be recognized as part of the reservation and held by the United States in trust for the tribe.

The MOU may not be construed as a waiver of any claim by the tribe under federal law to waters of the Truckee River not subject to vested or perfected rights and does not commit the tribe to pay any statutory fees required by the State Engineer out of tribal funds.

In anticipation and contingent upon execution of the MOU, on July 9, the Nevada legislature passed and the governor approved A.B. 618 to relinquish Nevada's right, title, or other interest in the beds and banks of that portion of the Truckee River and the land under and surrounding Pyramid Lake that is within the boundaries of the Pyramid Lake Indian Reservation. The act also limits to \$10,000 the permit fee for granting any single application by the Pyramid Lake Paiute Tribe relating to the Truckee River.

The MOU was signed on July 13, by Peter Morros, Director of the Nevada Department of Conservation and Natural Resources, and Alvin R. James, Chairman of the Pyramid Lake Paiute Tribe of Indians. Also signing and concurring were Nevada Governor Bob Miller and U.S. Secretary of Interior Bruce Babbitt. U.S. Senator Harry Reid (D-NV) signed as a witness.

## **POSITION OPENINGS**

The Montana Water Resources Association, a statewide water users group, is taking applications for a full-time Executive Secretary to replace Jo Brunner, who is retiring after serving for seven years. Duties include office and meeting management, lobbying and general representation of the association. The salary and duties are negotiable. Applicants must have five years or more experience in water resources activity. Applications are due by September 13. To receive an application or more information call Jo (406) 442-9666, or Jay Chamberlin, MWRA President, (406) 683-2307.

The Oregon Water Resources Department (OWRD) is hiring a watershed health program manager for a major new interagency program to restore watershed health in the Grande Ronde Basin and South Coast/Rogue Basins. Through local involvement and public participation, the program will develop, fund, and implement restoration plans. Applicants must be able to demonstrate a knowledge and understanding of watershed functions, an ability to complete major complex assignments that require teamwork and consensus, and an ability to motivate and organize volunteer participation. This is a Principle Executive Manager D position in Salem with a limited duration. It is funded through June 30, 1995. The salary is \$3,054-\$4,301 per month. Completed applications must be submitted by September 21. For copies contact OWRD's Personnel Office, (503) 378-8455, extension 308.

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# WESTERN STATES WATER



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## WATER RIGHTS/ENVIRONMENT

### Colorado/Wilderness

On August 13, the President signed H.R. 631, the Colorado Wilderness Act (P.L. 103-77; 107 Stat. 756). Ending a decade of disagreement, the bill passed the House by voice vote on July 19, and the Senate by unanimous consent on August 4. "The water issues associated with these proposed wilderness areas were particularly difficult to resolve because of the strong and diametrically opposed views held by many members of the water user and environmental communities," said Senator Hank Brown (R-CO). "Fortunately, this bill contains water language that is a true compromise that does not injure the fundamental principles...protection of wild lands and protection of Colorado's future ability to develop and use all of its interstate water entitlements." (CR Aug. 4, p. S10453)

The bill addresses the difficult issue of downstream wilderness study areas, where there could be conflicts with upstream water storage and diversion. Where any potential conflict existed, the areas were not designated as wilderness, ensuring that there would be no effect on existing and future water use. In order to make this intent crystal clear, there is also an explicit disclaimer of any federal reserved right for these areas, and the "existence of these areas cannot be used as a basis to affect upstream activities as a part of any administrative or regulatory program."

Section 8 reads, "Neither the Secretary of Agriculture nor the Secretary of the Interior, nor any other officer, employee, representative, or agent of the United States, nor any other person, shall assert in any court or agency, nor shall any court or agency consider, any claim to or for water or water rights in the state of Colorado, which is based on any

construction of any portion of this act, or the designation of any lands as wilderness by this act, as constituting an express or implied reservation of water or water rights." Senator Brown and Senator Ben Nighthorse Campbell (D-CO) entered a colloquy on the floor to reaffirm the act's intent to deny anyone an opportunity in any forum to claim that wilderness designations created a basis for claiming water or water rights. Senator Brown emphasized that without this prohibition, the act would not have passed.

On the other hand, the bill adds, "Nothing in this act shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States in the State of Colorado existing before the date of enactment of this act...." Also, Section 8 prohibits the licensing or permitting of any new water resource facility or the enlargement of existing facilities, within certain areas. However, the Secretary is to allow reasonable access to existing facilities, as well as continued operation, maintenance, repair and replacement "to the extent necessary for the continued exercise, in accordance with Colorado State law, of vested water rights adjudicated for use in connection with such facilities...."

The act adds, "Nothing in this act, and nothing in any previous act designating any lands as wilderness shall be construed as limiting, altering, modifying, or amending any of the interstate compacts or equitable apportionment decrees that apportion water among and between the state of Colorado and other states. Except as expressly provided in this section, nothing in this act shall affect or limit the development or use, by existing and future holders of vested water rights, of Colorado's full apportionment of such waters."

Senator Brown acknowledged the contribution of former Senator William Armstrong in developing a bill



that draws wilderness boundaries to preserve "areas where the earth and its community of life are untrampled by man," while at the same time, "...protecting the most important private property right in the West, water rights." He added, "All wilderness areas are designated 'subject to valid existing rights.' That phrase recognizes the priority of existing land and water rights." (CR Aug. 4, p. S10462-63)

Senator Brown explained, "To date our wilderness areas have been in the high country of the Rockies. High country reservoirs and ditch systems bring water not only to farmers, but to Colorado's growing municipalities and industries from ski areas to mining to high tech. Federal conditions on those water rights would render them valueless. Imposition of an unquantified federal reserved water right on 100 years of Colorado water law would mean economic chaos and costly takings of private property.... While water rights encompassed by Colorado wilderness bills to date are comparatively few, any future lower elevation wilderness bills unavoidably would encompass thousands of water rights...."

#### **WATER RESOURCES**

##### **Western Water Policy Review Commission**

Elizabeth Anne Reike, Assistant Secretary of Interior for Water and Science, has written advising each western governor that the Western Water Policy Review Commission would not meet on September 8 as announced. The commission's current chair, Thomas L. Sansonetti, was appointed with five other members by President Bush on January 19, 1993. On August 20, he wrote western governors and invited them to designate a representative to attend a September 8 meeting of the commission. While cancelling the meeting, Ms. Rieke noted that Interior is committed to the mission of the Commission, and to working with the states, Indian tribes, and other interested parties. However, she said, "The last minute nature of the appointments and the importance of the commission's task led the Department of the Interior and the White House to thoroughly review [President Bush's] appointments. Both the White House and the Department agreed that the current membership does not provide an appropriate balance of background, perspective, or experience. The White House is currently reviewing candidates, and we expect that a revised commission will soon be named."

#### **PEOPLE**

**George Christopulos** has resigned as an alternate WSWC member representing the State of Wyoming in order to pursue retirement on a "full-time basis." George was first appointed as a member in 1975 and has since served with distinction. He was elected as Chairman in 1979. George retired as the Wyoming State Engineer in 1987, and we have since missed his regular association. We wish George well in retirement, and know he will enjoy pursuing other interests (fishing and football)!

#### **MEETINGS**

The **Western States Water Council's** 112th quarterly meetings will be held on October 6-8, in Coeur d'Alene, Idaho at the Coeur d'Alene Resort. Betsy Rieke, Assistant Secretary of the Interior for Water and Science will be a featured speaker on Friday. Room reservations should be made before September 15. Call (208) 765-4000. The resort will make arrangements for ground transportation from the Spokane Airport, but reservations must be made in advance through the hotel. Ask for extension 7132. The round trip cost is \$25. Please call for more information.

**American Rivers** will host a conference entitled "The Future of America's Rivers" on November 4-7, in Washington, D.C. The meeting will mark the 25th anniversary of the National Wild and Scenic Rivers System. Federal, state and local decisionmakers will discuss watershed and ecosystem approaches for policy decisions, forging state and local partnerships, river restoration efforts and other topics. For information call American Rivers at (202) 547-6900.

#### **PUBLICATIONS**

"**The West Comes of Age: Hard Times, Hard Choices,**" is a recently published guide for state policy-makers in the West about regional trends in population, social characteristics, the economy, environment, and government. WESTRENDS was established in 1987 by the Western Legislative Conference and charged with analyzing changes in the Western United States that would impact public policy, and prescribing ways to translate those changes into policy choices. The report sells for \$30. For information call (415) 974-6422.

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001622

September 10, 1993  
Issue No. 1008

# WESTERN STATES WATER

THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## WATER RESOURCES

### Drought/General Accounting Office (GAO)

The GAO has released a report requested by Rep. John Dingell, Chairman of the House Energy and Commerce Committee, on Federal Efforts to Monitor and Coordinate Responses to Drought. The report covers data gathered and used by federal agencies to report drought conditions, as well as past and current federal mechanisms to plan, monitor and coordinate the government's response. Briefly, the report notes that collecting and reporting data is a collaborative, multi-level effort undertaken primarily by three federal agencies: the U.S. Geological Survey; the National Weather Service; and the Soil Conservation Service. The report states, "Although each agency has a unique mission, all three agencies have overlapping data needs and share much of the information or collect data on a cooperative basis." The report also found, "State and local governments make important contributions of work and funding to this effort," and that federal, state, and other users are generally satisfied with the data on drought.

With respect to federal agencies' response activities, the GAO found, "No permanent federal organization is responsible for monitoring drought conditions and planning the government's response to drought. Instead, individual agencies carry out these activities and make various arrangements to cooperate with one another. When drought has been severe or has had widespread geographic impacts...temporary federal interagency committees have been set up to coordinate the response. However, because drought periodically has had more and more significant impacts on large areas and segments of the economy, temporary committees may no longer be able to do the long-term planning needed for such droughts,

promptly resolve policy differences among federal agencies, or coordinate the federal response...."

In the past ten years, the report states that major droughts have occurred in California and the West, the Midwest and the South. "A drought occurs in at least part of the United States almost continuously...." The report adds, "As these recent examples illustrate, major droughts occur periodically in areas across the nation and are likely to occur again, creating impacts that may significantly change the way we live." The Western Water Policy Review Commission was created last year to address increasing demands on water in the West and the GAO states that "...the appropriate committees of the Congress may wish to request that the commission consider whether a permanent mechanism is needed to improve the ongoing planning and coordination of the federal response to drought." The commission could also be asked to consider whether such a mechanism should resolve policy differences among federal agencies. The report (GAO/RCED-93-117) can be ordered by calling (202) 512-6000; or using fax number (301) 258-4066.

### Oregon/Water Conservation

In 1987, Oregon became the first state to enact legislation encouraging users to conserve water by allowing water rightholders to use water saved through conservation projects on new lands or to sell or lease the water to other users (ORS 537.455 to 537.485). On July 20, the Oregon legislature enacted changes to streamline the application process and broaden the number of qualifying projects (H.B. 2155-A). The 1987 law provided the legal means for the Oregon Water Resources Commission (WRC) to grant users the right to keep a portion of conserved water for their own use. Before 1987, any water saved through conservation measures was available to other users downstream.

*It still and more*

However, over the past six years only two applications for a right to conserved waters have been received by the Oregon Water Resources Department (WRD), and neither have been approved. Last spring, WRD Director Martha Pagel testified that the program did not work because stringent requirements "contributed to the reluctance by irrigators to take advantage of the conservation program."

Under the 1987 act, 75% of any "conserved water" could be granted to the conserving water rightholder as a new right with a priority set at one minute after the original right. The remaining 25% was dedicated to the state to augment instream flows. The WRC could increase or decrease these percentages through rulemaking. The first hurdle was the 1987 law's strict definition of "conserved water" as only that which otherwise would be "consumed or irretrievably lost." Second, the law required that conservation projects cause "no injury" to other users. Third, project applicants could not know upfront how much of the conserved water they might receive, and therefore could not wisely invest in costly capital improvements. Lastly, the process of proving water was conserved could take several years. Last year, WRD staff drafted proposed legislative changes which were discussed with various interests and introduced as H.B. 2155-A.

H.B. 2155-A redefines "conservation" to be a reduction in the amount of water "diverted to satisfy an existing beneficial use," and redefines "conserved water" as that amount "measured as the difference between: (a) the smaller of the amount stated on the water right or the maximum amount of water that can be diverted using the existing facilities; and (b) the amount of water needed after implementation of conservation measures to meet the beneficial use under the water right certificate." The law declares it to be state policy to: aggressively promote conservation; encourage the highest and best use of water by allowing the sale or lease of the right to the use of conserved water; and "encourage local cooperation and coordination in development of conservation proposals to provide incentives for increased efficiency and to improve stream flows."

H.B. 2155-A adds that any person or group of persons holding one or more water right certificates may submit a conservation proposal. Proposals need only describe existing diversion facilities and estimate the amount of water that can be diverted, as well as

the amount of water that would be needed under existing rights after implementation of conservation measures and the proposed use of the conserved water. The Water Resources Commission will give notice of receipt of proposals in accordance with existing law, and then allocate the conserved waters and approve modification of water rights. The new law removes the commission's discretion to change the allocation formula, and the amount of conserved water to be allocated to the user would be determined in advance, rather than after the project was completed.

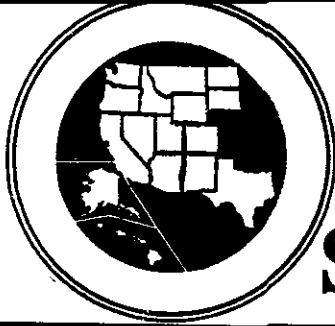
Under the 1987 law, the commission was required to find that a proposed conservation measure was feasible, would produce conserved water, could be affected without injury to existing water rights, or would adequately mitigate any effects on other water users, and would not adversely affect the public interest. Under the new law, the commission must only determine "the quantity of conserved water, if any, required to mitigate the effects on other water rights." Then the law states, "The commission shall allocate 25% of the remaining conserved water to the state and 75% to the applicant, unless the applicant proposes a higher allocation to the state or more than 25% of the funds used to finance the conservation measures come from...public funds," in which case water will be allocated to the applicant in proportion to the percentage of other funds used to finance the conservation measures. However, in no event is that applicant to receive less than 25% of the remaining conserved water unless the applicant proposes a higher allocation to the state.

Finally, the Water Resources Commission is to determine whether or not the water allocated to the state is necessary to support instream flow purposes. If so, the water is to be converted to an instream water right with a priority one minute following the original right. Otherwise, the water reverts to the public for appropriation by the next user in priority. The commission must now adopt rules and standards necessary to carry out the revised program.

Enactment of H.B. 2155-A is expected to further encourage conservation by removing unworkable requirements. The Water Resources Commission adopted a statewide water conservation policy in 1990. It is in the process of adopting and implementing rules requiring agricultural and municipal water users and suppliers to prepare plans for more efficient water use.

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001623

September 17, 1993

Issue No. 1009

# WESTERN STATES WATER

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## WATER QUALITY

### **Clean Water Act - Section 404**

On August 25, the U.S. Army Corps of Engineers and Environmental Protection Agency published final regulations implementing changes in the Section 404 permitting program (58 FR 45008). The final rules take effect in 30 days. The proposed changes were printed on June 16, and over 6300 comments were received. The final rule modifies the definition of "discharge of dredged material," and clarifies when the placement of pilings is considered a discharge of fill material. Both of these changes were part of a settlement in North Carolina Wildlife Federation v. Tullock (Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992)). Lastly, the rule codifies current policy stating that converted croplands are not "waters of the United States," which are redefined by EPA, along with "navigable waters" to conform with the new regulations.

Under the settlement agreement, the Corps and EPA changes clarify that "mechanized land clearing, ditching, channelization, and other excavation activities involve discharges of dredged material when performed in waters of the United States...." These activities are to be regulated when they destroy or degrade waters of the United States, including wetlands (57 FR 26894). The Corps and EPA also incorporated by rule substantive provisions of Corps regulatory guidance letters (RGL) 90-8 and 90-7. One clarifies the circumstances under which the placement of pilings are considered "fill material." However, the rules explain that this does "not affect, in any manner, the existing statutory exemptions under Section 404(f)(1) for normal farming, ranching and silviculture activities." The other addresses prior converted croplands. Finally, EPA redefines regulated waters in 40 CFR parts 110, 112, 116, 117, 122, and 401.

For information contact Michael Davis, Office of the Assistant Secretary of the Army for Civil Works at (703) 695-1376, or Sam Collinson, Army Corps of Engineers at (202) 272-0199, or Gregory Peck or Hazel Groman at EPA at (202) 260-7799.

## WATER RESOURCES/ENVIRONMENT

### **Colorado River Basin/Endangered Species Act**

On September 3, the U.S. Fish and Wildlife Service released a draft Recovery Implementation Program and Recovery Action Plan (RIPRAP) and agreement for endangered fishes in the Upper Colorado River Basin. The document addresses Section 7 consultation and how impacts related to water depletion from new projects and impacts associated with historic projects are to be handled (implementing a 1988 accord).

Due to water development and depletions, and the introduction of exotic sport and other fishes, and other factors, native fish populations have declined. Four species, the Colorado squawfish, humpbacked chub, bonytailed chub, and razorback sucker have been listed as endangered. The agreement and RIPRAP are intended to go "considerably beyond offsetting water depletion impacts by providing for the full recovery of the four endangered fishes, as well as allow water development to proceed in compliance with state law, interstate compacts, and the Endangered Species Act." The agreement recognizes that positive population responses to program initiatives are not likely to be measurable for many years due to the time required for the endangered fishes to reach reproductive maturity, limited knowledge about their life history and habitat requirements, sampling difficulties and limitations, and other factors. The new RIPRAP is an adaptive management plan incorporated by reference.

The RIPRAP identifies actions currently believed to be required to recover the endangered fishes in the most expeditious manner possible in the upper basin. However, the RIPRAP is expected to change along with priorities, additional information, and development of the states' water entitlements in the basin. The RIPRAP will be reviewed and modified or updated as necessary each year by September 30. It is intended to provide the reasonable and prudent alternatives needed for projects to proceed under ESA Section 7 requirements without triggering a jeopardy opinion. The U.S. Fish and Wildlife Service will monitor progress and measure population response, habitat improvement, any reduction in the threat of extinction, and legal protection afforded instreamflows essential to recovery of the endangered fishes.

The draft agreement and RIPRAP are available from the U.S. Fish and Wildlife Service, Assistant Regional Director, Ecological Services, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225. Fax requests to (303) 236-0027. Written comments may be sent to the above address by October 4. For more information contact Robert Jacobsen (303) 236-8189.

## **WESTERN STATES WATER COUNCIL**

### **Native American Rights Fund/WSWC Symposium**

On September 7-9, over 200 people gathered in Bismarck, North Dakota to participate in the third Symposium on the Settlement of Indian Reserved Water Rights Claims cosponsored by WSWC and the Native American Rights Fund (NARF). The three day event included the Dakota Plains Dancers presenting "A Powwow's Journey," a special cultural performance chronicling the history of the modern day powwow. The symposium was attended by Indian, local, state, and federal government officials, as well as water users and various industry and other interest groups.

The initial discussion focused on the basics of negotiating settlements. Experienced officials representing various groups discussed gathering background information and the role of technicians in negotiations, identifying parties and issues, and how negotiators bind larger groups. Administrative issues were also covered, along with establishing and improving communications. Gail Bingham spoke. She is President and Director of RESOLVE, a Center for Environmental Dispute Resolution. Other speakers

examined water rights management in Indian country, and water marketing proposals in the Colorado and Missouri River basins.

Joseph Little, representing the Department of Interior, reiterated the Administration's support for the negotiated settlement of Indian water right claims. Previously with the Albuquerque Office of the Bureau of Indian Affairs, he is working on federal Indian water rights settlement policy. He noted Interior's intent to flexibly interpret the Principles and Guidelines on settlements. He also said it would be a challenge to provide qualified federal negotiating teams to fill an increasing number of tribal requests. Mike Jackson, Senate Committee on Indian Affairs, and Steve Heeley, House Native American Affairs Subcommittee, next discussed getting bills through Congress.

Joe Ely, a well-known tribal representative, provided a wrap-up speech that will be sent to all symposium attendees in the next few weeks. Audio cassettes of the meeting will also be available for a fee. Those attending the symposium received a copy of Indian Water Rights, Negotiating the Future by Bonnie Colby and Elizabeth Checchio. It is available from the University of Arizona. Call (602) 621-4174.

## **MEETINGS**

The WSWC's 112th quarterly meetings will be held at the Coeur d'Alene Resort in Idaho on October 6-8. Guests include Interior Assistant Secretary Betsy Rieke and John Clements, Office of Hydropower Licensing, Federal Energy Regulatory Commission (FERC).

### **Schedule of Meetings**

#### **Wednesday, October 6**

Management Subcommittee	6:00 p.m.
FERC Subcommittee	7:30 p.m.

#### **Thursday, October 7**

Water Resources Committee	8:00 a.m.
Water Quality Committee	10:15 a.m.
Executive Committee	12:30 p.m.
Legal Committee	2:00 p.m.
Social Hour by Boyle Engineering	6:30 p.m.
Dinner Cruise	7:00 p.m.

#### **Friday, October 8**

112th Quarterly Meeting	8:00 a.m.
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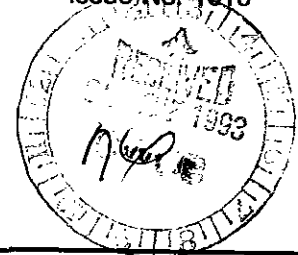


001624

September 24, 1993

Issue No. 1010

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Tony Willardson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## WATER RESOURCES/ORGANIZATIONS

### **Bureau of Reclamation/Western Legislative Conference**

The Western Legislative Conference met in Las Vegas on September 19-21. Joe Dini, Speaker of the Nevada State Assembly and a WSWC member, chairs its Water Policy Committee. The Committee discussed water supply challenges in southern Nevada, and state and federal officials addressed recent water policy initiatives. These included the Bureau of Reclamation's evolving mission, EPA's watershed initiative, the WGA/WSWC Park City Principles, an update on reauthorization of the Clean Water Act, and reserved rights developments.

Bureau of Reclamation Commissioner Dan Beard spoke to Conference members on "Water Wars: East vs. West, City vs. Farm - Water Reaching a Crisis." However, he took issue with this title, noting that a war was not in progress, but "slow, inexorable change." He described the history of the Bureau and the forces which are changing its mission, and federal water resource policies. He mentioned Las Vegas growth and urbanization as an example. He also discussed the increasing public value placed on protecting the environment, and the Congressional desire, backed by the courts, to protect Indian water rights. Since new large scale water supply projects are not popular, he concluded that new demands will have to be met by transfers from existing uses. Beard said that the Bureau and other agencies in the West need to look at alternatives associated with water transfers, and improving efficiency and conservation. He also noted the increasing pressure to end federal subsidies that foster inefficient water allocation.

Commissioner Beard spent some time speaking about the Administration's performance review, and

how it would be applied to the Bureau of Reclamation. He discussed the importance of delegating authority, developing quality leadership, and also redefining organizational functions. Henceforth, reviews will be performed by Reclamation and projects or programs that do not show any "value added," will be discontinued. Also, activities that do not contribute to the new mission of the Bureau will be phased out.

Someone asked Commissioner Beard about any potential water leases from the Colorado River, and he responded that the needs of Southern Nevada were a high priority. The Administration wants to allow the Lower Basin states to "move water around," and make the "Law of the Colorado River" work. "We have to have the ability to be creative," he added. When asked if once leased, water would ever be returned, he frankly answered that he did not know, but believed that such things could be worked out. He said that proposed regulations are forthcoming from the Bureau on its role in facilitating such transfers.

### **Ground Water Recharge/Bureau of Reclamation**

The Bureau of Reclamation's High Plains States Ground Water Demonstration Program was authorized in 1984 to study the potential for artificial ground water recharge in western states. Twenty-one projects were authorized. Nine are operating and four are under construction. However, these may be the last built. Commissioner Dan Beard has decided that, faced with strong budgetary constraints, additional funds required to complete the remaining eight projects can be more effectively used elsewhere, as little additional scientific information would be obtained. Beard concludes, "If resources become available, the additional eight sites could be reconsidered. Otherwise, I will request a change in the legislation to reduce the original twenty-one projects to thirteen."

In 1989, \$3M was appropriated to begin initial construction of twelve projects. Last year, authorized program spending was increased from \$20M to \$31M. The nine completed projects are: the Wood River and York projects in Nebraska; the Blaine Gypsum project in Oklahoma; the Hueco Bolson project in West Texas, the Denver Basin project in Colorado, the Southeast Salt Lake project in Utah, the Washoe County project in Nevada, the Turner-Hogeland project in Montana, and the Highline project in Seattle, Washington. The four projects under construction are: the Rillito Creek project in Arizona; the Southwest Irrigation project near Twin Falls, Idaho; the Hermiston project in Oregon; and the Huron project in South Dakota.

The eight projects dropped include the Big Creek and Equus Beds projects in Kansas, and Woodward project in Oklahoma. The later was completely reformulated to meet Bureau requests, and feasibility studies for all three are complete. Projects in Arcade and Stockton, California and the Texas High Plains had been deferred earlier, and local sponsors of the Frenchman and Arikaree projects in eastern Colorado withdrew from the program as project monitoring costs and their 20% cost share continued to increase.

The Council recently extended through FY94 a cooperative agreement with the Bureau of Reclamation to complete a study of the economic and institutional aspects of ground water recharge projects in the West and recommend program improvements.

#### **Water Transfers/Central Valley Project**

On September 21, the Metropolitan Water District of Southern California (MWD) announced it had reached the first negotiated voluntary water transfer authorized under last year's Central Valley Project Improvement Act. According to General Manager John Wodraska, "After years of speculation over urban/agricultural water transfers, Californians will finally benefit from these voluntary exchanges." He added, "Among the advantages such transfers provide are reliable water supplies for urban areas, and infusion of economic relief for a struggling agricultural community and significant steps to improve the state's environment." Under the agreement, MWD will pay \$7M to Areias Dairy Farms of Los Banos for up to 35,000 acre-feet of water over a 15-year period. MWD may choose to take up to 5,000 acre-feet in each of any seven years. Areias Dairy Farms will receive \$6.25M or \$175 per

acre-foot, while under the law the remaining \$875,000 or \$25 per acre-foot will be paid into an environmental restoration fund. MWD must also pay to transport the water to Southern California.

MWD's Board is expected to give its final approval next month. Then the agreement will be reviewed by the Secretary of Interior, State Department of Water Resources, State Water Resources Control Board and other regulatory agencies. Areias Dairy Farms is a 70-year old family operation and plans to use the capital to modernize facilities and make the transition from growing low-value water-intensive crops to high-value crops that require less water.

#### **WATER RIGHTS**

##### **Indian Reserved Rights/Arizona**

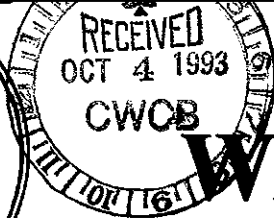
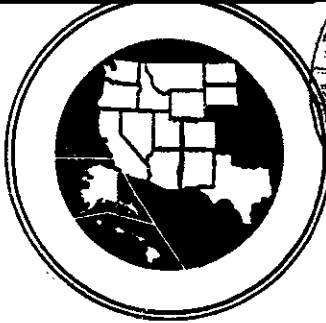
Senator John McCain (R-AZ) has introduced legislation (S. 1146), to implement a settlement reached between Arizona, the Yavapai Prescott Indian Tribe, the City of Prescott, and the federal government. A hearing was recently held on the bill to discuss technical amendments and allow Interior officials to testify. The Yavapai Reservation and the City of Prescott sit side-by-side near the Verde River. Tribal and municipal leaders, and nearby water users, have been concerned over their interrelated rights to water from the river. The reservation and the municipality signed a water service contract in 1972. In 1978, Arizona began a general adjudication proceeding of the Gila River and its tributaries, including the Verde. Given the complex nature of this proceeding, and the time necessary for its completion, the tribe sought to have its water rights established apart from the adjudication. The negotiations ultimately led to a successful settlement that is included in S. 1146.

The settlement amends the 1972 water service contract between the city and the tribe, and authorizes the federal government to repurchase federal water supply contracts from the city and the tribe, and help determine the purchase price. Funds acquired from the purchase would be deposited in a trust fund, along with an Arizona contribution of some \$200,000. The proceeds of the trust would be available to the tribe to develop new water facilities, and acquire additional water supplies. Further, the federal government would assist the tribe in establishing a ground water management plan in accordance with Arizona law.

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001625

September 30, 1993

Diss. No. 1011	
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# WESTERN STATES WATER

THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

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## ENERGY

### **Federal Energy Regulatory Commission (FERC)**

On September 21, FERC published in the Federal Register notice of a proposed policy statement with respect to the use of its reserved authority to require federally licensed hydropower projects to ameliorate any cumulative impacts in the same river basin. Comments on the issue should be addressed to: Office of the Secretary, FERC, 825 North Capitol Street, N.E., Washington, D.C. 20426. An original and fourteen copies of written comments must be filed. Comments should refer to Docket No. RM93-25-000, and are due by November 5. For more information contact Barry Smoler, (202) 208-1269.

Each license that FERC now issues include a set of standard articles known as "L-forms" which reserve broad authority for FERC to require project alterations in the public interest, after notice and an opportunity for a hearing. These "reopener" articles specifically refer to the electrical and hydraulic coordination of a project with other projects or power systems. They also allow FERC to prescribe operational rules that govern the use, storage and discharge from storage of waters affected by the license for the protection of "...life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public purposes, including recreational purposes..." They also address the conservation and development of fish and wildlife resources. FERC may require the construction and maintenance of reasonable facilities as may be recommended by the Secretary of Interior or state fish and wildlife agencies.

The Commission's proposed policy statement reads as follows: "The Commission believes that the

standard reopener clause as currently incorporated into hydropower licenses reserve adequate authority to the Commission to require all licensees of projects located in the same river basin to mitigate the cumulative impacts...including cumulative impacts that are identified after one or more of the licenses for those projects have been issued. The Commission may also include, as a condition to any new license, an article reserving the Commission's authority to require the licensee to undertake such measures as the Commission may later determine on a case-by-case basis to be reasonable and appropriate to mitigate the cumulative impacts of hydropower project operations within the same river basin or watershed." The policy statement promises that any such articles would describe to the maximum extent possible reasonably foreseeable future resource concerns that might warrant modifications.

## WATER QUALITY

### **Safe Drinking Water Act-Reauthorization**

The Clinton Administration has proposed ten recommendations for reauthorizing the Safe Drinking Water Act (SDWA). "The way we guaranteed safe water for the American people," said EPA Administrator Carol Browner in introducing the proposal, "is broken and...needs to be fixed." The recommendations seek a balance between public health concerns and easing the financial burdens created by the current SDWA, particularly those on small water suppliers. States and local suppliers should have more financial and regulatory flexibility under the proposals.

One recommendation is to establish a new SDWA state revolving loan fund (SRF). The Administration has proposed appropriating \$599M to the fund in

FY94, and \$1B each year from 1995-98. The FY94 money is not "new" to water quality. Rather, it would be transferred from the Clean Water Act SRF to the proposed SDWA SRF. In addition, to maintain state primacy, the proposal recommends a state fee program, borrowing concepts from the Clean Air Act.

Also, to ensure the viability of small systems, new "non-viable" systems would be prohibited and "small system 'best available technology' programs" would be established. Such systems would require less expensive equipment than large systems. Another proposal would improve the process for selecting contaminants for regulation. Currently EPA must set standards for 25 contaminants every three years. Under the new proposal, EPA would use a risk-based assessment to determine which contaminants to regulate and could use timeframes of up to 60 months before regulations become fully effective.

Reactions to the Administration's proposal have been mixed. Environmental groups have viewed them as a positive step, but are wary of the potential effects the many details needed to implement them. Rural water interests have expressed skepticism about the amount of relief they will receive.

## **WATER RESOURCES/PEOPLE**

### **Bureau of Reclamation**

More changes are taking place at the Bureau of Reclamation. Veteran Deputy Commissioner **Joe Hall** quietly retired in July. Assistant Commissioner for Engineering and Research **Darrell Webber** retired on September 3, after 36 years of service. Congressional Liaison **Russ Brown** has announced he will retire early on October 15. Brown also served for many years on the Senate Energy Committee staff, with jurisdiction over the Bureau of Reclamation. He will remain in the Washington D.C. area and is pursuing consulting work. Other changes are expected in the future at the assistant commissioner and regional director levels. Moreover, the Bureau's Denver office again faces reorganization, with many of the technical and support staff returning to the regional offices from which they were transferred during the last reorganization, when services were consolidated in Denver. Of particular note, **Ed Osann**, the National Wildlife Federation's director of water programs, has been named as Reclamation's new director of policy.

## **Water Supply Outlook**

According to the Palmer Index, pockets of drought remain in central and western Washington, along the central California coast and in northeastern California, in northeastern Oregon, southeastern Idaho, central and western Nevada and southwestern Wyoming. However, reservoir storage is much better than last year. In California, the state's major reservoirs hold some 25.6 million acre-feet (MAF) of water, about 12MAF more than last year. The elevation of Lake Tahoe is about 3.5 feet lower than normal, but two feet higher than last year.

Record breaking precipitation caused devastating floods on the Mississippi this year, and the U.S. Army Corps of Engineers virtually discontinued releases from Missouri River reservoirs. After years of drought, Missouri River reservoirs have rebounded, and total system storage is near 57MAF, only 3.1MAF below average, and 12MAF more than last year. The multipurpose pools at Fort Peck and Garrison reservoirs are nearly full, and storage at Oahe has risen to occupy 20% of the flood control zone. Fort Peck is 13.8 feet higher than last year, Garrison 13.6 feet, and Oahe 20 feet.

While water supplies in the West have improved, the Palmer Index indicates severe to extreme drought now grips the southeastern United States from Florida to West Virginia and covering all or parts of Virginia, Kentucky, Tennessee, Alabama, Georgia and North and South Carolina.

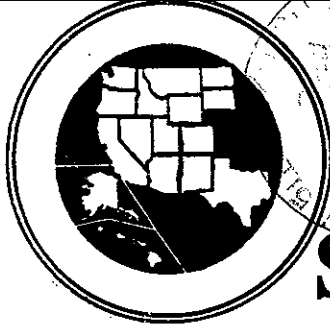
## **ORGANIZATIONS**

### **ICWP**

The Interstate Council on Water Policy (ICWP) has released a series of position papers, which deal with the Clean Water Act, the Safe Drinking Water Act, the Endangered Species Act, and small town and rural development. They are revised versions of papers which were discussed at ICWP's 1993 Washington D.C. roundtable. The papers initially served as the basis for discussions with representatives from the administration and the Congress, and were later revised to reflect ideas and viewpoints offered by roundtable participants. Copies of the position papers are available. Call ICWP at (612) 223-5828.

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# WESTERN STATES WATER

001526

October 12, 1993  
Issue No. 1012

THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

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## WESTERN STATES WATER COUNCIL

### Quarterly Meetings

The 112th quarterly WSWC meetings were held on October 6-8, at the Coeur d'Alene Resort in Idaho. A number of important matters were addressed. On Wednesday evening, the Federal Energy Regulatory Commission (FERC) Subcommittee met and listened as John Clements, Deputy Director of the Office of Hydropower Licensing, reported that after reviewing a draft memorandum of agreement (MOA) prepared by the state of Idaho with WSWC support, FERC Chair Elizabeth Moler had determined that an MOA was not an appropriate vehicle for resolving federal/state differences. Indeed, she feels the proposed MOA would delegate authority to the states that the Federal Power Act and Electric Consumers Protection Act reserved to FERC, and thus create an illegal dual system of jurisdiction. In response to earlier state calls for Congress to address the issues, and with the encouragement of the Western Governors' Association (WGA), former FERC Chair Martin Allday promised an administrative effort to resolve federal/state differences. The Council suggested and worked with FERC staff on the draft MOA for more than a year. However, in response to questions, it was apparent FERC now sees no way an MOA could work. The meeting was abruptly adjourned.

On Thursday, the Water Resources Committee met and Mr. Clements repeated his message regarding the FERC MOA. Members expressed disappointment, if not surprise, and decided to write Chair Moler asking for a written response and explanation of objections to the proposed MOA. Hedia Adelsman also reported on WGA/WSWC testimony she had presented before Congress regarding language to strengthen existing state authority over permitting federal projects,

including federal hydropower projects, under Section 401 of the Clean Water Act. Members were urged to express their support for the proposed legislative changes. The committee also discussed its 1994 work plan and state water use fees, a water conservation study, a study of ground water recharge, federal water project transfer issues, federal grazing/water rights policy, a western drought conference, and a proposed state water resources data management workshop.

The Water Quality Committee discussed the Administration's recommendations for reauthorization of the Safe Drinking Water Act (WSW #1011), and its new wetlands policy (WSW #1006). Some members expressed cautious support for many of the changes. Committee members also discussed S. 1304, Senator Baucus' wetlands bill, noting similarities to the Administration's proposal. Reauthorization of the federal Clean Water Act (S. 1114) was addressed, focusing on the timing of Congressional action, the WSWC's position (especially the watershed language), and the position of the Association of State and Interstate Water Pollution Control Administrators.

The Executive Committee reviewed its proposed 1994 work plan. The committee will oversee WSWC cosponsorship of a WGA workshop on watershed management in early 1994. The purpose is to convene a broadly representative group to consider successful watershed management efforts, extract any lessons, examine agency watershed initiatives, share information and explore ways to enhance coordination among activities and players. The committee also decided that the Council should hold another water management symposium in the fall of 1994, and the topic will be determined at the January meeting. Of note, the Executive Committee reviewed the results of the survey on member states' preferences regarding the frequency of Council meetings. In light of limited

state budgets and Council members' time, a majority of states favored meeting three times a year, rather than four. After some discussion, the committee agreed to suggest the Council make the transition.

The Legal Committee discussed possible state approaches to dealing with the effects of the U.S. Supreme Court's ruling in *U.S. v. Idaho* (WSW # 990) that the United States is not subject to the payment of the type of fees charged by the state in its general adjudication proceeding. Next, the committee evaluated the third WSWC/NARF Symposium on the Settlement of Indian Reserved Water Rights Claims (WSW #1009). The committee also spent a good deal of time discussing a draft report on improving relations between federal entities and state water resource managers so as to enhance endangered species protection while at the same time respecting state water management decisions. The committee also discussed a number of recent court cases, Oregon's new water conservation law, and the reserved rights language in the recent Colorado Wilderness bill.

On Friday, the 112th Quarterly Meeting began with a panel discussion of efforts in the Coeur d'Alene basin to remediate pollution related to mine waste (as well as other sources) on a voluntary, non-CERCLA basis. A number of state, federal and local representatives discussed their interest in beginning to correct past and present problems in the basin without waiting for federal action under CERCLA or Superfund mandates, which are cumbersome and can result in open-ended liability for certain parties, while leaving some "orphan sites" with no viable party responsible for cleanup. In order to address these problems, a voluntary, cooperative council was created. Panel members represented the Idaho Departments of Health and Environmental Quality, EPA, Hecla Mining, and the Coeur d'Alene Tribe.

Elizabeth Ann Rieke, Assistant Secretary of Interior for Water and Science (and a former WSWC member), was also a special guest. She briefed members on the Administration's goal of "reinventing government," and earlier Interior review initiatives examining the need for virtually every program. Betsy also noted efforts to resolve a number of longstanding conflicts, including specifically the Pacific Northwest salmon and Sacramento-San Joaquin River Delta issues. Part of the challenge is that federal agencies' actions are not well coordinated. Another part is that the "science" is

not well settled. Secretary Bruce Babbitt strongly supports creation of a National Biological Survey to provide "credible" independent scientific information, but the proposed federal legislation has been caught up in the frustration over reauthorization of the Endangered Species Act. While Interior has had some success in resolving ESA problems using habitat conservation plans, the Northwest salmon and Delta controversies involve many more complex issues. After her formal remarks, Betsy responded honestly and directly to a number of questions from members.

Each of the standing committees reported on various topics, as well as discussions and priorities related to their 1994 work plan items. A final work plan will be approved at the January meetings. There were no external positions considered, but the Council did adopt a resolution of appreciation in honor of retiring member George Christopolus (WSW #1007). Also, the Council unanimously agreed to suspend the rules, as the Executive Committee recommended, in order to try reducing the number of meeting to three per year, beginning in 1995. Individual states reported on significant events and activities, and members expressed their thanks to Keith Higginson and the other Idaho representatives that planned and hosted the meetings and special activities. The next Council meetings will be hosted by the state of Hawaii at the Royal Lahaina Resort, in Kaanapali Beach, Maui on January 12-14, 1994.

## PEOPLE

We are sad to report that Tom Choules passed away on October 8, in Arizona. He was 65. Tom suffered for many years with health problems related to diabetes, but he was always cheerful and active. He enjoyed golf and tennis. Funeral services were held in Yuma at the Church of Jesus Christ of Latter Day Saints, on October 12. Tom was active in his church, as well as his community. An attorney, he was president of the Arizona Bar Association, and represented many water interests, including the Wellton-Mohawk Irrigation District. For over seventeen years, he represented Arizona as a WSWC member and served as chair of the Legal Committee and numerous subcommittees. He often came to WSWC meetings with a box of dates from a farm in Yuma that he also partly owned. We will miss his friendship. Letters may be addressed to his wife Ida Choules, 1483 S. Gateway Drive, Yuma, Arizona 85364.

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# WESTERN STATES WATER

001627

October 22, 1993  
Issue No. 1014

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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

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## LITIGATION/WATER RESOURCES

### General Adjudication/Washington

The Washington Supreme Court has held that the state Department of Ecology (WDOE) has no authority to issue cease and desist orders to regulate water use without undertaking a general adjudication of the rights involved (*Rettkowski v. Washington*, No. 59086-9, Sept. 9, 1993). The case arose when ranchers who water their cattle at Sinking Creek complained to WDOE that ground water pumping by irrigators reduced the creek's flow. WDOE found a connection between the withdrawals and the creekflow, and that the ranchers held senior water rights. Accordingly, DOE ordered the irrigators to halt ground water pumping. No general adjudication of water rights had been conducted. The matter ultimately came before the Washington Supreme Court.

The court found that the two major issues in the case were whether WDOE had the authority to determine the priorities of water rights between the irrigators and the ranchers, and then whether it could issue enforcement orders. The court answered "no" to both questions. The key was that no general adjudication had been undertaken. Comparing the situation to a bankruptcy proceeding, the court held that only after the judicial determination of the relative water rights (referring to the water resources available for use as "an inadequate pie to divide") could the state regulate the rights. The court rejected WDOE's arguments that its enabling statutes, and the public trust doctrine, gave it authority to regulate unadjudicated rights.

A dissenting opinion noted the appropriateness of the bankruptcy law analogy, because "the requirement that the courts exclusively determine conflicting water

rights claims...shall surely result in the application of [such] law to the estates of the ranchers and irrigators....". The dissent concluded, "To those who cry out that the majority's unsettling opinion constitutes the end of civilization,...do not despair. The legislature must now address itself to a comprehensive water policy....". Washington has filed a motion for reconsideration of the opinion.

## WATER RESOURCES

### Central Arizona Project

The "Governors' Central Arizona Project Advisory Committee" has recently issued its final report. Governor Fife Symington formed the committee, consisting of 34 members, in December, 1992 and charged it with developing recommendations to assure the long term viability of the Central Arizona Project (CAP). At the inaugural meeting last January he explained: "The problem facing CAP is the significant underutilization of the resource. The project was designed on the assumption agriculture would use most of the water in the early years, [but] agricultural use has declined.... Underutilization has major potential consequences. First, it could result in a substantial shift of CAP costs to the municipal/industrial sector. Second, Arizona is leaving thousands of acre-feet of [its] CAP water in the Colorado River at a time when our neighbors...are seeking additional water.... This situation creates a potential threat to Arizona's ability to hold on to its CAP entitlement. Finally,...the prospect of irrigation district default on federal loans brings the potential for Congressional intervention.... It is the Committee's charge to come up with an Arizona solution to the...problem." The Committee was organized to facilitate public involvement; three working groups and an "interagency study team" were formed.

Regarding financial issues, the Committee recommends that the Central Arizona Water Conservation District (CAWCD) and the Bureau of Reclamation review their operations and search for cost reduction opportunities. CAWCD should also optimize its power marketing to maximize interim revenues. The Committee suggests that CAWCD adopt a policy of "target-pricing" to increase incentives for CAP use, ensure fair prices for water purchasers, and develop appropriate expectations for future prices. To compensate for projected deficits caused by target-pricing, the Committee recommends that CAWCD obtain additional financial authority to issue bonds, and urges CAWCD to charge agricultural users current ground water costs, or less, to the extent that all CAP users benefit.

The Committee recommends that the state, CAWCD and M&I subcontractors explore ways within their existing contracts to require M&I subcontractors to pay their share of OM&R costs, whether or not they take water delivery. Given the financial hardships likely to occur, this "take or pay" policy should be combined with a policy to allow subcontractors to join a replenishment district instead. The federal government should pay the fixed OM&R costs associated with CAP allocations for federal purposes, and restructure the agricultural irrigation districts' distribution system debt by offering deferral contracts.

Regarding water marketing, the Committee recommends that CAWCD and the Arizona Department of Water Resources (ADWR) develop an intrastate CAP marketing program and allow CAP to benefit from implementing a fee structure for such transfers. Additionally, ADWR should study arrangements where California and Nevada take advantage of unused entitlement and canal capacity to store water in Arizona in exchange for the right to increased Colorado River diversions. The contracting state would pay the cost of the banking arrangement. The Committee notes that "this type of program could be beneficial...because it would provide a long-term source of water to a neighboring state without reducing Arizona's Colorado River entitlement."

The Committee recommends that the state request the federal government to make settlement of Indian water rights claims in Arizona a priority. Also, the state should offer its assistance to complete Indian water right settlement negotiations. Various possibilities

should be evaluated to encourage the use of non-Indian agricultural water as a water source for such settlements. Once a settlement has been completed, tribes should be allowed to lease CAP water, first within the CAP service area, and then within the state.

Concerning environmental issues, the Committee suggests three levels of water allocation be considered for environmental enhancement (50,000, 100,000, and 150,000 acre-feet), with an evaluation of the impact on CAP water users. The Committee notes that a large amount of water reserved for environmental enhancement would be required on the Colorado mainstem, and recommends a taskforce discuss the economic, environmental, and political consequences of allocating CAP water for the environment. The Committee also suggests an environmental trust fund. Alternative funding sources should be explored, including a surcharge on underground storage projects using CAP water. The Committee urges, however, that revenue sources available to the CAWCD for repayment and OM&R should not be placed in the trust fund.

In releasing the report, Governor Symington and co-chair Mark DeMichele, Arizona Public Service Company CEO, noted that each action recommendation was supported by a majority of the Committee. They said: "This report sets forth a plan for [CAP] operation which will ensure...[efficiency]..., guarantee adequate water supplies across the state, and promote and enhance quality of life in Arizona." For copies (\$5.00) call Jan Loffman (602) 542-1554.

In a related water development, on October 1, the CAWCD announced that CAP is "substantially completed," 25 years after it was authorized in 1968, at a cost of some \$4B. Its completion "triggers the start of the district's 50 year period to repay the federal government...reimbursable construction costs..." After substantial changes and modifications from its initial authorization, CAP is the most expensive water project ever built by the Bureau of Reclamation.

#### PEOPLE

Due to Council work plan priorities, **Norman Johnson** will serve on an interim basis as editor of this newsletter. It is expected that he will continue the excellent work performed by **Tony Willardson**, who will reassume this responsibility next fall.

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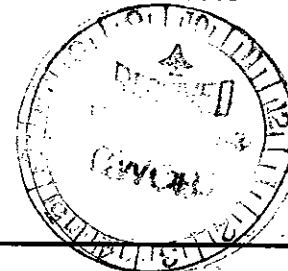


001628

October 29, 1993

Issue No. 1015

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

editor - Norman K. Johnson

chairman - Dave Kennedy

typist - Carrie Curvin

executive director - Craig Bell

## LITIGATION/WATER RIGHTS

### **Water Transfers/Utah**

The Utah Supreme Court has held that a mutual water district shareholder may not change its point of diversion unless the district approves (*East Jordan Irrigation Co. v. Morgan*, 218 Utah Adv. Rep. 62, Aug. 5, 1993). The case arose when Payson City, an East Jordan Irrigation Co. stockholder, attempted to change its diversion and East Jordan protested. The state engineer approved the change, based on his usual procedure. East Jordan challenged the approval in state district court, which upheld the state engineer's action. An appeal was taken, and the case was eventually heard by the Utah Supreme Court.

In reaching its decision, the court relied on principles of corporate and water law. It noted that only the board of directors, not individual shareholders, can manage corporate affairs. It also said that under Utah water law only the owner of a water right may change its place of use. The water right holder, the court found, was East Jordan, not Payson City, which held only shares of East Jordan's stock. The court also rejected the city's claim that its equitable ownership of its water right allowed it to change the place of use. A lengthy dissent was filed. The Utah State Engineer must now establish a system to allow mutual water companies to approve attempts by shareholders to modify their water rights.

## WATER QUALITY

### **Clean Water Act-Reauthorization**

The date for a subcommittee markup of S. 1114, the Water Pollution Prevention and Control Act of 1993, introduced by Senators Baucus (D-MT) and

Chafee (R-RI), has been changed from mid-October to mid-November. Staff members are gathering input on the bill. Full committee markup, which had been expected by year's end, will now likely occur in January. The House is still drafting a CWA reauthorization bill. Top EPA staff are finalizing the agency's position on CWA before the Senate markup to maximize the agency's influence in the debate. Some observers suggest that the delay in moving the CWA legislation may be because of a current priority to deal with the Safe Drinking Water Act.

## WATER RESOURCES/WATER RIGHTS

### **General Adjudications**

Over 50 individuals from eleven western states met by invitation in Jackson, Wyoming, on October 18-19 at the Western States Adjudication Conference. The 1½ day program included presentations by Jeff Fassett, WSWC member and Wyoming State Engineer, district court judges, consultants, attorneys, a state legislator, and various state officials. Recent court decisions, technical adjudication activities, implementation and administration of reserved rights decrees, and a number of other issues were discussed. The meeting improved the ability of the participants, and thereby the western states, to more effectively carry out general adjudication proceedings.

### **Grazing Reform**

Opponents failed again on Thursday, October 29, to break the filibuster, led by western Republicans, to block a House/Senate conference agreement that would increase the fee for grazing livestock on federal property and impose other new restrictions on those who lease government-owned rangelands. Earlier in the month, a majority of House and Senate negotiators



reached agreement, voting to accept a compromise worked out by Interior Secretary Babbitt, Senator Reid (D-NV), and key House democrats. Although the debate has centered on proposed grazing fees hikes, controversy has also developed over incorporation of other reforms advanced by Babbitt, including new environmental regulations, enforcement provisions, and an end to the policy of allowing grazing permit holders to claim water rights or hold title to range improvements on federal property. The provisions relating to water resources, contained in H.R. 2520, are principally: (1) Section 406(d), which provides that: "Subject to valid water rights existing on the date of enactment, no water rights shall be obtained for grazing-related actions on public lands except in the name of the United States;" (2) Section 406(i)(2)(last sentence): "The United States shall assert its claims and exercise its rights to water developed on public lands to benefit the public lands and resources thereon;" and (3) Section 406(m): "Subject to valid rights existing on the date of enactment of this section, all rights to permanent improvements contained on or in public lands are vested in the United States."

While the above provisions can be variously interpreted, their ambiguity has raised concerns among many western state representatives that the provisions could be construed as an assertion of new federal water rights and a resulting regulatory preemption of state water law. The potential for such claims is seen as being in sharp contrast to the Administration's announced policy that the Bureau of Land Management would simply file with states for sole title to water rights connected with water related to range improvement projects, with the aim to make BLM policy consistent with Forest Service policy.

In response to the above language, for example, Wyoming Governor Sullivan recommended in a letter to Senator Wallop (R-WY) dated October 25 that "the vague, ambiguous language in Sections 406(d) and 406(i)(2) should be amended to avoid future confusion and the effect upon state water rights administration. Since the reform policies were first made public, the BLM and the Administration have said that water rights changes will not affect state primacy.... The current compromise language, some of which was newly inserted, is a 'water lawyers dream come true' and should be eliminated or modified to maintain a consistent and firm congressional deference to the states on water rights." He then recommended

specific deletions and additions that "will maintain these historic relationships." A similar letter was sent to Senators Hatfield (R-OR) and Packwood (R-OR) on behalf of Oregon Governor Roberts. Colorado Governor Romer also provided a letter to the Senate leadership expressing his reservations about the bill, which include concern over the water rights provisions. He concluded, "If passed in its present ...ambiguously worded form, the Reid amendment could be construed to reserve a federal water right on federal lands not only for grazing but for any other purpose as well. Such an outcome unnecessarily exceeds the scope of rangelands management reform, and could undermine state water allocation laws and the rights created under those laws."

The governors reiterated the position of the Western Governors' Association (WGA) about the process used to produce the bill. A WGA letter cautioned that "rangeland reform is complex, with the potential result of healthier land and sustainable rural communities. It should not be done hastily, opening the door to unintended or un-debated results.... Therefore, western governors are not supportive of the process that led to this proposal.... We are not supportive of management practices being codified through the appropriation process. This forecloses opportunities for constructive input which leads to policies that meet our common goals."

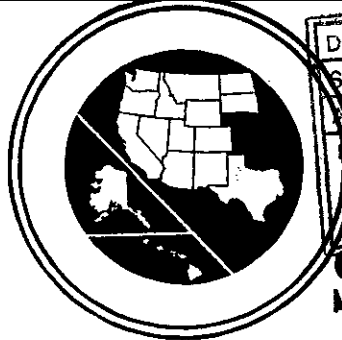
Opponents have failed three times to break the Senate filibuster. The FY94 Interior appropriation continues to be accomplished through a continuing resolution. Secretary Babbitt has, reportedly, promised to pursue administratively the tougher grazing reform measures he originally proposed if the deadlock is not broken.

#### PUBLICATIONS

The Rocky Mountain Institute has recently released two reports: (1) "Feedback and Irrigation Efficiency," showing the importance of providing farmers with information to enhance the efficiency of their irrigation decisions; and (2) "Linking Water and Energy Savings in Irrigation," discussing the connection between water and energy efficiency in irrigation, and illustrating with case studies how energy utilities can help farmers become more efficient irrigators. For copies (\$6 and \$7, respectively) contact RMI, 1739 Snowmass Creek Road, Snowmass, CO 81654-9199; (303) 927-3851.

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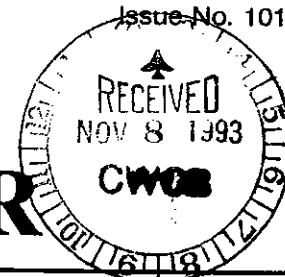
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001629

November 5, 1993

Issue No. 1016

# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

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## ADMINISTRATION UPDATE/WATER RESOURCES

### **National Performance Review/Bureau of Reclamation**

Under President Clinton's directive to "reinvent government," the Bureau of Reclamation has embraced the goals of the National Performance Review (NPR), and released a *Blueprint for Reform*. It is a product of many recommendations from over 1,000 Reclamation employees and management officials. The Bureau is one of the first federal agencies to respond to the NPR. In announcing the *Blueprint* on Nov. 1, Commissioner Dan Beard said, "We were stuck working on yesterday's issues. We were reading off an old script. By adopting...these reforms, we can help manage the water needs and problems of today, while preparing for the future." The Commissioner created a Program and Organization Review Team earlier this year. In August, it presented recommendations concerning changes needed to achieve Reclamation's mission and Interior Secretary Babbitt's goal of transforming Reclamation "from a civil works construction agency into a preeminent water management agency." The recommendations were based on two "givens;" that Reclamation must be responsive to changing public values, and that declining budget and personnel ceilings pose significant constraints on program activities and require more efficient use of existing resources. The changes address internal organization and overall policy.

Reclamation's mission statement is: "To manage, develop and protect water and related resources in an environmentally and economically sound manner in the interest of the American public." The new reforms fall under four key NPR principles: cutting red tape, putting customers first, empowering employees to get results, and getting back to basics. The *Blueprint*

adds other guiding principles to accomplish the mission, including: (1) facilitating water transfers to new uses according to state law; (2) coordinating and improving management of existing water and power resources; (3) promoting sustainable and environmentally sensitive water and land uses; (4) facilitating integrated water resources management on a watershed basis; and (5) prompting fiscal responsibility and sound business practices. A common set of values embraced in the report address leadership, accomplishment, respect, recognition, service, responsibility, public trust, innovation, teamwork, diversity, communication, trust, and ethics.

With respect to functional realignments and Bureau organization, some changes made in 1988 will be reversed. Regional directors, in consultation with the Washington and Denver offices, are to develop a plan for delegating more authority to the field offices and proposing a new alignment of area offices. A new Denver Service Center will provide scientific, human resource and administrative services. However, three layers of management will be removed and staffing will be reduced. Where cost effective, scientific and engineering functions will be returned to the field. Thus, the Washington office will set policy to be implemented by local offices, with the Denver office outside of the direct chain of command.

The proposed changes have been approved by Betsy Rieke, Assistant Interior Secretary for Water and Science, and Commissioner Beard has asked existing Reclamation leadership to formulate implementation plans and submit them for his approval by Dec. 31. He expects functional process changes to be implemented no later than the end of FY94. The *Blueprint* notes that, "It is critical for the well-being of the employees...that [the] transition occur rapidly." For information contact Lisa Guide (202) 208-4662.

## WATER RESOURCES/WATER RIGHTS

### **Grazing Reform**

As reported last week, the Senate continues to filibuster a House/Senate conference agreement, reached as part of the Interior appropriations bill, to increase the fee for grazing livestock on federal land and impose other restrictions. Although the debate has centered on grazing fees, other issues, including water provisions in the bill, have been controversial (WSW #1015) and the process by which the reform has been undertaken, amending an appropriations bill rather than using an open, public process, has been widely criticized.

In response to a letter of concern from Colorado Governor Romer, Interior Secretary Babbitt replied in a letter dated October 24, and Senator Reid (D-NV), the range reform bill's chief sponsor, read the letter into the October 26th *Congressional Record*. The reply read in part:

"...[N]othing in new Section 406(d) changes the traditional practice of acquiring water rights for livestock grazing on public lands under state law. It only ensures that, subject to valid existing water rights, such water rights be obtained in the name of the United States. This has long been the practice on the national forests, as well as state law in many western states....

"Your letter expresses specific concern that the Reid compromise 'could be construed to reserve a federal water right on federal lands not only for grazing but for any other purpose as well.' Apparently you are referring to language in the last sentence of Section 406(i)(2). But this sentence does not address federal/state relations in water law. It simply confirms the common sense principle that federal claims and...rights to water 'developed on public lands [shall be exercised] to benefit the public lands and resources thereon'....

"You have also raised concerns about sections 406(o), which directs the development of standards and guidelines that 'establish minimum conditions for the protection of rangeland ecological health,' and which shall include, among other things, 'restoration and protection of riparian values, such as healthy wildlife and fish habitat and diverse vegetation.'

Nothing in this section addresses water rights or state-federal relationships in the area of water; rather, it merely furnishes direction for the Department in implementation of existing law....

"You have my assurance that the Department of the Interior will, if these provisions are enacted into law, interpret and apply them in conformance with their intent - not to make drastic changes in state-federal relations in water law, but rather to ensure that water rights obtained under state law for grazing-related purposes on public lands serve federal grazing-related needs, and that the ecological health of federal rangelands is secured."

Despite Secretary Babbitt's assurances, concerns continued to be raised throughout the West about the water rights-related provisions of the grazing bill. Subsequently, according to reports from Washington D.C., the Administration, in a further effort to break the filibuster, offered to agree to the amendment of Section 406(d) to read: "(d) WATER RIGHTS--Subject to valid water rights existing on the date of enactment, no rights to water developed on public lands shall be obtained for grazing-related actions on public lands except pursuant to State law and in the name of the United States." Also, the last sentence of 406(i)(2) would be stricken in the "draft, clarifying amendment" the Administration has proposed.

After examining the revisions, Governor Romer wrote a letter to Secretary Babbitt dated Nov. 4 saying:

"After reviewing the 'draft, clarifying amendment' you forwarded to my office this morning, I am satisfied that...ambiguity can be corrected with this statutory language. I have asked a number of water law experts in Colorado to review the draft amendment, and those I have consulted assure me that the new language corrects the problem.... I am also encouraged by your willingness to...expand the process...for implementing standards and guidelines.

"In conclusion, I think it is in the best interest of all parties to get beyond the current deadlock. I support these changes, and urge that they be adopted, together with the bill currently before the U.S. Senate."

The next vote to defeat the Senate filibuster is scheduled for November 10.

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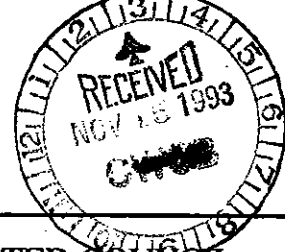
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# WESTERN STATES WATER

November 12, 1993

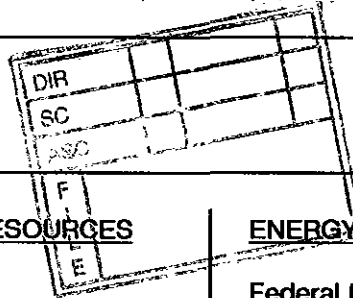
Issue No. 1017



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

Editor - Norm Johnson  
Typist - Carrie Curvin



Chairman - Dave Kennedy  
Executive Director - Craig Bell

## ADMINISTRATION UPDATE/WATER RESOURCES

### Bureau of Reclamation

In two Nov. 3 Salt Lake City press conferences, convened to present water conservation awards to Utah's Department of Natural Resources (UDNR) and Murray City, Bureau of Reclamation Commissioner Dan Beard announced new water conservation initiatives for the Bureau. They include: (1) a document (to be issued by January) to guide the development of water conservation plans by each of the 800 water-user organizations receiving Reclamation water; (2) a cooperative agreement between the Bureau and the Soil Conservation Service to harmonize technical capabilities regarding water conservation; (3) guidance to Reclamation personnel on water contract and repayment policy; (4) initiation of studies under the 1992 Energy Policy Act to identify water conservation opportunities at reclamation facilities that may increase hydropower or enhance fish and wildlife habitat; and (5) development of measures to gauge water conservation improvement. Beard noted, "We must seek out cost-effective ways to make the most efficient use of our available water supplies... I would hasten to say that most of the best work in water conservation is being done at the local level, with states becoming somewhat attentive, and the federal government coming up a distant third."

The awards presented at the press conferences acknowledged innovative water conservation practices. UDNR was cited for its leadership in advancing the practice of xeriscaping (using native, drought tolerant plants for landscaping) in Utah, while Murray City was honored for its work using wetlands to collect and naturally treat storm water from a portion of the I-215 freeway, and other sources, as part of the Jordan River Parkway Development.

## ENERGY

### Federal Energy Regulatory Commission

FERC chair Elizabeth A. Moler has responded to a letter from Craig Bell, WSWC Executive Director, regarding her decision not to proceed with negotiations toward a memorandum of agreement (MOA) between FERC and western states on hydropower licensing (WSW #1012). The Nov. 2 letter concludes that the proposed MOA "does not provide a sound basis for further discussions because the Commission lacks authority to carry out the type of agreement you have proposed.... The chief difficulty with the Council's proposed MOA is its inconsistency with *California v. FERC*.... There, the Supreme Court reaffirmed its...holding in the *First Iowa* case that the federal government occupies the field of...regulating hydropower projects, and held that the Commission's authority to set minimum flows for protection of fish and wildlife preempts non-consumptive state water rights laws." "The Council's proposal, if adopted, would effectively reverse the Court's ruling," she said.

The draft MOA was prepared by Council members and submitted to FERC last April, with the expectation that negotiations on it would proceed, as former FERC chair, Martin Allday, had promised an administrative effort to resolve federal/state differences. However, FERC offered no proposal to amend the draft MOA. The first official response was conveyed by John Clements, Deputy Director, FERC Hydropower Licensing Division, at the WSWC meetings in October on behalf of Ms. Moler, to the effect that the draft MOA was inherently defective, and could not be a vehicle for improving federal/state relationships.

The letter concedes that an MOA could be an effective means for bettering relationships and

recognizes that the Commission has entered into MOA's with other federal and states agencies. Ms. Moler stipulates, however, that such agreements "properly recognize each participant's legal responsibilities and authority" and "do not administratively reverse the law as written by Congress and interpreted by the courts."

She goes on to say that she remains "committed to establishing better relationships with the states. I have taken steps to ensure that their interests are fully considered in the Commission's decision-making processes." She then refers to improvements in the Commission's NEPA process and the expanded scope of public interest decisions made possible through a recent notice that FERC may reopen and revisit licenses (WSW #1011). "I specifically invite the Council to fully ventilate its views on these important issues," she said. She also refers to state comprehensive water right planning, concluding that "developers carry a heavy burden when they ask the Commission to act inconsistently with a comprehensive plan that accounts for all public interest considerations." Her letter closes by reemphasizing her desire to work cooperatively with the states, noting "the Commission will carry out its responsibilities with sensitivity to your concerns."

## **WATER RESOURCES**

### **FY94 Energy and Water Appropriations**

The President signed the \$22B FY94 energy and water appropriations bill (P.L. 103-126) on October 28. While the bill is within budget guidelines and contains less money than requested by the President overall, Congress added significant funds to the President's request for the Corps of Engineers and Bureau of Reclamation. Still, funding for both agencies is less than in the past. Senator Bill Bradley (D-NJ) unsuccessfully offered an amendment to further reduce funding, and included for the record a letter from environmental groups that read in part: "...This amendment...represents an...effort to hold the line against wasteful spending. For FY94, the President requested about \$3.75B for the accounts covered by the amendment, but the Committee appropriated about \$4.09B, an increase of \$344M. This money will go to the BuRec and the Corps,...agencies in...need of 'reinvention,' given their proclivity toward...uneconomic projects and their failure to ensure that beneficiaries

pay for the benefits of federal water projects."

Senate Energy and Natural Resources Committee Chair J. Bennett Johnston countered that the committee recommended \$3.9B in funding, which is less than last year, taking into account inflation. He also said that last year Sen. Bradley pushed through the Reclamation Projects Authorization and Adjustment Act, with an estimated cost of \$2.6B. Further, concerns over flood control in the Mississippi River Basin are greater now than when the bill was drafted. He added, "I am for budget cutting, but in a year when you have had all of these tremendous floods, and we are already less in real terms than we had last year, where are we going to take it from?" Sen. Johnston named several projects funded under the bill and said, "Altogether, I think there are 54 Corps projects and about another ten Bureau of Reclamation projects [that are] ongoing.... Are we supposed to stop those?" (Sept. 30, CR, S. 12808-810)

### **Grazing Reform**

The Senate filibuster over a bill raising grazing fees and implementing range reforms ended when Interior Secretary Babbitt withdrew the proposed changes from his department's appropriation bill on Tuesday, Nov. 9. The bill was due for another cloture vote that afternoon. Proponents twice failed to break the filibuster led by western senators who voiced several objections, including some related to water rights provisions. As earlier reported (WSW #1016), a "draft clarifying amendment" had been offered by the Administration to address objections, but concerns remained about the water and other provisions.

Notwithstanding the defeat, grazing issues are far from decided, as far as the Administration is concerned. As he withdrew the proposal, Secretary Babbitt echoed an earlier commitment, "We intend to move forward with the regulatory proposal to bring about range reform." But, some expect Babbitt to hold off on range reform proposals until they are heard by the Senate Energy and Natural Resources Committee. He has said that he plans to include more people in the process; elected officials, ranchers and environmentalists, beginning with a trip to Colorado next week. Further, in a Nov. 10 *Wall Street Journal* article a White House official confirmed that the Administration is negotiating on a grazing fee plan to shore up support for the NAFTA treaty.

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## WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201/942 East 7145 South/Midvale, Utah 84047/(801) 561-5300 / FAX (801) 255-9642

## MEMORANDUM

TO: Council Members

CB FROM: D. Craig Bell, Executive Director

DATE: November 12, 1993

RE: Response from the Federal Energy Regulatory Commission

Enclosed please find the letter I received from Elizabeth Moler, Chair of the Federal Energy Regulatory Commission. She was responding to my letter asking for written clarification on her decision not to proceed with negotiations toward a memorandum of agreement between the Commission and western states concerning hydroelectric licensing.

The substance of the letter is described in the enclosed newsletter article. The bottom line is that Ms. Moler viewed the draft MOA as an attempt to reverse the Court's ruling in California v. FERC (the Rock Creek case). While conceding that an MOA could be an effective means for bettering relationships, she states that "these agreements are for the purpose of improving consultation and cooperation, and do not administratively reverse the law as written by Congress and interpreted by the courts."

The draft MOA was prepared by Council members and submitted to FERC last April. The first official response was communicated by John Clements, Deputy Director of the Hydropower Licensing Division, at our recent meetings in October. He conveyed the substance of Ms. Moler's conclusions, noting her view that the kinds of changes addressed in the MOA would have to be made by the Congress.

With this in mind, I wanted to remind you of current Congressional activity regarding these matters. As you know, S. 1114, a bill to reauthorize the Clean Water Act, includes language amending Section 401 of the Clean Water Act under which states are authorized to certify or refuse certification for a proposed project requiring a federal permit or license. Without such certification, or a waiver thereof, no federal license or permit may be granted to the proposed project. Various courts have reached different results with regard to the scope of this section, including the question of whether the certification can cover protection of designated uses included in water quality standards. Section 602 of S. 1114 would clarify Congressional intent by adding to the first sentence of Section 401(a)(1) an amendment, so that the sentence would read in pertinent part as follows:

Any applicant for a federal license or permit to conduct any activity...which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of this Act, and that any such activity will comply with water quality standards adopted under Section 303 and allow for the protection, attainment, and maintenance of designated uses included in the standards."

Council Members  
November 12, 1993  
Page 2

As you no doubt know, the term "navigable waters" in the Clean Water Act is very broadly defined to include all "waters of the United States." Designated uses must be included in water quality standards along with the criteria for such waters based upon such uses. The basic use designations contemplated by the statutes and/or EPA rules are: public water supply; protection and propagation of fish, shellfish, and wildlife; recreation; agriculture; industry; and navigation.

The state of Washington relied on the current language of the Act to defend its imposition of an instream flow requirement in a Section 401 certificate to ensure compliance with Washington's water quality standards. The Washington Supreme Court upheld this action. The court said: "the Section 401...certificate may include conditions to enforce all state water quality-related statutes and rules.... Inasmuch as issues regarding water quality are not separable from issues regarding water quantity and baseflows, we...hold that [Washington law on baseflows] qualifies as an 'appropriate requirement of state law' for purposes of [CWA] Section 401." The court also rejected the applicant's contention that the Federal Power Act, as interpreted in the Rock Creek case, precluded the state action. However, as earlier indicated, other courts have reached different results, finding that 401 is limited to control pollution discharges, and the U.S. Supreme Court has agreed to review the Washington ruling. It is expected that states will be supporting Washington's position in the form of an amicus brief. However, seeking a clarifying amendment from Congress is not seen as inconsistent with this effort.

Several states and public interest groups have voiced strong support for the clarifying amendment (the Council testified in support, consistent with its position on reauthorization of the Clean Water Act). However, hydropower interests are lobbying intensely in opposition. The Senate Subcommittee on Clean Water, Fisheries and Wildlife is currently in the process of a write-up with the hope that they can pass a bill out of Subcommittee for consideration by the full Senate Environment Committee before the end of this session.

Also, in light of the response from the Federal Energy Regulatory Commission to any further negotiations, the possibility exists that a bill will be introduced similar to S. 106 in the last Congress, which would amend the Federal Power Act to address state concerns.

In light of these developments, you may wish to provide copies of the enclosed letter to members of your Congressional delegation in support of one or both of the above Congressional proposals to address these longstanding issues. I am including, for your reference, a copy of my letter to Ms. Moier which generated her response, and a copy of S. 106.

If you have any questions regarding the foregoing, or if we can be of any assistance, please let us know.

Enclosures

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## WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201/942 East 7145 South/Midvale, Utah 84047/(801) 561-5300 / FAX (801) 255-9642

October 15, 1993

Ms. Elizabeth A. Moler, Chair  
 Federal Energy Regulatory Commission  
 825 North Capitol Street, NE  
 Washington, D.C. 20426

Dear Chairwoman Moler:

As you know, we have been working for some time in cooperation with the Western Governors' Association to improve federal/state relations with regard to the licensing of hydropower projects. Specifically, we had developed a proposed memorandum of agreement with the purpose of developing a process that would accommodate both legitimate federal and state interests in the licensing process. There was considerable effort expended in putting this draft together, as well as a summary of every western state's water right permitting procedures. This latter document was requested in order to assist the Commission in understanding the typical state role in evaluating water right applications.

These efforts were begun with the blessing of your predecessor and in cooperation with staff members of your hydropower licensing division, with hopes on both sides that these matters could be handled administratively without the need for further battles in Congress and in the courts. Thus, we were very disappointed to recently learn from John Clements of your conclusion that the proposed MOA is illegal as currently framed, and more importantly that an MOA is not a proper vehicle to address the issues that have plagued us for so long. This disappointment is exacerbated by the knowledge that FERC has entered into MOAs with other federal agencies and, in fact, with the State of Washington regarding dam safety.

Given this disappointment and apparent incongruity, we would very much like a written explanation of your decision; namely (1) in what respects is the proposed MOA illegal; and (2) why is an MOA an inappropriate vehicle for improving federal/state relations in the hydropower licensing process? I would hope, given the time and energy we have expended in developing the draft MOA and other related documents, that you will respond to this request. Thus, we look forward to hearing from you.

Sincerely,

D. Craig Bell  
 Executive Director

cc: FERC Subcommittee Members  
 John Clements  
 Jo Clark

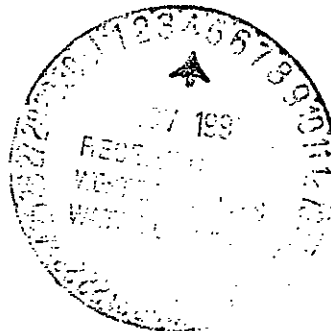
## FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, DC 20426

November 2, 1993

OFFICE OF THE CHAIR

Mr. D. Craig Bell  
Executive Director  
Western States Water Council  
Creekview Plaza, Suite A-201  
942 East 7145 South  
Midvale, Utah 84047



Dear Mr. Bell:

Thank you for your letter of October 15, 1993, concerning my decision not to proceed with negotiations toward a memorandum of agreement (MOA) between the Commission and the Western States Water Council concerning hydroelectric licensing. I certainly understand your disappointment. But, after reviewing the draft MOA, I concluded it does not provide a sound basis for further discussions because the Commission lacks authority to carry out the type of agreement you propose.

The chief difficulty with the Council's proposed memorandum is its inconsistency with California v. FERC, et al., 495 U.S. 490, reh. denied, 497 U.S. 1040 (1990). There, the Supreme Court reaffirmed its long-standing holding in the First Iowa case that the federal government occupies the field of licensing and regulating hydroelectric projects, and held that the Commission's authority to set minimum flows for protection of fish and wildlife preempts non-consumptive state water rights laws.

The Council's proposal, if adopted, would effectively reverse the Court's ruling. For instance, it provides for subordination of the Commission's license to existing state water rights, including those established for minimum flow purposes. Similarly, it contemplates blanket Commission recognition of future upstream diversions of water under state water rights that could interfere with a licensed project or even render it uneconomic. Subordination to such rights may be in the public interest in a given case, but that decision cannot be made before the fact and the Commission cannot, by negotiation, delegate to states its responsibility to make that decision. Similarly, the Commission cannot delegate to states the independent authority of other federal agencies to provide mandatory terms and conditions in Commission issued licenses.

An MOA can certainly be an effective means for bettering relations between government agencies if they properly recognize each participant's legal responsibilities and authority. Indeed, the Commission has MOAs with other federal and state agencies.

However, these agreements are for the purpose of improving consultation and cooperation, and do not administratively reverse the law as written by Congress and interpreted by the courts. A good example is our MOA with the Washington Department of Ecology concerning dam safety.

I remain committed to establishing better relations with the states. I have taken steps to ensure that their interests are fully considered in the Commission's decision-making processes. I recently implemented improvements in the Commission's NEPA process specifically designed to increase local participation. In addition, the Commission recently issued a Notice of Proposed Policy Statement to confirm that the Commission, during a license term, may use reopener conditions in licenses to revisit (on its own motion or that of another entity, including a state) public interest decisions made at the time of licensing and, if necessary, to amend a license to reflect changed conditions. Similarly, the Commission issued a Notice of Inquiry regarding appropriate policies for decommissioning hydroelectric projects. I specifically invite the Council to fully ventilate its views on these important issues.

I am very supportive of state comprehensive waterway planning and believe developers carry a heavy burden when they ask the Commission to act inconsistently with a comprehensive plan that accounts for all public interest considerations. I also strongly support settlements reflecting a consensus of the participants to a proceeding. I would work to adopt such settlements if they are consistent with the law and do not interfere with a substantial federal interest.

In closing, let me reemphasize my desire to work cooperatively with state governments. Having been born and raised in Utah, I can assure you that I recognize the vital role that water and water rights play in the West. I want to assure you the Commission will carry out its responsibilities with sensitivity to your concerns.

With best wishes,

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth A. Moler".

Elizabeth A. Moler  
Chair

102D CONGRESS  
1ST SESSION

# S. 106

To amend the Federal Power Act.

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## IN THE SENATE OF THE UNITED STATES

JANUARY 14 (legislative day, JANUARY 3), 1991

Mr. CRAIG (for himself and Mr. SYMMS) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

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## A BILL

To amend the Federal Power Act.

- 1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That section 9(a) of the Federal Power Act is amended by  
4       adding a new paragraph (3) at the end thereof as follows:  
5               “(3) No license may be granted for any project  
6       subject to the provisions of this Act unless the appli-  
7       cant complies with all procedural and substantive re-  
8       quirements of the laws of the State or States in which  
9       the project is located with respect to the acquisition of  
10      water rights and administration of the use of water.  
11      Any such license shall be subject to the applicant ob-

1        taining any water rights needed for such project in ac-  
2        cordance with such requirements.”.

3        SEC. 2. Section 27 of the Federal Power Act is  
4        amended—

5                (1) by deleting “used in irrigation or for municipal  
6        or other uses”; and

7                (2) by deleting “therein.” and inserting in lieu  
8        thereof “therein; and no license granted pursuant to  
9        this Act shall relieve any licensee or applicant for a li-  
10       cense from complying with all procedural and substan-  
11       tive requirements of the laws of the State in which the  
12       project is located with respect to any water rights  
13       needed for such project, including any terms, condi-  
14       tions, limitations, or other restrictions attached to such  
15       rights. Nothing in this Act nor in any other Act may  
16       be construed to constitute a preemption or intent to  
17       preempt the procedural and substantive requirements of  
18       State law with respect to the acquisition of water  
19       rights and administration of the use of water or with  
20       respect to any terms, conditions, limitations, or other  
21       restrictions which a State may attach to any such  
22       water rights for such project.”.

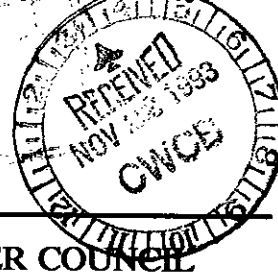


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# WESTERN STATES WATER

November 19, 1993

Issue No. 1018



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

Editor - Norm Johnson

Typist - Carrie Curvin

Chairman - Dave Kennedy

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## ENVIRONMENT/WATER RESOURCES

### **Endangered Species Act (ESA)/Colorado River Basin**

The U.S. Fish and Wildlife Service (FWS) has released draft overview and biological and economic analyses of proposed critical habitat designations for endangered Colorado River fishes. The three documents summarize major issues. A public notice, published Nov. 12, began a 60-day comment period that closes Jan. 11, 1994. Eight public hearings have been scheduled (4-8 p.m.) for the following dates and locations: Nov. 29 - Salt Lake Hilton in Utah, and the Clark County Commission Chamber in Las Vegas, Nevada; Nov. 30 - Cheyenne Holiday Inn in Wyoming and the Cobra Valley Country Club in Globe, Arizona; Dec. 1 - Grand Junction Hilton in Colorado, and Sinagua High School in Flagstaff, Arizona; Dec. 2 - The Inn-Best Western in Farmington, New Mexico; and Dec. 3 - Feldheym Library in San Bernadino, California. Call Robert Williams (801) 975-3630 for information. Send comments to Field Supervisor, FWS, 2060 Admin. Bldg., 1745 West 1700 South, Salt Lake City, UT 84104-5110 (58 FR 59979).

The economic analysis determines the incremental impacts of the critical habitat designation, in addition to the effects of listing only, for the Colorado squawfish, razorback sucker, humpback chub, and bonytail chub. Economic growth data and activity levels were projected for 20 sectors through the year 2020. The report concludes that overall impact for the Colorado River Basin is positive, but the impacts are unevenly distributed.

The positive incremental output for the basin totals \$167M (using a 3% discount rate, in 1982 dollars). California would gain \$262.6M. Utah and New Mexico would lose \$63.4M and \$60.1M, respectively.

According to the report, "The reasons for these differences lie in the nature of proposed recovery efforts.... Streamflow requirements and operational changes at federal reservoirs may negatively impact recreation,...power production, and future consumptive water uses in some geographic areas, while these same recovery efforts may enhance economic activity in other areas. This phenomena is particularly notable [in]...California.... Increased water availability in the lower basin...may significantly benefit that state's economy."

With respect to differences between economic sectors within a state, Colorado would lose an expected \$27.3M in livestock feed, \$20M in recreation services, and \$21.1M in electric power production, but gain an estimated \$35M from combined manufacturing and \$32.3M in new construction. Overall, Colorado's incremental output would increase \$1M. Arizona, Nevada, and Wyoming would lose \$2-5M. Incremental earnings impacts, indirect business and personal taxes, and employment are also estimated.

A team of economists and biologists identified management practices that might need to be altered to ensure recovery of the fishes and then identified sectors of the economy that would likely be impacted. While the Upper Basin and San Juan River have approved recovery implementation programs (RIPs) designed to reduce economic and environmental conflicts, the report assumes neither will show sufficient and timely progress in recovering endangered fishes. Thus, some planned water developments may be modified, scaled back, or foregone. Given this assumption, the potential magnitude of economic impacts provides an upper bound associated with the proposed critical habitat designations. The analysis does not estimate impacts that may result should ESA consultation requirements

lead to re-initiation of existing projects to ensure that their operation does not threaten listed species.

## **WATER QUALITY**

### **Safe Drinking Water Act-Reauthorization**

S. 1547, to reauthorize the Safe Drinking Water Act (SDWA), has been introduced in the Senate by Senator Max Baucus (D-MT). Important provisions of the bill would: (1) establish a state revolving loan fund (SRF) for construction of drinking water treatment facilities, with authorization of \$600M for FY94 and \$1B annually for FY95-FY2000 (a 20% state match would be required); (2) provide new requirements regarding standard setting for drinking water contaminants, where EPA, within three years of enactment of the bill, and every three years thereafter, identifies for regulation the 15 contaminants which pose the greatest risk to public health; (3) require states to develop plans to coordinate the management of public water systems serving 3,300 individuals, or less, including establishing criteria for determining viability, proposing schemes for the consolidation of management of small systems, and defining the financing needs of such systems; (4) increase emphasis on drinking water pollution prevention, especially in wellhead protection and sole source aquifer areas; (5) establish new requirements for regulating radon and lead in drinking water; and (6) enhance EPA's enforcement authority.

One hearing has been held on S. 1547. EPA's new Assistant Administrator for Water Robert Perciasepe was a key witness. He urged Congress to fine-tune SDWA, but not overhaul it. He expressed support for much of S. 1547, but offered, in his written testimony, a number of suggestions to improve it.

In the House, no comprehensive SDWA reauthorization bill has been introduced. Two committees - Public Works and Energy - have approved competing bills that authorize a drinking water SRF. However, a disagreement over jurisdiction has so far prevented further action. In the Senate, Senator Nickles (R-OK) has introduced S. 767, to reauthorize SDWA. A major difference between that bill and the Baucus bill is S. 767 authorizes no additional funding. While Senator Chafee (R-RI), the ranking minority member on the Senate Environment Committee, was expected to cosponsor S. 1547, he

did not endorse the bill. Reportedly, he has a number of concerns with its approach, which are being discussed at the staff level.

## **ORGANIZATIONS**

### **Association of State Dam Safety Officials (ASDSO)**

ASDSO has announced its 1994 scholarship program for undergraduate students interested in dam safety engineering as a career. Contact ASDSO at 450 Old East Vine, Second Floor, Lexington, KY 40507 (606) 257-5146 for information.

### **Interstate Council on Water Policy (ICWP)**

ICWP's recent annual meeting was held in conjunction with an "Interamerican Dialogue on Water Management." The program included many interesting and productive discussions, and fostered relationships which its sponsors hope will launch increasing coordination, cooperation, and information exchange between water managers in North, South, and Latin America.

During the meeting, ICWP presented the **Western States Water Council with its Water Management Achievement Award**, which is given for introduction of an "innovative or progressive water management project or program." Wayne Haas, a Council representative from Idaho, and ICWP immediate past-chair, accepted the award on the Council's behalf. Keith Higginson, the Council's vice-chair, will present the award to the Council at the next Council meeting in Hawaii. In explaining the award, ICWP's Executive Director, Holly Stoerker, noted that, "while the Council has made many important contributions over the years to the advancement of water policy, we particularly wanted to recognize the Council's recent leadership in the development of the Park City Principles. Please convey our deepest appreciation and congratulations to all the Council members."

## **PEOPLE**

WSWC member **Ruben Ayala** has been awarded the Association of California Water Agencies annual Legislative Merit Award for his leadership on water issues. Ayala chaired the California Senate Committee on Agriculture and Water Resources for 16 years before assuming a seat on the Rules Committee.

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# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## WATER QUALITY

### **Clean Water Act (CWA)-Reauthorization**

Both the House and Senate have postponed until next year consideration of CWA reauthorization bills.

## WATER RESOURCES/WATER QUALITY

### **Funding**

Venting their frustration with the federal government for requiring states to administer programs without providing related funding, a coalition of federal lawmakers, including Sen. Dirk Kempthorne (R-ID) and Rep. Gary Condit (D-CA), and local politicians recently launched a campaign to curtail unfunded federal mandates. They cite as an example of the problem a Congressional Research Service study estimating that the cost of federal mandates is roughly \$430B for state and local governments. Rep. Condit is preparing legislation to bar the federal government from forcing the states to carry out programs without providing financial support. Meanwhile, he is attempting to require the United States to reimburse state and local governments for previously mandated programs.

Rep. Condit successfully added such language to a House bill that provides states with flexibility to overhaul their public schools. Also, on Nov. 4 the House Government Operations Committee approved H.R. 3425 (to grant EPA cabinet-level status) and included an amendment to allow states and localities to opt out of compliance with unfunded federal mandates. Committee Democrats, however, stressed that this provision applies only to the bill's mandates, and that the bill has none.

The federal legislative debate over unfunded mandates comes against a backdrop of serious state and local concerns. At current levels, for example,

state CWA revolving loan funds will cover only a small portion of construction needs. As a result, the Association of Metropolitan Sewerage Agencies proposes that Congress boost funding to \$6B, half for state revolving funds and half for direct municipal grants. Also, public/private partnerships are receiving serious consideration, especially in small communities that lack the financial muscle and management expertise to upgrade their sewage treatment systems.

This fall, after the state senate turned down proposed pollution control fees, Governor Evan Bayh (D), declared that he would return Indiana's authority to regulate landfill and control water pollution to the U.S. EPA. Kathy Prosser, Commissioner, Indiana Department of Environmental Management, acknowledged that her state's actions were unprecedented, and that, "we're not proud of them." But, in light of Congressional increases in state environmental responsibilities and decreasing federal assistance, "something had to give, and in Indiana, it just did." Indiana's problems are not unique; at least half the states, including a number in the West, disturbed by EPA's testing requirements, have threatened to return to federal authority their power to enforce the federal Safe Drinking Water Act (*Governing*, November, '93, p. 70).

A Council of State Governments' study, "Resource Guide to State Environmental Management," helps explain the states' frustration. It estimates that state governments spent \$9.3B on environment and natural resources regulation programs during FY91 (the most recent year for data). The federal share was 14%, while "the federal share has traditionally been given at 35-40%. Our data shows that states have assumed almost all of the cost of regulating the environment and protecting natural resources, at least for those programs delegated to the states."

Robert Roberts, South Dakota Water and Natural Resources Department Secretary and WSWC Executive Committee member, explained in a recent article: "The problem here is the belief that more regulations equal more environmental protection. Unfunded federal mandates, like pages of the *Federal Register*, give the illusion of environmental protection. Nothing is accomplished until the program is implemented at the state and local level." The article goes on to raise the question of whether state and local governments will continue to invest in local solutions to environmental problems, or rebel against costly federal regulations. "The answer," the author concludes, "may depend on whether state and local leaders can convince federal officials to treat them as equals, and whether they can convince voters to invest tax dollars in new environmental strategies." (*State Government News*, Oct. '93, p. 24) Some environmentalists also question the current approach to environmental protection. Dick Carter, Coordinator of the Utah Wilderness Association, wrote recently that "solutions must move away from Washington, D.C. That model of decision-making fails the adaptive, participative, dynamic, longterm view. The point is, our models - the paradigm[s] - must change. All of them." (*High Country News*, Nov. 15, '93, pg. 15) Utah Governor Mike Leavitt (R) has opined, "If we are to reverse this trend of rampant centralization of authority at the national level, it will have to be governors and [state] legislators who do it. Congress won't return decisionmaking to states. The president won't. The courts won't." (*Capitol Connections*, Dec. '93, p.2)

## **WATER RIGHTS/WATER RESOURCES**

### **Water Transfers/Arizona**

The Arizona Department of Water Resources (ADWR) has objected to the proposed imposition by the Bureau of Reclamation of a fee that must be paid into an environmental trust fund by the Town of Payson to obtain federal approval to transfer its Central Arizona Project (CAP) subcontract water. ADWR believes the Bureau's actions establish far-reaching policy without public input, and objects to the use of the trust fund at the Secretary of Interior's sole discretion. DWR officials have also opined that "the Bureau's actions are a precursor to what we are going to see in all federal water and power transactions."

The situation arose when Payson chose to market its right to receive CAP water to a developer in

Scottsdale, who transferred the right to the City of Scottsdale. The developer's action was in lieu of paying a water resource development fee, and Scottsdale agreed to accept the transferred right instead of cash. The ADWR, which is authorized to advise and consult with the Interior Secretary on matters related to use of Arizona's CAP water, had initial concerns. But, following full public involvement, ADWR formulated policy guidelines which approve of the marketing of CAP water in situations similar to the Payson/Scottsdale transfers.

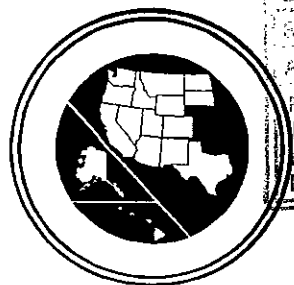
After approval by the Central Arizona Water Conservation District, the prime contractor for CAP repayment and operation, the Payson/Scottsdale transfer was sent to federal officials for approval. The task was delegated to Bureau of Reclamation Commissioner Dan Beard because of past involvement with the issue by Interior Secretary Babbitt and Assistant Secretary for Water and Science Rieke.

Commissioner Beard recently decided to approve of the transfer, but required that 7½% of the money paid from Payson to Scottsdale must be placed in an environmental trust fund. Use of the fund would be according to a priority system, first for environmental projects in the Payson area, and then for projects benefitting the State of Arizona. But, the Secretary would ultimately have broad authority to use the funds at his discretion for "other environmental projects."

In a letter dated Nov. 17 to Secretary Babbitt, ADWR Director Rita Pearson said, "I must express in the strongest possible terms my concerns about the manner in which this money was obtained...." She then outlined a number of problems, not necessarily with Interior's intentions, but rather with the process it used in this instance. The letter mentions lack of public involvement, lack of express legal authority to create the trust fund, and absence of specific guidance in the expenditure of funds, which "may be used for environmental purposes unrelated to the environmental goals of Arizona." She also noted, "I believe the Bureau's action renders the Department's participation in the reallocation process meaningless." She concluded, "I am hopeful that after you review the Bureau's...proposal, you will come to the conclusion that I have, that if 'reinventing government' means keeping the public out of the decisionmaking process and developing programs which spend public monies on ill-defined objectives, you cannot support it."

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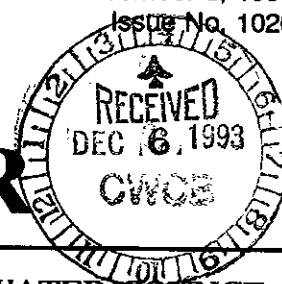
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**WE**

# WESTERN STATES WATER

December 3, 1993

Issue No. 1020



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

Creekview Plaza, Suite A-201 / 942 East 7145 So. / Midvale, Utah 84047 / (801) 561-5300 / FAX (801) 255-9642

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## WATER QUALITY

## Clean Water Act-Reauthorization

Thirteen organizations representing governors, state attorneys' general, state water managers, and the environmental community have written a letter to Sen. Max Baucus (D-MT), Chairman of the Senate Environment and Public Works Committee, expressing support for the clarifying language contained in Section 602 of S. 1114, which would amend Clean Water Act Section 401. Section 401 provides authority to states to issue or deny water quality certification for federal projects that discharge pollutants into state waters. Courts have defined its scope in different ways. S. 1114 Section 602 would clarify that any activity certified by states "will comply with water quality standards adopted under Section 303 and allow for the protection, attainment, and maintenance of designated uses included in the standards."

The Western Governors' Association, National Governors' Association, Council of Western Attorneys General, WSWC, Interstate Council on Water Policy, Natural Resources Defense Council, Trout Unlimited, National Wildlife Federation, and National Audubon Society were among the signatories to the letter. The letter notes, "If states are to continue to take innovative and successful steps toward improving the quality and overall health of their water resources, their ability to effectively utilize all available authorities must be assured. State water quality certification under Section 401 is critical to the successful achievement of comprehensive water management efforts and the ultimate success of the Clean Water Act. The clarification provided by Section 602 of S. 1114 provides the assurance that responsible state water management activities are not disrupted by an arbitrarily narrow interpretation of Section 401."

## WATER RESOURCES

## Animas La-Plata Project/Colorado

Reclamation Commissioner Dan Beard has reportedly suggested that the chances for construction of the Animas La-Plata project would improve if the dam were built by the Southern Ute and Ute Mountain Ute Indian tribes, with federal support, rather than by the federal government. Such construction might be carried out under the Indian Self-Determination and Education Assistance Act. The dam must be completed by the year 2000, according to a negotiated settlement of the tribe's water right claims reached in 1988 (WSW #742, #750). If not, the Ute tribes have five years to negotiate compromise water rights from the Animas and La-Plata rivers, or initiate legal proceedings to quantify their rights. The Bureau is working on a new environmental impact statement for Animas La-Plata mandated by the legal actions of environmental groups.

### Buffalo Bill Dam/Wyoming

Governor Sullivan and Wyoming's Congressional delegation joined with the Bureau of Reclamation on Sept. 25 for the dedication of an expanded Buffalo Bill Dam on the Shoshone River near Cody, Wyoming. The dam, built in 1910, provides agricultural water to the Cody-Powell area. It was raised 25 feet, adding 260,000 acre-feet (af) of storage capacity and bringing the total capacity to 644,000 af. Also, four generators were installed in a new powerplant. The project began 8 years ago. New recreation facilities for Buffalo Bill State Park, and a new visitors center, are being built as part of the expansion.

The total cost of the modifications was \$132M. Wyoming's "up-front" contribution was \$52M. The

state will have the right to 74,000 af of water for future municipal and industrial use, and will receive part of the power generation revenue. The power receipts will begin now, but the state has agreed to delay marketing its share of the storage for 10 years. Payment of its share of operation and maintenance costs will also not begin for 10 years. Power revenues will be used to offset future operation costs, and the state's original investment.

### Bureau of Reclamation

Not everyone in the Bureau of Reclamation is happy with the Administration's *Blueprint for Change* (WSW #1016). Our article on the subject prompted two lengthy, written responses from Bureau employees. One said, in part, "I can assure you that the plan described in the press releases and the destructive realities of what is actually occurring [are]...totally different.... In the last two weeks, Reclamation employees all over the West have written hundreds of letters to Congress trying to let our representatives know what Babbitt is really doing to Reclamation as part of his big plan to control water in the West, not to mention mining, cattle and other resources.... Most of us support needed reforms and...all the other necessary changes to reduce the bureaucracy...but [not] destroying the scientific and engineering arm of reclamation...instead of cleaning up the real problems.... [The] national performance review is being used...as a clever disguise to totally gut Reclamation...."

Another Bureau employee wrote, "A concerted effort is being made to destroy the technical viability and dilute what remains of the organization by massive layoffs and dispersing organizational elements to 'area' offices...directly controlled by political appointees...who would do their best to phase out existing irrigation and power projects." The letter continues, "[Officials] are using a glittering generality about making the Bureau 'the premier water management agency in the world....' People are being misled by this misinformation. In reality, [Interior leaders] are riding roughshod over hundreds of dedicated...employees and inferring that they are guilty of some sin for building water projects. [They] are extremely clever in carrying out a takeover. They have requested input...on ways to improve the organization and then ignored what doesn't fit their agenda.... If we want western water and power policy to remain in our

control and not controlled by eastern environmentalists, they must be stopped soon."

### WESTERN STATES WATER COUNCIL

#### **Montana - Associate Membership**

Governor Marc Racicot has responded positively to the option offered by the Council at its last meeting for Montana to assume associate membership status for 1994. In a recent letter to WSWC Executive Director, Craig Bell he wrote: "It is unfortunate that our budget problems have mandated that we restrict our membership in [WSWC]. The option of maintaining a presence with the Council as an associate member is attractive. Consequently, the Department of Natural Resources and Conservation is committed to paying the reduced dues as an associate member for fiscal year 1994." The Governor went on to designate Gary Fritz, Administrator, Water Resources Division, and Steve Pilcher, Administrator, Environmental Sciences Division, as Montana's official observers to the Council. Alternates will be Don MacIntyre, Chief Legal Counsel for the Department of Natural Resources and Conservation and Harley Harris of the Attorney General's Office. The Governor concluded by saying, "I look forward to a continuing relationship with the Council." At its last meeting in October, the Council's Executive Committee unanimously suspended the bylaws in order to offer Montana associate membership for fiscal years '94 and '95, hoping that the economic situation will improve in Montana so that it may once again become a full Council member.

#### MEETINGS

The American Bar Association's Section on Natural Resources, Energy, and Environmental Law, WSWC, and the Conference of Western Attorneys General will hold their 12th Annual **Water Law Conference** on February 10-11, 1994, in San Diego. Agenda topics will focus on the Endangered Species Act, management of the Colorado River, Clean Water Act Section 401, wetlands, and the new role of the Bureau of Reclamation, among others. Speakers will include Assistant Interior Secretary Betsy Rieke, Bureau of Reclamation Commissioner Dan Beard, Interior Solicitor John Leshy, Law Professor Dave Getches, and WSWC member Mike Brophy. Please mark your calendars for this event. More information will be provided in a future issue of *Western States Water*.

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# WESTERN STATES WATER



December 10, 1993  
Issue No. 1021

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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## LITIGATION/ENVIRONMENT

### **Idaho/Endangered Species Act**

The Idaho Department of Fish and Game has filed a complaint in the U.S. District Court in Boise seeking a court order to change management of federal dams on the Columbia River to encourage protection of endangered salmon. The state disagrees with a National Marine Fisheries Service opinion released earlier this year that the dams pose "no jeopardy" to salmon migration. The suit, which is against a number of federal agencies, seeks development of a long-range plan under the Endangered Species Act to recover salmon runs by drawing down reservoirs in the spring to increase the velocity of flows to assist out-migrating smolts. Commenting on the suit, Idaho Governor Cecil Andrus said, "The interests that control the dams...have shown...no compassion...or willingness to move in an expedited fashion to save these...stocks."

## WATER RESOURCES

### **Water Supply Outlook**

The Bureau of Reclamation has released a report entitled, *1993 Water Supply Conditions for the Western States and Outlook for 1994*. It presents and evaluates information on soil moisture, streamflows, snowpack, and reservoir inflow and storage. The report notes that the Palmer Drought Index is a tool for evaluating prolonged and abnormal soil moisture conditions based on weekly precipitation, temperatures, evapotranspiration rates and previous index values. It is an important climatological tool for evaluating the scope, severity and frequency of weather events. Recent Palmer drought index values show mostly adequate to excellent soil moisture conditions, which

have a direct influence on water demands and water supplies. However, the index does not consider snowmelt runoff, reservoir storage, and the availability of ground water.

As of the end of the water year, carryover reservoir storage in Reclamation projects is good to excellent in most areas. Storage as a percent of average for selected river basins range from 20% in the Yakima to 345% in the Solomon. Others are: Columbia 125%; Yakima 93%; Boise 116%; Upper Snake 125%; Malheur 174%; Umatilla 194%; Dechutes 92%; Rogue 97%; Klamath 90%; Sacramento 141%; San Joaquin 109%; Stanislaus 68%; Truckee 134%; Carson 146%; Humboldt 42%; Lower Colorado 82%; Upper Colorado 77%; San Juan 96%; Gunnison 87%; Upper Green 93%; Missouri 105%; Bighorn 114%; Cheyenne 130%; North Platte 86%; South Platte 113%; Arkansas 102%; and Rio Grande 86%. Reclamation's five regions report water deliveries are expected to be adequate next year. However, no single parameter can reflect the water supply picture, and winter precipitation and snowpack remain unknown variables.

For the Pacific Northwest region, above average carryover reservoir storage promises good irrigation water supplies next year across Oregon and Idaho. However, poor carryover storage in the Yakima River basin means above average winter and spring precipitation is needed to ensure a good water supply. At present, most projects are storing inflows, while passing minimum instream flows. However, next spring, flood control releases may be necessary in several basins to accommodate spring runoff.

In the Mid-Pacific region carryover storage for the Central Valley Project (CVP) at the end of the water year was about 6.9M acre-feet (Maf), well over last year's 3.1Maf. Reservoir storage in other areas is

good to excellent, except in the Humboldt river basin. Most areas anticipate normal 1994 water deliveries, given average reservoir inflows.

In the Lower Colorado region Lake Mead holds 21.4Maf, with a 1994 water use forecast of the usual 7.5Maf. In the Upper Colorado Region, overall reservoir storage is about 3.5Maf over last year and 1994 water supplies should be adequate given average snowfall and spring runoff. Along the Wasatch Front of the Great Basin, average precipitation and runoff are expected. However, due to the past drought, ground water levels are low and will take several years to recover. Rio Grande water supplies should be good, with average runoff. Elephant Butte Reservoir holds some 1.8Maf of water. Storage in the Pecos River Basin is also above average.

The Great Plains region is Reclamation's largest, stretching from Montana to Texas. Carryover storage in many reservoirs is the highest in several years and soil moisture conditions have improved dramatically. Adequate 1994 water supplies are projected for all but the North Platte River system. While better than last year, storage in Pathfinder and Seminole Reservoirs is only 30% and 60% of capacity respectively. Water supply problems in the North Platte and Kendrick Projects will likely continue through 1994. Several reservoirs have reached all time highs, and flood control releases will continue well into the winter as long as weather permits, in order to draw down reservoir levels in anticipation of spring runoff.

## WATER RIGHTS

### **Arizona/Idaho/Indian Water Rights**

Arizona Superior Court Judge Stanley Z. Goodfarb approved the Fort McDowell Indian Community water rights settlement on Nov. 5, 1993. Special Master John Thorson heard objections to the settlement and submitted a report to the judge recommending its approval. Approval by the state adjudication court was one of several requirements imposed by Congress for federal consent to the settlement.

The Fort McDowell Indian Community will receive a total entitlement of 36,350 acre-feet per year under the terms of the settlement. The water entitlement will come from a variety of sources, including Central

Arizona Project water. This is the second successful incorporation of an Indian water right settlement into Arizona's ongoing general stream adjudication. For more information, call John Thorson at (602) 542-9600. In a related matter, just before the holiday recess, the Senate Indian Affairs Committee approved S. 1146, which would enact a settlement of the water rights claims of the Yavapai-Prescott Indian Tribe of Arizona, and S. 1654, to make "technical" corrections to several Indian land and water rights settlements.

In Idaho, the Shoshone-Paiute Indian Tribe of the Duck Valley Reservation has submitted to the State Water Resource Board a proposal to settle its water rights claims. The proposal includes water supplies from both Idaho and Nevada, and has been submitted to Nevada officials as well. In addition to the Shoshone-Paiute Tribe, Idaho has been contacted by officials from the Nez Perce Tribe, asking for an initial meeting to begin the process of negotiating the settlement of the tribe's water rights. Like Arizona, Idaho seeks to negotiate the water right claims of tribes located in the state as part of its general water rights adjudication.

## MEETINGS

The WSWC's 113th Quarterly Meetings will be held at the Royal Lahaina Resort ((808) 661-3611) in Maui, Hawaii on Jan. 12-14, 1993. Interior Solicitor John Leshy will participate in the meetings. **Please note that the cut-off date for room reservations is Dec. 17.**

### **Schedule of Meetings**

#### Wednesday, January 12

Field Trip	7:30 a.m.- 5:30 p.m.
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# WESTERN STATES WATER



THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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## LITIGATION/ENERGY/WATER QUALITY

### ***Washington v. Public Utility Dist. No. 1.../Federal Power Act/Clean Water Act***

Over 40 states joined in an amicus brief filed December 14 supporting the State of Washington in a case before the U.S. Supreme Court. Further, the U.S. Justice Department has reportedly filed a brief supporting Washington's position. Environmental groups, led by American Rivers, also filed a supporting brief. The case is an appeal of a Washington Supreme Court decision holding that the Federal Power Act (FPA) does not preempt the Washington Department of Ecology from including minimum streamflow conditions in a Clean Water Act (CWA) Section 401 certificate issued by the state in conjunction with a hydropower project licensed by the Federal Energy Regulatory Commission (*State of Washington v. Public Utility Dist. No. 1...*, WSW #987). The Court's decision is expected to help define the scope of state authority under CWA Section 401, and the relationship between CWA and FPA requirements with respect to hydroproject licensing.

## WATER QUALITY

### **Clean Water Act-Reauthorization**

Two key House Committee Chairmen introduced H.R. 3465, a compromise wetlands bill, on November 8. Gerry Studds (D-MA), Merchant Marine and Fisheries Committee Chair, and Kika de la Garza (D-TX), Agriculture Committee Chair, cosponsored the measure. It incorporates some provisions of S. 1304 (the Senate Environment Committee's wetlands bill) and the Clinton Administration's wetlands proposal. The compromise is important because Studds is known for his environmental leanings, while de la Garza is a longtime ally of agriculture. The bill's significance is increased because many observers

believe that resolving contentious wetlands issues must precede a CWA reauthorization consensus.

H.R. 3465 would recognize the 1987 Corps of Engineers Wetlands Delineation Manual as definitive and limit revisions to it. The Soil Conservation Service would be given jurisdiction over "agricultural" wetlands, defined as "cropland, pastureland, haylands, rangelands, orchards, vineyards, production nurseries, and any other land that is intensively used or managed for agricultural purposes...." The bill authorizes the EPA Administrator to make grants to states to assist with state wetlands conservation plans, based on listed criteria. It directs the Secretary to "ensure, to the maximum extent practicable, that there is no net loss of the acreage, functions, and values of wetlands" in issuing Section 404 permits. Five-year general permits would be allowed for a defined category of activities and a defined category of waters. Wetland mitigation banks would be established, based on criteria contained in the bill. Such banks would be defined as "restoration or enhancement projects undertaken by one or more parties...expressly for the purpose of providing advance mitigation to fully offset reasonably foreseeable wetlands losses...where adverse impacts to wetlands cannot be avoided...and compensatory mitigation at the project site is not practicable...."

Reaction to the bill has been mixed. Some environmentalists believe it goes too far with its agricultural lands definition. Others have complained that including "categories of waters" as a basis for general permits may unnecessarily expand the reach of general permit programs. On the other hand, supporters view the compromise as a vehicle for agreement on Section 404 amendments, particularly in light of the support in the House for H.R. 1330, a wetlands bill touted by industry and landowner interests.



## WATER RESOURCES

### **California**

The California State Water Project has announced initial approval of 1994 water deliveries to customers of 1.6Maf, or about 50% of projected demand. One year ago, the initial 1993 approval, after six drought years, was for only 10% of requests, or 385,000af. Because of subsequent wet weather, 1993 deliveries ultimately totaled 2Maf, or 60% of demand. Two years ago, the initial projection was for 20%, or 720,000af, and ultimately deliveries were about 45%.

## WATER RIGHTS/LITIGATION

### **Colorado/General Adjudication Fees**

U.S. Justice Department attorneys have recently informed the judge in Colorado's Water District No. 4 of their intention to discontinue the payment of filing fees to the Colorado water court system. The U.S. has traditionally paid the fees, albeit under protest. The judge has asked the Colorado Attorney General's Office to prepare a response. In May, the U.S. Supreme Court reversed an Idaho Supreme Court decision and held that the McCarran Amendment's waiver of sovereign immunity is not sufficient to subject the United States to the payment of the filing fees envisioned under the Idaho general stream adjudication statute (*United States v. Idaho*, WSW #990). The Supreme Court's opinion concluded that the "McCarran Amendment submits the United States generally to state adjective [procedural] law, as well as to state substantive law of water rights, but we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact...." The United States had argued at length that it should not be subject to Idaho procedural law. The relatively narrow holding, which applied to "the sort of fees that Idaho sought," is the basis for the United States' actions in Colorado.

## ORGANIZATIONS

The Colorado River Water Users Association held its annual meeting December 8-10 at the Mirage Hotel in Las Vegas. Speakers from various state and federal agencies dealt with a number of topics, including endangered species protection, water transfers, use of tribal water rights, and other related issues. Utah Governor Mike Leavitt gave the keynote address. He stressed the critical need for states to cooperate to

resolve the challenges related to management of the Colorado River. If not, he asserted, the federal government will step in and attempt to mandate solutions which will be less palatable to the states.

The Four States Irrigation Council and Upper Missouri Water Users Association held a joint annual meeting December 7-10 in Rapid City, South Dakota based on the theme: "Building on our Strengths: Seven States United." WSWC Executive Director Craig Bell presented an address entitled, "Western Water Management in an Era of Change." Tom Donnelly, National Water Resources Association Executive Vice-President, then provided an "Overview of Water Issues Affecting the West." Presentations on the Endangered Species Act and environmental issues/federal legislation followed.

Bureau of Reclamation Commissioner Dan Beard was the luncheon speaker. He described the Bureau's response to the Administration's National Performance Review, and the Bureau's new mission. His remarks were similar to those given previously during a series of press conferences (WSW #1017). Referring to the Bureau's emphasis on water conservation, he asked, "Will prices for water from Bureau projects go up?" "Probably," he responded. "Will prices go up to the extent that farmers are forced out of business?...No," he said emphatically. In conclusion, he asked the group to judge the Bureau not by rhetoric, but by results. In January, the Bureau is expected to issue a document, among other things, to guide the development of water conservation plans by each of the 800 water user organizations receiving Reclamation water, and to guide Reclamation personnel on water contract and repayment policies. These measures are part of the Bureau's mission to "seek out cost effective ways to make the most efficient use of our available water supplies...."

## PEOPLE

Robert Roberts, WSWC Executive Committee member and South Dakota Department of Energy and Natural Resources Secretary, is on leave without pay to serve as campaign manager for Governor Walter Dale Miller. Miller, who replaced George Mickelson after Mickelson's tragic death, will now run for election to the governor's office. Russell Stone will serve as acting department secretary in the interim. Roberts intends to return to his post after the election.

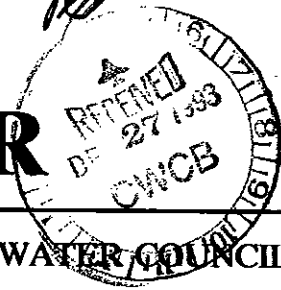
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HAPPY HOLIDAYS





# WESTERN STATES WATER



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## WATER QUALITY

### California's Bay Delta Estuary

On December 15, the Environmental Protection Agency published in the Federal Register a draft of proposed new water quality standards "necessary to help restore the health of the San Francisco Bay and Delta Estuary." After a 90-day comment period, EPA's new standards officially go into effect. The decision sets in motion a process that is likely to result in 500,000 acre-feet of water per year being restored to the natural water system flowing into San Francisco Bay. That figure would increase to 1.1 million acre-feet in extremely dry years. Simultaneously, the U.S. Fish and Wildlife Service (1) announced plans to allocate and manage the 800,000 acre-feet (af) of water reserved from the Central Valley Project to upgrade fish and wildlife in the Delta pursuant to the CVP title of the Omnibus Water Act signed into law in October of 1992, (2) issued a determination of critical habitat for the Delta smelt, which had earlier been listed as a threatened species, and (3) announced its plans to make the Sacramento splittail minnow a candidate for listing under ESA. In a concession to agriculture, the new administration plan stipulates that of the 500,000 acre-feet reserved for the Delta, 300,000 feet can come from the amount diverted from agriculture by the omnibus law enacted last year. Also, the National Marine Fisheries Service announced its intention to elevate the winter run chinook salmon in the Sacramento River from a threatened to an endangered species and released its draft recovery plan for the salmon, initially listed in 1992. Thus, the amount of water reserved for the Delta could significantly increase when taking into account these additional actions.

These three federal agencies, in addition to the

Bureau of Reclamation that controls most of the water deliveries in the Central Valley Project, have attempted to coordinate their activities on matters relating to the estuary, pursuant to a coordination agreement signed by them on September 10, pledging to work cooperatively and also with other federal and state agencies on matters of mutual interest on matters regarding the estuary.

California Governor Pete Wilson has responded that the proposed standards are too strict. He accused Washington of imposing a "rigid regulatory approach ...that will thoughtlessly cost California jobs and fail to balance the competing needs of urban, industrial, and agricultural water uses." Sen. Dianne Feinstein is also concerned about the impacts of the proposed standards on existing water right holders. Approximately 7Maf of water is now delivered from the Delta annually to CVP and the State Water Project. "I believe," she states, "that acquiring all water needs to satisfy the Clean Water Act and the ESA from these two projects could have a devastating impact on their customers." Senator Feinstein wants the state to allocate the water involved in the December 15th federal announcement. Indeed, many agree that while EPA has authority to set the standards, it does not have authority to implement them. The state had developed proposed new water quality standards for the Bay Delta estuary in 1991, but EPA found them inadequate and was subsequently led to issue its own water quality standards.

The Association of California Water Agencies (ACWA), a state water organization whose members are responsible for about 90% of the water delivered in California, took exception to the proposed standards. The Association's Executive Director, Stephen Hall, stated that the standards failed to provide certainty to water users, since they apparently

do not take into account the simultaneous listings and other actions under the Endangered Species Act. While the Association had several other concerns, they applauded the announcement's emphasis on the desire of the federal agencies to give the state flexibility in implementing the standards.

## WATER RIGHTS/ENVIRONMENT

### **Reserved Rights/Wilderness**

Attorney General, Janet Reno, Department of Interior Solicitor, John Leshy, and Agriculture General Counsel, James Gilliland, have announced their intention to "reexamin[e]...the position of the Reagan and Bush Administrations not to file claims for water rights in certain congressionally designated wilderness areas." The legal issue presented, according to Leshy and Gilliland, is "primarily the interpretation to be given certain provisions of the Wilderness Act and related federal legislation."

During the Carter Administration, when Leshy worked in the Solicitor's office, Solicitor Leo Krulitz issued an expansive opinion recognizing not only reserved water rights for wilderness areas but also so-called "non-reserved" federal water rights that could be claimed by the United States for congressionally authorized programs by applying water to beneficial uses. A subsequent opinion by Solicitor William Coldiron rescinded the portion of the Krulitz opinion recognizing "non-reserved" water rights. Later, an opinion by Solicitor Ralph Tarr determined that reserved rights did not exist for wilderness areas.

Pending the current reevaluation of the assertion of reserved rights for wilderness areas, the Tarr Opinion (#N-36914 (Supp.III) July 26, 1988), overruling a portion of Krulitz' opinion (#N-36914, 86 I.D. 553 (June 25, 1979)) has been formally suspended, as has the concurrence of the Attorney General in the Tarr opinion.

Solicitor Leshy is seeking comments on the suspension of the Tarr opinion, not only on legal issues, but also on any practical issues relating to administration of water rights for wilderness areas. Comments, which are due by April 1, should be submitted to John D. Leshy, Solicitor, Department of the Interior, M.S. 6352, 1849 C Street, N.W., Washington, D.C. 20240. For information contact Mr. Leshy at (202) 208-4423.

In a letter to some western state officials announcing their action, and requesting comment on it, Gilliland and Leshy noted: "Pending completion of this reevaluation, pertinent federal agencies will, in order not to forfeit claims of water rights that might be made as a result of this reevaluation, file claims for water rights and pertinent designated wilderness areas when required to file water rights claims by Court deadlines in pending adjudications."

Leshy's announcement does not affect the Coldiron Opinion, which overturned the Krulitz opinion's assertion of the existence of so-called "non-reserved" federal water rights.

## PEOPLE

WSWC member **Richard Simms** of new Mexico has resigned as a Special Master for the Snake River Basin general adjudication proceeding. He has rejoined his former law firm, Simms & Stein, which has opened an office in Sun Valley, Idaho, limited to the practice of water law.

## MEETINGS

The WSWC's 113th Quarterly Meetings will be held at the Royal Lahaina Resort ((808) 661-3611) in Maui, Hawaii on Jan. 12-14, 1994. Interior Solicitor, John Leshy, will participate in the meetings.

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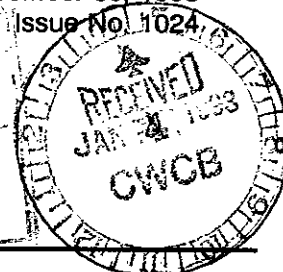
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# WESTERN STATES WATER

December 30, 1993

Issue No. 1024



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## LITIGATION/ENVIRONMENT

### Idaho Farm Bureau Federation v. Babbitt/Endangered Species Act

In an unusual ruling handed down December 14, a senior United States District Judge set aside the listing of the Bruneau Hot Springs Snail as an endangered species, Idaho Farm Bureau Federation v. Babbitt, Civ. No. 93-0168-E-HLR (Dec. 14, 1993). The judge cited "serious" due process violations in the listing process, and held that the actions of the Fish and Wildlife Service (FWS) were "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with [federal] law." It is, apparently, the first time that a federal court has overturned an Endangered Species Act (ESA) listing.

The lawsuit was filed in May on behalf of 60 Owyhee County farmers and ranchers affected by the FWS decision to list the snail. In its notice of proposed listing, FWS identified the adverse effect on habitat of "reduced spring flows caused by drawdown of the water table by ground water pumping for agricultural and other uses" as the primary threat to the snail's existence. The FWS initially published the proposal to list the snail in August, 1985. The listing process took over seven years. ESA provisions require the process to take a maximum of eighteen months.

The judge rejected challenges to the scientific basis of the agency's findings, noting there was a rational connection between factors identified by FWS and the listing of the snail. However, he found numerous procedural and due process violations related to the listing, owing to the length of time the process took and other factors. Among the problems were: (1) the delay in issuing the final rule; (2) failure to provide actual notice to the Owyhee County Commission of

the intention to list the snail; (3) failure to allow public review of critical data; and (4) failure to respond to and consider certain public comments, especially the views of a noted scientific expert with expertise particularly relevant to the snail and its habitat.

Idaho Farm Bureau spokesman Jim Yost called the decision "a tremendous victory for farmers and ranchers." "Things can now go back to normal in that area," he said. However, Idaho Conservation League (ICL) representative, Karl Brooks, noted that ICL will consider pushing a new attempt to list the snail.

No decision has been made concerning an appeal of the district court ruling. Many existing ESA listings have taken longer than eighteen months to complete.

## WATER QUALITY

### Clean Water Act/Section 518

On December 22, EPA published a final rule establishing requirements for determining eligibility of Indian tribes to be treated in the same manner as states under several sections of the Clean Water Act. The rule addresses requirements for monitoring, inspections and entry under Section 308 (in part), as well as federal enforcement under Section 309 (in part). The rule also sets requirements for certification of water quality standards for some types of permits under the National Pollutant Discharge Elimination System (NPDES) under Section 402, and under Section 401 (in part). The rule also establishes eligibility requirements for the pre-treatment program under Section 402 and the sewage sludge management program under Section 405.

If an Indian tribe is found eligible, it may apply to EPA to assume the NPDES permit program (including pre-treatment) and the state sludge management

program. The regulation satisfies a statutory provision in Section 518 of the Clean Water Act with respect to the 402 program and is consistent with previous EPA rulemaking addressing the eligibility of Indian tribes to assume Section 405 state sludge management programs. The final rule will take effect on January 21, 1994 (58 FR 67966). For more information contact Laura Phillips, OWEC Permits Division (4203), EPA, 401 M Street, S.W., Washington, D.C. 20460; (202) 260-9522.

Section 518 has proven to be controversial, which could prompt Congress to push for a legislative solution to conflicts over interpretation of its provisions in the context of reauthorization of the Clean Water Act. One example of such a conflict was prompted by an application by the Confederated Salish and Kootenai Tribes in Montana. In a letter endorsed by Governor Marc Racicot, Robert Robinson, Director of the Montana Department of Health and Environmental Sciences, took exception to the application on a number of grounds.

His letter to EPA Region VIII points out that: "While the Tribes have demonstrated sufficient basis for a narrowly-based finding of jurisdiction over tribal lands and members, they have not demonstrated that, as a matter of fact or of law, such authority extends to non-member activity on fee lands. Furthermore, the state retains significant regulatory interest on the Reservation and the power to enforce state law when and where appropriate. The state is disappointed that EPA policy, coupled with the Tribes' broad assertions, leave it no choice but to oppose the Tribes' application. Issues involving water quality on the Reservation and within the Flathead Basin are best addressed in a spirit of intergovernmental cooperation and respect. The state remains ready to discuss with the Tribes and the EPA the implementation of a Reservation water quality program that is, first and foremost, protective of the environment; but which also addresses the legitimate interests of the regulated public and the responsibilities of the involved governments."

EPA sources say that the response to this application is indicative of potential reactions to a dozen pending or approved tribal proposals to set Clean Water Act standards, adding that the agency expects to face legal challenges in virtually every case. Sources in EPA's Region VIII office expect the agency

to approve the Montana Tribe's request within the next few weeks.

## **WATER RESOURCES/ORGANIZATIONS**

### **Water Conservation/American Water Works Association**

Some 1100 people from across the West attended "Conserve 93: The New Water Agenda," a conference cosponsored by the American Water Works Association (AWWA), the American Water Resources Association, and the American Society of Civil Engineers in Las Vegas, Nevada, on December 12-16. The meeting, which is the second in a series, brought together a wide range of interests and experts from federal, state, and local government agencies, public and private utilities, consulting and engineering firms, academia and non-profit organizations. Scores of papers were presented, along with panel discussions and workshops on every aspect of water conservation.

Some of the topics discussed at "Conserve 93" were integrated resources planning, public involvement, program financing, wastewater reuse and reclamation, water resources planning, water marketing and transfers, policy development, cooperative partnerships, non-traditional uses, water rights, the Clean Water Act and water efficiency, drought, river basin and watershed management, long range planning, computer software, irrigation and agriculture, education, and plumbing codes. Also, numerous case studies covering agricultural, industrial, commercial, residential and landscape water conservation activities were explored. For more information, contact AWWA at 6666 West Quincy Avenue, Denver, CO 80234; (303) 794-7711, fax (303) 794-7310.

## **MEETINGS**

An outstanding program has been planned for the **Twelfth Annual Water Law Conference** sponsored by the Water Law Committee of the American Bar Association's Section of Natural Resources, Energy and Environmental Law in cooperation with the Western States Water Council and the Western Attorneys General. Attendance at the last few meetings has averaged over 200, with exceptional feedback on program content. A number of noted western water law experts will speak at this year's conference. Please see the enclosed brochure for details.

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