

Monthly Briefing

A Summary of the Alliance's Recent and Upcoming Activities and Important Water News

Federal Judge Blocks New Clean Water Act Rule

A U.S. District Court judge in North Dakota on August 27 issued a temporary injunction against the Environmental Protection Agency (EPA) and Army Corps of Engineers' Waters of the U.S (WOTUS) rule, calling it "exceptionally expansive". The ruling blocks implementation of the rule in 13 states pending further judicial proceedings.

Judge Ralph R. Erickson called EPA's attempt "inexplicable, arbitrary and devoid of a reasoned process," and issued an injunction preventing the EPA and the U.S. Army Corps of Engineers from claiming oversight of millions of acres of land that contain small bodies of water."

EPA and the Army Corps of Engineers were preparing to implement the new Clean Water Act WOTUS rule on August 28, 2015. Since publication of the rule in the *Federal Register*, numerous lawsuits were filed challenging the regulation, and several parties sought preliminary injunctions to delay implementation of the rule. Late this month, United States District Courts in Georgia and West Virginia agreed with the Agencies that legal challenges to the Rule could only be



Judge Ralph R. Erickson—who issued a temporary injunction against the federal government's new Clean Water rule—is shown here, addressing the North Dakota U.S. Attorney's Office's 2013 Tribal Consultation Conference. Photo Source: United Tribes News, Dennis J Neumann.

brought in the United States Court of Appeals for the 6th Circuit and therefore denied the requests for preliminary injunction.

On August 27, the District Court for North Dakota found that it had jurisdiction and granted the request of a number of States and issued a decision preliminarily enjoining the Clean Water Rule. Critics of the rule and other recent actions taken by EPA were quick to voice their support of the court's decision.

"Yesterday's injunction is a desperately needed respite for farmers, ranchers, and hardworking American families in those states," said U.S. Rep. Cynthia Lummis (WYOMING) on August 28. "The ruling raises even more questions about the competence of an EPA whose credibility is on the decline. Whether it is our precious water resources or our electrical grid that is crucial to our way of life, our nation cannot afford to hand over more control to this reckless agency—their power grabs need to be stopped."

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Court Halts WOTUS Implementation (Cont'd from Page 1)

Under the order issued by the District Court of North Dakota, the parties that obtained the preliminary injunction are not subject to the new rule, and instead continue to be subject to the prior regulation. In light of the order, EPA and the Army Corps of Engineers will continue to implement the prior regulation in the following States: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

In all other respects, the rule became effective on August 28. The federal agencies are evaluating these orders and considering next steps in the litigation. Read more: <https://blog.epa.gov/blog/2015/07/implementation-of-the-clean-water-rule/>

"It is important to note that the Court decision delaying implementation of the WOTUS rule will only affect these states and not the entire nation," said Mark Limbaugh, the Family Farm Alliance's representative in Washington, D.C. "Several other lawsuits remain, from other states and also from farm and business groups."

The proposed rule seeks to clarify which waterways are overseen by the federal government. Because the current standard has long been a source of confusion and the Supreme Court has had to weigh in twice, the Obama administration set out to clarify the issue in early 2014, releasing a proposed rule that it said would make clear the reach of federal oversight and preserve long held exemptions for agriculture. On May 27, 2015, the EPA and the Corps of Engineers announced the final WOTUS rule. The rule becomes effective 60 days after its publication in the Federal Register - August 28.

The Family Farm Alliance shares many of the views expressed by the states, agricultural organizations and others in the regulated community that, in many ways, the final WOTUS rule expands federal jurisdiction over most waters under the Clean Water Act (CWA). Small tributaries, adjacent waters and isolated wetlands and ponds will automatically become jurisdictional "waters of the U.S." under the final rule and not be subject to any interpretational significant nexus analysis.

"While many of these waters would be determined to be jurisdictional anyway under previous regulations, the larger issue is the final rule's categorical determination that certain waters are *de facto* "waters of the U.S." by rule without further analysis or due process," said Dan Keppen, Family Farm Alliance Executive Director.

However, the Alliance in the past two years has also worked constructively with EPA to ensure that, regardless of what happens with the various court proceedings, assurances will remain that allow for construction and maintenance of irrigation ditches and the maintenance of drainage ditches consistent with Section 404(f) of the CWA.

Mr. Keppen was invited to brief the Council of State Governments West Legislative Council on River Governance in Kalispell (MONTANA) on the new WOTUS rule earlier this month. In attendance were state legislators from Idaho, Montana, Oregon and Washington.

While the recent court ruling in North Dakota is seen as a victory for many Western states, others, such as Maryland, have voiced broad support for the new WOTUS rule. In 2014 public comments filed on the proposed WOTUS rule, some states wrote asking for greater input in shaping the rule to ensure proper implementation while other states argued the rule has so many flaws that EPA should have revoked it and issue a new proposal.

Meanwhile, Congress is considering several pieces of legislation aimed at forcing the agencies to withdraw the final rule and restart an accelerated collaborative process with the states and other stakeholders to write and propose a new rule. H.R. 1732 has passed the House and S. 1140 was marked up in committee earlier this summer. A House appropriations bill includes a provision defunding the Corps from implementing the final WOTUS rule. Both House bills have garnered a veto threat from the White House.

EPA and the new WOTUS rule have been the focus of oversight by Congress in the last year, and that attention will likely intensify in the wake of the recent gold mine cleanup disaster that occurred in Colorado earlier this month, where EPA crews have been accused of spilling millions of gallons of acidic wastewater into the Animas River.



Spill cleanup crews at Gold King Mine in Colorado add lime to a settling pond to assist in the pH adjustment of the water prior to discharge to Cement Creek, a tributary of the Animas River on Aug 14, 2015. During excavation operations on August 5, pressurized water began leaking above the mine tunnel, spilling about three million gallons of water stored behind the collapsed material into Cement Creek. (Credit: Eric Vance/EPA).

Welcome to the Bizarro Universe of California Water

Recent Management Decisions, Media Coverage Puzzling and Troubling

Remember the 1997 “Seinfeld” episode that was all about the concept of a Bizarro universe, where Jerry Seinfeld and his pals encounter characters who look remarkably like they do, but are actually the exact opposite? This concept was taken directly from the Superman universe, where Bizarro Superman – Superman’s exact opposite – lives in the backwards Bizarro world, where up is down, and down is up. Bizarro Superman says “Hello” when he leaves, “Goodbye” when he arrives.

Flash forward to 2015, where the tensions of the Western drought crisis have forced federal water management agencies to make seemingly irrational decisions backed by federal courts. In this time and place, a university report underscoring the devastating impacts of the drought to California farmers is overshadowed by a Bay Area activist organization’s cherry-picked findings that suggests otherwise. A heart-breaking crisis that is inflicting billions of dollars of economic impact and ruining tens of thousands of lives is instead characterized by a *New York Times* guest columnist who claims the state is getting along “fabulously”.

Welcome to the Bizarro universe of California water.

Trinity River Flow Management

Perhaps the most bizarre occurrence of the past month in California began on August 21, when the U.S. Bureau of Reclamation announced plans to release up to 88,000 acre-feet of Central Valley Project (CVP) water from Trinity Reservoir in the hope of aiding returning non-listed Chinook salmon. This action, which CVP users claim is outside of Reclamation’s authorized place of use, is a repeat of a similar action taken last year with the intention to help avoid an outbreak of a naturally-occurring disease epidemic known as Ich (pronounced “ick”). Since 2000, a significant supply of water has been set aside each year from the Trinity Reservoir for fishery protection purposes. Over the past four years, this has equated to more than 200,000 acre-feet of water lost which was literally flushed down the Lower Klamath River.

Several water agencies immediately filed a lawsuit in court to stop what they termed a “gross misuse of water”, and many others – including the Family Farm Alliance, City of Redding (CALIFORNIA) and water users in Oregon’s Upper Klamath Basin -voiced their opposition to the action. But the August 26 court ruling has negated any hope of a possible solution that would bring additional water to severely parched areas of California.

On August 27, a number of water agencies experiencing a second year of a zero water allocation – including San Luis & Delta-Mendota Water Authority, Westlands Water District, Tehama-Colusa Canal Authority, South Valley Water Association and San Joaquin River Exchange Contractors

Water Authority - joined together to express their frustration and disappointment with the latest court ruling denying relief from historic water shortages.

“In light of the Court’s prior decisions on this topic, we do not understand this decision,” the agencies said in a joint press statement. “Given the magnitude of harm resulting from water shortages caused by drought and decisions to reallocate water from people to the environment, we are terribly disappointed.”

Reclamation is now releasing additional water from Trinity Reservoir for the lower Klamath River to help protect returning adult fall run Chinook salmon from a disease outbreak and mortality. Supplemental flows from Lewiston Dam began on August 21 and will extend into late September.

“In this fourth year of severe drought, the conditions in the river call for us to take extraordinary measures to reduce the potential for a large-scale fish die-off,” said Bureau of Reclamation Mid-Pacific Regional Director David Murillo. “This decision was made after discussions with federal and state fish regulatory agencies and serious consideration of the impacts on all affected parties.”

At a time when record fallowing of agricultural land is on the rise, community wells are drying up, and more than 95 percent of the state is experiencing drought conditions, the court’s support of Reclamation’s decision came as a huge disappointment to Central Valley Project water users dependent upon its share of the Trinity River stored water.

“The impact of the lost water, which is in excess of 28 billion gallons, will be felt all over the state, and is enough water to serve 175,000 families for an entire year,” the CVP water users said collectively in their statement.

“Unfortunately, government agencies continue to dump the most important resource out to the ocean on one day, only to bemoan the ‘historic drought’ the next day.”

In what has become an annual exercise for over a decade, environmental and tribal interests earlier in the summer began calling for the release of more water from federal water projects dependent upon Klamath River watershed sources.

Remarkably absent from the media coverage of this topic was in-depth analysis questioning the wisdom of sending an artificial deluge of water out to the ocean at a time when –in the absence of upstream dams providing stored water – natural streamflows would be a mere trickle. Ever since thousands of migrating salmon died on the Lower Klamath River in 2002, activists have forecast that another such event is imminent, unless more stored water is released.

“This type of reactive management clearly has impacts to irrigators trying to close out the growing season,” said Family Farm Alliance Executive Director Dan Keppen.

“Government agencies continue to dump the most important resource out to the ocean on one day, only to bemoan the ‘historic drought’ the next day.”

**Joint Statement of CVP Water Users
August 27, 2015**

Continued on Page 4

California Drought Craziness (Continued from Page 3)

This year's argument by downstream tribal and environmental interests is that more water is needed in response to the threat of rising water temperatures and deadly parasites.

In the past month, the Alliance worked with its CVP water service contractors and the Klamath Water Users Association to coordinate formal comments on the draft Lower Klamath River flow plan that were transmitted to Reclamation on August 20. Comment letters developed by these interests primarily focused on Reclamation's authority to use water for its intended purpose and the lack of meaningful assessment of impacts to other water and power users and habitat in the Sacramento and San Joaquin Valleys.

The Family Farm Alliance letter essentially sought to identify the flawed flow-centric philosophy behind Reclamation's flow plan and tells the other side of the story regarding artificial flows and fish health on the lower Klamath River.

Nearly all media accounts carry the arguments of lower Klamath River advocates who claim that the 2002 Klamath River fish die-off was caused by flow reductions associated with operations of the Klamath Reclamation Project, located hundreds of miles upstream. These arguments ignore findings of the National Academy of Sciences and a federal judge who failed to find a relationship between the 2002 die-off and unique flow or temperature conditions.

"The combination of warm water, the timing of the salmon run, and crowded conditions was chronically and cumulatively stressful to fish and is probably the most plausible reason for the 2002 fish die-off," the Alliance observed in its letter to Reclamation. "This explanation is further buttressed by hydrologic records which show that flow conditions similar or worse than those in 2002 have occurred six times in the past 36 years with no similar salmon die-off."

Nevertheless, federal agencies appear to be fearful of another die-off and releasing additional stored water has been the sole measure used to prevent another disaster from occurring. The draft Reclamation plan made no mention of the NAS report or federal court decision, and essentially ignored earlier non-flow recommendations provided by water and power users.

"In a year like this before dams went in, nature would have mostly dried up the river and there would have been no way to augment flows," said Dan Errotabere, who farms on the west side of the San Joaquin Valley. "Why are we doing it now when water is so critically needed?"

Additional information on this development is summarized on Page 5 of this newsletter.

It should be noted that Reclamation's August 21 release of water for fish is different from the recently announced release for the Hoopa Valley Tribe's bi-annual Boat Dance Ceremony. These ceremonial flows are provided on odd years and support an important cultural tradition. Releases

for the ceremony began August 16 and continued through August 20.

Pacific Institute Report and Recent California Drought Media Coverage

The Pacific Institute, an environmental think tank based in Oakland (CALIFORNIA), released a report (*Impacts of California's Ongoing Drought: Agriculture*) in late August that describes what it considers to be the impacts of the drought on California agriculture. The report concludes that the impacts of the drought on California agriculture have been less than expected; agricultural production has been buoyed by "increased but unsustainable" groundwater pumping; such pumping shifts the burden of the drought to others by causing shallow wells to dry and by causing subsidence

that damages infrastructure. The report notes that gross crop revenues have continued to increase during the drought, as has agricultural employment. Along with its references to groundwater, it also brushes briefly on a perceived need to change water rights and discusses the impacts of water transfers.

The Pacific Institute has long advocated that increased water conservation in agricultural and urban areas provides the potential to free up water that can be used to offset growing demands in California.

"We often see bold general statements by water transfer proponents about the potential for agricultural water use efficiency to free up water that can be transferred for use in urban areas or to enhance in-stream

flows for the environment," said Mr. Keppen. "However, those statements are usually followed up by a list of the factors that make it a difficult proposition."

Those include re-use deficiencies when water is removed upstream in the system, state water rights laws that protect water users from water being taken away, or forfeited, if they conserve water, and transactions that move water between presumably willing buyers and willing sellers, but have the effect of taking farmland out of production.

All of those issues are dealt with directly in a report released by the Center for Irrigation Technology (CIT) at Fresno State. The report, "Agricultural Water Use in California: A 2011 Update", refutes some long-standing beliefs about agricultural water usage and confirms others. The full report is available at <http://www.californiawater.org>. The CIT report and others have reached a similar conclusion: the only large potential for moving water from agriculture to other uses will come from fallowing large swaths of farmland.

Ironically, the Pacific Institute, which calls itself a



A recent UC Davis study found that the statewide 2015 drought impact to agriculture and related industries is \$2.74 billion.

Photo Source: California Farm Water Coalition

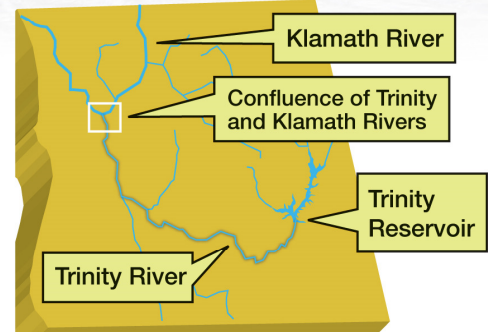
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Wasting Water in Time of Drought?

August 12, 2015

While millions of Californians are making extraordinary sacrifices to cope with drought – showering with buckets and killing once pleasing landscapes – the Bureau of Reclamation is poised to dump up to 83,000 acre-feet of water – enough for a city like Sacramento for a year – into the ocean in the hope of avoiding a once-in-history salmon die-off on the Lower Klamath River. The benefits of this action are not certain. The real damage to people and the environment is unquestionable.



Harming Other Species



Throughout this severe drought, Reclamation has chosen to let go of over 120,000 acre-feet of stored water from Trinity Reservoir at the expense of Central Valley Project water users across California, including endangered species. While there is no proven benefit to salmon on the Lower Klamath River, other listed species have undoubtedly been harmed, such as winter-run salmon on the Sacramento River. The National Marine Fisheries Service has identified winter-run as one of eight priority species to prevent extinction. Other affected species include listed Coho salmon, Giant Garter Snake, and San Joaquin Kit Fox, migratory waterfowl and the once imperiled American Bald Eagle. Reclamation's choice to release water for highly speculative, unproven "benefits" is incomprehensible.

The Problem

In 2002, a die-off of salmon occurred on the Lower Klamath River, the only recorded time this has happened. Blame for the die-off ranged from political interference to illegal drug labs. The Department of Interior's official cause was an outbreak of "*Ich*" (pronounced "*ick*"), a fish parasite, due to a "combination of factors", including low flows, high temperatures, and high fish density. However, a National Academy of Sciences study found a unique combination of these factors could not explain the event. Conditions similar or worse than those in 2002 have occurred six times in the past 36 years with no similar salmon die-off.

Reclamation's "Solution"

Reclamation claims flow augmentation is the most viable management action to protect salmon on the Lower Klamath River despite the lack of scientific data. In 2012 and 2013, Reclamation released water to "prevent" an *Ich* outbreak even though monitoring data demonstrated no presence of *Ich*. In 2014, Reclamation announced it would not automatically make "preventative" release, prompting protests from local residents and a visit by Interior Secretary Sally Jewell. Soon after, "preventative" releases began even though no *Ich* had been detected yet again. Ironically, it was only after the "preventative" releases that an *Ich* outbreak occurred, and yet, despite doomsday predictions, no die-off. The only fish die-off to occur in 2014 was the result of Reclamation's hasty release of water from storage, which caused the death of thousands of Kokanee salmon. Ultimately, all uses of water, including for environmental management, must be held equally accountable to demonstrate benefit based upon science, not faith.

Other Consequences

In today's water market, the value of this taken water is at least \$120 million. In 2012, Reclamation promised to assess the effects of the proposed action and ensure that these releases would have no impact on CVP customers. That promise was broken. If Reclamation releases water again in 2015, the total cost to CVP power customers will be almost \$10 million and produce nearly 250 million pounds of global warming greenhouse gas emissions to replace the lost hydropower generation. In 2012, Reclamation promised to repay CVP customers for the lost power – another broken promise.

Conclusion

Water management in California is about balance, accountability and established priorities. To use our meager water supplies to protect abundant fish when other endangered species face greater dangers, and when so many people are doing without, makes no sense.

“California is doing fabulously....” (Continued from Page 4)

“nonpartisan research institute”, penned a guest column just days before the release of its report in the *Sacramento Bee*, titled “GOP presidential wannabees have no clue about drought”. However, as is typically the case, reports from this organization generated media coverage in the *Los Angeles Times* and elsewhere, just days after a University of California study found that the statewide impact to agriculture and related industries is \$2.74 billion, up from \$2.2 billion in 2014.

According to the UC report, the state's agricultural economy will lose about \$1.84 billion and 10,100 seasonal jobs because of the drought, with the Central Valley hardest hit, the report says. That's about 30 percent more workers and cropland out of production than last year. Most idled land is in the Tulare Basin.

"If a drought of this intensity persists beyond 2015, California's agricultural production and employment will continue to erode," said co-author Josué

Medellin-Azuara, a water economist with the UC-Davis Center for Watershed Sciences. Overall, however, the agricultural industry remains "robust," the study said. The agricultural economy continues to grow because of the "vast but declining" reserves of groundwater, which will offset about 70 percent of the surface water shortage this year, the researchers said.

Unfortunately, the Pacific Institute report leaves out several key factors that affect farmers and ranchers.

"You can sometimes tell a lot about a report by what's not in it," said Paul Wenger, President of the California Farm Bureau Federation.

One of those issues is the cost of production. The report focuses on gross farm incomes but ignores the rising costs farmers must pay to grow crops during the drought—with rapidly rising water costs a key factor.

"People should not use the report to assert that farmers have been unaffected," said Mr. Wenger.

In fact, the report itself notes that farmers have employed "a range of strategies" in response to drought that include under-irrigating fields, fallowing land, shifting crops, buying insurance and pumping groundwater. Oddly, the report does not note the significant investments farmers have made to improve irrigation efficiency, through changes in irrigation systems and changes in management through enhanced weather, soil and crop monitoring.

Other writers have marveled at how the attitude of Californians has helped them weather the historic drought, but sometimes gloss over the finer, and sometimes uglier, details. Charles Fishman, the author of "The Big Thirst: The Secret Life and Turbulent Future of Water" crafted a guest column for the *New York Times* titled "How California is Winning the Drought", where he concludes that California is weathering the drought with "remarkable resilience", because the state "has been getting ready for this drought for the past 20 years."

"Yet by almost every measure *except* precipitation, Cali-

fornia is doing fine," writes Mr. Fishman. "Not just fine: California is doing fabulously."

Mr. Fishman's *New York Times* column overlooked the grim reality discussed in the UC Davis Report, which determined that the employment impact of this year's drought took out 21,000 jobs.

Another factor missing from the Pacific Institute report and Mr. Fishman's commentary is the need for enhancing water supplies. Although the Pacific Institute report focuses extensively on groundwater use, it fails to mention one of the best ways to take pressure off of groundwater supplies: enhancing surface water availability by building new reservoirs and addressing federal environmental laws that have dedicated increasing amounts of Central Valley project stored water to meet fish species protected by the Endangered Species Act (ESA).

"It is unbelievable to blame us for the burden shift of

groundwater impacts," said Mr. Erratobere. "Farmers and others are going to groundwater - where available - because much of their once reliable surface water is now being left in the Bay-Delta, with questionable benefits for the fish it is intended to protect."

Perhaps no one is more concerned about the health of groundwater aquifers than California farmers and ranchers. During droughts, the food they grow often depends on groundwater to sustain it.

"Groundwater levels have typically recovered quickly after previous California droughts, and we hope that will be the case again," said Mr. Wenger. "But we certainly must be more active in enhancing surface storage and replenishing aquifers to prepare for future droughts, while we enact new California groundwater management activities."

Back to Reality; Reasons for Hope

Amidst all the craziness, a glimmer of hope emerged earlier this month, as evidenced by the response of average Americans to the current drought. When water gets scarce and the government slaps restrictions on its use, farmers should be first in line at the spigot, according to an Associated Press-GfK poll released on August 3rd. When asked to rate the importance of competing needs when water is scarce, 74 percent said agriculture should be a top or high priority, followed by residential needs (66 percent), wildlife and ecosystems (54 percent) and business and industry (42 percent).

Meanwhile, the waters of the eastern Pacific Ocean are heating up, scientists say, building towards a strong El Niño event that could rival the intensity of the record 1997 event that triggered floods throughout California. The current El Niño, nicknamed Bruce Lee, is already the second strongest on record for this time of year and could be one of the most potent weather changers of the past 65 years, federal meteorologists say.

It may take Bruce Lee to topple Bizarro Superman and set things straight in the Golden State this year.

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Environmental Groups Sue Over Oregon Spotted Frog

150 Local Farmers and Ranchers Show Up for Town Hall Meeting

Over 150 Deschutes Basin (OREGON) local farmers and ranchers on August 26 attended a public briefing to learn more about litigation they have been threatened with by two environmental organizations over the Oregon Spotted Frog, which is protected by the federal Endangered Species Act (ESA). Many of those in attendance expressed frustration by the litigation threat after investing so heavily in the pending Deschutes Basin Habitat Conservation Plan and the many local interim steps that have been voluntarily taken to improve habitat for the frog.

"We're working really hard and we're spending a lot of effort and capital on a habitat conservation plan," said Kenneth Rieck, who manages the Tumalo Irrigation District. "It won't be complete for about two years. Almost a year ago we started voluntary releases of water to protect the frog."

Two environmental groups are threatening legal action against the U.S. Bureau of Reclamation (Reclamation) and several irrigation districts (Districts) regarding potential harm to the Oregon spotted frog and its habitat in the Deschutes Basin. The Center for Biological Diversity and WaterWatch of Oregon filed separate 60-day Notices of Intent, setting forth their intentions to sue Reclamation for alleged violations of the ESA. WaterWatch's Notice also targets Central Oregon Irrigation District, North Unit Irrigation District (NUID), and Tumalo Irrigation District. The environmental groups are calling for Reclamation and the Districts to change operations at three reservoirs, including Crane Prairie, Wickiup, and Crescent Lake, to protect this species and its habitat.

"This legal threat is unfortunate," said Mike Britton, President of the Deschutes Basin Board of Control (DBBC), comprised of local water districts. "It will divert attention, resources, and funding away from the collaborative conservation work that so many agencies and individuals have been working toward -- not only for Oregon spotted frog but other fish and wildlife species. Recreational values may also ultimately be compromised."

Any changes to how water is stored or released by

Reclamation and the Districts at the targeted reservoirs may affect hundreds of family farms and ranches served by the Districts. Altered operations may also reduce water supplies for local parks, recreation on the Deschutes River and in the reservoirs, and even other fish and wildlife species in the Deschutes and other rivers. For example, releasing water in the winter for Oregon spotted frog may result in less water available for steelhead and red band trout in the summer. Local businesses may also be affected by the threatened litigation.

The environmental groups are demanding that Reclamation enter into a formal "consultation" with the U.S. Fish and Wildlife Service. In the consultation, the two federal agencies would evaluate whether Reclamation's operations of Crane Prairie and Wickiup are in fact harmful to the frog, and if so, to

then identify steps to avoid or mitigate that harm.

"We also anticipate that the environmental groups will demand that Reclamation and the Districts implement several interim measures such as higher winter releases from the reservoirs into the Deschutes River to improve downstream habitat," said Mr. Britton.

These legal threats may compromise meaningful steps to improve habitat for Oregon spotted frog and other fish and wildlife species. For several years, the three irrigation districts along with five others, and the City of Prineville, have been developing the Deschutes Basin Habitat Conservation Plan. This comprehensive plan is intended to provide clear, specific habitat restoration steps for Oregon spotted frog, steelhead, bull trout, and other species in the Deschutes Basin. Over 20 different stakeholders have participated in this effort, including the Deschutes River Conservancy, Trout Unlimited, Confederated Tribes of Warm Springs, and state and federal agencies. The Districts, and their patrons, have invested millions of dollars in this plan, which may be delayed due to the pending litigation.

"Despite this legal threat, the DBBC will continue to work collaboratively with our partners in our basin to improve both this region's economy and environment," said Mr. Britton.



Deschutes Basin water user representatives brief local landowners on ESA litigation threatened by two environmental organizations.
Photo Source: Central Oregon Irrigation District

Reclamation Hosts Infrastructure Investment Strategy Meeting

New Excess Capacity Policies Released for Public Review

The Bureau of Reclamation earlier this month hosted a meeting to brief stakeholders on its Infrastructure Investment Strategy report, which was finalized in May. A key purpose of the meeting was to obtain participants' feedback and input on the implementation of the Strategy (the Final Report can be accessed at <http://on.doi.gov/1USY5sw>). Meeting topics included background, objectives, strategy elements, planning, and financial issues related to Reclamation's Infrastructure Investment Strategy.

Based on stakeholder input provided until October 1, a follow-up installment report that includes more specific recommendations may be developed. Reclamation is particularly interested in receiving stakeholder input on excess capacity, creative financing ideas, title transfers, loan guarantees, and defining "deferred maintenance". A website is also under development, and the next level of stakeholder outreach will be conducted at the regional level. Reclamation's contact person on this matter is Chris Perry (cperry@usbr.gov), from the Denver Technical Services Center.

Alliance Executive Director Dan Keppen (OREGON) was among 30 who attended the meeting; 45 others participated by webinar.

"The document we reviewed in Denver is final, and it lays out the plan for the next three years, primarily focusing

on Reclamation's internal actions," said Mr. Keppen. "A critical issue for the Alliance at this point is to review two draft Directives and Standards (D&S) that Reclamation has prepared on excess capacity and related charges and to develop comments for Reclamation to consider."

When Reclamation has space available in its reservoirs or delivery systems, it can make that extra space ("excess capacity") available for non-Reclamation project water storage and transport.

The draft policy, "Contracting for Non-Project Use of Excess Capacity in Reclamation Project Facilities" (PEC 05-10), establishes the requirements for contracting for the use of excess capacity in Reclamation facilities, including identifying appropriate contracting authorities and addressing major rehabilitation and replacement needs of Reclamation facilities.

The draft policy, "Charges for Non-Project Use of Excess Capacity in Bureau of Reclamation Project Facilities" (PEC 05-11), is intended to promote consistency and transparency of contract rates and to help ensure federal taxpayers are receiving a fair return for the value of the service provided.

The two draft D&S can be downloaded at (<http://www.usbr.gov/recman/drafts/pec05-10webdraft.pdf>), and <http://www.usbr.gov/recman/drafts/pec05-11webdraft.pdf>.

Comments are due September 30.

Dear Friends of the Family Farm Alliance:

***Irrigation Leader* magazine is distributed to irrigation district managers and boards of directors in the 17 western states, Bureau of Reclamation officials, members of**

We encourage Family Farm Alliance members to consider signing up for an electronic notice or having their names added to the hard copy mailing list of *Irrigation Leader* magazine.



Please contact Kris Polly at (703)-517-3962 or by e-mailing at: IrrigationLeader@waterstrategies.com.

Federal Appeals Court Rejects Challenge to Klamath Straits Drain Court's Holding "Welcome News" to Western Water Users

The United States Court of Appeals for the Ninth Circuit has rejected a lawsuit by environmental activists that claimed that movement of water from the Klamath Straits Drain to the Klamath River violates the Clean Water Act (CWA). The court agreed with the Bureau of Reclamation (Reclamation) and Klamath Water Users Association (KWUA) that no federal CWA permit is necessary to return water to the Klamath River.

"This decision represents a significant victory for the Klamath Project," said KWUA Executive Director Greg Addington.

Under the CWA, the discharge of pollutants from a point source to "waters of the United States" (such as the Klamath River) is illegal unless the U.S. Environmental Protection Agency (EPA) or the state has issued a permit, known as a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permitting system was originally developed for municipal wastewater or industrial discharges, but past lawsuits and agency decisions have resulted in broadening the scope of regulated activities.

The Klamath Straits Drain, operated by Reclamation, originates in the Lower Klamath Lake area of the Klamath Project and runs to the Klamath River, carrying irrigation runoff and return flows as well as runoff from Lower Klamath National Wildlife Refuge. By statute, irrigation runoff and return flows are exempt from NPDES permitting requirements, but the Oregon Natural Resources Council (ONRC) Action's case was premised on the fact that the Straits Drain does not convey exclusively irrigation returns.

Based on U.S. Supreme Court precedent, the Ninth Circuit ruled that no permit is required because the Straits Drain is not meaningfully distinct from the Klamath River. The court reviewed the history of development of irrigation and Klamath Project infrastructure to make its decision. The court noted the historical relationship and intermingling of Klamath River and Lower Klamath Lake waters and recognized the complex engineering of the Klamath Project that collects both Klamath and Lost River water that may contribute to Straits Drain flows back to the Klamath River. The court explained that it is not relevant that these systems are now highly "engineered" and thus that the water bodies involved are simply not meaningfully distinct for purposes of the federal regulatory system.

The "meaningfully distinct" test comes from two U.S. Supreme Court decisions. See *South Florida Water Management Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109–12 (2004); *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council*, ___ U.S. ___, 133 S. Ct. 710 (2013). The Court based its ruling on several factual findings. First, it found that "the [Straits Drain] is essentially an improved version of a previously existing natural waterway, the Straits." Second, that "much of the water that flows through the [Straits Drain] originated from the Klamath River itself." Finally, the opinion concurs with the District Court's factual findings that "the [Straits Drain], like the Klamath Straits, creates a hydrological connection between the Klamath River and Lower Klamath Lake," and "if the headgates and the pumps were removed, it would be possible for water to flow between the Klamath River and Lower Klamath Lake."

"In the western United States, where movement of water across water bodies is a commonplace necessity so that supplies can be delivered to those areas where there is the highest demand, the Ninth Circuit's holding is likely to be welcome news."

**Harleen Kaur
Attorney
Nossaman LLP**

Having upheld the District Court's decision on the threshold issue of whether the Straits Drain and Klamath River are "meaningfully distinct," the Ninth Circuit declined to further rule on whether the water transfers rule serves as an alternative ground on which to uphold the District Court's decision.

"This was an important win because the lawsuit tar-

geted Klamath Project irrigators by seeking to make them pay for some type of treatment plant on Straits Drain before returning water to the Klamath River," said Mr. Addington. "The decision's recognition of the realities of the Klamath Project is beneficial overall. The Project is a complex and highly efficient system for moving water to farmland and to wildlife refuges too, including returning water to the Klamath River where it came from. It would cripple operations if every movement of water in these basins required a federal permit."

In the western United States, where movement of water across water bodies is a commonplace necessity so that supplies can be delivered to those areas where there is the highest demand, the Ninth Circuit's holding is welcome news.

"This is particularly the case in light of the potential that the 2012-2015 drought may be the new normal when it comes to water availability and management," said Harleen Kaur, an attorney with Nossaman LLP.

For more information, contact Greg Addington ((541) 883-6100) or Nick Jacobs of Somach, Simmons & Dunn ((916)446-7979).

Save the Date! 2016 Annual Conference

The Family Farm Alliance recently entered into a contract with the Monte Carlo Resort and Casino, which will once again host the Alliance's annual meeting and conference in Las Vegas. Mark your calendars: the general session of the 2016 Family Farm Alliance Annual Conference is set for February 18-19. In 2016, the Monte Carlo room rates will actually be 9\$ lower than in 2015. We hope to see you there!



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