

2004

ANNUAL REPORT

of the

WESTERN STATES WATER COUNCIL

Thirty-Ninth Annual Report

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# 2004 ANNUAL REPORT

## OF THE

### WESTERN STATES WATER COUNCIL

#### INTRODUCTION

The first official meeting of the Western States Water Council was held on the south shore of Lake Tahoe, at Stateline, Nevada on August 3, 1965. The Western Governors' Conference approved the creation of the Western States Water Council during meetings in Portland, Oregon on June 10-13, 1965. The Governors' resolution explicitly stated: "The future growth and prosperity of the western states depend upon the availability of adequate quantities of water of suitable quality." Further, the governors felt that a fair appraisal of future water needs, and the most equitable means of meeting such needs, demanded a regional effort. Water availability and interbasin transfers of water were important issues. Western states found themselves in an era of rapid federal water resources development, and regional or basinwide planning, without a sufficient voice in the use of their water resources. The Western States Water Council has since provided a unified voice on behalf of western governors on water policy issues.

The emphasis and focus of the Western States Water Council has changed over the years as different water policy problems have evolved. However, the commitment towards reaching a regional consensus on issues of mutual concern has continued. The Council has proven to be a dynamic, flexible institution providing a forum for the free discussion and consideration of many water policies that are vital to the future welfare of the West. As envisioned by the Western Governors' Conference, it has succeeded as a continuing body, serving the governors in an expert advisory capacity. Over the years, the Western States Water Council has sought to develop a regional consensus on westwide water policy and planning issues, particularly federal initiatives. The Council strives to protect western states' interests in water, while at the same time serving to coordinate and facilitate efforts to improve western water management.

Council membership and associate membership status is determined based on a request from the governor. Originally, Council membership consisted of eleven western states: **ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON and WYOMING**. In 1978, **TEXAS** was admitted to membership, after many years of participation in Council activities in an "observer" status. **ALASKA** requested and received membership in 1984. **NORTH DAKOTA** and **SOUTH DAKOTA** both received membership in 1988 after a long association with the Council. **HAWAII** was a member from 1991-1999. In 1999, **OKLAHOMA** requested and received membership. In 2000, both **KANSAS** and **NEBRASKA** joined the Council at the request of their respective governors. Council membership is automatically open to all member states of the Western Governors' Association. Other states may be admitted by a unanimous vote of the member states.

Associate membership has also been granted states exploring the benefits of membership, experiencing financial hardship, or otherwise temporarily unable to maintain full membership.

Each member state's governor is an ex-officio Western States Water Council member. The governor may appoint up to three Council members or representatives, and as many alternate members as deemed necessary. They serve at the governor's pleasure. (Associate member states are limited to two representatives and two alternates.)

Council officers, including the Chair, Vice-Chair, and Secretary-Treasurer, are elected annually from the membership. State representatives are appointed to working committees, with one representative per state also appointed to an Executive Committee. The Executive Committee attends to internal Council matters with the assistance of a Management Subcommittee, which includes the Council officers, immediate past Chair, and Executive Director. The Council's working committees are the Legal Committee, the Water Quality Committee, and the Water Resources Committee. Each working committee is directed by a committee chair and vice-chair. Committee chairs, in turn, name special subcommittees and designate subcommittee chairs to study issues of particular concern.

Meetings of the Council are held on a regular basis, rotating among the member states, with state representatives hosting Council members and guests. In 2004, meetings were held in: Las Vegas, Nevada on March 31-April 2nd; Newport, Oregon on July 14-16th; and Santa Ana Pueblo, New Mexico on October 27-29th. Guest speakers are scheduled according to the relevant subjects to be considered at each meeting. The Council meetings are open to the public. Information regarding future meeting locations and agenda items can be obtained by contacting the Council's office. Included herein are reports on each of the Council meetings, positions and resolutions adopted by the Council, and a discussion of other important activities and events, related to western water resources. Other information about the Council and Council members is also included.

The Council relies almost exclusively on state dues for funding the organization. The dues for FY2004 (ending June 30, 2004) were set at \$25,000 per state. They have remained at this level for some years now. A copy of the audit performed for the fiscal year ending June 30, 2004 can be obtained from the Council office. The auditors noted "no matters involving the internal control over financial reporting and its operation that we consider to be a material witness," and "no instances of non-compliance that are required to be reported herein under *Government Auditing Standards*."

During 2004, the Council staff was comprised of: D. Craig Bell, Executive Director; Anthony G. (Tony) Willardson, Associate Director; Chad Shattuck, Legal Counsel; and a secretarial staff consisting of Cheryl Redding and Julie Groat.

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## COMMITTEE AND SUBCOMMITTEE MEMBERSHIP

### **EXECUTIVE COMMITTEE**

Bob Loeffler - Alaska  
Herb Guenther - Arizona  
Lester Snow - California  
Rod Kuharich - Colorado  
Hal Simpson - Colorado  
(Chair) (Alternate)\*  
Karl Dreher - Idaho  
David L. Pope - Kansas  
Jack Stults - Montana  
Roger K. Patterson - Nebraska  
Michael Linder - Nebraska  
(Alternate)\*  
Roland Westergard - Nevada  
Allen Biaggi - Nevada  
(Alternate)\*  
William Hume - New Mexico  
John D'Antonio - New Mexico  
(Alternate)\*  
Ron Curry - New Mexico  
(Alternate)\*  
Dale Frink - North Dakota  
Miles Tolbert - Oklahoma  
Duane A. Smith - Oklahoma  
(Vice-Chair) (Alternate)\*  
Phil Ward - Oregon  
Steve Pirner - South Dakota  
Thomas Weir Labatt - Texas  
D. Larry Anderson - Utah  
Linda Hoffman - Washington  
Patrick T. Tyrrell - Wyoming

\*For purposes of Committee rosters, the designation as "alternate" may not necessarily reflect the person's status regarding Council membership, but rather the person's function on the Committee.

### **Management Subcommittee**

Hal Simpson - Colorado  
(Chair)  
Duane Smith - Oklahoma  
(Vice-Chair)  
Roger Patterson - Nebraska  
(Secretary/Treasurer)  
Karl Dreher - Idaho  
(Past Chair)  
D. Craig Bell  
(Executive Director)

### **WSWC Water Policy Seminar Subcommittee**

David Pope - (Chair) - Kansas  
Roland Westergard - Nevada  
Dee C. Hansen - Utah

### **Endangered Species Act Subcommittee**

Dean Couch - (Chair) - Oklahoma  
Tom Maddock - California  
Karl Dreher - Idaho  
Roger Patterson - Nebraska  
James Davenport - Nevada  
Roland Westergard - Nevada  
Phil Ward - Oregon  
Weir Labatt - Texas  
Dee C. Hansen - Utah  
Joe Stohr - Washington  
Sue Lowry - Wyoming

### **Western Water Supply Challenges Subcommittee**

Sue Lowry - (Chair) - Wyoming  
Hal Simpson - Colorado  
Rod Kuharich - Colorado  
Karl Dreher - Idaho  
Norm Semanko - Idaho  
David Pope - Kansas  
Hugh Ricci - Nevada  
Jim Davenport - Nevada  
Eileen Grevey Hillson - New Mexico  
Duane Smith - Oklahoma  
Larry Anderson - Utah  
Pat Tyrrell - Wyoming

## **LEGAL COMMITTEE**

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William Staudenmaier - Arizona  
(Chair)  
Thomas Maddock - California  
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Karl Dreher - Idaho  
Candace West - Montana  
David A. Vogler - Nebraska  
Roland Westergard - Nevada  
Jim Davenport - Nevada  
(Alternate)\*  
Maria O'Brien - New Mexico  
(Vice-Chair)  
Chuck DuMars - New Mexico  
(Alternate)\*  
John Utton - New Mexico  
(Alternate)\*  
Julie Krenz - North Dakota  
Dean A. Couch - Oklahoma  
John Guhin - South Dakota  
J.E. (Buster) Brown - Texas  
Fred N. Pfeiffer - Texas  
(Alternate)\*  
Norman K. Johnson - Utah  
Barbara Markham - Washington  
Jennifer Golden - Wyoming

## **General Adjudication Fees Subcommittee**

Karl Dreher - (Chair) - Idaho  
Roland Westergard - Nevada  
Norman Johnson - Utah

## **Federal Reserved Water Rights Subcommittee**

Christopher Estes - Alaska  
Susan Cottingham - Montana  
Norman Johnson - Utah

## **Legal Education Subcommittee**

Norman Johnson - Utah

## **Amicus Brief Subcommittee**

Jim Davenport - Nevada  
John Guhin - South Dakota  
Norman Johnson - Utah



## **WATER RESOURCES COMMITTEE**

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Gary Prokosch - Alaska  
(Alternate)\*  
Herb Guenther - Arizona  
Tom Maddock - California  
Jeanine Jones - California  
(Alternate)\*  
Harold D. (Hal) Simpson - Colorado  
Norman Semanko - Idaho  
David L. Pope - Kansas  
(Chair)  
Jack Stults - Montana  
(Vice-Chair)  
Roger K. Patterson - Nebraska  
David A. Vogler - Nebraska  
(Alternate)\*  
Hugh Ricci - Nevada  
Eileen Grevey Hillson - New Mexico  
John D'Antonio - New Mexico  
(Alternate)\*  
Dale Frink - North Dakota  
Duane A. Smith - Oklahoma  
Phil Ward - Oregon  
Garland Erbele - South Dakota  
Thomas Weir Labatt - Texas  
David Montagne - Texas  
(Alternate)\*  
Dee C. Hansen - Utah  
D. Larry Anderson - Utah  
(Alternate)\*  
Joe Stohr - Washington  
Keith Phillips - Washington  
(Alternate)\*  
Stephen Bernath - Washington  
(Alternate)\*  
Patrick Tyrrell - Wyoming  
Sue Lowry - Wyoming  
(Alternate)\*

### **Border Water Issues Subcommittee**

Jeanine Jones - California  
Karl Dreher - Idaho  
Jack Stults - Montana  
Sherry Tippet - New Mexico  
Dale Frink - North Dakota  
Herman Settemeyer - Texas  
Keith Phillips - Washington

### **Drought/Flooding Issues Subcommittee**

Tom Carr - Arizona  
Jeanine Jones - California  
Jack Stults - Montana  
Roger Patterson - Nebraska  
John D'Antonio - New Mexico  
Sherry Tippet - New Mexico  
Duane Smith - Oklahoma  
D. Larry Anderson - Utah

## **USGS Streamgaging/NRCS Snow Survey Programs Subcommittee**

Hal Simpson - Colorado	Phil Ward - Oregon
Karl Dreher - Idaho	Barry Norris - Oregon
David Pope - Kansas	Barney Austin - Texas
Jack Stults - Montana	Larry Anderson - Utah
Estevan Lopez - New Mexico	Sue Lowry - Wyoming
Duane A. Smith - Oklahoma	

## **Water Use Efficiency/Conservation Subcommittee**

Sue Lowry - (Chair) - Wyoming	Roger Patterson - Nebraska
Herb Guenther - Arizona	Jim Davenport - Nevada
Jeanine Jones - California	Estevan Lopez - New Mexico
Lester Snow - California	Kevin Ward - Texas
Rod Kuharich - Colorado	Larry Anderson - Utah
Norm Semanko - Idaho	Stephen Bernath - Washington
Dave Pope - Kansas	

## **Water Information Management Systems Workshop**

Hal Simpson - Colorado	Duane Smith - Oklahoma
Hal Anderson - Idaho	Phil Ward - Oregon
Tracy Taylor - Nevada	Nancy McCann - Wyoming

## **Water Resources Program Funding Subcommittee**

Jeanine Jones - California	Eileen Grevey Hillson - New Mexico
Rod Kuharich - Colorado	John Utton - New Mexico
Hal Simpson - Colorado	Duane Smith - Oklahoma
Norm Semanko - Idaho	Kevin Ward - Texas
Roger Patterson - Nebraska	

## **Water Transfers and the Public Interest**

Jeanine Jones - California	Duane Smith - Oklahoma
Norman Semanko - Idaho	Phil Ward - Oregon
Tom Stiles - Kansas	Weir Labatt - Texas
Jim Davenport - Nevada	Pat Tyrrell - Wyoming

## **High Plains Work Group**

Hal Simpson - Colorado	Duane Smith - Oklahoma
Dave Pope - Kansas	Garland Erbele - South Dakota
Jack Stults - Montana	Weir Labatt - Texas
Roger Patterson - Nebraska	Sue Lowry - Wyoming
Dean Couch - Oklahoma	Pat Tyrrell - Wyoming

## **WATER QUALITY COMMITTEE**

Tom Chapple - Alaska  
Karen Smith - Arizona  
Paul Frohardt - Colorado  
(Chair)  
Mark Pifher - Colorado  
(Alternate)\*  
Toni Hardesty - Idaho  
Ron Hammerschmidt - Kansas  
Karl Mueldener - Kansas  
(Alternate)\*  
Tom Stiles - Kansas  
(Vice-Chair) (Alternate)\*  
Jan Sensibaugh - Montana  
Michael Linder - Nebraska  
Patrick Rice - Nebraska  
(Alternate)\*  
Allen Biaggi - Nevada  
Ron Curry - New Mexico  
Sherry J. Tippet - New Mexico  
(Alternate)\*  
Fred Lujan - New Mexico  
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David Glatt - North Dakota  
Miles Tolbert - Oklahoma  
Steve Thompson - Oklahoma  
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Holly Schroeder - Oregon  
Steve Pirner - South Dakota  
Kathleen Hartnett White - Texas  
David Montagne - Texas  
(Alternate)\*  
Walter Baker - Utah  
Dee Hansen - Utah  
(Alternate)\*  
Linda Hoffman - Washington  
Stephen Bernath - Washington  
(Alternate)\*  
John Corra - Wyoming  
John Wagner - Wyoming  
(Alternate)\*

### **Clean Water Act Subcommittee**

Mark Pifher - (Chair) - Colorado  
Paul Frohart - Colorado  
Tom Stiles - Kansas  
Walter Baker - Utah  
Stephen Bernath - Washington

## **Arid Waters Water Quality Policy & Positions**

Paul Frohardt - (Chair) - Colorado  
Steve Pawlowski - Arizona  
Mark Pifher - Colorado  
Susan Braley - Washington  
Bill DiRienzo - Wyoming

### **Western Water Quality Issues Subcommittee**

Karen Smith - Arizona  
Paul Frohardt - Colorado  
Dennis Fewless - North Dakota  
Steve Bernath - Washington  
John Wagner - Wyoming

### **Non-Point Source (NPS) Pollution Subcommittee**

Mark Charles - Arizona  
Don Shroyer - Arizona  
Greg Parsons - Colorado  
Jim Smitherman - Nevada  
Jack Barnett - Utah

### **Safe Drinking Water Act Subcommittee**

Steve Pirner - South Dakota

### **Total Maximum Daily Load (TMDL) Subcommittee**

Tom Stiles - (Chair) - Kansas  
Dennis Fewless - North Dakota  
Dick Pedersen - Oregon  
Stephen Bernath - Washington

# WESTERN STATES WATER COUNCIL Committee Assignments

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Rod Kuharich - Colorado  
Hal Simpson - Colorado  
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David L. Pope - Kansas  
Jack Stults - Montana  
Roger K. Patterson - Nebraska  
Michael Linder - Nebraska  
(Alternate)\*  
Roland Westergard - Nevada  
Allen Biaggi - Nevada  
(Alternate)\*  
William Hume - New Mexico  
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(Alternate)\*  
Ron Curry - New Mexico  
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Dale Frink - North Dakota  
Miles Tolbert - Oklahoma  
Duane A. Smith - Oklahoma  
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Steve Pirner - South Dakota  
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Jack Stults - Montana  
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Joe Stohr - Washington  
Keith Phillips - Washington  
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Sue Lowry - Wyoming  
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## Water Quality Committee

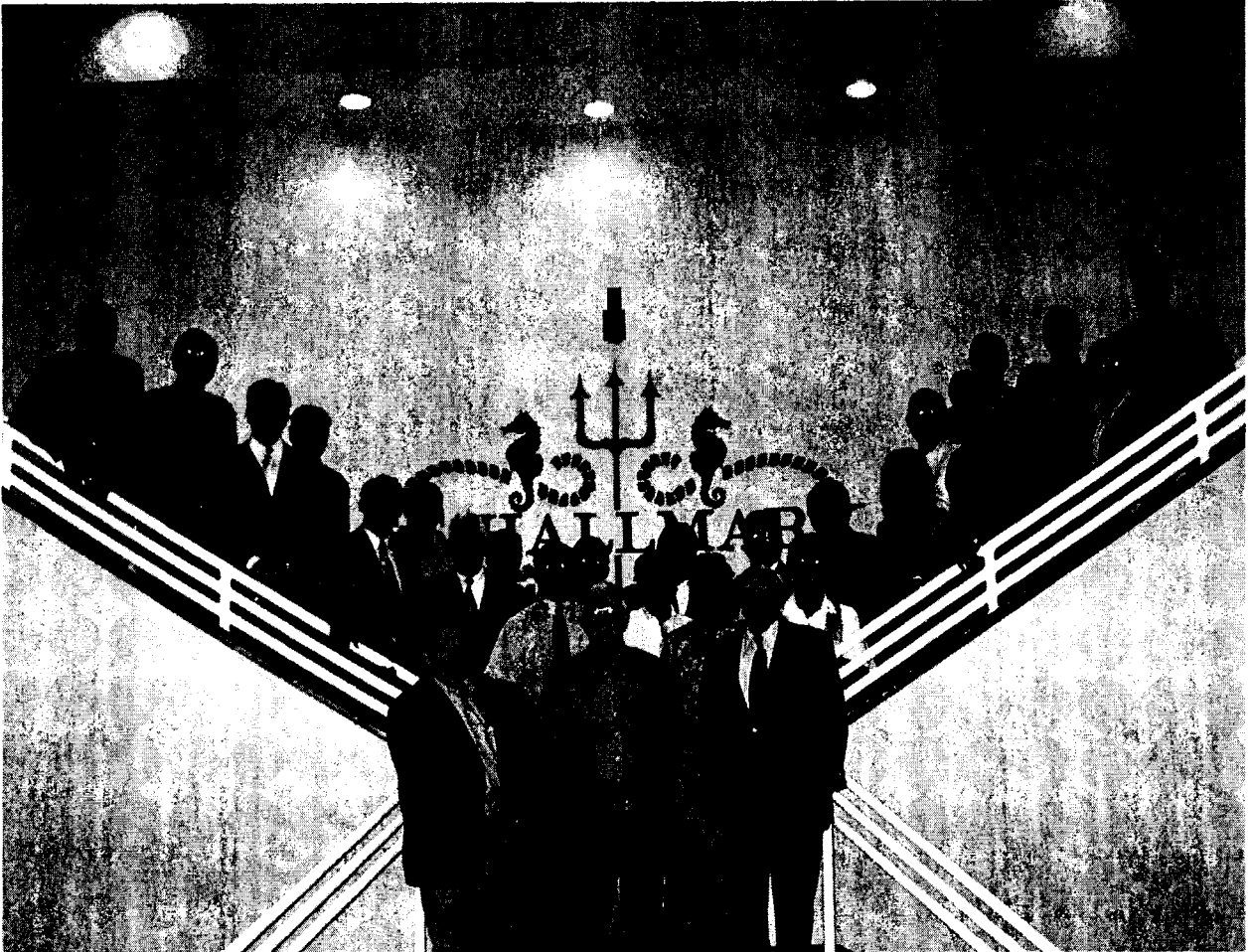
Tom Chapple - Alaska  
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Barbara Markham - Washington  
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## COUNCIL MEMBERS

at Newport, Oregon meeting on July 16, 2004



Bottom Center: Lester Snow, Roland Westergard, Tom Maddock

Left to Right: Weir Labatt, Larry Anderson, Norm Johnson, Hal Simpson, Walt Baker, Duane Smith, Dee Hansen, Phil Ward, Stephen Bernath, Adrian Polansky, Dave Pope, Karl Dreher, Sue Lowry, Pat Tyrrell, Barbara Markham, Jim Davenport, Eileen Grevey Hillson, Bill Hume, John D'Antonio, John Utton, Maria O'Brien, Bill Staudenmaier, Jeanine Jones, and Dave Glatt.

## STAFF



Back Row: Chad Shattuck, Craig Bell and Tony Willardson  
Front Row: Cheryl Redding and Julie Groat

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Anthony G. Willardson (Tony) .....	Associate Director
Chad Shattuck .....	Legal Counsel
Cheryl Redding .....	Office Manager
Julie Groat .....	Receptionist/Secretary

## **COUNCIL MEETINGS**

### **144th Council Meetings Las Vegas, Nevada March 31 - April 2, 2004**

The Western States Water Council's 144th meetings were held in Las Vegas, Nevada at the Golden Nugget Hotel on March 31-April 2. The State of Nevada and Southern Nevada Water Authority hosted a field trip that included wetlands restoration in the Las Vegas Wash, a summary of perchlorate problems in the Henderson area and a visit to the Alfred Merritt Smith water treatment facility on the shores of Lake Mead.

Concurrently, the Western Governors' Association (WGA) and Council co-hosted a workshop on Water Quality Standards for Effluent Dependent and Effluent Dominated Waters. State and federal officials discussed case studies in Arizona, Colorado, Washington and Wyoming, to identify lessons, guidelines, principles, options, constraints, solutions, and outstanding issues. Participants included representatives from eight states, EPA Regions VI, VII, VIII, IX, X and EPA Headquarters, environmentalists and various stakeholders from the regulated community.

The Water Resources Committee held an extended discussion on ground water management issues in California, Montana, Oregon, South Dakota and Washington -- building on a previous workshop held in Amarillo, Texas on December 3-5, 2003. Other topics discussed included issues related to the management of terminal lakes, future water supply challenges, national energy policy and hydropower licensing, drought, rural water supply needs, and endangered species.

Glenn Patterson, the U.S. Geological Survey's new Cooperative Water Program Coordinator, described for the Committee the recently completed national water use summary. He also discussed the FY2005 budget request, which due to uncontrollable cost increases, would continue the trend towards the loss of a dozen or so streamgages again this year. USGS continued to be concerned about the losses, as some were irreplaceable gages with over 30 years of record. The erosion in funding had made it impossible for the USGS to match state contributions.

Bruce Newton, Director of the National Water and Climate Center, also thanked members for their support of the Snow Survey and Water Supply Forecasting Program. While the Congress has earmarked more funds for the program in recent years, due largely to WSWC efforts, the Office of Management and Budget had directed that overhead costs, paid in the past with other funds, be taken out of the earmarked account. As a result, system operation and maintenance funds had been reduced by about \$3M, though carry over money and "forward funded" work meant the actual reduction would be about \$2.3M for FY2004. A similar FY2005 request would again lead to a system maintenance crisis, even as the West continued to suffer from extended drought.

Given the Council's interest in both the Cooperative Water Program and the Snow Survey and Water Supply Forecasting Program, members revised and readopted a position urging the Administration and the Congress to "...give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a

myriad, growing and diffuse number of decision makers and stakeholders, with significantly adverse consequences." It specifically asked for approximately \$3M more for the Snow Survey and Water Supply Forecasting Program.

The Water Quality Committee meeting featured comments by Chuck Sutfin, Director of the Assessment and Watershed Protection Division of the Environmental Protection Agency (EPA), on guidance and progress related to state 2004 and 2006 integrated §303(d) and §305(b) lists of impaired water bodies. He also reviewed the FY2004 budget and FY2005 request, pointing out the latter included a proposed cut in §319 grants to states for non-point source pollution abatement demonstration projects for agriculture, silviculture, abandoned mine lands, and urban runoff. The Council had urged the Congress and the Administration to support §319 funding as an essential cog, along with Farm Bill programs, in the federal strategy to control non-point source pollution, the largest remaining contributor to the impairment of the Nation's waters. Mr. Sutfin also spoke on EPA/USDA efforts to integrate Farm Bill programs, it's Watershed Initiative, and coastal zone management.

The Committee also discussed a number of recent legal decisions. Mark Pifher of Colorado outlined the U.S. Supreme Court's *Miccosukee* decision, which held that the mere movement of polluted waters through canals, pipes and pumps -- without any actual addition of a pollutant to the water -- does constitute the addition of a pollutant to waters of the United States, requiring a National Pollutant Discharge Elimination System (NPDES) permit. The Court likened the *Miccosukee* facts to those surrounding publicly-owned sewage treatment works, which require a NPDES permit for their discharges, but do not add pollutants to the waste stream. However, the Court remanded for the district court's consideration the question of whether or not the waters in question were actually moved from one water body to another. Further, during the appellate process, the U.S. raised a "unitary waters" theory, which if accepted by the district court would also preclude the need for an NPDES permit. The Court left these issues to be determined by the district court. Regarding issues related to the possible future requirement for an NPDES permit for raw water transfers between basins in the West, the Court recognized the potential high, prohibitive cost of treatment, and possible conflict with §101(g) protecting the rights of the states to allocate the use of their waters, but it also pointed out that Pennsylvania regulated such transfers using general permits.

The Legal Committee spent most of the meeting discussing takings issues. Michael Van Zandt reviewed the Tulare Lake case and damages awarded to water users for the physical taking of their contract rights to waters for endangered species purposes under federal law. The U.S. Court of Claims had held the government could take the water, but must pay water users \$26M in compensation. A similar and much larger suit involves the waters in the Klamath Basin, and related issues have been raised with respect to the federal Central Valley Project in California. Next, the Committee discussed the Okanogan case, where the county had challenged the U.S. Forest Service's use of rights-of-way conditioning authority to prohibit the diversion of waters from the Methow River by an irrigation district based on the recommendations of the National Marine Fisheries Service (NMFS or NOAA Fisheries) in a biological opinion. Having lost their argument in the district and 9th Circuit Court, the county was appealing to the United States Supreme Court. A draft report on takings issues was also distributed to members for their comments. Other cases discussed included the Alsea Valley case, where the court struck down the listing of coho salmon in Oregon as arbitrary and capricious because NMFS failed to include genetically identical hatchery-spawned

fish in its listing. John Utton reported on the Aamodt and Navajo Indian water right settlements in New Mexico.

Of note, Pam Inmann, the new Executive Director of the Western Governors' Association (WGA) was introduced to members during the meetings. She expressed appreciation for the good working relationship between the two organizations on a number of issues, and encouraged continued cooperation.

Jennifer Gimbel, representing the Bureau of Reclamation, briefly addressed the full Council and reviewed developments in the Middle Rio Grande. She reported that the 10th Circuit Court withdrew its decision regarding the Bureau's discretion in managing federal projects for the benefit of the silvery minnow, declaring the appeal moot, but did not negate the district court's discussion regarding the need for compensation for any water taken. The U.S. will move to vacate the district court's preliminary injunction, while the plaintiffs want the case dismissed with prejudice. Jennifer stated, "I don't think there is any precedent for the West." She also noted the Congressional prohibition on spending any money to move water from the San Juan-Chama project to the Rio Grande for endangered species.

Jennifer introduced Avra Morgan, a Denver water lawyer, who was recently hired as Reclamation's Water 2025 Initiative Program Coordinator. Reclamation is also assigning Regional Water 2025 Coordinators. Avra spoke briefly about the \$20M FY2005 request for the program, and funding for competitive "challenge grants" to water districts to make conservation improvements. Sue Lowry introduced Johnny Sundstrom, Chair of a recently created Western Coalition within the National Association of Conservation Districts. He was interested in cosponsoring a Western Watershed Conference.

Lastly, Pat Mulroy, General Manager of the Southern Nevada Water Authority (SNWA), described the local water supply situation in this "ugly" drought. SNWA was doing all it could to conserve water and find new water supplies. It spent \$20M last year to pay landowners to replace turf grass (at \$1/square foot) with xeriscaping alternatives. Last year, the area's actual consumptive water use was 273,000 acre-feet, compared to an expected draw from Lake Mead of 330,000 acre-feet. When available, surplus water was banked underground locally, and in Arizona under an interstate arrangement. At present, there was no Colorado River surplus. In Las Vegas, only 3% of the water is used by casinos, which employ 50% of its 1.7M people. Gaming and resorts account for 70% of Nevada's economy, which would be devastated without water for future growth. Nevada will do whatever is needed to survive this drought. "We can't allow our cities to drop off the map!"

**145th Council Meetings  
Newport, Oregon  
July 14-16, 2004**

The 145th meetings of the Western States Water Council were held in Newport, Oregon on July 14-16 at the Hallmark Resort. A field trip on Wednesday included a tour of the Hatfield Marine Science Center and cruise on Yaquina Bay, along with presentations on wetlands, estuaries, invasive and endangered species, and water supply concerns on the central Oregon coast.



On Friday morning, during the Full Council meeting, Newport's City Manager, Sam Sasaki, described the inadequacy of seasonal streamflows, even where there is abundant rainfall, given the drought, and the need for more local storage. Newport and eight other entities entered into a 2001 intergovernmental agreement (IGA) to develop a new regional water supply and drinking water treatment plant. The key feature was a proposed \$139M 9,000 acre-foot reservoir on Rocky Creek that would meet projected water supply needs through 2050. While there were numerous economic and environmental benefits from a regional approach, some of the different parties were still reluctant to give up their water rights to the new Central Coast Water Council (CCWC). Final ownership interests in the proposed CCWC facilities (and the needed water rights) had yet to be resolved. Newport and Lincoln City, the largest cities, had agreed to funding preconstruction activities. Together, they accounted for 60% of the projected new water demands.

Mark Limbaugh, Bureau of Reclamation, addressed the Council, expressing Commissioner John Keys regrets for not being able to attend. Mark reported that under Reclamation's Water 2025 Initiative, a number of projects had been selected to receive challenge grants for water management and efficiency improvements. The Bureau received requests for around \$100M for about 100 projects. The federal contribution could be up to 50% of the total project cost, but Reclamation had leveraged the \$4M available for FY2004 to begin \$40M in projects. A total of \$8.4M was appropriated for FY2004, but with a number of earmarks for specific projects. The House had included \$20M in its FY2005 Energy and Water Appropriations Bill for more grants.

As an example of how the money was being used, Mark reported that a \$1M grant to the Nevada Desert Research Institute which would help develop application protocols which had proven water conservation and water quality benefits.

Mark also briefly summarized pending federal legislation authorizing the CALFED program, federal dam safety, rural water supply and desalination projects, as well as authorizing Columbia River power system offsite mitigation projects. Lastly, he mentioned the upcoming House Resources Committee hearing on the economic impacts of the Endangered Species Act (ESA) in the Klamath River Basin, to be held in Klamath Falls, Oregon on July 17.

The standing WSWC committees met on Thursday. The Water Resources Committee listened to Bob Hirsch, Assistant Director of the U.S. Geological Survey, and Bruce Newton, Director of the National Water and Climate Center, address a number of federal activities and programs related to measuring and monitoring streamflows, snowpack, and precipitation, as well as assessing water availability and current uses. Kevin Moran, with the Western Governors' Association (WGA), talked about WGA efforts related to the continuing drought and a new report on the need for a National Integrated Drought Information System to bring together and distribute data from various sources to facilitate both public and private, governmental and individual decision-making in response to recurring drought events.

The Council adopted two positions recommended by the Water Resources Committee in the form of two letters. The first recognized the potential benefit of a comprehensive study of the Nation's available water supplies and needs, under a Twenty-First Century Water Commission, as proposed in H.R. 135. The bill had passed the House, but not the Senate. Should such legislation pass in this Congress, the draft letter to Senator Mike Crapo (R-ID) stated that the WSWC would

“...be happy to be of assistance as representatives to the Commission are selected.” Further, the letter noted that representation should “...reflect the diverse interests...in water resources...,” and that in order to be successful any Commission recommendations should “...reflect the long-held Congressional policy of deference to states regarding water management.”

The proposed letter, as adopted, was revised to reiterate the Council’s continuing support for the National Drought Preparedness Act, which would establish a comprehensive national policy that “statutorily authorizes a lead federal agency for drought, and delineates the roles and responsibilities for coordinating and integrating federal assistance...” as well as authorize a “drought fund which would be available for the development and implementation of drought preparedness plans at all levels including the watershed, local, state, tribal and national.” The letter stated that this approach was intended “to move the country away from the costly, ad-hoc, response-oriented approach that characterizes current federal drought programs, and moves us instead toward a proactive, preparedness approach.”

The Council also approved a letter to Senators Pete Domenici (R-NM) and Jeff Bingaman (D-NM) that stated: “We strongly support federal legislation to provide technical and financial assistance for small rural communities struggling to meet their water supply needs. We appreciate your efforts in this regard, and hope to see appropriate legislation enacted to create a systematic, integrated approach to investigating, authorizing and constructing projects to meet rural western needs in close cooperation with State, local and regional entities, as well as tribes.”

The Legal Committee agenda included a number of special guest speakers. Jim Lecky, NOAA fisheries, Senior Advisor for Intergovernmental Programs, described the evolution of federal policies related to anadromous fish hatcheries, in light of the Alsea decision, and the continuing commitment to pacific salmon recovery and protecting naturally spawning salmon and their ecosystems. He noted hatcheries were originally intended to mitigate the loss of habitat from development and replace lost “catch opportunities,” but the court found no genetic differences, nor ESA legal distinctions between “wild” and hatchery fish that would allow for different treatment in ESA listing and protection activities. Subsequently, the listing of Oregon’s coastal coho salmon was invalidated, and NOAA fisheries began a review of some 27 anadromous fish stocks. NOAA’s new proposed hatchery policy recognized that salmon numbers alone were not sufficient, and scientific studies had found some hatchery practices could pose risks to the fitness of naturally spawning salmon -- due to genetic homogenization, competition with wild salmon for food and spawning habitat, etc.

Richard Whitman, Oregon Attorney General’s Office, and Barbara Markham, Washington State Assistant Attorney General, discussed current legal issues in the Northwest. Mr. Whitman described in detail the Alsea case and salmon listings, a challenge to Oregon’s ground water/surface water interference mitigation rules (*Waterwatch v. Oregon Water Resources Commission*), and a suit involving a biological opinion related to operation of the Columbia River system (*National Wildlife Federation v. National Marine Fisheries Service*). Ms. Markham talked about water right relinquishment, water transfers and general adjudication issues. She summarized the 27-year history of the Aquavella case involving adjudication of 40,000 water right claims in the Yakima River Basin.

Jennifer Spaletta, Stockton East Water District, described the District's complaint filed in the federal court of claims for just compensation and breach of contract as a result of the United States failure to deliver promised waters from the New Melones project, while the District had spent \$65M on a required delivery system. The suit asked for \$500M for the Bureau of Reclamation's continuing refusal to deliver available water, due to its other obligations related to protecting water quality and ESA-listed species downstream in the Sacramento-San Joaquin Delta. She noted that the water passing her District and flowing into the Delta was "conveniently" recaptured downstream by the pumps for the federal Central Valley Project (CVP) and California's State Water Project (SWP). While CVP and SWP contractors had received 70% of their water delivery requests on average over the past ten years, New Melones Project contractors had received no more than 30% of their requests and sometimes no water at all.

Shannon Cunniff, Department of Defense (DOD), addressed the Water Quality Committee on efforts to assess and contain contamination from perchlorate, an unregulated substance used mostly in DOD munitions. Next, Roger Gorke described EPA's Water Office work on water quality monitoring, setting standards and TMDLs, and the difficulty in communicating to the public whether or not water quality is improving. Shaun McGrath, WGA, discussed arid area water quality issues. Tom Stiles, Kansas, and by speaker phone Paul Frohardt, Colorado, talked about effluent dependent and dominated waters and EPA regulation. Tom also covered guidance for listing quality impaired waters, tribal administration, and water quantity/quality issues.

Of note, the Council elected new officers, with Hal Simpson, Colorado, as Chairman, Duane A. Smith, Oklahoma, as Vice-Chairman, and Roger Patterson, Nebraska, as Secretary-Treasurer.

**146th Council Meetings  
Santa Ana Pueblo, New Mexico  
October 27-29, 2004**

The State of New Mexico hosted the 146th meetings of the Council at the Santa Ana Pueblo's Hyatt Tamaya Resort, north of Albuquerque, on October 27-29, 2004. At the Council meeting on October 29, State Engineer John D'Antonio welcomed members, reporting that the state was "dealing with the drought," and "working actively to acquire tools needed to effectively administer water in New Mexico." He introduced Estevan Lopez, Director, New Mexico Interstate Stream Commission. Mr. Lopez reviewed the status of several water right settlements with the Navajo Nation; the Aamodt case involving the Nambe, Tesuque, Pojoaque, and San Ildefonso Pueblos in the Rio Pojoaque Basin; the Gila River Settlement; the Pecos Settlement; and the Taos Pueblo Settlement.

DL Sanders, Director of New Mexico's Litigation and Adjudication Program, next reported that given then current resources, completing all the adjudications in the state would take 20-30 years. He explained that they were working with the courts to streamline and speed up the process. He displayed some of the technological advances used to move from paper files to a web-based system that presents both tabular and spatial data, as well as digital imagery, in a manner that allows or would allow water right owners, the courts, watermasters and others to access, view and query combined data tools from a laptop computer in the field. He also briefly cited New Mexico's State Water Plan.

Eileen Grevey Hillson, on Governor Bill Richardson's Blue Ribbon Task Force on Water, described the state's huge water infrastructure needs, which totaled some \$2.8B to meet needs related to growth, regional water systems, project rehabilitation, flood control, natural arsenic in drinking water, and endangered species. The Governor had created a Financial Council to identify, prioritize and package fiscally responsible and environmentally sustainable projects. Further, he had set up Governor's Infrastructure Finance Teams (GIFTs) to encourage collaboration in leveraging state and federal money. In the Pecos River Basin, the New Mexico Interstate Stream Commission was acquiring water through purchase, leases and donations to help meet the needs of endangered species and compact delivery obligations to Texas. She also observed that a third or more of the members of the Navajo Nation must still haul water for domestic purposes. New Mexico's Spanish acequias or community ditch systems, are a cultural heritage that combine members' resources to share the burden of supplying water to their lands and sharing shortages when necessary. While many varied uses and users compete for water, she observed, "Water is like a liquid road with which our lives are intertwined and it brings us all together." Eileen was chiefly responsible for the very enjoyable Wednesday field trip, which gave WSWC members a firsthand look at New Mexico's people, waters, environment and cultural heritage.

Of note, the Council renewed a sunseting position (No. 208), originally adopted in 1995, that urged the Congress to reaffirm its deference to state water law and pass legislation to require federal agencies to participate "in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons." Further, with the exception of Native American tribes, such legislation would require the United States to pay filing and other fees as part of general state stream adjudications. The position asked the Congress to appropriate money for the payment of expenses related to processing federal water right claims and objections to private claims -- arguing "equity and fairness dictate that federal agencies who voluntarily seek to appropriate water pursuant to state law, or who acquire water rights based on state law, should be required to comply with state law, including the payment of fees, to the same extent as all other persons."

The Council's working committees reported on their Thursday meetings, and individual states summarized briefly important activities and events related to water. The different Committee work plans were discussed and would be revised and distributed in the future. A discussion of the Western Water Supply Challenges Workshop, held in Salt Lake City on September 28-29, led to a decision to hold a half-day workshop, on Wednesday morning, April 20, 2005 with federal officials as part of the Council's next meetings. The workshop would be followed by an afternoon field trip.

The Water Resources meeting included a discussion of ways to begin addressing three priority topics that were identified at the Salt Lake workshop: water resources data gathering and management; water conservation; and water supply augmentation. The Committee's workplan would be revised to reflect these top priorities. Among other things, the Committee planned to continue working with the U.S. Geological Survey's Cooperative Water Program, and with the Natural Resources Conservation Service and Bureau of Reclamation as part of the Bridging-the-Headgate Partnership. Mark Limbaugh, Reclamation's Deputy Commissioner, pledged their continued cooperation, stating he had learned a lot from the 17-states' meeting in Salt Lake. He said Reclamation would like to work more closely with the Council and the states to leverage resources and "get the most bang for the buck," as we seek to meet the future water needs of the West. He noted that given limited money and growing future water demands, as well as aging infrastructure, Reclamation was looking into the possibility of some type of federal loan guarantee for perhaps as

much as 90% of non-federal project costs, at a reasonable interest rate and based on terms of between 20-25 years.

Other guests addressing the committee included Margret Carde, with New Mexico Legal Aid, which was helping the Nacimiento acequia work through an agreement with the U.S. Forest Service to recognize the water rights of the community ditch and allow for maintenance and minor improvements as needed within federal law related to rights-of-way and special use permits for federal land. The intent was to allow "parciantes," acequia members or landowners, to work with the USFS district ranger to jointly determine needed repairs and authorize the limited use of mechanized hand tools (chain saws) within a wilderness area. Chuck DuMars commented on the conflict which had evolved between cultural water uses and new USFS values and regulations. Ms. Carde emphasized that the USFS could not circumscribe the acequia's prior vested rights to water. Lastly, Nancy Knouse, with New Mexico's Office of the State Engineer, described the benefits gained through building and digitizing their water rights database, and estimating the benefits and cost savings related to improved customer service, time savings and security.

The Legal Committee began with Maria O'Brien's update of current legal issues in New Mexico, including adjudication of the San Juan River Basin, completion of the Aamodt settlement with various pueblos, and other pueblos' claims to water. She also described endangered species and water issues along the Rio Grande, use of out-of-basin diversions of water from the San Juan-Chama Project, and recent New Mexico State Land Office claims for reserved water rights on their allotted school trust lands. Next, Committee Chairman Bill Staudenmaier reported on the Gila River Indian Community Water Rights Settlement in Arizona, with John Utton describing part of the agreement affecting New Mexico. There were 35 signatory parties. While the settlement was viewed as a "tremendous achievement, it did not address Apache water right claims. Norm Semanko explained the Nez Perce Indian Water Rights Settlement in Idaho, and its impact on the Snake River Basin Adjudication (SRBA), given it would provide an instream flow with the most senior right at the end of the basin. The Salmon and Clearwater Rivers would also be affected. The agreement set a March 1, 2005 deadline for approval by the U.S. Congress, the Idaho Legislature and the SRBA Court. Lastly, Norm Johnson and WSWC Chairman Hal Simpson briefly explained court decisions in *Norton v. Southern Utah Wilderness Alliance* and *Trout Unlimited v. U.S. Department of Agriculture*, respectively.

The Water Quality Committee included an extended discussion of Environmental Protection Agency (EPA), Office of Water Activities with Roger Gorke, Policy Advisor to the Assistant Administrator (Ben Grumbles). Next, a panel with Gary Hudiburgh, Deputy Director of EPA's American Indian Environmental Office, Linda Taunt, with Arizona's Water Quality Division, and Blane Sanchez, with the New Mexico Water Commission, discussed issues surrounding tribal administration of Clean Water Act (CWA) requirements under Section 518. Water quality standards for effluent dependent and dominated waters were addressed by Paul Frohardt. EPA was engaged in continuing discussions and a special subcommittee would work with EPA to identify issues and potential approaches to address them. Tom Stiles described the results of a survey of water quantity and water quality issues. Lastly, Chairman Frohardt advised members the Western Governors' Association was looking to the Council for recommendations regarding a review of its existing policy statements related to water quality and CWA reauthorization.

## OTHER MEETINGS

### Water Quality Standards for Effluent Dependent and Effluent Dominated Waters

On March 31-April 1, the Western Governors' Association (WGA) and Western States Water Council (WSWC) co-hosted a Workshop on Water Quality Standards for Effluent Dependent and Effluent Dominated Waters in Las Vegas to discuss the setting of water quality standards for various effluent dependent and effluent dominated waters in the West. The workshop brought together state and federal officials to discuss case studies in Colorado, Washington, Arizona and Wyoming. Each case study dealt with a unique set of facts and provided geographic diversity, in order to make the lessons learned more broadly applicable. Panelists made brief presentations, followed by a question and answer session and moderated group discussion. Where they could, participants identified lessons learned, principles, guidelines, constraints and proposed possible solutions to the problems presented. Participants included representatives from eight states, Environmental Protection Agency (EPA) Regions VI, VII, VIII, IX, X and EPA Headquarters, as well as environmentalists and various stakeholders from the regulated community.

Participants discussed a case study where increasing demands on Colorado's Fraser River, a tributary to the Colorado River, would reduce stream flow to the point that current discharges from a local wastewater treatment plant would no longer meet water quality standards as established by regulation under the authority of the Clean Water Act (CWA). Participants' general consensus was that current state law allowed in-basin water users and Denver to fully divert the flow to satisfy their water rights. In fact, Denver was currently in the permitting process for an expansion of the city's ability to divert water from the Fraser River watershed. Local officials were currently considering three options to meet the existing use designations: (1) upgrade the existing treatment facilities; (2) construct an upstream reservoir to supply future dilution water; and (3) pump effluent into an irrigation ditch for land application. A "net environmental benefit" could result if water quality standards were relaxed to avoid the potential loss of flow from the wastewater discharge. All parties recognized that it would be desirable to keep water flowing in the river.

The Kittitas case study in eastern Washington presented a contrasting situation. Kittitas is a small municipality of meager means with a newly constructed wastewater treatment plant that did not treat discharges enough to meet ammonia standards during the winter, when Cooke Creek's flow was at its lowest. A smaller tributary to the Yakima River, Cooke Creek historically had been ephemeral, and would be intermittent in many stretches were it not for the return flow from irrigation water taken from another part of the Yakima watershed. Unless the existing water quality standard for ammonia was changed, to come into compliance, Kittitas could: (1) reuse the effluent; (2) dispose of the effluent via land application, or (3) upgrade its treatment plant, which was not very likely due to the lack of financial resources. A fourth possibility, combining treatment facilities with nearby Ellensburg, was also suggested, but doing so would remove the effluent discharge upon which Cooke Creek riparian habitat depended. Some discussion ensued regarding whether science could come up with a better water quality standard for the creek, while keeping water flows created by the effluent discharge. Washington, as well as other states, voiced frustration in overcoming the presumption in EPA regulations that CWA §304(a) criteria apply whenever there was water in a stream. On one hand, states were concerned with the lack of flexibility in the regulations, and on the other hand, EPA was worried about providing too much flexibility, since it had the potential to create additional lawsuits and possibly result in inadequate protection of water quality.

About 80% of Arizona's stream miles are ephemeral. The state had made significant progress dealing with some of the issues surrounding discharges to streams in arid areas. Arizona had adopted a specific use designation for effluent dependent waters. The state's success in dealing with effluent dependent waters was enhanced by involving all stakeholders early on in developing water quality standards for these waters. EPA indicated that Arizona's state effluent dependent water rulemaking was approved by the Agency in part because the state followed EPA's methodology. The issue of appropriate ammonia standards for effluent dependent waters in Arizona had not yet been resolved. Arizona officials felt that EPA still needed to be more flexible in its regulatory administration.

Wyoming's Whitetail Creek, in the Powder River drainage, received and stored in a collection reservoir, water discharged with the extraction of oil. The state and oil industry would like to see the discharges continued, while environmentalists wanted the water reinjected into the ground. Contending that a "wetter" system was not always a "better" system, environmentalists preferred to look at the natural hydrograph in determining whether the effluent discharge indeed constituted a net environmental benefit. A number of issues remained unresolved where a wastewater discharge had created riparian habitat sustaining all sorts of life. Many states and those in the regulated community were concerned with the expectation that was created by setting water quality standards for species that were expected to exist in a certain location, where currently the species was not found. State officials opined that where effluent created a habitat, it arguably made little sense to tighten water quality standards to protect an "expected" species community, and thereby create an incentive to curtail the discharges. Another major issue was whether an existing use, where it was higher than the designated use, was sufficient justification for raising the use designation for a creek. As an example, bass were found in an effluent receiving reservoir on Whitetail Creek. Was that an indication that the water's use designation should be upgraded? Should water quality standards be tightened to protect the fish in this man-made environment? The answers were uncertain. At the time, where there was a truly ephemeral stream, EPA believed it possible to remove the aquatic life use designation. However, where the source of water creating the stream was effluent, the Agency did not approve removing the aquatic life use designation.

A common problem recognized in the case studies was the bifurcation of water quality and water resource issues between state administrative agencies, although the two are interrelated. This makes water quality regulation more difficult, since so much revolves around how much water is available to dilute effluent. Although adjusting water quality standards is an option in many instances where dilution water has become scarce or nonexistent, adjusting them is not a purely scientific matter. It is also a politically and legally delicate process. States were hesitant to invest the effort and financial resources needed to propose a new standard, only to have EPA reject the proposed standard. All participants agreed that success was more likely if all participants, especially EPA, were involved early in the process.

A moderated discussion identified several questions which were being refined by a working group. The questions dealt with the protection of "existing uses," the protection of potential additional uses, "refined" designated uses, "net environmental benefit," and requirements for dischargers to effluent dependent or effluent dominated streams. After refining the questions, the work group would work with EPA to obtain guidance on these issues.

States felt an urgent need to determine where the boundaries between state discretion and EPA mandates lay. It was noted by EPA and state officials that obtaining specific guidance eliminating existing ambiguities could be a double edged sword. It could ultimately constrain available options. However, it remained imperative at some point to identify and clarify some existing ambiguities that impeded progress in resolving these issues. States and EPA alike would like to see more regional consistency when interpreting federal regulations. EPA representatives encouraged states and regulated entities to seek informal input and feedback as they addressed site-specific issues, while EPA was in the process of developing policy guidance.

Denise Keehner, EPA, Water Quality Standards and Health Protection Division, reminded participants that solutions to the issues would require collaboration and honest discussion. She applauded the forthright dialog at the workshop, and expressed her resolve to work with states, regulated communities, EPA regions and other stakeholders to come up with effective operating approaches to arrive at solutions. The WGA and WSWC hoped resulting principles, guidelines and solutions would be useful for application by similarly situated dischargers in western communities.

### **State Management Issues at Terminal Water Bodies and Closed Basins**

The Water Education Foundation (WEF), Western States Water Council (WSWC) and Western Association of Fish and Wildlife Agencies, under the direction of WSWC member, Jeanine Jones, sponsored a conference on State Management Issues at Terminal Water Bodies Closed Basins in Salt Lake City on September 22-24. The meetings included a field trip to Antelope Island in the Great Salt Lake and surrounding wetlands, much of which have been dried out due to drought. Some 50 participants discussed a variety of issues related to closed western watersheds, including related legislation, litigation and negotiation, geomorphology, saline lake ecology, water quality standards, aquatic wildlife management issues and avian resources, as well as different management plans. The Public Trust Doctrine and public interest tests were also discussed.

Some of the water bodies and wetlands considered, in addition to the Great Salt Lake, included: California's Salton Sea, Owens Lake, Mono Lake and others; the Klamath and related closed systems management; Nevada's Pyramid and Walker Lakes; Oregon's Summer Lake; and Cheyenne Bottoms in Kansas. There are hundreds of other saline lakes and intermittently wet playas. These lakes are sometimes viewed as "dead," but actually support large invertebrate populations, notably brine shrimp and brine flies, that attract millions of birds and are important resting, breeding and migratory staging areas often supporting a large percentage of the nation's shorebirds and other waterfowl. Drought, agriculture, growing urban and municipal demands and other uses had reduced available water resources and contributed to fluctuating lake levels and dewatering, raising issues related to water quality, including salinity and selenium, air quality due to drying out and dust storms, and avian and fish resources management and protection.

Some of the featured speakers included Elizabeth Ann Rieke, the BOR Lahontan Area Office Manager (and former Assistant Secretary of Interior); Nancy Sutley, a member of the California Water Resources Control Board; Walt Baker, Acting Director of the Utah Division of Water Quality; Adam Sussman, Oregon Department of Water Resources; Bruce Falk, Kansas Water Commissioner, Department of Agriculture; Dick Nichols, Oregon Department of Environmental Quality; Jeanine Jones, California Department of Water Resources; Simeon Herskovitis, Western Environmental Law Center; and Paul Taggart, a Carson City, Nevada attorney formerly with the state. A broad range of



disciplines was represented: biologists, zoologists, geologists, toxicologists, hydrologists, lawyers and public administrators.

### **Western Water Supply Challenges Workshop**

On September 28-29, the Western States Water Council (WSWC) and Western Governors' Association (WGA) sponsored a workshop addressing the question: "How Do Western States Plan To Meet Future Water Supply Challenges?" Top water officials from 17 states and eight federal agencies participated. Following presentations from each of the 17 western states, two separate panels of federal officials discussed the role of their agencies in meeting western water supply needs. The meeting also included a panel on the potential for greater climate variability in the future, and what that might mean for water managers. Copies of the many powerpoint presentations had been posted on the Council's web site.

Utah Governor Olene Walker, in an opening address, stressed the importance of our scarce water resources, noting that the extended drought has left some reservoirs "absolutely empty." She exclaimed, "Water is a commodity that has to be taken seriously." She added, "Who owns the water is going to become more and more important.... Water is a critical issue.... Even in good times, water will be of critical concern." Utah and many other parts of the West are rapidly urbanizing, with subsequent demands for municipal and industrial water. Utah has set a goal of reducing per capita water use by 25% by 2050. "We have to!" Water use is declining, but the challenge will be to continue to reduce use after the drought is over. She stressed the need for public education and understanding of water issues. She also addressed the need to protect water quality, and highlighted Utah's Watershed Initiative, in cooperation with the U.S. Bureau of Land Management and others, to improve water yields and water quality. The initiative covered 25 watersheds and some 20% of the state. The governor concluded that the future of the state depended on water, but there were a "very limited number of water resources we have not developed." She stressed the need for western states to work together to "find new ways" to address the "major problems ahead of us."

One of the primary purposes of the workshop was to give states an opportunity to present their own vision of their future water problems, and what states were doing to meet their water needs. Therefore, most of the first day was spent listening to individual state presentations by many WSWC members and other state water leaders. Some of the issues raised, among others, included the need for additional storage, water conservation, water rate structures, growth management, ground water and surface water interactions and conjunctive use, interbasin transfers, water resources planning, climate variability, desalination, water project financing, water use fees, water quality, water marketing and banking, water rights adjudication and administration, tribal water rights, water law enforcement, drought, water metering, watermasters, data gathering, snow surveys and stream gaging, public awareness and education, rural water systems and regionalization, land management for water yield, reservoir reoperations and project rehabilitation, sustainability, instreamflows, interstate and interagency cooperation and coordination, and other topics.

The first panel of federal officials included: Bob Hirsch, Associate Director for Water, U.S. Geological Survey; John Keys, Commissioner, U.S. Bureau of Reclamation; Fred Caver, Deputy Director, Civil Works, Army Corps of Engineers; and Bruce Knight, Chief, Natural Resources Conservation Service, Department of Agriculture. Mr. Hirsch addressed water use and water supplies in the West, noting there were currently serious deficits in the Lower Colorado and Rio

Grande basins. He noted that there could be many factors that influence water use, including agricultural prices, demographics, energy costs and other market forces, as well as state water laws and federal environmental laws. Public values and choices are also constantly changing, and the demand for "ecosystem services" was a major "driver" for changes in past water allocations. However, there was a tremendous uncertainty related to environmental needs and demands, which represented an obstacle to decisionmaking based on sound science. He also lamented the continuing decline in funding, in real terms, for the USGS Cooperative Water and National Stream Information Systems Program (leading to the loss of stream gages).

Mr. Keys described the vision and framework for Interior's Water 2025 Initiative, and addressed state concerns over the identification of geographic areas that could face future water conflicts. He said the President's recent executive order on "cooperative conservation" was an example of the Administration's emphasis on collaborative problemsolving. He added the President and Vice President had been briefed personally on Water 2025. Water use in the West is still dominated by agriculture (80%) and we have to find water for new uses, he said. Water 2025 emphasized conservation and new technologies, such as advances in reducing desalting costs, to stretch existing supplies. Still, there could be a need for new storage. He repeated that the federal government could not bring a lot of new money to the table, but noted that \$4M in Challenge Grants and \$9M for the Field Services Program had been leveraged to help fund many water management improvement projects. For FY05, the House Energy and Water bill had \$20M for Water 2025's Challenge Grants, and the President requested \$7.3M for Field Services, which was a lot of new money in an era of tight federal budgets.

Mr. Caver said the Corps had been forced to reflect on its water resources priorities and values, and stated we "need to be more flexible and adaptable," moving away from the "Projects-R-Us" approach. In the future, he said, state's must lead the problemsolving effort, but the Corps was a world-class professional and technical organization and federal-state partnerships should be part of the solutions. Mr. Knight added that as a farmer from South Dakota, he realized water is the defining factor in the success, or failure, of rural communities. USDA had invested some \$350M in water conservation over the past ten years, and continued to promote net water savings through Farm Bill programs. Working with other federal agencies, NRCS was committed to better water management and conservation. On a second panel, U.S. Forest Service Chief Dale Bosworth and Jim Hughes, Deputy Director of the Bureau of Land Management, discussed requirements for rights-of-way and special use permits for projects. Mr. Bosworth said, "Federal land managers are absolutely committed to protecting and preserving state water rights." Mr. Hughes said states had the opportunity for constructive involvement in the environmental review process.

### **Water Information Management Systems Workshop**

In conjunction with the Western States Adjudication Conference, the Council sponsored its WIMS workshop in Sun Valley on October 18-20. Thirty-one information technology experts involved in adjudications, water use and planning, water quality management, and similar resource issues from ten states participated. State and federal information needs and available resources were discussed, along with different hardware and software solutions. Increasing public access to water information and security were mentioned, along with the need for greater federal and state coordination, and opportunities to collaborate in gathering water quantity and quality data. The use

of infrared, thermal imaging to identify and estimate water use was demonstrated, but this tool was threatened as NASA's LANDSAT program planned to drop the thermal band data in the future.

## OTHER IMPORTANT ACTIVITIES AND EVENTS

### Council Staff and Membership Changes/News

#### Arizona

**Tom O'Halleran** was appointed by Arizona Governor Janet Napolitano as a WSWC member replacing Michael McNulty.

#### California

**Lester Snow** was appointed Director of the California Department of Water Resources by Governor Arnold Schwarzenegger.

#### Idaho

Governor Dirk Kempthorne appointed **Toni Hardesty** as Director of the Department of Environmental Quality, replacing Steven Allred, who retired.

#### Nevada

Governor Kenny Guinn of Nevada announced the retirement of **Michael Turnipseed**, Director of the Department of Conservation and Natural Resources. The Governor named **Allen Biaggi** as the new director.

#### New Mexico

Governor Bill Richardson realigned the state's WSWC representation, which now consists of: State Engineer **John D'Antonio**, Environment Secretary **Ron Curry**, and **Bill Hume**, Governor's Director of Policy and Issues. Alternate members still include: **John Utton**, **Maria O'Brien**, **Eileen Grevey Hillson**, **Sherry Tippet** and **Fred Lujan**.

#### Oregon

**Paul Cleary** resigned from the Oregon Department of Water Resources to take a position as Executive Director of the Oregon Public Employee Retirement Systems. **Phillip Ward**, Deputy Director, became the new acting Director.

**Holly Schroeder** was appointed Water Quality Administrator in February 2004.

**Mike Llewelyn** left the Oregon Department of Environmental Quality.

*Utah*

**Don Ostler**, former Director of the Water Quality Division of the Utah Department of Environmental Quality, resigned as a WSWC member given his new position as Secretary and Executive Director with the Upper Colorado River Commission, replacing Wayne Cook, who retired in March 2004. **Walt Baker** was named acting director.

## **Western States Water**

Since the first issue in 1974, the Council's weekly newsletter, *Western States Water*, has been one of its most visible and well received products. Its primary purpose is to provide governors, members, and others with accurate and timely information with respect to important events and trends. It is intended as an aid to help achieve better federal, state, and local decisionmaking and problemsolving, improve intergovernmental relations, promote western states' rights and interests, and point out policy trade-offs. Further, it covers Council meetings, changes in Council membership, and other Council business. The newsletter is provided as a free service to members, governors and their staff, member state water resource agencies, state water users associations, selected multi-state organizations, key congressmen and their staffs, and top federal water officials. Other public and private agencies or individuals may subscribe for a fee.

The following is a summary of significant activities and events in 2004 primarily taken from the newsletter. However, it does not represent an exclusive listing of all Council activities or other important events. Rather, it seeks to highlight specific topics.

### **Clean Water Act**

Litigation marked much of the activity in 2004 related to Clean Water Act (CWA) policies and CWA implementation. Significant administrative actions were also taken by the Environmental Protection Agency (EPA).

#### *South Florida Water Management District v. Miccosukee*

On March 23, in *South Florida Water Management District (SFWMD) v. Miccosukee*, the U.S. Supreme Court unanimously rejected the argument that the National Pollutant Discharge Elimination System (NPDES) program covers a point source only when pollutants originate from that source and not when pollutants originating elsewhere merely pass through the point source. Instead, according to the Court, the definition of a point source as a "conveyance" makes plain that the point source need only convey the pollutant to navigable waters. However, based on other considerations, the Court vacated the lower court decisions and remanded the case for further proceedings.

The issue arose as a result of the operation of a pump station by SFWMD that moves water from a canal collecting ground water and runoff to an undeveloped wetland, a remnant of the original South Florida Everglades. In rejecting SFWMD's argument, the Court said: "Tellingly, the examples of point sources listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them." The opinion concluded, the statutory "...definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters, which are, in turn, defined as the waters of the United States."

The U.S. Department of Justice (DOJ), in its amicus brief, urged the Court to adopt a "unitary waters" theory that the Congress intended "waters of the United States" to mean all navigable waters as a whole. The CWA requires a NPDES permit for "any addition of any pollutant to navigable waters from any point source." Omitting the word "any" before "navigable waters," wrote DOJ,

signals "...Congress' understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one 'navigable water' into another." The Court appeared unconvinced, citing contrary EPA policy, but as the issue had not been raised in the lower courts, it declined to decide the matter, leaving it to be addressed by the parties and district court on remand.

If the "unitary waters" theory were to prevail, then no NPDES permit would be needed, according to the Court. Further, the Court indicated that no NPDES permit would be required if there is no real distinction between the relevant water bodies. "Both the District Court and the Eleventh Circuit rested their holding on the... determination that the [point source] canal and [the receiving] reservoir are two distinct water bodies." However, the Court found this issue to be one of material fact that had not been resolved, thus holding that the summary judgement issued by the district court was premature.

Commenting on the potential impact on engineered diversions for water supply in the West, the Court said, "It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that 'the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired' by the Act." However, the Court suggested, "States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs." Pennsylvania does issue general permits.

Peter Nichols of Trout, Witwer & Freeman opined: "The critical future issue posed by the decision is the character of 'the waters of the United States'; that is, whether all waters of the United States should be viewed unitarily for purposes of NPDES permitting requirements. How this question is resolved is critically important to the Western states and Western water users. The Court invited the parties to argue the unitary waters theory on remand, and this issue...appears destined to return to the Supreme Court, probably sooner rather than later."

The impacts for the West were underscored in amicus briefs submitted in the case, but states in general were divided on the merits. Colorado, New Mexico, Hawaii, Idaho, Nebraska, Nevada, North Dakota, South Dakota, Texas, Utah and Wyoming joined a brief asking the Supreme Court to reverse the Eleventh Circuit's decision. Other briefs in support of SFMWD's appeal had been filed by the United States Solicitor General, the National Water Resources Association and New York City, which prevailed in a Second Circuit decision which held its Catskill water diversions didn't require a NPDES permit. "The case will, without a doubt, have impact around the country on anybody who manages water," said Scott Glazier, SFMWD Litigation Manager. "All we're doing is moving water through a pipe with a pump.... We're not adding any of these pollutants to the water. This is stuff already in the water when we get it." Jeff Kightlinger, General Counsel for the Metropolitan Water District of Southern California, said a Supreme Court decision upholding the Eleventh Circuit could have widespread impacts. "Basically all our water is transferred," he said. "Perhaps just moving that water and putting it into reservoirs..." would require a NPDES permit.

Oklahoma and Washington joined the States of New York, Connecticut, Illinois, Kentucky, Maine, Massachusetts, Michigan, Missouri, New Jersey, North Carolina and Vermont in submitting an amicus brief urging the Supreme Court to affirm the Eleventh Circuit Court of Appeal's 2002 decision. The brief argued that water transfers are clearly subject to the Clean Water Act (CWA), since points of transfer are point sources. It likened points of transfer to sewage treatment plants,

neither of which actually create the pollution received. The brief insisted that inter-basin water transfers and water quality concerns were not adequately handled by states through current non-point source programs and other pollution control measures.

### Clean Water Act Jurisdiction

Despite conflicting circuit court decisions, on April 5 the U.S. Supreme Court denied petitions to review three circuit court decisions regarding federal jurisdiction over wetlands under the Clean Water Act (CWA). Petitions for certiorari were filed regarding the Fourth Circuit Court of Appeals June 2003 ruling in *U.S. v. Deaton* that federal jurisdiction over wetlands includes an indirect man-made hydrologic connection to navigable waters of the United States and its September 2003 ruling, in *Treacy v. Newdunn Associates*, similarly affirming federal jurisdiction over waters connected only by man-made means. The Court also denied the petition from an August 2003 Sixth Circuit Court of Appeals decision in *United States v. Rapanos*, where a landowner was held criminally liable for filling wetlands which were situated between eleven and twenty miles from navigable waters, but adjacent to a drainage that eventually ran to navigable waters. The Deaton, Newdunn and Rapanos decisions liberally interpreted the U.S. Supreme Court's 2001 ruling in *Solid Waste Agency of Northern Cook County v. United States* (SWANCC), rejecting federal CWA jurisdiction over isolated intrastate wetlands. These three circuit court decisions extended federal jurisdiction over wetlands based on the fact that eventually water would escape the properties in question and ultimately find its way to a navigable waterway.

Tom Jackson, an attorney who had represented the National Association of Home Builders and other industry clients, was disappointed with the Supreme Court's decision not to hear the cases. It ignores "a clear split" among the circuit courts as to whether drainage ditches can be considered federally protected wetlands, Jackson said. Just as important, the Court's refusal to hear the cases perpetuated "a lot of uncertainty" for landowners about the scope of the Clean Water Act, he added.

### Combined Sewer Overflows

In July, the House passed the Water Quality Investment Act (H.R. 784) to reauthorize grants to municipalities and states to control combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs).

Under the Environmental Protection Agency's CSO Control Policy, issued in 1994, communities must adopt minimum controls and develop long-term management plans, which EPA estimated would cost communities \$50.6 billion in its 2000 Clean Water Needs Survey. While the survey did not include a category for information on SSO needs, EPA had estimated the cost to be \$88.5 billion (using models). Most of the cost would fall on local cities and ratepayers. While language reauthorizing CWA Section 221 at a level of \$250 million annually for FY2004 - FY2008 was in the Water Quality Financing Act (H.R. 1560), which the subcommittee passed in 2003, that broader bill had not moved further. As a result, H.R. 784 was introduced to separately address this specific issue. Of note, in 2003 the Senate attached a legislative rider to the FY2004 EPA appropriations bill to reauthorize the grants, but it did not become law. H.R. 784 would provide authority for up to \$750 million in grants in both FY2004 and FY2005, but the bill was not taken up by the Senate.



### Watch Lists

Early in the year, in a memorandum to Environmental Protection Agency Regional Administrators and State Environmental Agency Commissioners, John Suarez, Assistant Administrator for Enforcement and Compliance Assurance, announced the official launch of a "Watch List" project, intended to "...assist the EPA and states to track facilities with serious or chronic violations of our environmental laws, but without recent formal enforcement response." The Watch List was an automated tool which would be used to track significant noncompliers (SNCs) under the Clean Water Act's National Pollution Discharge Elimination System, and Resource and Conservation and Recovery Act, as well as high priority violators (HPVs) under the Clean Air Act.

### Cooling Water Intake Structures

On February 16, the Environmental Protection Agency's Administrator Mike Leavitt signed a final rule to protect aquatic life from being killed by cooling water intake structures at large power plants. "This is the first time in the 32-year history of the Clean Water Act that EPA has established a systematic way to comprehensively address the environmental consequences of power plants that withdraw more than 50 million gallons of water per day," the release read.

EPA estimated that the rule would affect about 550 facilities, with implementation and administration costing roughly \$400 million. The agency estimated that this rule would save more than 200 million pounds of aquatic organisms annually.

The release indicated that "the new rule will require all large existing power plants to meet performance standards to reduce the number of organisms pinned against parts of the cooling water intake structure by 80 to 95 percent. Depending on location, the amount of water withdrawn, and energy generation, certain facilities will also have to meet performance standards to reduce the number of aquatic organisms drawn into the cooling system by 60 to 90 percent. These ranges represented differences among facilities and nearby aquatic environments. To offer these large power plants flexibility to comply and to ensure energy reliability, facilities would have several compliance alternatives to meet the performance standards.

The rule fulfilled a consent decree filed in 1995 as a result of a lawsuit brought by several environmental groups. The national standards EPA announced were the second of three rules for cooling water intake structures being developed under the consent decree. The first rule was for new facilities and was completed in December 2001. The new rule applied to existing electric generating plants that use large amounts of cooling water. Scheduled for subsequent proposal, the third rule would be for existing electric generating plants using smaller amounts of cooling water and for other manufacturers.

Two weeks previously, the Second Circuit Court of Appeals found in *Riverkeeper, Inc. v. EPA*, that the agency's mitigation measures for new power plants were inconsistent with the technology-based standards envisioned in Section 316(b) of the Clean Water Act.

## **Drought/Water Supply**

### Conditions

The multi-year drought conditions extended into 2004 over much of the West. In January, the National Weather Service reported that “exceptional” drought conditions (D4) afflicted the Idaho and southwestern Montana border, southeastern Idaho, southeastern and southwestern Utah, a small portion of northern Arizona, and portions of southwestern and northern New Mexico. “Extreme” drought (D3) affected a large portion of the Intermountain West, portions of the Rocky Mountain States and parts of the Central Plains, while less severe drought categories continue to cover most of the West.

On April 23, the Bureau of Reclamation released an update on the continuing drought. “We are in the fifth consecutive year of a drought that has had impacts throughout the West,” said Commissioner John Keys. “The foresight of the planners and engineers who designed the dams and reservoirs of Reclamation’s water storage system across the West has allowed us to efficiently manage water deliveries in times of drought as well as in times of plenty. The system is working. It is doing the job that was intended when it was first designed.”

In the Pacific Northwest Region, little had changed by Spring in the water supply outlook. As a result runoff forecasts continued to drop. In addition, the abnormally warm temperatures were shifting the inflows several weeks earlier than is typical. The effects of a warm and dry March continued to be felt in Idaho, where extreme drought conditions expanded to cover more of the Snake River Basin. In Montana, some rains did fall in the northwestern part of the state, but not enough to prevent drought conditions from spreading into the region. Meanwhile, the dry winter exacerbated conditions in north-central Montana. Great Falls had the driest October-March period in 112 years of record.

In the Great Plains Region, eastern Montana, Wyoming and Colorado faced a sixth year of drought. Forecasts called for above normal temperatures for this time of year, while precipitation was below normal. Reclamation reservoirs were at extremely low levels, many recording the lowest levels for the end of December, with record low inflows. Reclamation reservoirs in Nebraska and Kansas, and several in Montana and Wyoming, had reached “minimum levels.”

In the Upper Colorado Region, April was much wetter than March, with noticeable improvements to snowpacks. Still the drought continued. Only 50% of normal spring inflow was expected in Lake Powell. At 42% of live capacity, Powell was 117 feet below full pool and only 93 feet above the minimum power pool. In contrast, Rio Grande and Pecos River Basin flows were good, with projections calling for nearly full water deliveries. The Pecos snowpack climbed from 49% of average in January to 122% in April, improving runoff forecasts.

The lower Colorado River Basin had no precipitation for two weeks, with temperatures near normal. Water demands were slightly above forecasts. Reservoir storage levels in Lake Mead continued to drop, reaching down closer to the level of diversion works and creating water quality problems for the Southern Nevada Water Authority, which supplies the Las Vegas area.

As of April 23, reservoirs in the Central Valley were 87% full. In light of these conditions, Assistant Secretary of Interior Bennett Raley told lower Colorado River Basin water officials to

conserve water or face a mandatory cutback. "We need the three basin states to get their act together and deal with shortages." Otherwise, we "...will have to do it." In December, Secretary Gale Norton told Colorado River Water Users that if Lake Mead dropped to 1,125 feet in elevation, just 10 feet lower than its April 2004 level, she would have to cut surplus supplies to Arizona, California and Nevada. According to Raley, "We are entering some new territory."

The upper basin was also threatened as Lake Powell dropped. Scott Balcomb, representing Colorado, noted, "We're definitely going to have to reassess the amount of water available to us in the upper basin.... If this drought lasts much longer, it's going to change the rules by which we evaluate new storage projects.... If there's ever a call [by lower basin states], any new reservoir storage would be junior to the compact, and bingo, we wouldn't be able to fill new reservoirs."

By the end of May, rain showers and cool weather erased primarily agricultural dryness west of the Cascades, but the long-term drought picture remained virtually unchanged across the remainder of the West. For the water year, precipitation remained near, to slightly below normal across most of the West.

By November, things began to look up for some, particularly in southern California where record rains fell in October. But, according to the National Drought Mitigation Center, they were not enough to eliminate all concerns and water supply issues so early into the wet season. In addition, it was too early to tell "if the winter pattern would set up this way and persist in conjunction with the development of El Niño, or whether it would simply be an aberration." A report from the center further stated: "As for the other states in the West, this past week brought generally good patches of precipitation to parts of central Arizona, southwestern Colorado and northeastern Utah. They too have been in the grips of a 5-year drought, leaving most cautiously hopeful about the fast start as it isn't the first time they've had a good start to the water year only to see it fizzle out down the stretch. As such, things remain in a holding pattern on the map. There has been some definite short-term improvement, but we still have a long ways to go to bring ground water, streams and reservoirs up to their pre-drought levels."

According to the November 2 Drought Monitor, exceptional drought conditions (D4) still existed in parts of eastern Idaho and southwestern Montana, as well as southcentral Montana and northcentral Wyoming -- with extreme (D3) and severe (D2) conditions persisting in surrounding areas, as well as western Nevada, southeastern Utah, northeastern Arizona and parts of northern New Mexico.

On November 9, the National Oceanic and Atmospheric Administration (NOAA) sponsored a briefing on the Colorado River in Salt Lake City, Utah. Eric Kuhn, General Manager, Colorado River Water Conservation District, noted that CRWCD is "very interested in the big river issues." He observed that districts operated on the basic assumption that they could use the past to plan for and "predict" the future. Project operations were driven by this assumption, and depended to a large extent on U.S. Geological Survey streamgaging. He added, the "longer the gage record the better." He also noted that the 1922 Colorado River Compact assumed flows of some 17 million acre-feet (Maf) of water at Lee's Ferry, below Glen Canyon Dam, and allocated 15 Maf between the Upper and Lower Colorado River Basin. However, it appears average annual flows are closer to 13 Maf, and if so, Lake Mead water levels may never recover. Tree ring reconstruction studies have found

large variations in precipitation, suggesting an increase in the probability of more severe, sustained droughts over the next 25 years.

Bob Livezey of NOAA, challenged the notion that operational decisions should be based on the assumption of a stationary climate. The climate is changing, and historical data may not be relevant to the future, given statistical issues. He suggested, "We don't have any basis for projecting the climate in five or 25 years!"

Regarding the impact of a developing El Niño event, or warming of sea surface temperatures in the equatorial Pacific, weak warming in the western Pacific in the past was accompanied by below average precipitation in the Southwest, making recent record fall rains the exception. However, if the warming trend continued and strengthened in the Spring, moving into the eastern Pacific, past experience would suggest above average precipitation would be likely, and spring- summer 2005 Southwest streamflows and reservoir inflows would benefit. A strong El Niño usually brings drier weather to the Northwest and northern tier states.

#### *Drought Related Response*

On March 9, the Senate Committee on Energy and Natural Resources held a hearing on "Water Supply Challenges in the West," with a focus on the effects of the multi-year drought. Chairman Pete Domenici (R-NM) opened the hearings, suggesting that the federal government may need to establish a major federal water program to assist communities, particularly small rural towns, in building infrastructure they require to ensure adequate water supplies. The hearing featured witnesses representing various federal agencies, and included Craig Bell, Executive Director of the Western States Water Council, and Tex Hall, President of the American Congress of American Indians.

Assistant Secretary of Interior Bennett Raley acknowledged the significant challenges facing the West with regard to water supply, particularly in light of the extended drought. He referred to the Administration's 2025 Initiative as an effort to respond to these challenges. Answering a question about the status of cooperation among federal agencies in responding to drought, he called it "poor," not because of any lack of desire or intention, but rather due to the fragmentation of responsibilities that are associated with drought response among the various federal agencies.

Brigadier General William T. Grisoli of the Corps of Engineers discussed the ongoing effort by the Corps to make sure that reservoir plans are designed to take into account the effects of drought. Senator Byron Dorgan (D-ND) later criticized the Corps with regard to its recent decisions regarding operation of the Missouri River. He said the Corps failed in its responsibilities. He referred in particular to the adverse impacts in the Upper Basin. Senator James Talent (R-MO) took a different view of the Corps' decisions. He agreed, however, that there needed to be improved processes for coordination of vital information regarding water supply, and about the need generally to address more effectively the needs of rural communities throughout the country.

Floyd Gaibler, Deputy Undersecretary for the Department of Agriculture, referred to the establishment of the Interim National Drought Council in partnership with other entities (including the Western Governors' Association) as a successful effort to improve response to drought. The Interim National Drought Council was formed in September 2000 to establish a more

comprehensive, integrated and coordinated approach towards reducing the impacts of drought through improved preparedness, protection and risk management. The creation of the Council was one of the recommendations in the May 2000 report of the National Drought Policy Commission, created by Congress in July 1998 to provide advice on how to improve federal drought policy. In response, then Secretary of Agriculture, Dan Glickman, announced that the USDA would move forward with the recommendations of the report that could be implemented without congressional action, including creation of the Interim National Drought Council and the National Integrated Drought Information System (NIDIS).

Mr. Gaibler noted that the current drought was the most severe since the droughts of the 1930s and 50s, and also confirmed that while the recent precipitation had been helpful, it did not equate to relief for the past several years of drought. Louis Uccellini, testifying on behalf of NOAA's National Center for Environmental Prediction, addressed the potential effects of global climate change. He said there needed to be a "more coordinated effort on sharing [water supply] planning data and how it is used in the decisionmaking process."

Mr. Bell expressed the vital interest of western states in water supply conditions, and explained the impacts generally of the drought in the West over the past several years. While acknowledging that the drought was comparable to the droughts of the 1930s and 50s, he also underscored the fact that the current drought was more challenging in several respects because of the growth and increased demands for water in the West. He illustrated those challenges by referring to the situations that developed in the Klamath Basin and in the Middle Rio Grande, both of which were precipitated by significant drought conditions. He emphasized the importance of vital water information to state administrators, and referred to programs of particular importance; namely, the U.S. Geological Survey's Cooperative Water Program and the Natural Resources Conservation Service's Snow Survey Program. He also reiterated the support of the Western States Water Council and the Western Governors' Association (WGA) for the Drought Preparedness Act of 2003, S. 1454. He noted that the bill would "move the country away from costly ad hoc approaches to drought response in favor of proactive preparedness, improve delivery of federal drought programs, and provide new tools for drought preparedness planning." He referred to a letter prepared for the hearing supporting the bill, signed by the co-lead governors on drought for WGA; namely, Governors Bill Richardson (NM), Mike Johanns (NE), and Judy Martz (MT), which was attached to his written testimony.

Mr. Hall confirmed the dire effects of the drought on tribes, indicating the tribes continued to find themselves having to haul water in the absence of appropriate infrastructure. He underscored the important need to address the water supply needs of tribes throughout the West.

In a May 28 meeting in Las Vegas, Senators Harry Reid (D-NV), John Ensign (R)-NV, Assistant Secretary of Interior Bennett Raley, and Pat Mulroy, General Manager of the Southern Nevada Water Authority, discussed what still needed to be done to reduce the area's dependence on water from the Colorado River. Despite an aggressive water conservation campaign, according to Mulroy, growth and the drought continued to stress existing supplies, with Lake Mead still dropping. Senator Ensign exclaimed, "Something has to give unless we do a better job."

Southern Nevada was also discussing possible water sharing solutions with other Colorado River Basin states. Nevada was already participating in the Arizona Ground Water Bank, and recent

talks raised the possibility of Las Vegas acquiring agricultural rights to water in other lower Colorado River Basin states with their approval. Unlike Arizona and California's major metropolitan areas, there is no significant agricultural development around Las Vegas. Mr. Raley warned that Interior may have to act as watermaster to protect existing storage along the Colorado River, if the Lower Basin states were unable to reduce their current uses and reach some agreement on solutions.

The August 16<sup>th</sup> issue of Time Magazine carried an article entitled, "Why the West is Burning." It noted the drought could "...easily turn 2004 into one of the West's worst fire years on record." It also stated, "And no one knows when the drought will end."

Later in the year, on October 4, the Southern Nevada Water Authority (SNWA) filed an application with the Bureau of Land Management (BLM) for permanent rights-of-way to allow for the construction and operation of facilities necessary to convey water from northeastern rural areas to Las Vegas. SNWA's water supply plan stated, "If drought conditions persist and the availability of interim surplus water is further reduced -- meaning that Southern Nevada is unable to access any additional Colorado River water above its 300,000 acre-feet per year allocation -- additional drought response will be required. Other water resources may be accessed to meet future water demands along with demand management, including Southern Nevada and Arizona water banks and additional in-state, non-Colorado River resources."

In October, Congress passed agricultural drought disaster assistance, which it attached to the conference report on FY2005's Military Construction and Homeland Security appropriations package. It included \$2.9 billion for farmers that lost crops in last year's drought, but as the House demanded, the report required that the spending be offset by reductions in funding for the Conservation Security Program (CSP) authorized by the 2002 Farm Bill. A similar arrangement funded drought assistance in FY2003, but that CSP money was eventually restored. Senator Tom Harkin (D-IA) objected to the move, and delayed final action on the measure until he was assured the CSP money would again be restored later in the year.

Although nearly successful, the Western Governors' Association (WGA) was unable to persuade the Congress to include proposed comprehensive drought planning and mitigation authority as part of the bill. In a September 21 WGA letter, signed by Governors Mike Johanns of Nebraska, Bill Richardson of New Mexico, Judy Martz of Montana, and Michael Rounds of South Dakota, the states urged House and Senate appropriators to include S. 1454 and H.R. 2871, the National Drought Preparedness Act, as part of the Homeland Security package.

#### Water 2025 Initiative

The Bush Administration asked the Congress for \$21 million for FY2005 for Interior's Water 2025 Initiative, to help western communities develop conservation, efficiency and water-marketing projects. The President's proposal represented an increase of \$13.4 million over FY2004 funding. Water 2025 was intended to focus existing federal financial and technical resources in key western watersheds and in critical research and development efforts that will help to "predict, prevent and alleviate water supply conflicts."

At a Senate Appropriations Committee hearing on the Administration's FY2005 budget, Assistant Secretary of Interior Bennett Raley testified that \$956.3 million requested for the U.S. Bureau of Reclamation is \$13.5 million more than enacted in 2004, though anticipated offsetting receipts could result in net discretionary spending of \$880 million, a decrease of \$32.1 million, compared to FY2004.

"Unfortunately," said Senator Pete Domenici (R-NM), Chairman of the Energy and Water Subcommittee, "I fear this is a budget request that only exacerbates problems we face in addressing our various water resources requirements." (Office of Senator Domenici, Press Release, 4-20-04) With respect to the Water 2025 Initiative, he said, "With the water needs in the country, it is almost hilarious to have a proposal for \$20 million." He added, "We need a revolving fund of \$1 billion with grants and matching funds."

Mr. Raley explained the \$828.5 million Water and Related Resources Account included an "undistributed reduction" of \$36.6 million due to anticipated construction delays. As directed, Interior would "prorate underfinancing to each project and program." There was \$366.6 million for operations, maintenance, and rehabilitation.

Commissioner John Keys also testified, adding some detail to Mr. Raley's remarks. Keys specifically referred to "Reclamation plans to identify water supply needs for consumptive and non-consumptive purposes in Reclamation states in the next 25 years that are likely to be unmet with existing resources."

## **Endangered Species Act**

### Legislative Reforms

The House Resources Committee began early in the year a process of gathering information and preparing a white paper on the successes and failures of the Endangered Species Act (ESA) and ways to both better promote species recovery and respect private property rights. According to Brian Kennedy, Director of Communications, they looked for stories that "...help paint the picture of how rigid the law is, and how the arbitrary and ambiguous language in the law has led to decisions that defy common sense -- decisions that put species over human beings."

On January 20, the first day of the new session, Senator Gordon Smith (R-OR) introduced S. 2009, the Sound Science for Endangered Species Act Planning Act of 2004, to require the Secretary of the Interior to give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed. It was referred to the Environment and Public Works Committee. An identical bill (H.R. 1662) was introduced in the spring of 2003 by Rep. Greg Walden (R-OR) and had 62 cosponsors. In introducing his bill, Senator Smith said, "In recent years, we in the Northwest have experienced a number of situations in which Federal agency scientists either demanded actions not supported by scientific data, or actually fabricated the data itself.... The most egregious example of decisions not based on scientific evidence, however, occurred in the Klamath Basin in 2001."

He continued, "Taken together, these two biological opinions sought to both raise the level of Upper Klamath Lake and increase flows in the Klamath River, at the time the basin was

experiencing a severe drought. On April 6, 2001, the Bureau of Reclamation announced that the agency would deliver no water to most of the agricultural lands that had received irrigation water from the Federal project for almost 100 years. I cannot begin to describe the human toll that these biological opinions exacted on the farmers and ranchers in the Klamath Basin. This situation should never be repeated. Decisions of this magnitude under the Endangered Species Act must be peer reviewed, and some standard for the science used in these decisions must be established."

At their mid-winter meeting in Washington, D.C. on February 22, the National Governors Association (NGA) renewed their support for amending and reauthorizing the Endangered Species Act. NGA also released an issue brief entitled: "Tapping State Leadership to Manage Endangered Species." The brief highlights case studies demonstrating strong state leadership, including Colorado's efforts to recover the lynx, Idaho's wolf reintroduction program, and Oregon's coho salmon plan. It also illustrated challenges states face under ESA, including unclear criteria for downlisting or delisting species, inflexible regulations and paperwork, and disincentives for early proactive species protection efforts aimed at precluding the need for listings.

The brief declared: "State experience suggests that instead of serving as the only method for protecting species, the ESA can be the endpoint on a continuum of species assistance that the federal and state governments together provide. For example, through State Conservation Agreements (SCAs), states and the federal government can cooperate in protecting species, habitats, and entire ecosystems that are imperiled. Such approaches can foster creative collaboration that precludes the need for ESA listing."

On April 28, the House Resources Committee, Chaired by Rep. Richard Pombo (R-CA), held a hearing on H.R. 2933, the Critical Habitat Reform Act, introduced by Rep. Dennis Cardoza (D-CA), to reform the process for critical habitat designation under the Endangered Species Act. Mr. Cardoza, in opening remarks, observed, "When the ESA was adopted in 1973, it was celebrated as ground-breaking environmental legislation. The ultimate goal...was to focus sufficient attention on listed species so that, in time, they could be returned to a healthy state and removed from the list. I...believe that recovery, and ultimately delisting...should be the [U.S.] Fish and Wildlife Service's top priority. Unfortunately, we have been driven off course from a system that should have been directed by biology, to a system that is driven by litigation. The efforts by the Service to recover species have been hampered by litigation, court orders and unrealistic timelines which are preventing the exercise of discretion and frustrate the original purpose of the Act.... [T]he Fish and Wildlife Service needs to be put back in the driver's seat. We need to let them do their job of prioritizing listing, recovery and critical habitat decisions. Biology and sound science, not litigation, should drive the...critical habitat program."

H.R. 2933 would have required the concurrent designation of critical habitat with approval of recovery plans. Rep. Cardoza said, "We are putting the cart before the horse in many instances -- designating millions of acres of land as critical habitat, when we do not have the information...needed for the recovery of the species." The bill would have clarified the definition of critical habitat and required that critical habitat designations be practicable, economically feasible and determinable. It would also exclude from designation any area subject to a habitat conservation plan or state or federal conservation program determined by the Secretary of Interior to provide substantially equivalent protection.



Craig Manson, Assistant Secretary of Interior for Fish and Wildlife and Parks, testified that "...litigation has hijacked the program." He added that "...lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct resources to...actions that would provide the greatest conservation benefit to those species in need of attention."

Jamie Rappaport Clark, Executive Vice President for Defenders of Wildlife (and former Director of the Fish and Wildlife Service) testified in opposition to H.R. 2933 and, as a general rule, piecemeal ESA changes. She said, "Reauthorization is best considered in the context of the Act's entire framework in order to ensure all aspects of threatened and endangered species conservation are adequately addressed." Further, she charged that the "...current Administration is now perversely using critical habitat as a tool to undermine, rather than advance, species conservation."

Dr. Rob Roy Ramey, Department of Zoology Chair and Curator of Vertebrate Zoology at the Denver Museum of Nature & Science, stated: "When it comes to ESA decisions, opinions, interpretations of limited anecdotal observations, and hypothetical threats are sometimes given equal or greater weight than conclusions reached through hypothesis testing. Much discretion is left in the hands of the USFWS biologist(s) making the decisions." He observed, "In my experience, when USFWS biologists issue decisions on listings or biological opinions, they rarely have the benefit of a truly independent peer review."

The House Resources Committee voted on July 21 in favor of the two ESA reform bills -- the critical habitat reform measure from Rep. Dennis Cardoza (D-CA) (H.R. 2933) and the "sound science" measure from Rep. Greg Walden (R-OR) (H.R. 1662). While the committee approved the bills by fairly comfortable margins, voting 28-14 for Cardoza's bill and 26-15 for Walden's, opposition to the measures among some Democrats and environmentalists promised to present significant obstacles relative to further action.

#### Administrative Policy

Considerable controversy erupted when it was reported in May that the Administration would include hatchery fish in its current and future review of the status of salmon and steelhead stocks under the Endangered Species Act. In answering some of those questions, Vice Admiral Conrad Lautenbacher (retired), Under Secretary of Commerce for Oceans and Atmosphere, in a May 14 letter to the Congress, stated: "I am writing to inform you about the National Oceanic and Atmospheric Administration's upcoming proposals to renew listings of Northwest salmon populations under the Endangered Species Act, to explain how hatcheries will be taken into account in the proposals, and to correct recent erroneous accounts of how our hatchery policy will be used."

"NOAA will shortly propose a renewed set of listings of salmon populations under ESA. Since 1991, the federal government has listed 26 species of salmon and steelhead in the Northwest and California for protection under ESA. In a lawsuit that followed these listings, a federal judge set aside the listing of Oregon Coast Coho salmon because NOAA failed to include closely-related hatchery fish in the listing decision. Since the same flaw was present in almost all of the other listing decisions, NOAA voluntarily agreed to reconsider all of our earlier listing decisions and to adjust our policy for considering hatchery fish in making those decisions -- and NOAA will be asking the

public to comment on both. NOAA's decisions are driven by the science, which suggests benefits, risks, and uncertainties regarding salmon hatcheries. Simply put, some well-managed conservation hatcheries are fostering recovery of species, some hatcheries are having little or no effect, and some hatcheries potentially hinder recovery."

"After re-evaluating the listing of 26 species of salmon and steelhead, and considering the science on hatcheries, we have preliminarily determined to propose relisting at least 25 of the 26 species, with evaluation of the remaining species still underway. A final proposal will be completed in the next two weeks and the new hatchery policy will be only one factor for the evaluation still under way."

"The central tenet of the hatchery policy is the conservation of naturally-spawning salmon and the ecosystems upon which they depend. As our preliminary conclusions indicate, appropriate consideration of hatchery fish does not lead to wholesale de-listing of species as some are claiming. Equally erroneous is the suggestion our policy would allow the purposes of ESA to be satisfied by having all the salmon in a hatchery. Salmon hatcheries have long played an important role in the Northwest, including fulfilling trust and treaty rights of Northwest Indian tribes, and supporting sport and commercial harvest cherished by Northwest citizens. NOAA is encouraged by improvements in hatchery management, and is seeing their increasing contribution to speeding the recovery of salmon."

Reactions from the plaintiff in the related lawsuit, *Alsea Valley Alliance v. Evans* were unfavorable. Russell Brooks, with the Pacific Legal Foundation (PLF) said, "It appears to me that the Bush Administration just simply can't follow the law, even when it has a federal court decision drawing it a map." He opined earlier, "The only relevant scientific question under the plain language of the ESA is whether hatchery salmon and naturally spawned salmon are the same species, and all biologists agree that they are. This means that under the ESA the government must either list all the fish of that species, or none at all. They can't pick and choose among the same species swimming side-by-side in a stream, and cherry pick which fish they will protect and which they will ignore."

On November 16, the PLF announced it would file a sweeping lawsuit challenging the listings of salmon and steelhead under the Endangered Species Act across four western states, if the proposed new federal hatchery policy is approved that distinguishes between hatchery and naturally spawned fish.

### Regulatory "Takings"

In December the United States reached a settlement with four California water districts and agreed to pay \$16.7 million for water the federal Court of Claims valued at \$26 million, which the government failed to deliver to the districts from 1992-1994, in order to protect endangered winter-run chinook salmon and the threatened Delta smelt. Justice Department spokesman Blain Rethmeier said, "This settlement is the result of careful and deliberate negotiations between the parties."

In December of 2003, the Federal Court of Claims in *Tulare Lake Basin Water Storage District v. the United States*, awarded \$13.9 million to irrigators for water withheld in accordance with a federal biological opinion under the Endangered Species Act. The price of the water was

determined based on California state drought water bank transactions, and the total award, including interest and attorney fees, was some \$26 million. Judge John Paul Wiese said, "The federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so." The "contractually conferred water," would otherwise have been delivered from the Sacramento-San Joaquin Delta.

The California Attorney General's Office and State Water Resources Control Board (SWRCB), as well as Senator Dianne Feinstein (D-CA), had asked the Bush Administration to appeal the court's decision, and consider certifying the case to the California Supreme Court to decide important questions of state law. California's objections to the award and subsequent agreement centered on certain assumptions regarding state water rights law in Judge Wiese's opinion, which could "...fundamentally change the way that water resources are managed in California...[and interfere with]...a market that is essential to meeting demands caused by water supply shortages and ensuring that water is available to mitigate for the effects of water deliveries on the environment," according to SWRCB Chair Arthur Baggett. Mr. Baggett added that such questions should be resolved in state court and not the federal courts.

Senator Feinstein, urging appeal of the award, said, "This would establish a precedent that could require the public to pay tens of millions of dollars to water users every time even a small portion of their anticipated deliveries are needed to protect endangered salmon or other fish."

### **Farm Bill/Water Conservation**

On May 11, Bruce Knight, Chief, Natural Resources Conservation Service (NRCS) testified in an oversight hearing before the Senate Agriculture Committee's Forestry, Conservation and Rural Revitalization Subcommittee on the implementation of Farm Bill programs. NRCS has published rules for ten major conservation programs, including a final rule on May 30, 2004, for the Environmental Quality Incentives Program (EQIP). He observed, "The increased funding for EQIP in the 2002 Farm Bill greatly expands program availability for optimizing environmental benefits. Including funding distributed in FY2002, 2003 and 2004, totaling \$2.2 billion, EQIP will benefit close to 200,000 participants. In addition, EQIP leverages additional funding from landowner match requirements, and State and local cost-share programs. Producer demand continued to be high for EQIP assistance. At the end of May 2003, NRCS published priority resource concerns and program rules for EQIP resulting from the changes enacted in the 2002 Farm Bill. We believe that the increased program flexibility and improved program features will continue to make EQIP one of the most popular and effective conservation efforts Federal Government-wide."

### **Indian Water Settlements/Litigation**

#### *Pueblo Indian Water Rights Settlement*

After nearly 40 years of litigation and negotiation, a settlement plan to meet the water needs of four pueblos and thousands of non-Indian water users in New Mexico was proposed in February. Under the proposal, which had yet to be ratified by the parties involved, existing water uses by the Nambé, Pojoaque, San Ildefonso and Tesuque Pueblo Indians would have first priority. The respective Pueblo's presently decreed rights totaled: 1,459 acre-feet (af); 236 af; 1,246 af and 719 af (or 3,660 af), but remained subject to inter se challenges and the Pueblos were seeking more

water. An additional 2,500 af would be sought for the Pueblos from a source that had yet to be determined. Of note, the Pueblo water rights would not be subject to forfeiture or abandonment.

Acequia and other existing "Non-Pueblo" water rights would fall next in priority, and the Pueblos would agree not to challenge, nor infringe on the exercise of those rights in developing additional Pueblo uses in the future. However, non-Pueblo well owners would be required to cap their wells and connect to a proposed \$280 million regional water system (RWS).

The system would include both a "Potable" water pipeline, and a "Red" untreated water pipeline that would supply 475 af of alternative water to the Pojoaque Pueblo at no cost to the Pueblo. Federal appropriations of over \$200 million would be sought for the RWS, and to acquire necessary water rights. Until the Red pipeline is constructed and alternative water is available, the Pueblo could divert its supplemental 475 af right from ground water. To the extent that any Non-Pueblo ground water right might be impaired as a result of such use, compensation would be made from an Impairment Fund. The Pojoaque Pueblo could also acquire and exercise additional rights to divert and consume water through lease, purchase or other arrangements.

Within each Pueblo's "First Priority Rights," the proposal allowed each Pueblo to make changes in the "point of diversion, place of use, or purpose of use" of such rights, as long as it did not impair any other Pueblo or Non-Pueblo ground water rights.

There were many other provisions in the 60-page proposal. Before the proposal could be finalized, a process that could take years, it would have to be approved by the Pueblos, Non-Pueblo water users, Santa Fe, Santa Fe County, the New Mexico State Engineer, and others. Also, Congress would have to appropriate the money for the RWS and additional water resources would have to be found -- perhaps by way of the San Juan-Chama Project and by the acquisition of water rights.

#### Arizona Water Rights Settlement

On November 17, by unanimous consent, the House passed the Arizona Water Settlements Act (S. 437), sending the bill to the President's desk. Rep. Ed Pastor (D-AZ) said, "Since before the founding of Arizona as a State, we have, like most other Western States, struggled to meet the water demands of our inhabitants. It has not been easy. In 1968, in hopes of resolving these problems, the Central Arizona Project (CAP) was authorized...and charged with distributing water from the Colorado River to communities and tribes in the central and southern parts of Arizona. However, for decades there have been disputes on the appropriate distribution of these waters, resulting in litigation. I believe [S. 437] will resolve most of these disputes."

The Act was divided into three titles. The first resolved repayment of nearly \$2 billion for CAP construction and the allocation of water between state and federal interests. The legislation allowed excess funds from the Lower Colorado River Basin Development Fund and payments by the Central Arizona Water Conservation District to be applied towards CAP construction costs. It defined permissible CAP uses, and set forth requirements for the reallocation of CAP non-Indian agricultural and uncontracted municipal and industrial priority water. It also created a funding mechanism for tribal settlements.

The second title resolved claims under the Gila River Indian Community water rights settlement of 2003. It required the Secretary of Interior to help reduce the consumptive use of irrigation water on the upper Gila River by acquiring and extinguishing or transferring water rights or entering into fallowing agreements. It defined reallocated Community water rights and revises Community water delivery requirements, and released Arizona from any future water right claims from the Community. It also required the Secretary and Arizona to develop a program to protect CAP water supplies for Arizona Indian tribes during water shortages.

The third title reauthorized and amended the Southern Arizona Water Rights Settlement Act, which resolved claims by the Tohono O'odham Nation. It set forth permissible water uses, water delivery requirements, and construction obligations with respect to the San Xavier Indian reservation and the Schuk Toak District. It also reauthorized a cooperative fund to cover operation, maintenance, and repair costs of delivering water to the reservation and district.

Also of note, the legislation granted New Mexico an annual entitlement to 14,000 acre-feet of water and at least \$66 million to address future water supply needs and potentially as much as \$128 million for new infrastructure. "New Mexico has worked for 36 years to resolve how we could access the Gila River water rights established by the 1968 Colorado River Basin Project Act. With this legislation, we now have assurance that the citizens of New Mexico will have control of their future," said Senator Pete Domenici (R-NM). "New Mexico's interests have been well protected and assured with this bill."

Rep. Donna Christensen (D-St. Croix) observed, "The bill includes several important revisions, including new language in title 4 that will assist the San Carlos Apache Tribe, the White Mountain Apache Tribe, and other tribes in Arizona, as they work to complete their own comprehensive water settlements.... Certainly, the benefits to all parties including the United States will be significant. But this legislation will also be very expensive, and many of the costs will be off-budget, avoiding the annual appropriations process. The legislation, in effect, will...dramatically [restructure] the payments for the Central Arizona Project. However, I am satisfied that...the benefits of this legislation will significantly outweigh the costs on the taxpayers."

#### Pecos River Settlement

On November 30, New Mexico Fifth District Judge Pro Tem David W. Bonem dismissed objections to the state's \$70 million plan to buy land and water rights, clearing the way for implementation of a Pecos River Settlement and ensuring compact water would flow downstream to Texas as mandated by the U.S. Supreme Court. The Settlement and purchases should ensure water is available to meet New Mexico's obligations to Texas under the Pecos River Compact. The New Mexico Interstate Stream Commission (ISC) is responsible for compact compliance. The Settlement was designed to resolve water right issues between the Pecos Valley Artesian Conservancy District (PVACD), the Carlsbad Irrigation District (CID) and the Fort Sumner Irrigation District. The cornerstone of the Settlement involved the purchase and retirement of some lands and water rights. In 2002, the Legislature authorized and appropriated money for purchases, but also required ISC to first settle the long-running lawsuit over control of water rights in the Carlsbad area.

On December 10, Judge Bonem entered a partial final decree adjudicating the rights on the river of the United States and CID. Rights of individual district members would be addressed later.

ISC Director, Estevan Lopez said, "This is a major step forward in allowing the State of New Mexico to proceed with implementation of the settlement and thereby comply with its obligations under the Pecos River Compact and the U.S. Supreme Court's 1988 amended decree. With entry of the partial final decree, the state can begin acquiring land with funds appropriated by the legislature."

### Nez Perce Water Rights Settlement

On November 19, the Senate passed S. 2605, the Snake River Water Rights Act, introduced by Idaho Republican Senators Michael Crapo and Larry Craig. On December 7, it cleared the Congress as part of the Omnibus Appropriations package, which was signed by the President on December 8. The bill would resolve Nez Perce Tribe claims in the Snake River Basin Adjudication (SRBA). It approved, ratified, and confirmed the Mediator's Term Sheet dated April 20, 2004. Senator Craig stated, "This bill directs the federal government to facilitate compliance with the terms of the Settlement Agreement by authorizing federal funds and land exchanges. When this bill is signed into law, the Idaho Legislature will have the responsibility of determining whether this agreement should be executed." Tribal approval is also required. The Tribe would get 50,000 acre-feet of water annually and \$80 million under various provisions.

The settlement would result in the recognition of a federal reserved water right of 50,000 acre-feet for consumptive uses on tribal lands and certain springs and fountain claims on federal lands. All other federal reserved water right claims for instream flows and springs and fountains on private and state lands would be dismissed. In addition, the settlement would provide "incidental take" coverage under the Endangered Species Act for the operation of the Upper Snake River Bureau of Reclamation Projects and for certain water users in the Salmon and Clearwater Basins. According to a summary of the bill by the Congressional Research Service (CRS), the bill authorized a one-time payment to local governments to mitigate a change in the use of water acquired by the Bureau of Reclamation. It also authorized the transfer of up to \$7 million dollars in value of Bureau of Land Management (BLM) lands selected by the Tribe, to the Bureau of Indian Affairs to be held in trust for the Tribe. Further, it provided that consumptive use and "springs or fountains water rights" would be held in trust by the United States for the benefit of the Tribe. It required that the Tribe enact a water code, to be approved by the Secretary, that: (1) manages, regulates, and controls the consumptive use reserved water right so as to allocate water for irrigation, domestic, commercial, municipal, industrial, cultural, or other uses; (2) includes a due process system for the consideration and determination of any request by an allottee (who holds a beneficial real property interest in an Indian allotment located within the Nez Perce Reservation, and held in trust by the United States), or any successor in interest, for an allocation of such water for irrigation purposes on allotted land, including a process for an appeal and adjudication of denied or disputed distribution of water and for resolution of contested administrative decisions; and (3) includes a process to protect the interests of allottees when entering into any lease of entitlement water through an Idaho State water bank.

The bill also prescribed requirements for water claims, and the satisfaction of claims and entitlements. It declared that the consumptive use reserved water right and the springs or fountains water right would not be subject to loss by abandonment, forfeiture, or nonuse. Further, it authorized the Tribe, subject to the water code (but without further approval of the Secretary of Interior), to lease water to which the Tribe is entitled under the consumptive use reserved water right through any

State water bank in the same manner and subject to the same rules and requirements that govern any other lessor of water to the water bank

The bill established a Nez Perce Tribe Water and Fisheries Fund for the Tribe to acquire land and water rights, restore or improve fish habitat, or for fish production, agricultural development, cultural preservation, water resource development, or fisheries-related projects. In addition, it created a Nez Perce Domestic Water Supply Fund to pay for the design and construction of water supply and wastewater treatment systems for tribal communities.

The bill also established a Salmon and Clearwater River Basins Habitat Fund, consisting of the Nez Perce Tribe Salmon and Clearwater River Basins Habitat Account and the Idaho Salmon and Clearwater River Basins Habitat Account, to pay for habitat protection and restoration in the Salmon and Clearwater River basins

The bill declared that the United States (on behalf of the Tribe and the allottees) and the Tribe, waived and released all claims: (1) to water rights within the Snake River Basin; (2) for injuries to such water rights; and (3) for injuries to the treaty rights of the Tribe, to the extent that such injuries result or resulted from flow modifications or reductions in the quantity of water available that accrued at any time up to and including the effective date of the settlement, and any continuation thereafter of any such claims, against the State, any agency or political subdivision of the State, or any person, entity, corporation, municipal corporation, or quasi-municipal corporation.

Moreover, it directed the Tribe, in consideration of U.S. performance of all actions required by the Agreement, including the appropriation of all authorized funds, to execute a waiver and release of the United States from claims.

#### Navajo Indian Water Rights Settlement

On December 10, a revised draft San Juan water rights settlement between the State of New Mexico and the Navajo Nation was released. The Navajo Nation was expected to consider it soon thereafter, while approval by the Interstate Stream Commission could come in January 2005. The State Attorney General must also approve the settlement. Earlier drafts were released in December 2003 and July 2004. State Engineer John D'Antonio said, "This proposed settlement agreement...draws to a close more than 20 years of efforts to adjudicate the Navajo Nation's water rights claims. Importantly for non-Navajo water right owners, it protects existing uses of water, it allows for future growth, and it does so within the amount of water apportioned to New Mexico by the Colorado River Compact."

Once approved by New Mexico and the Navajo Nation, draft legislation would be forwarded to the State's Congressional delegation to approve the settlement and authorize the related Navajo-Gallup Water Supply Project. Under the settlement, the Bureau of Reclamation would also contract to supply additional water to the Navajo Nation from the Navajo Indian Irrigation Project and the Animas-La Plata Project. The agreement called for enactment of the settlement by the end of December 2006, with a partial final decree to be entered by the end of 2010, a hydrographic survey completed by December 2011, and a supplemental partial final decree by the end of 2013. The agreement also set milestones for project funding and construction.

## River Basins

### Cal-Fed

On October 6, the House passed H.R. 2828, the [California] Water Supply, Reliability, and Environmental Improvement Act, also known as the Cal-Fed bill, sending it to President Bush's desk for his signature. "The days of no new water storage for California are over," declared House Resources Committee Chairman Richard W. Pombo (R-CA). "Today we finished a decade of hard work and established a path to bring new water storage projects online for the first time in thirty years. This legislation represents a paradigm shift in our policy by making water storage the lynchpin of the entire Cal-Fed program. The success of Cal-Fed depends upon expanded and better-managed storage, and this bill establishes a framework around that very fact.... We will enhance Delta water quality, improve delivery, and secure future supplies of water -- the lifeblood of California's agricultural economy."

The Cal-Fed bill included: (1) \$90 million for pre-authorized levees and levee stability projects; (2) more than \$180 million for pre-authorized water quality improvement projects throughout California, including drinking water; and (3) \$90 million for fish and wildlife enhancements. It also established a "trigger" mechanism for the implementation of storage projects. Once a project feasibility study was completed, the Congress would have to authorize the project. If it did not, the Secretary of the Interior must declare an "imbalance" in the Cal-Fed program and prescribe what must be done to achieve balance.

"Ample storage is critical to every sound water policy in the United States," Senator Pete Domenici (R-NM) said. "California has clearly fallen behind in this regard, which is why I have committed to work on Chairman Pombo's behalf to fund the feasibility studies necessary to increase water storage in his state."

Domenici also said Cal-fed is the first of several bills likely to pass through Congress in the coming years to address growing western water challenges. He declared, "When I became chairman of the Energy Committee..., I identified water legislation as one of my top three priorities. Over the years, I have watched sustained drought and growing populations create serious water challenges in the West. Agriculture, recreation, industry and growing towns and cities compete for dwindling supplies of water. This challenge will become a crisis if Congress doesn't act. Calfed - achieved after several years of analysis and negotiation - sets the standard for future water bills."

### Colorado River Basin

On September 14, Interior Secretary Gale Norton signed a Memorandum of Agreement with Arizona, Nevada, and California that would result in the completion and implementation of a long-term, comprehensive initiative to recover endangered species and protect wildlife habitat from Lake Mead to the U.S.-Mexico border. "The Lower Colorado River Multi-Species Conservation Program is a crucial environmental achievement," Norton said. "This program will protect the river's habitat and the species that depend on it, while also ensuring the river's resources can continue to be used by the citizens of Nevada, California and Arizona to support their economy and quality of life."



The 50-year initiative was intended to protect the environment, while insuring continuing water and power production and deliveries. It was designed to address the needs of listed threatened and endangered species, while preventing the listing of additional species. The proposed plan would create more than 8,100 acres of riparian and backwater habitat for 31 endangered species. Interior would provide half of the estimated \$620 million cost over the life of the program, and the three lower basin states the other half. Interior spokesman Frank Quimby noted, "It's being called the largest river habitat and conservation project ever proposed under the Endangered Species Act."

Discussions on the issues began in 1997, and the MOA committed the partners to using their "best efforts," staff, and other resources necessary to publish a final Environmental Impact Statement for the program by late December, and to have a Record of Decision in place to implement the program in early January of 2005. Numerous permits and documents were needed to be completed to allow this to occur.

On October 20, the Colorado River Water Conservation District, a state-chartered agency designated to protect the water resources of fifteen counties on Colorado's West Slope, announced its Board of Directors had unanimously passed a resolution urging the State of Colorado, as well as the other Upper Basin states of Wyoming, Utah and New Mexico, to "take whatever actions are necessary" to conserve storage in Upper Basin reservoirs and release only the absolute minimum amount of water necessary from Lake Powell to meet obligations to downstream states. Record low water levels in Lake Powell, Flaming Gorge, Navajo and the Aspinall Unit of the Colorado River Storage Project (CRSP) posed a significant threat to hydroelectric power generation and the ability of Upper Basin states to meet compact obligations.

Lake Powell, in particular, has suffered from the past five years of drought and was down to 38% of its useable capacity. The reservoir is instrumental in meeting required water deliveries under the Colorado River Compact of 1922 to the Lower Basin states of Arizona, California and Nevada at the Colorado River's dividing point of Lee's Ferry, Arizona. The District's Board reaffirmed its "historical position" that the Upper Basin states are not required to supply one-half of the United States' treaty obligation to Mexico of 1.5M acre-feet of water each year.

On December 9, the Arizona Water Banking Authority approved an amended interstate agreement, which would guarantee that Arizona would store up to 1.25 million acre-feet (Maf) of water for Nevada in return for \$330 million. Nevada would make a \$100 million down payment in 2005, and pay \$23 million/year beginning in 2009. Nevada could take up to 40,000 af/year of Arizona's Colorado River apportionment directly from Lake Mead, with Arizona taking a proportionate share from Nevada's water bank account. On December 3, the Central Arizona Project (CAP) board voted to approve the agreement, and in turn Nevada agreed to support CAP's efforts to "rid itself of its junior rights status." At the time, if a shortage was declared on the Colorado River, California could take its full 4.4 Maf apportionment before CAP could take any of its 1.5 Maf share. CAP would like all river water users to share any shortage equally.

Herb Guenther, Director of the Arizona Department of Water Resources, told the CAP Board, "I believe this amendment is in the best interests of the state and the people of Arizona." The agreement will help Arizona utilize its full 2.8 Maf allocation of Colorado River Water, while the state gains an ally in its efforts to change CAP's junior water rights status. Further, according to Guenther, some of the money could be used to help protect some of the state's riparian areas.

Pat Mulroy, General Manager of the Southern Nevada Water Authority, told the CAP Board that Nevada desperately needs the additional water because the drought has hit them harder than other states. "The drought wiped out 15 years of water supply for Southern Nevada," she said. Nevada had counted on being able to use excess water from the Colorado River while developing new sources from within the state. She also said CAP's junior rights status makes no sense and needs to be revisited.

The Colorado River Water Users Association held its annual meeting in Las Vegas on December 17. Steve Griles, Deputy Secretary of Interior addressed the group. He declared, "With every year that passes, the importance of...the Colorado River increases. In just the past decade, the population of the seven Basin states that rely on the waters of the Colorado River has grown by nearly 11 million people - an increase of 26%.... The challenges that we face would be daunting enough if we were in normal water conditions. But as you know, the Colorado River basin has experienced five consecutive years of drought."

Deputy Secretary Griles emphasized that Interior will act to uphold and enforce the terms of the Colorado River Compact of 1922 and the rest of the Law of the River, which allocates its flows, including the *Arizona v. California* decree. He observed, due to the continuing drought, "Today we face the prospect of...imposing a shortage in the Lower Basin for the first time." He said, "Under the 2005 Annual Operating Plan Secretary Norton signed last month, access to surplus water in the Lower Basin will be eliminated...beginning on January 1, 2005. Secretary Norton is once again required to limit use in the Lower Basin to 7.5 million acre-feet, as agreed to by all seven Colorado River Basin States..... We must face our collective responsibility to plan for the likelihood that water supplies may be limited in the Lower Basin over an extended period of time. More specifically we must accelerate the development of procedures for the administration of shortages.... We are not yet in crisis, and, with prudent action, we will not reach the point of crisis.... There are promising signs that the Basin will successfully face this challenge."

Mr. Griles noted that in the Las Vegas valley, water use was down, despite continuing urban growth. He also went on to discuss in some depth the important accomplishments of the last few years, including the Interim Surplus Guidelines, California's 4.4 Plan and Quantification Settlement Agreement (QSA), Colorado River Water Delivery Agreement, Arizona-Nevada and Nevada-California banking agreements, Arizona Water Rights Settlement Act, Upper Colorado River Endangered Fish Recovery Program, Lower Colorado River Multi-Species Conservation Program, San Juan Recovery Implementation Program, Water 2025 Initiative, and Glen Canyon Adaptive Management Program, as well as progress on construction of the Animas-La Plata and Navajo Indian Irrigation Project.

Again referencing the severity of the current drought, he reported they had "...briefed the State Department on our view that, should the drought continue, we anticipate the need to formally engage...the International Boundary and Water Commission to address implementing a shortage to Mexican deliveries in accordance with the 1944 Treaty."

Bureau of Reclamation Commissioner John Keys also addressed the meeting, focusing his remarks on the drought. "A record five years of drought has certainly gotten everyone's attention. It is not unusual to have drought on the Colorado River. But we haven't seen one this severe in recorded history.... Still, it's not time to panic. The system is still about half full...and neither we

nor the States have been sitting around wringing our hands over this situation. We've been looking at potential operating scenarios and strategies for managing the river in the future, whether or not the drought continues...."

### Columbia River Basin

On April 5, the U.S. Fish & Wildlife Service announced the release and publication in the Federal Register of a draft analysis of the potential economic impacts of a proposal to designate critical habitat for bull trout in the Columbia and Klamath river basins. The draft analysis, prepared by Bioeconomics Inc. of Missoula, Montana, estimated the cost of protecting bull trout to be \$230 million - \$300 million over the following 10 years. Most of the expenses related to federal agency actions on federal lands, and occur due to the listing of bull trout and protective measures already in place, according to the analysis. Also, more than 60% of the proposed critical habitat had already been classified for salmon and steelhead, and no effort was made to separate related costs.

The Service proposed to designate 18,741 miles of streams and 532,721 acres of lakes and reservoirs in Oregon, Washington, Idaho and Montana as critical habitat for the Columbia and Klamath basin populations of bull trout. A court settlement required that the final designation be completed by September 21, 2004. A series of public information meetings were held throughout the area.

The ESA requires that the Service complete an economic analysis prior to the designation of critical habitat, and allows for the exclusion of some areas, if the benefits are greater than they would be if included, unless the exclusion would result in the extinction of the protected species. The Service listed the bull trout as a threatened species in 1998, and proposed critical habitat in November 2002 after it was sued by the Alliance for the Wild Rockies and Friends of the Wild Swan. Prior to that time, the Service had been unable to complete proposed critical habitat designations because of budget constraints. As part of the settlement, the Service had also agreed to designate critical habitat for bull trout in Washington's Coastal-Puget Sound, Montana's St. Mary-Belly River, and Nevada's Jarbidge distinct population segments. A proposal was expected in June, and a draft recovery plan for all lower-48 populations of bull trout was also being developed.

An overview of the economic analysis stated, "Most of the estimated costs of the actions described (75%) are expected to be borne by Federal agencies, primarily the Forest Service and the Bureau of Reclamation.... Approximately 30% of the total estimated cost is associated with administration of Section 7 consultations, the other 70% with project modifications to benefit bull trout.... Approximately half the identified project modification costs are associated with dams and reservoirs; primarily related to water level regulation, [federal hydropower] relicensing conditions, and fish passage at a relatively small number of sites.... Annual foregone power revenue losses to the Bonneville Power Administration...are considered to be \$2-4 million per year.... Water diversion modifications (such as fish screens) account for about [13%] of the total project modification costs...[and] 30% of the...modification cost is associated with only 4% of the area--primarily in... Washington and portions of Oregon where major fish passage issues are likely to be addressed."

On August 31, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) announced that it would release a draft written strategy in the form of a "biological opinion" to protect Endangered Species Act (ESA) listed salmon that is

performance-based and expected to avoid jeopardizing the continued existence of the species. NOAA cited improvement in virtually every Columbia and Snake River salmon and steelhead population over the past four years. "Nearly all ESA-listed populations are significantly improved from numbers counted in 2000, and well above the 10-year averages. NOAA Fisheries credits measures to restore hundreds of miles of in-river and estuary salmon habitat, state-of-the-art technological upgrades to hydroelectric dams and other facilities, aggressive predator control, better hatchery and harvest practices, and favorable ocean conditions with boosting returns." The NOAA news release said the Bush Administration had made federal resources available for salmon recovery in priority areas, including a request for \$100 million in the President's FY 2005 budget, for "hundreds of collaborative, locally driven projects. The new strategy continues these successful efforts and calls for historic federal commitments to improve fish passage at hydroelectric dams. The plan balances the energy and water needs of the Northwest with the commitment to increasing healthy salmon stocks." The new strategy abandoned calls for removal of dams on the Snake and Columbia Rivers. "Although the draft is undergoing final review, this draft biological opinion is expected to result in the most significant improvements in the federal dams since the Endangered Species Act was enacted over thirty years ago," said Bob Lohn, NOAA's Northwest Regional Administrator. "This is a win-win scenario for salmon and for the citizens of the Northwest and we look forward to discussing the details of the plan in the coming days. [I]t will positively contribute to salmon for the long-term."

The new draft biological opinion would govern how the federal hydroelectric system must be operated to minimize harm to ESA-protected fish and responded to an order by a federal district court in June 2003 that a prior version should be revised to provide more certainty. NOAA Fisheries worked collaboratively on the plan's scientific details with other federal agencies, the Northwest states and Indian tribes.

### Klamath Basin

Rep. Ken Calvert, Chairman of the House Resources Committee's Subcommittee on Water and Power, opened a field hearing on the impacts of the Endangered Species Act (ESA) in Klamath Falls, on July 17. He stated, "We are all too aware of the impacts here.... Thirty years ago, Congress had the best intentions when it passed the [ESA, but] only 7 species out of 1300 listed have been 'recovered' and those are mainly due to other species conservation laws. That means that [ESA] has a success rate of .01% at best. But, at the same time, communities across the West are stopped cold in their tracks to the point where some legitimately wonder whether their way of life has become endangered.... Clearly, something isn't working."

He continued, "There's no reason why we can't require -- by law -- independent, peer-reviewed science for every major aspect of the [ESA] and use that science to make the best-informed decisions.... Everyone should support this effort if they truly care about protecting and recovering endangered species." He then previewed House Resources Committee action, including a "sound science" measure introduced by Rep. Greg Walden (R-OR), reported on July 21, with a critical habitat reform bill by Rep. Dennis Cardoza (D-CA).

Dan Keppen, Executive Director of the Klamath Water Users Association (KWUA), referred to a National Research Council (NRC) report and questioned the science and current regulatory structure governing Klamath basin fisheries management. He concluded, "The report confirms

observations of many landowners in the Upper Klamath Basin: the regulatory approach of implementing the ESA, as opposed to the use of incentives that would encourage landowners to promote the welfare of species, is...more stick than carrot.... This perception could be changed by cooperative arrangements that promote the welfare of the listed species without threatening land-owners. To solve the problems of the Klamath River watershed, we need a coordinated management program....”

On October 14, Interior Secretary Gale Norton announced a landmark agreement between Oregon and California, the President’s Council on Environmental Quality (SEQ.), and four cabinet-level federal agencies. It committed the participants to future cooperation and collaboration in Klamath River watershed activities, and pledges to make those activities a priority in their respective agencies.

Secretary Norton stressed that the agreement would focus on and prioritize mutual efforts in the entire Klamath watershed. The agreement would enhance coordination and communication among the signatories, tribal and local governments, and other interests as they work to resolve water quantity, water quality, and fish and wildlife resource problems in the entire basin.

#### Missouri River Basin

On June 21, in a consolidated case, Minnesota District Court Judge Paul Magnuson ruled that the U.S. Army Corps of Engineers (Corps) has discretionary authority to operate the Missouri River system as it deemed best to balance water uses. He ruled that under the 1944 Flood Control Act (FCA), “All river interests must be considered and evaluated to secure the maximum benefits to river interests. The court finds that the FCA does not impose a non-discretionary duty to maintain minimum navigation flows of season lengths. The Corps’ prioritization of river interests is discretionary.” The Pick-Sloan Plan, authorized by the 1944 FCA, provided for flood control and navigation on the Missouri, as well as storage for irrigation and recreation. River levels and reservoir releases impact water intakes for powerplants and municipalities, and affect endangered birds and fish. The Corps has struggled to balance these competing interests, under the 1944 FCA, and its ESA and other statutory responsibilities.

In the summer of 2003, conflicting flow mandates from various district courts put the Corps in a lose-lose situation and facing contempt charges over its management of the Missouri River system. The cases were centralized by the Judicial Panel on Multidistrict Litigation and referred to Judge Magnuson on July 24. He temporarily required the Corps to reduced reservoir releases in order to protect the endangered pallid sturgeon and interior least tern, and threatened piping plover.

The Corps had since completed its revision of its “Missouri River Main Stem Reservoir System Master Water Control Manual” (Master Manual), with a Record of Decision, effective March 19, 2004. It included higher summer flows, arguably to the detriment of upstream states, recreation and fish and wildlife interests. They sued the Corps to limit upstream reservoirs releases and reduce summer streamflow, mimicking the Missouri’s natural hydrograph. They claimed the new Master Manual violated provisions of the 1944 FCA, ESA and National Environmental Policy Act (NEPA), but the Court rejected these allegations.

Of note, the first Master Manual was developed nearly forty years ago. It was revised in 1973, 1975 and 1979. In the late 1980s, facing an extended drought that drained the upstream storage reservoirs, decimating fisheries and recreation, the Corps again began revising its Master Manual.

The March 2004 Master Manual considered drought and the U.S. Fish and Wildlife's (FWS) 2003 Biological Opinion (BiOp). In the past, the Corps and FWS had concluded that reducing summer flows would create sandbar habitat necessary for plover and tern habitat, but the agencies now agreed "...that the 'alluvial geomorphic process' indicated that spring and summer flows would not create sandbar habitat, but would potentially destroy beneficial sandbar habitat." Judge Magnuson ruled that the streamflow baseline adopted was proper and founded on a rational basis, and also denied claims that Reasonable and Prudent Alternatives (RPAs) outlined in the 2003 BiOp were insufficient.

Rebecca Wodder, President of American Rivers, said, "The Corps has postponed the necessary changes in river flows for nearly fifteen years, and we do not share the court's confidence that new flows will occur sometime in the future without a court order. Americans deserve more than ecological decline, economic stagnation, and political stalemate along the Missouri River.... We predict that long haul barges will disappear from the river by the end of the decade regardless of this ruling. This was a setback, but we will not give up the fight to save this river for future generations."

On June 23, South Dakota Governor Rounds observed, "While many of the early headlines read that the judge ruled in the Army Corps of Engineer's favor, there are many positive aspects to this ruling. We have a new Master Manual that was developed with a significant amount of input from all interests up and down the river. The state claimed that once a master manual is issued, it is a binding document that is reviewable by the courts. Although the Corps argued that it is free to make changes as they see fit, the court accepted the state's position. This decision allows the Corps the flexibility to manage the river based on all recognizable uses, not just navigation and flood control." He added, "The court held that South Dakota's fish stocking activities do not violate the Endangered Species Act (ESA). The court recognized that environmental laws apply to the Corps, including the ESA.... While we continue to struggle with the effects of an ongoing drought, there are additional drought conservation measures that will help us retain water in the years to come.... We are going to thoroughly study the decision before we decide what our next move will be."

North Dakota Governor John Hoeven expressed frustration saying: "We have to do everything we can to get a new law into place. I think this emphasizes the need for a new law, one that reflects today's realities on the river. Pick-Sloan was passed close to 60 years ago. That idea is totally out of sync with today's realities."

### Pecos River Basin

The House Resources Committee held a hearing on Endangered Species Act impacts in southern New Mexico in Carlsbad on June 7. Tom Davis, Manager of the Carlsbad Irrigation District (CID) and a former WSWC member, testified that CID is authorized to store 176,500 af in four reservoirs on the Pecos River: Santa Rosa, Sumner, Brantley and Avalon and delivers water to 25,005 acres. Water is kept in the upper most reservoirs as long as possible and released in large

blocks to minimize evaporation and channel losses. These practices have been used since 1937. CID only impounds flood flows in Santa Rosa and Sumner from March through October, passing the natural base flows.

The blunt nose shiner, a small fish, was listed in 1987 as threatened and critical habitat had been designated that includes a 70-mile stretch of the river downstream from Sumner Dam, where the river is wide, shallow and meandering. The U.S. Fish and Wildlife Service (FWS) had taken the position that the historical operation of the dam was responsible for reducing shiner numbers, and CID was cooperating to the extent possible with biologists' requests to experiment with operational releases. However, the fish population continued to decline, raising questions as to the real limiting biological factors. Davis declared, "My point is that we are not making any progress after 12 years of manipulating the system and spending millions of tax-payer's dollars to study and meet the shiners supposed needs." The New Mexico Interstate Stream Commission hired a private firm with nationally recognized biologists to make an independent review. It found differences with FWS findings regarding habitat preferences and survivability, and located shiners "in reaches of the river where we were told they could not survive. So, what is the shiner's real situation? No one knows!"

Davis concluded, "No civilized nation desires to sit by while species go extinct. There is no doubt our nation has spent more and tried harder...than anyone through-out the history of mankind. But it is not working. We are just spending money and crippling economies.... The cost to local economies [in] the West is in the millions. Yet, the benefits to the listed species are negligible.... If Congress is sincere in making the ESA truly functional, they need to draw on the experiences of westerners who continue to struggle to implement the act and at the same time, preserve their livelihoods."

#### Rio Grande Basin

On January 5, the Tenth Circuit Court of Appeals declared moot and vacated its June 2003 panel opinion affirming a preliminary injunction granted by the U.S. District Court for the District of New Mexico and requiring the Bureau of Reclamation to use water from its Middle Rio Grande and San Juan-Chama Projects as necessary to meet the needs of species listed under the Endangered Species Act (ESA). The injunction expired on December 31, 2003. Previously, New Mexico, Colorado, Idaho, Kansas, Nebraska, Nevada, Utah and Wyoming had petitioned for a rehearing en banc.

The court reasoned, "As of today, the parties agree all provisions of the injunction have either been met or were never invoked. Most importantly, we are informed that between the entry of the injunctive order and December 31, 2003, the Bureau of Reclamation has not had to comply with paragraph 14 of the district court's order by reducing delivery of allocated water to any contract user. Thus, for all practical purposes, none of the provisions of the injunction remain. This court then faces the question of what relief we can afford by either affirming or reversing the preliminary injunction on en banc review, if granted. The answer is none. The climatological circumstances that occurred during the appeal and the passage of time have rendered the injunction superfluous. No water has been diverted.... Thus, the injunctive order from which this appeal was taken no longer provides the court with a live controversy to review. Therefore, this appeal is moot."

The court also noted that the enactment of the 2004 Energy and Water Development Appropriations Act "... also makes moot further proceedings in this court." The act prohibited any federal funds from being used to reduce or reallocate water pursuant to San Juan-Chama Project contracts, including the execution of such contracts facilitated by the Middle Rio Grande Project, for the purpose of ESA compliance, unless it was done on a willing seller or lessor basis and in compliance with New Mexico laws. The court also determined that silvery minnow habitat recovery requirements had been and continued to be met through the reasonable and prudent alternatives outlined in a March 2003 Biological Opinion (BiOp) issued by the U.S. Fish and Wildlife Service.

Arguing for an exception to the mootness doctrine, New Mexico noted that the dispute is capable of repetition. The court said, "The State confuses the potential for the resurgence of the issue of governmental discretion...with whether the appeal is moot.... The Government correctly points out if the district court's conclusion that [Reclamation] has discretion under the contracts [to release water for endangered species needs] is embodied in a final order, that analysis will once again be subject to review, and sufficient time for the appellate process to run will be available." The court also cited the public interest and equities in vacating its own panel opinion, but added "...the complaint has not been dismissed and because the injunction was temporally limited and preliminary, the district court should determine whether there are unresolved issues that remain to be tried."

On August 27, the North Alamo Water Supply Corporation, 17 irrigation districts in the Rio Grande Valley and 29 individuals filed a claim under Chapter 11 of the North American Free Trade Agreement (NAFTA) asking for \$500 million in estimated economic losses as Mexico had failed to deliver over 1 million acre-feet (Maf) of water since 1992, that was due the United States under a 1944 treaty. If Mexico did not agree to pay within 90 days, the water users would file a formal complaint with a NAFTA arbitration panel. NAFTA provisions require countries to provide compensation for property taken and forbid discriminatory treatment of foreign investors. Some 22 NAFTA claims have been filed since 1992. Several have been successfully argued by Don Wallace Jr., a Georgetown University School of Law professor of international law, who represented the irrigation districts along with the Washington, D.C. law firm of Marzulla & Marzulla.

According to treaty, the United States has a right to an annual average of 350,000 acre-feet of water from six Rio Grande tributaries arising in Mexico. The largest is the Rio Conchos. Mexico had blamed extreme drought for contributing to its water debt. The treaty also requires that the U.S. deliver 1.5 Maf of water from the Colorado River to Mexico, which it has done consistently despite drought. More abundant rains in 2003 and 2004 largely replenished Amistad and Falcon Reservoirs on the Rio Grande in South Texas, and allowed Mexico to reduce its water debt by about half. While diplomatic overtures continued, negotiations had not produced any more water. Moreover, Mexico rejected the U.S. water users' assertions of economic losses. "Any claim that there could have been some damage to U.S. farmers is unfounded, given that [Mexico's] average water payments have been greater than those called for in the treaty," said Juan Bosco Marti, Director North American Affairs, Foreign Relations Ministry.

Texas Governor Rick Perry and Agriculture Commissioner Susan Combs had worked closely with the Bush administration on the issue. "We have a very good relationship with the State Department, but the problem has been that the diplomatic measures taken by the State Department have not worked," Combs said. As a result, Rio Grande Valley water-rights holders were



determined to make their claim of injury as individual investors under NAFTA directly against Mexico.

## RESOLUTIONS AND POLICY POSITIONS

Under the Council's rules of organization, its functions include the investigation and review of water-related matters of interest to the western states. Moreover, from time to time, the Council adopts policy positions and resolutions, many of which address proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of western water resources. The following were adopted by the Western States Water Council in 2004.

**POSITION  
of the  
WESTERN STATES WATER COUNCIL  
regarding  
FEDERAL WATER AND CLIMATE DATA COLLECTION AND ANALYSIS PROGRAMS  
Adopted as Revised  
Las Vegas  
April 2, 2004**

**WHEREAS**, the Western States Water Council is a policy advisory body representing eighteen states, and has long been involved in western water conservation, development, protection, and management issues, and the member states and political subdivisions have long been partners in cooperative federal water and climate data collection and analysis programs; and

**WHEREAS**, in the West, water is a critical, vital resource (much of which originates from mountain snows) and sound decision making demands accurate and timely data on precipitation, temperature, soil moisture, snow depth, snow water content, stream flow, and similar information; and

**WHEREAS**, the demands for water and related climate data continue to increase along with our population and this information is used by federal, state, tribal, and local government agencies, as well as private entities and individuals, to forecast flooding and drought and to project future water supplies for agricultural, municipal, and industrial uses; hydropower production, recreation, and environmental purposes, such as for fish and wildlife management and for endangered species needs; and

**WHEREAS**, without timely and accurate information, human life, health, welfare, property, and environmental and natural resources are at considerably greater risk of loss; and

**WHEREAS**, critical and vital information is gathered and disseminated through the Snow Survey and Water Supply Forecasting Program, administered by the National Water and Climate Center (NWCC) in Portland, Oregon, and funded through USDA's Natural Resources Conservation Service (NRCS), while equally essential data on stream flow conditions are gathered and disseminated through the U.S. Geological Survey's Cooperative Stream Gaging Program and National Stream Flow Information Program, which are funded through the Department of Interior; and

**WHEREAS**, state-of-the-art technology has been developed to provide real or near real-time data with the potential to vastly improve the water-related information available to decisionmakers in natural resources and emergency management, and thus better protect the public safety, welfare and the environment; and

**WHEREAS**, over a number of years, federal appropriations have not kept up with increasing program costs and/or matching non-federal contributions, and this erosion in funding has led or would have led to the discontinuance, disrepair, or obsolescence of a significant number of manual snow courses, automated SNOTEL (SNOWTElemetry) sites, stream flow forecasting capabilities, and stream gages; and

**WHEREAS**, beginning in FY2001, an increase in the federal appropriation, in the amount of approximately \$2.5 million, was made for the Snow Survey and Water Supply Forecasting Program to prevent the discontinuance, disrepair, or obsolescence of a significant number of manual snow courses, automated SNOTEL sites, and stream flow forecasting capabilities; and

**WHEREAS**, the USDA has now determined to implement accounting changes that will essentially erase the benefits of the added federal appropriations that began in FY2001, which changes will essentially exhaust funds available for the operation and maintenance of NWCC's SNOTEL System and Soil and Climate Analysis Network (SCAN) by FY2006; and

**WHEREAS**, increases in federal costs for salaries and overhead are continuing to be absorbed by the U.S. Geological Survey's Cooperative Stream Gaging Program, resulting in erosion of the funding needed to maintain the stream gaging program; and

**WHEREAS**, there is a serious need for adequate and consistent federal funding to maintain, restore, modernize, and provide for the continued targeted expansion of NWCC's SNOTEL and SCAN Systems, and USGS's Cooperative Stream Gaging Program and National Stream Flow Information Program, with a primary focus on coordinated data collection and dissemination.

**NOW THEREFORE BE IT RESOLVED**, that the Western States Water Council urge the Administration and the Congress to give a high priority to the allocation and appropriation of sufficient funds for these critical, vital programs which benefit so many, yet have been or are being allowed to erode to the point that it threatens the quantity and quality of basic data provided to a myriad, growing and diffuse number of decision makers and stakeholders, with significantly adverse consequences.

**BE IT FURTHER RESOLVED**, that Western States Water Council urge the Administration and the Congress to increase the earmark for the Snow Survey and Water Supply Forecasting Program beginning in FY2005 by approximately \$3.0 million, without necessarily increasing the overall appropriation to USDA by this amount, to insure that the intent of the increased federal appropriation for NWCC's SNOTEL and SCAN Systems, that began in FY2001, is accomplished.

**POSITION STATEMENT**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**relative to the recommendations of the**  
**WESTERN WATER POLICY REVIEW ADVISORY COMMISSION**  
**Las Vegas, Nevada**  
**readopted April 2, 2004**

**Introduction**

The Western States Water Council is an organization representing eighteen states. Members are appointed by their respective governors to address a broad range of water policy issues affecting the West. In this context, the Council responded to the recommendations of the Western Water Policy Review Advisory Commission (WWPRAC) in a letter dated November 14, 1997. The Commission had been charged by the Congress to prepare a report to the President on "federal activities in the nineteen western states which directly and indirectly affect the allocation and use of water resources...." The Council understood the difficulty of the task undertaken by the Commission and spent considerable time itself in reviewing draft reports and recommendations, as well as the Commission's final report. While commending the Commission for the time spent and commitment made by the Commission and its staff, the Council in its November 1997 letter expressed concerns with several of the Commission's recommendations. At the beginning of a new Congress and federal Administration, the Council wishes to reiterate the concerns expressed in its earlier letter in the form of this position statement.

**Governance**

The Council takes issue with the Commission's primary recommendations related to "fundamental changes in institutional structure and government process...." incorporating top-down approaches to water management by federal river basin commissions, which have been tried and failed in the past. Such an approach is the antithesis of the local bottom-up watershed approaches to identifying and solving water-related problems, which have gained favor and momentum westwide. The report's overall reliance on federal action and authority contrasts with existing interstate compacts and the growing recognition of the pivotal role states must play if we are to successfully deal with the complex challenges we face in water resources. In order to effectively carry out this role, flexibility and innovation at the state level is necessary. This emerging model for water governance moves away from federal mandates and institutional structures.

The final report states an intention to support such local initiatives. However, the suggested use of federal basinwide governance pilot projects ignores the success of many innovative state and local efforts undertaken without the need for federal direction or federal leadership, and threatens further successes by the imposition of the proposed governance structure.

Importantly, the final report fails to define the problem or problems that require a federal solution in the form of a federal river basin plan to be developed by a federal river basin commission. Local watershed councils or groups should be allowed to define and resolve problems without forced federal solutions as a condition of priority federal financial assistance and expedited regulatory action. While enhanced federal policy and budget coordination, as well as expedited regulatory reviews and decisions, are commendable objectives, the prospect for their attainment is dim. The proposal for federally created and operated top-down river basin commissions is unworkable and unacceptable.

## **Conflicts with State Water Law and Institutions**

The Council has serious concerns with other recommendations in the report which either directly conflict with existing state water law and policy, or fail to provide for adequate partnerships between the state and federal agencies on key policy issues. For example, while the report states an intention to "respect" state water law, the report also recommends changes in state management of ground water and allocation of conserved water which are contrary to current state laws.

Recommendations relative to the review of authority and operations of existing dams and hydroelectric facilities, would promote federal objectives without adequately addressing concomitant state interests. Other recommendations would condition distribution of federal funds based solely on federal policy considerations without adequate state and stakeholder input. Such undertakings will require effective partnerships between state and federal agencies, as well as affected stakeholders.

## **Summary**

The federal government's preemption of state authority is not the way to address the complex issues associated with western water management. The report, if implemented, would move us in the wrong direction, adversely affecting states' abilities to efficiently address our water resource problems. The suggested federal role would create more problems than it would resolve. The recommendations regarding state authority are placed in the context of the report's conclusions that would undermine the long-established congressional policy of deference to state water allocation law. The Western States Water Council strongly opposes this and similar recommendations in the report. More detailed comments on the report were provided by many of our member states.

The Council invites reference to a published report prepared by it for the Commission entitled, "Water in the West Today: A States' Perspective." This report was prepared by Council members and staff in response to a request from the Commission. The report relates to directives given to the Commission to: (1) review present and anticipated water resource problems affecting the nineteen western states; (2) review the problems of rural communities relating to water supply, potable water treatment, and wastewater treatment; (3) review the need and opportunities for additional storage or other arrangements to augment existing water supplies, including water conservation; (4) examine institutional arrangements to address problems of water allocation, water quality, planning, flood control, and other aspects of water development and use; and (5) review the respective roles of both the federal government and the states and examine federal-state relations regarding various aspects of water allocation and use.

The Council's report (published by the Commission) is based on responses elicited through a written request for information from the Council's member states, as well as several subsequent telephone conversations. Appendix I of the report contains the individual state responses, which exemplify both the commonality and diversity of challenges associated with the management of water resources in the West. Appendix II contains relevant policy positions of the Council, as well as the Western Governors' Association, with which the Council is formally affiliated.



## WESTERN STATES WATER COUNCIL

942 East North Union Avenue, Suite A-201 / Midvale, Utah 84047-1764 / (801) 561-5300 / FAX (801) 255-9642

Web Page: [www.westgov.org/wswc](http://www.westgov.org/wswc)

July 26, 2004

Position No. 258

The Honorable Michael Crapo  
Chairman, EPW - Subcommittee on Drinking Water, Fisheries and Wildlife  
United States Senate  
239 Dirksen Senate Office Building  
Washington, DC 20510

Dear Senator Crapo:

I'm writing as Chairman of the Western States Water Council to express the Council's views on H.R. 135, to establish the "Twenty-First Century Water Commission." The Council consists of representatives appointed by the governors of eighteen western states.

The Council's mission is to promote cooperation among its member states in the management and development of water resources in the West. In this capacity, the Council has recognized and documented the need for additional supplies to meet growing consumptive use demands and also to support existing water infrastructure rehabilitation. Council member states also recognize as a significant challenge the need to sustain instream values generally, and specifically for maintaining and enhancing water quality, and for protecting endangered species. Because the West is often subject to wide swings in water supplies, states have identified drought planning and response as a priority problem, and similarly flagged flood planning and response. Overlying many of the above challenges are legal and institutional conflicts facing western states, involving federal/state relationships, conflicts between states, and disputes among water users, among others.

Given this context, it has been some time since a comprehensive study of the available water supplies and the future needs of the United States has been undertaken. Thus, a study, such as that proposed in H.R. 135, could be of substantial benefit to the West.

If such a commission is to be successful, it will be important that it represent the diverse interests that exist. This is particularly so in the West, which by its very nature is a semi-arid climate where there is heavy reliance on the ability to capture run-off from snowmelt and storage reservoirs. To assure that such representation exists, the Western States Water Council would be happy to be of assistance as representatives to the Commission are selected.

We appreciate the legislation's reference to the importance of state rights with regard to water resources. The last congressionally authorized commission on water, the Western Water Policy Review Advisory Commission established in 1996, was perceived to be flawed in this respect. In the process of working with this Commission, the Council was asked to provide its perspectives on the directives given to the Commission. These directives included a review of present and anticipated water resource problems affecting the 19 western states, a review of the problems of rural communities relating to water supply, and an examination of the need and opportunities for additional storage or other arrangements to augment existing water supplies, including water conservation. For your reference, I am attaching a copy of the Executive Summary of the Council's report. This report underscores that states are taking initiatives to

Senator Crapo  
July 26, 2004  
Page 2

address the water challenges that we face. In a very real way, these state efforts collectively represent a "national water strategy."

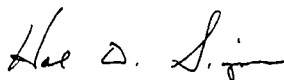
Nevertheless, the federal government's role is vital. There are numerous federal programs that deal with water resources development, management and protection. As a result, the issue of coordination of these programs and related federal projects to improve efficiency and their ability to assert states in the primary role in water management would be a useful focus for the Commission.

In summary, we believe that the work that is contemplated for the Twenty-First Century Water Commission under H.R. 135 could be beneficial. If it is to be successful, it will be vital that there be appropriate representation on the Commission to reflect the diverse interests across the nation in water resources, and that in its recommendations, the Commission reflect the long-held Congressional policy of deference to states regarding water management.

There is another bill before the Congress which is also important to western states. "The National Drought Preparedness Act of 2002" was introduced in May of 2002, by Senators Domenici and Baucus, and a companion bill in the House by Rep. Hastings and Rep. Rehberg. The bill would establish a comprehensive national policy that statutorily authorizes a lead federal agency for drought, and delineates the roles and responsibilities for coordinating and integrating federal assistance for droughts. The bill is intended to move the country away from the costly, ad-hoc, response-oriented approach that characterizes current federal drought programs, and moves us instead toward a proactive, preparedness approach. This is accomplished through the authorization of the drought fund which would be available for the development and implementation of drought preparedness plans at all levels including the watershed, local, state, tribal and national. The drought plans will not be mandated in a top-down manner, but rather encouraged through incentives. The bill recognizes the importance of allowing flexibility so that plans are developed to address local needs and in a manner that is acceptable to the people affected by the plan. We urge your support for the bill.

We appreciate your consideration of the Council's views on these matters.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harold D. Simpson". The signature is fluid and cursive, with a large initial "H" and a stylized "S".

Harold D. Simpson, Chairman  
Western States Water Council

Enclosure



August 24, 2004

Position No. 259

The Honorable Pete Domenici  
Energy and Natural Resources Committee  
United States Senate  
328 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Domenici:

The Western States Water Council represents eighteen states, which include all the Reclamation Act States, plus Alaska. Our members are appointed by their respective governors to address a broad range of water policy issues affecting the West. Much of the West is characterized by its aridity, and the current drought highlights the fact that water availability continues to define and circumscribe our economic and environmental well being and quality of life. This is particularly true in many small rural communities.

We strongly support federal legislation to provide technical and financial assistance for small rural communities struggling to meet their water supply needs. We appreciate your efforts in this regard, and hope to see appropriate legislation enacted to create a systematic, integrated approach to investigating, authorizing and constructing projects to meet rural western needs in close cooperation with State, local and regional entities, as well as tribes.

The states should have a key role in the development and establishment of guidelines and criteria for determining program eligibility and in selecting project priorities. It is important to note that rehabilitation and replacement of existing sub-standard rural water supply systems must be an important part of the program. Some areas depend on water systems that might be compared to Third World projects, with unprotected wells and other sources of supply that fail to meet Safe Drinking Water Act standards. In some instances, upgrading and replacing these antiquated and inadequate systems will require finding new water supplies, which may entail acquiring adequate water rights and building the necessary infrastructure.

The authorities proposed as part of S. 2218, S. 1732 and S. 1085 must be implemented in cooperation with other Federal and non-Federal programs, including coordinating actions with state and local watershed groups. Cost sharing and repayment requirements and "capability-to-pay" measures should recognize the potential hardship some rural communities face, and the Secretary should have the flexibility to make appropriate adjustments.

States must have a say in determining the availability of water rights to support project development and actual water delivery, as well as appropriate water conservation measures. The states are primarily responsible for water allocation, and the legislation should explicitly direct that nothing in the proposed legislation is intended to nor shall be construed to affect any state granted water rights. It is also important that non-Federal entities retain title to projects.

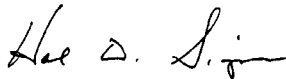
Senator Domenici  
August 24, 2004  
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In determining and allocating project costs among beneficiaries, it is also important to clearly define which federal costs are or are not reimbursable. Federal oversight or overhead costs, which are beyond the control of non-Federal project sponsors, should be non-reimbursable. Further, the Secretary should be allowed to accept appropriate non-Federal in-kind contributions as part of cost-sharing requirements.

Existing authorities, such as the Drinking Water State Revolving Loan Fund, are not sufficient to meet the needs of small rural communities, which are facing serious obstacles in securing the resources necessary to ensure an adequate and reliable water supply for their future. New authority and significant new funding is essential to better meet the needs.

We again applaud your efforts to address these problems and hope to be able to work together to authorize, fund and implement an appropriate program, in partnership with state and local entities and tribes. Hopefully, we can ease the burden and improve the lot of many of our rural citizens struggling to ensure that their water supplies meet minimal standards of public health and are sufficient to carry them through shortages, such as the current drought.

Sincerely,

A handwritten signature in dark ink, appearing to read "Harold D. Simpson". The signature is fluid and cursive, with a large initial "H" and a stylized "S".

Harold D. Simpson, Chairman  
Western States Water Council

**RESOLUTION**  
**of the**  
**WESTERN STATES WATER COUNCIL**  
**URGING CONGRESS TO REAFFIRM ITS DEFERENCE TO STATE WATER LAW,**  
**PROVIDE FOR THE WAIVER OF THE UNITED STATES' IMMUNITY TO**  
**PARTICIPATION IN STATE ADMINISTRATIVE AND JUDICIAL PROCEEDINGS,**  
**AND PROVIDE FOR PAYMENT OF FEES REQUIRED BY STATE LAW**

**WHEREAS**, water is the lifeblood of each of the arid Western States, the allocation of which determines the future of each Western State's economic, environmental, social and cultural fortunes; and

**WHEREAS**, each Western State has developed comprehensive systems for the appropriation, use and distribution of water tailored to its unique physiographic, hydrologic and climatic conditions found within that state;

**WHEREAS**, the United States does not have a water management system that is equivalent to those of the Western States for the appropriation, use or distribution of water; and

**WHEREAS**, Congress has consistently recognized the primacy of state water law because of the need for comprehensive water management systems tailored to the unique needs and characteristics of the individual states; and

**WHEREAS**, Congress enacted the McCarran Amendment, 43 U.S.C. § 666, to allow the joinder of the United States in state general stream adjudications, and Congress intended the United States to be subject to the same procedures as all other water right claimants joined in state general stream adjudications; and

**WHEREAS**, many of the Western States are conducting general stream adjudications for the purpose of quantifying all water right claims in accordance with the McCarran Amendment; and

**WHEREAS**, the United States is often the largest claimant of water rights in these general stream adjudications, and the adjudication of federal water right claims requires a large commitment of time, effort and resources by the state courts and by state agencies; and

**WHEREAS**, the adjudication of water rights claims is absolutely essential for the orderly allocation of water in all the Western States where state law is based on the prior appropriation doctrine; and

**WHEREAS**, many of the Western States' general stream adjudication procedures require claimants to pay a fee to offset the states' expenses arising from state general stream adjudications; and

**WHEREAS**, citing to *United States v. Idaho* the United states claims immunity from the payment of adjudication filing fees required of all other claimants to offset the state's judicial and administrative expenses in conducting general stream adjudications; and

**WHEREAS**, for the United States to be immune from sharing in the expenses of these proceedings constitutes an unfunded federal mandate to the states; and

**WHEREAS**, the United States contends that it cannot be joined in state administrative or judicial proceedings with respect to water rights it has acquired under state law other than pursuant to the McCarran Amendment, 43 U.S.C. § 666; and

**WHEREAS**, it is inefficient and wasteful to require that a separate lawsuit be commenced for the sole purpose of regulating water rights acquired by the United States under state law; and

**WHEREAS**, the United States claims it is also immune from paying fees to states that are required of all other water users for the appropriation, use or distribution of water; and

**WHEREAS**, equity and fairness dictate that federal agencies who voluntarily seek to appropriate water pursuant to state law, or who acquire water rights based on state law, should be required to comply with state law, including the payment of fees, to the same extent as all other persons.

**NOW, THEREFORE, BE IT RESOLVED** that the Western States Water Council supports passage of legislation that at a minimum provides for the following:

1. Requires the federal government to participate in all state administrative and judicial proceedings with respect to water rights it acquires to the same extent as all other persons.
2. Requires the federal government to pay filing fees (not Native American tribes) as well as comply with all other state substantive and procedural water right adjudication laws to the same extent as all other persons.
3. Requires the federal government to pay applicable fees as well as comply with all other state substantive and procedural laws for the appropriation, use and distribution of water rights to the same extent as all other persons.
4. Provides for state administration of all water rights.

**BE IT FURTHER RESOLVED** that the Western States Water Council also urges Congress to appropriate moneys for payment of unpaid fees to states that have incurred expenses as a result of processing federal claims or federal objections to private claims in state general stream adjudications.

**BE IT FURTHER RESOLVED** that the Western States Water Council shall send a copy of this resolution to the congressional delegations representing the states and territories who are members of the Western States Water Council, to President George W. Bush, and to the President Pro-Tem of the United States Senate and the Speaker of the United States House of Representatives.

## **RULES OF ORGANIZATION**

### **Article I - Name**

The name of this organization shall be "THE WESTERN STATES WATER COUNCIL."

### **Article II - Purpose**

The purpose of the Western States Water Council shall be to accomplish effective cooperation among western states in matters relating to the planning, conservation, development, management, and protection of their water resources.

### **Article III - Principles**

Except as otherwise provided by existing compacts, the planning of western water resources development on a regional basis will be predicated upon the following principles for protection of states of origin:

- (1) All water-related needs of the states of origin, including but not limited to irrigation, municipal and industrial water, flood control, power, navigation, recreation, water quality control, and fish and wildlife preservation and enhancement shall be considered in formulating the plan.
- (2) The rights of states to water derived from the interbasin transfers shall be subordinate to needs within the states of origin.
- (3) The cost of water development to the states of origin shall not be greater, but may be less, than would have been the case had there never been an export from those states under any such plan.

### **Article IV - Functions**

The functions of the Western States Water Council shall be to:

- (1) Undertake continuing review of all large-scale interstate and interbasin plans and projects for development, control or utilization of water resources in the Western States, and submit recommendations to the Governors regarding the compatibility of such projects and plans with an orderly and optimum development of water resources in the Western States.
- (2) Investigate and review water related matters of interest to the Western States.

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These rules incorporate the last changes that were adopted in November 1997 at the Council's 125th meetings in Carlsbad, New Mexico.

- (3) Express policy positions regarding proposed federal laws, rules and regulations and other matters affecting the planning, conservation, development, management, and protection of water resources in Western States.

- (4) Sponsor and encourage activities to enhance exchange of ideas and information and to promote dialogue regarding optimum management of western water resources.
- (5) Authorize preparation of amicus briefs to assist western states in presenting positions on issues of common interest in cases before federal and state courts.

#### Article V - Membership

- (1) The membership of the Council consists of not more than three representatives of each of the states of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming appointed by and serving at the pleasure of the respective Governors. Member states of the Western Governors' Association, which are not members of the Council, shall be added to membership if their respective Governors so request. The Executive Committee may, upon unanimous vote, confer membership upon other western states, which are not members of the Western Governors' Association, if their respective Governor so requests.
- (2) Member states may name alternate representatives.
- (3) Any state may withdraw from membership upon written notice by its Governor. Further in the event any state becomes delinquent in paying dues as set forth in Article V (5) for a period of three years, the state will be excluded from Council membership unless and until the current year's dues are paid.
- (4) The Executive Committee of the Council may, by unanimous vote, confer the status of Associate Member of the Council upon states it deems eligible. Associate Membership may be granted for a period of up to three years, during which time the state may appoint two official observers to participate in Council activities and receive all printed material disbursed by the Council. Associate Member states shall have no vote in Council matters. The Executive Committee shall, through regular Council voting procedures, establish the appropriate level of dues for Associate Member states. In addition to determinations concerning Associate Member states, the Executive Committee may, when appropriate, establish fees for participation in Council activities by non-members.
- (5) If any state fails to pay the appropriate level of dues established by the Executive Committee of the Council, the privilege afforded by virtue of its membership to participate in Council activities and to receive all printed materials dispersed by the Council shall be withheld pending the payment of dues, beginning at the start of the fiscal year following the delinquency.

#### Article VI - Ex-Officio Members

The Governors of the member states shall be ex-officio members and shall be in addition to the regularly appointed members from each state.

#### Article VII - Officers

The officers of the Council shall be the Chair, Vice-Chair and Secretary-Treasurer. They shall be selected in the manner provided in Article VIII.

## Article VIII - Selection of Officers

The Chair, Vice-Chair and Secretary-Treasurer, who shall be from different states, shall be elected from the Council by a majority vote at a regular meeting to be held in July of each year. These officers shall serve one-year terms. However, the Chair and Vice-Chair may not be elected to serve more than two terms consecutively in any one office. In the event that a vacancy occurs in any of these offices, it shall be filled by an election to be held at the next quarterly Council meeting.

## Article IX - Executive Committee

(1) Each Governor may designate one representative to serve on an Executive Committee which shall have such authority as may be conferred on it by these Rules of Organization, or by action of the Council. In the absence of such a designation by the Governor, representatives of each state shall designate one of their members to serve on the Executive Committee. Any Executive Committee member may designate an alternate to serve in his/her absence.

(2) The Council may establish other committees which shall have such authority as may be conferred upon them by action of the Council.

## Article X - Voting

Each state represented at a meeting of the Council shall have one vote. A quorum shall consist of a majority of the member states. No external policy matter may be brought before the Council for a vote unless advance notice of such matter has been mailed to each member of the Council at least 30 days prior to a regular meeting and 10 days prior to a special meeting at which such matter is to be considered; provided, that such matters may be added to the agenda at any meeting by unanimous consent of those states represented at the meeting. In any matter put before the Council for a vote, other than election of officers, any member state may upon request obtain one automatic delay in the voting until the next meeting of the Council. Further delays in voting on such matters may be obtained only by majority vote. No recommendation may be issued or external position taken by the Council except by an affirmative vote of at least two-thirds of all member states; provided that on matters concerning out-of-basin transfers no recommendation may be issued or external position taken by the Council except by a unanimous vote of all member states. On all internal matters; however, action may be taken by a majority vote of all member states.

## Article XI - Policy Coordination and Deactivation

With regard to external positions adopted after being added to the agenda of the meeting by unanimous consent, such external policy positions shall be communicated to the member governors of the Western Governors' Association (WGA) and the WGA Executive Director for review. If after 10 days no objection is raised by the governors, then the policy position may be distributed to appropriate parties. In extraordinary cases, these procedures may be suspended by the Executive Director of the WGA, who will consult with the appropriate WGA lead governors before doing so.

Policy positions will be deactivated three years after their adoption. The Executive Committee will review prior to each regular meeting those policy statements or positions due for sunset. If a majority of the Executive Committee members recommend that the position be

readopted by the Council, then such position shall be subject to the same rules and procedures with regard to new positions that are proposed for Council adoption.

#### Article XII - Conduct of Meetings

Except as otherwise provided herein, meetings shall be conducted under Robert's Rules of Order, Revised. A ruling by the Chair to the effect that the matter under consideration does not concern an out-of-basin transfer is an appealable ruling, and in the event an appeal is made, such ruling to be effective must be sustained by an affirmative vote of at least 2/3 of the member states.

#### Article XIII - Meetings

The Council shall hold regular meetings three times each year at times and places to be decided by the Chair, upon 30 days written notice. Special meetings may be called by a majority vote of the Executive Committee, upon 10 days written notice.

#### Article XIV - Limitations

The work of the Council shall in no way defer or delay authorization or construction of any projects now before Congress for either authorization or appropriation.

#### Article XV - Amendment

These articles may be amended at any meeting of the Council by unanimous vote of the member states represented at the meeting. The substance of the proposed amendment shall be included in the call of such meetings.



**POLICY  
regarding  
PROPOSED POLICY POSITIONS  
of the  
WESTERN STATES WATER COUNCIL**

July 16, 2004

**Introduction**

The following policy is designed to improve the process by which the Western States Water Council considers and adopts external policy positions. It augments, but it does not supplant, existing procedures established in the Council's by-laws.

As soon as practicable following distribution of the "30-day Notice" containing proposed policy positions for consideration by the Council, the staff, after consultation with the Chairman, will organize a conference call. Participants in the conference call will include members of the Executive Committee, other Council representatives as deemed appropriate by the Chair who are associated with the proposed policy positions, as well as the chairpersons of the standing committees that will consider the positions at the Council meeting. The purpose of this conference call will be to discuss the issues raised by any proposed policy positions and to identify problem areas that may require further exploration and discussion to achieve consensus. The Chairman will designate individuals to take the lead in this effort, so that any differences may be resolved prior to the Council meeting.

**Credentials**

Whenever a person who is not a Council representative is attending on behalf of a Council member at a regular or special meeting of the Council, either in person or via conference call, a written notification to this effect must be provided to the Council offices to assure that the person is serving in the appropriate capacity. Since delegations to the Council from each state consist of more than one person, but each state has only one vote, the Executive Committee member for each state shall be responsible as an internal state matter for coordinating and communicating the official position of the state relative to voting on proposed policy positions.

**Council Committee Chairs**

The standing committees of the Council will be the primary forum for discussion and debate of policy issues prior to consideration by the Full Council. The respective chairs of the standing committees of the Council shall have the responsibility to attempt to resolve any remaining differences that surface during the discussion of proposed policy positions at the respective committee meeting. While this will not always be possible, additional efforts to reconcile opposing views and attempt to reach compromise will improve the chances for consensus when the matter is brought before the full Council.

## **10 Day Review**

The by-laws require a ten (10) day review period by the Western Governors' Association for proposed external policy positions that were not included in the 30-day Notice. In order to comply with the spirit of this policy, external positions that are included in the 30-day Notice, but then are substantially revised at the Council meetings prior to adoption, shall also be subject to a 10-day review by the Western Governors' Association. Further, the Council Chair at his or her discretion, and in consultation with WGA staff, may choose to provide a 10-day review period for any policy positions which do not result from total consensus at the Council meeting.