

ENDANGERED SPECIES & WETLANDS REPORT

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Politics, regulation and law on ESA, wetlands and takings

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ESA took Calif. water rights, Claims Court judge rules

Pumpers, farmers were entitled to water under state contracts, Judge Wiese finds

For the first time, a federal court has found a taking of property caused by the Endangered Species Act.

Judge John Wiese of the U.S. Court of Federal Claims (COFC) ruled April 30 that the withholding of water from California farmers and irrigators to comply with Biological Opinions effected a physical taking of their property (*Tulare Lake Basin Water Storage District v. U.S.*, 98-101L; see *ESWR* March, p. 10, for coverage of oral arguments).

"[T]he federal government is certainly free to preserve the fish; it must simply pay for the water it takes to do so," Wiese said in the last line of his opinion, before finding for the plaintiffs and against the government.

The BiOps imposed restrictions and water quality standards to protect the Delta smelt and winter-run chinook salmon.

FWS and NMFS had argued that the plaintiffs' water use was

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Flycatcher CH designation set aside by Tenth Circuit

FWS will analyze effects of listing in economic analyses

The Fish and Wildlife Service will change the way it conducts economic analyses for critical habitat (CH) designations following a decision by the Tenth Circuit Court of Appeals that set aside the designation for the Southwestern willow flycatcher—about 600 miles of rivers and streams in California, Arizona and New Mexico (*New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 00-2050).

The service will assess the impacts of Section 7 that flow from listing and critical habitat and provide a total number that reflects the effects of both, said John Charbonneau, chief of FWS's Division of Economics. Then it will isolate the portion of the impacts caused only by critical habitat.

All economic analyses will be done the same way, Charbonneau said. Even though the Tenth Circuit decision theoretically only affects CH proposals in the states within that circuit—Colorado,

(Continued on page 4)

Tulare Lake

(Continued from page 1)

unreasonable or a violation of the public trust. But Wiese noted that the state itself had approved the water allocation scheme, and had elected not to change it.

“That the use now being challenged was not always unlawful is evident from the fact that it was specifically authorized by the state in D-1485. Were we now to deem that use a nuisance, we would not be making explicit that which had always been implied under background principles of property law, but would instead be replacing the state’s judgment with our own. That we cannot do.”

D-1485 is a water allocation scheme approved by the State Water Resources Control Board in 1978.

Wiese agreed that the state Department of Water Resources’ permits, “and in turn plaintiffs’ contract rights, are subject to the doctrines of reasonable use and public trust and to the tenets of state nuisance law” and that the State Water Resources Control Board, “under its reserved jurisdiction, could at any time modify the terms of those permits to reflect the changing need of the various water users. The crucial point, however, is that it had not.”

“[P]laintiffs’ right to divert water in the manner specified by their contracts and in conformance with D-1485 continued until a determination to the contrary was made either by the SWRCB or by the California courts,” Wiese said. “As no such determination was made during the period 1992-1994, and subsequent amendments to policy cannot, for contract purposes, be made retroactive, plaintiffs were indeed entitled to the water use provided for in D-1485 and in their contracts.”

Wiese said the public trust and reasonable use doctrines “each require a complex balancing of interests—an exercise of discretion for which this court is not suited and with which it is not charged.”

The case could have sweeping repercussions, and not just in California, said plaintiffs’ attorney Roger Marzulla of Marzulla & Marzulla.

“The federal government now has to pay for the water it took and realizes it has to pay in the future,” he said. The value of the water lost is “conservatively” estimated at \$25 million, he said.

But Marzulla said that in this case, “the government gets

off easy” because there only two groups of water contractors involved.

“The implications [of the decision] are far broader,” he said. “We’re talking about the future here.” The BiOps at issue in the *Tulare Lake* suit came out between 1992 and 1994, but later agreements and laws such as the Bay-Delta Accords and the Central Valley Project Improvement Act could serve as the springboard for more litigation.

The government could appeal the decision, but would have to ask Wiese to certify an interlocutory appeal, for which there is no deadline. There is no final, appealable order in the case because the damages phase awaits.

On the issues presented, Wiese sided with the plaintiffs. He found that the plaintiffs had a right to use the water by

**The State Water Resources Control Board
“could at any time modify the terms of those permits to reflect the changing need of the various water users. The crucial point, however, is that it had not.”**

Judge John Wiese

virtue of their state water contracts and that by limiting water use, the government had effected a physical taking.

Wiese distinguished his decision in *Tulare Lake* from *Rith Energy*, which the government said supported the position that limits on water use were reasonable under state law.

In *Rith*, Wiese explained that he had “rejected the takings claim of a surface mining operator who was denied a federal permit to mine when it was determined that the mining operation would have polluted the state’s groundwater. There, we concluded that ‘regulatory action that restrains an owner from the beneficial use of his property—even a restraint barring all such use—cannot become

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Correction

The May 14 *ESWR Update* sent by e-mail to subscribers said that the “Simovich Study” at issue in the fairy shrimp listing challenge came in during the comment period. As reported in last month’s issue and on page 5 of this issue, the study came in after the close of the comment period.

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Mining company loses taking claim in Fed. Circuit

A coal company that was prevented from mining because of the risk of acid mine drainage lost its takings claim in the U.S. Court of Appeals for the Federal Circuit (*Rith Energy v. U.S.*, 99-5153).

In upholding a decision by Judge John Wiese in the U.S. Court of Federal Claims, the Federal Circuit said that Rith “did not have reasonable investment-backed expectations that it would be permitted to mine in a way that would create a high risk of acid mine drainage.”

In addition, the court ruled that the government—in this case, the Office of Surface Mining—had not deprived Rith of all economically viable use of its property, because Rith was able to mine about 14 percent of the coal it had hoped to mine, making \$14 per ton in the process.

Since there was no categorical taking, Rith had to show that when it acquired the coal leases, it could not reasonably expect that it would be subject to regulations implemented by the Office of Surface Mining.

“Our precedents make clear that Rith could not have had such expectations,” the court said. “SMCRA was enacted

eight years before Rith purchased the coal leases. Its provisions include environmental performance standards that directly address acid mine drainage...”

Rith acquired the mineral leases, covering 250 acres in Bledsoe County, in 1985.

Wiese found that even though Tennessee had granted Rith a discharge permit, “[a] high probability of pollution of an aquifer is not within the tolerances of either regulatory scheme—the Tennessee Water Quality Control Act or [the Surface Mining Control and Reclamation Act (SMCRA)].”

But the appeals court said it did not need to reach the question whether Rith’s mining activities would have been prohibited by Tennessee nuisance law.

The National Wildlife Federation, which filed an *amicus* brief siding with the government, said the decision “has a broad impact; U.S. Court of Appeals for the Federal Circuit precedent directly controls almost all takings claims against the United States and heavily influences state court decisions on takings claims against state and local agencies.”

The National Mining Association backed Rith as an *amicus*.

Circuit Judge William Bryson wrote the opinion, in which he was joined by Judges Alan D. Lourie and Chief Judge H. Robert Mayer.

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the basis of a compensable taking where the restraint that is imposed is grounded ‘in the restrictions that background principles of the State’s law of property and nuisance already place on land ownership,’ ” *Rith Energy*, 44 Fed Cl. at 113 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029).

Wiese said *Rith Energy* “does not stand for the principle for which it is cited” by the government. “Crucial to the determination in *Rith Energy* was an adjudicated finding by the Department of Interior’s Office of Hearings and Appeals—based on evidence that had not previously been submitted to the state licensing authority—that plaintiff’s proposed mining activity would pollute the groundwater.... Because the background principle of Tennessee law made clear that such contamination was prohibited, the action taken by the federal government did not represent merely what the state *could* have done under its police powers, but rather, what the court believed the state was *required* to do in light of the adjudication by [DOI] establishing a ‘high probability’ of aquifer contamination.”

Environmental lawyer is critical of decision

NWF counsel Glenn Sugameli was highly critical of Wiese’s reasoning, noting the absence of any other decisions like it. “If you expand physical takings to this sort of regulatory context, where do you stop?” he asked. “Even courts that have been more receptive to regulatory takings

have been very reluctant to expand physical takings, because you can lead to absolute rules.

“I don’t think a number of grounds that the judge relies upon have clear stopping points,” he said.

For example, a landowner who is prevented from cutting down a tree that serves as habitat for a listed species could claim a physical taking.

The judge “gets around the parcel-as-a-whole issue” by concluding that the water limitations constitute a physical taking, Sugameli said. He also avoids any inquiry into whether the plaintiffs possessed reasonable investment-backed expectations.

But Marzulla said that the “parcel-as-a-whole analysis is really intended to apply to parcels of land. It doesn’t translate as well when you talk about water.”

With water, “what you’re entitled to is merely a use,” he said.

The plaintiffs include—among others—the Kern County Water Agency, Lost Hills Water District, Hansen Ranches and Lee and Anita Brown. The Pacific Legal Foundation and the State Water Contractors filed *amicus* briefs in support of the plaintiffs, and a slew of environmental groups did the same for the government. They were led by the Natural Heritage Institute, but also include the National Wildlife Federation, Sierra Club, Defenders of Wildlife, the Planning and Conservation League (a California group), California Trout, and WaterWatch of Oregon.

Web: Go to <http://www.eswr.com/tulareop430.pdf> for a copy of the decision.

Critical habitat decision

(Continued from page 1)

Kansas, New Mexico, Oklahoma, Utah and Wyoming—Charbonneau said it makes no sense for the service to prepare economic analyses differently just because a species is in a different state.

“We’ll be consistent,” Charbonneau said. “We’re funneling the information to the same decisionmakers, so you’re not going to show them one analysis that’s done one way, and one done another way.”

The additional analysis will be “an extra step” that FWS has to do, but shouldn’t have a big impact on the service’s budget, he said. “It’ll be a little bit more work—not double.”

To Marc Stimpert of Budd-Falen Law Offices in Cheyenne, who represents the cattle growers, the ruling “could potentially have very large impacts,” since FWS is being forced by the courts to designate more critical habitat.

The decision could result in FWS being more judicious in designating CH, Stimpert said, which is all his clients were looking for. “Our goal was to get some reasonableness in there,” so FWS “would actually get out there on the ground and figure out what’s essential and what’s not essential. It will help with balancing. Congress intended there be some sort of balance struck—maybe not in listing, but with critical habitat.”

In its opinion, the appeals court found that the way FWS prepared its economic analysis for the designation did not comply with the ESA.

“[W]e conclude Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes,” the court said. “Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA.”

The baseline method assumes that the effects of critical habitat designation and listing are virtually the same. Using that approach, FWS has generally found in its analyses that CH designations cause little to no economic impact beyond what is caused by listing species, because the “jeopardy” standard for determining effects on listed species and the “adverse modification” standard for determining effects on critical habitat are essentially the same.

In the case of the flycatcher, the service’s economic analysis said that the CH designation would result in no economic impact, because the designation itself would not protect the bird any more than listing would.

But the three appellate judges, including the author of the opinion, Chief Judge Deanell Tacha, became the latest to question the service’s equating of the “jeopardy” and “adverse modification” standards. Circuit Judge Paul Kelly and John W. Lungstrum, Chief District Judge for the District of Kansas, joined Tacha.

In March, the Fifth Circuit Court of Appeals rejected the

FWS/NMFS definition of “adverse modification” of critical habitat as meaning any action “that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” Inclusion of the word “survival” in the standard contravenes congressional intent, that court said, and is in conflict with Congress’s stated goal that nondesignation of critical habitat occur only rarely.

That ruling will force FWS and NMFS to take another look at their decision not to designate CH for the gulf sturgeon in the Gulf of Mexico (*Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 5th Cir. 2001; *ESWR March*, p. 1; also see p. 5).

Taking note of the Fifth Circuit’s action, the Tenth Circuit said that even though the definitions of jeopardy and adverse modification (found in 50 C.F.R. 402.02) “are not before us today, federal courts have begun to recognize that the results they produce are inconsistent with the

Southwestern willow flycatcher



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intent and language of the ESA.”

“The statutory language is plain in requiring some kind of consideration of economic impact in the [CH designation] phase,” the court said. “Although 50 C.F.R. 402.02 is not at issue here, the regulation’s definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless. We are compelled by the canons of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation.”

“We’re ecstatic,” said Caren Cowan, executive director of the New Mexico Cattle Growers Association. She said she hoped that this decision, “on the heels of Rio Grande silvery minnow decision by Judge [Edwin] Mechem, would

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Fairy shrimp listings upheld by D.C. Circuit Court of Appeals

Late-arriving study didn't affect decision, court says

The Fish and Wildlife Service did not violate the Administrative Procedure Act when it declined to publish a scientific study on fairy shrimp that came in after the comment period on their proposed listing (*Building Industry Association of Superior California v. Norton*, 00-5143, D.C. Cir.).

"A final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if [it] relies on data submitted during the comment period," the D.C. Circuit Court of Appeals said in a May 8 decision, getting the timeline wrong.

The BIA was challenging the listing of four California fairy shrimp species in 1994: the vernal pool fairy shrimp, Conservancy fairy shrimp, longhorn fairy shrimp, and vernal pool tadpole shrimp.

[Those species are now the subject of a court order in California requiring FWS to designate critical habitat by August (*Butte Env'tl. Council v. White*, S-00-0797 WBS GGH, E.D. Cal.). FWS's request to the Ninth Circuit to stay that order was denied, but the parties are in settlement

discussions.]

The D.C. Circuit rejected arguments by the environmental intervenors, Butte Environmental Council and the Environmental Defense Center, that the lower court judge (U.S. District Judge Paul Friedman) should not have allowed BIA and the other plaintiffs to drop their critical habitat claim.

"[I]t would be passing strange if in order to secure appeal of the claims on which they lost appellants were forced to litigate to finality claims on which they preliminarily prevailed and that they now wish to abandon," the court said.

The opinion was authored by Judge Laurence Silberman, who was joined by Judges David Sentelle and Karen Henderson.

Ironically, the decision could aid BIA's attorneys if another case they're handling gets appealed. Lawrence Lieberman and Rafe Petersen represent the developer in the Delmarva fox squirrel case that was just decided by U.S. District Judge James Robertson (*see story, p. 6*). Robertson ruled that the plaintiffs did not need to look at a map showing a mitigation area in order to comment on an HCP being considered by FWS.

The D.C. Circuit's decision will be "the death knell" of the fox squirrel case, said Petersen.

Web: Go to www.eswr.com/ish68.htm for a link to the decision.

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cause the agency to really take a close look" at how it's doing CH designations.

Mechem struck down the designation for the Rio Grande silvery minnow in November. In his most recent ruling in that case (*Middle Rio Grande Conservancy District v. Norton*, 99-870, D.N.M.), the judge denied FWS's request for an extension of 20 months to redesignate CH for the minnow, but took no other action. Mechem's original deadline came and went in March. "I want, first before all else, to see the defendants continue to work on a formal designation of critical habitat for the silvery minnow with the urgency this work deserves," the judge said April 25.

Robert Wiygul, who represented the Sierra Club in the gulf sturgeon case, said the "central premise of Bruce Babbitt's argument, of [former FWS Director] Jamie Clark's argument, and now the Bush Administration's argument, that they ought to put a moratorium on critical habitat designations, and on citizen lawsuits, has been clearly rejected twice within the last six weeks."

FWS was working on guidance to respond to the gulf sturgeon decision, but it is nowhere near completion, said Christine Nolin, head of conservation and classification in the endangered species division.

The Tenth Circuit rejected FWS's contention—as characterized by the court—that if it is "forced to abandon the baseline approach and consider all of the economic impact of a [CH designation], even if that impact is attributable co-extensively to another cause, [FWS] will be injecting

economic analysis improperly into the listing process."

Not so, said the court. Instead, the economic impacts would be considered "in precisely the spot intended by Congress.

"Moreover, should this ruling result in certain areas being excluded from future [CH designations], it will not undermine congressional intent that economic factors be excluded from the listing decision. The listing of the species will remain in effect and the significant protections afforded a species by listing will not be undermined. Indeed, if the FWS's position that the protections afforded by a CHD are subsumed by the protections of listing is accepted, this ruling will result in no decreased protection for endangered species or their habitat."

Web: Go to www.eswr.com/ish68.htm for a copy of the decision. Also, a version of this story appeared in *ESWR Update*, an e-mail service provided to subscribers. Please send an e-mail to poplar@crosslink.net if you are not getting these.

No rehearing sought of sturgeon decision

The Fish and Wildlife Service and National Marine Fisheries Service have decided not to seek rehearing of the March 15 gulf sturgeon critical habitat decision by the Fifth Circuit Court of Appeals (*Sierra Club v. U.S. Fish and Wildlife Service*, 00-30117).

The court gave the government an extension until May 30 to decide whether to seek rehearing, but on May 21, the government said it would not do so.

Fox squirrel HCP survives district court challenge

Judge rules for FWS even though FWS “appears” to have deliberately withheld mitigation map

A habitat conservation plan that allows construction of a subdivision in Delmarva fox squirrel habitat was upheld May 15 by a federal judge, who said plaintiffs did not need to see a map showing the mitigation property (*Gerber v. Norton*, 99-2374 JR, D.D.C.).

U.S. District Judge James Robertson concluded that the Fish and Wildlife Service probably deliberately withheld the map that had been sought by the plaintiffs, but said that they were able to comment extensively on the proposed HCP even without the map.

The omission of the map amounted to “harmless error,” the judge said. “Plaintiffs were able to, and did, provide extensive commentary on the [incidental take permit (ITP)] application without knowing the precise location of the mitigation site. Plaintiffs point to no authority for the proposition that they were entitled to know every detail of the HCP.”

However, plaintiffs’ attorney Eric Glitzenstein, commenting on the decision, said that the specific location of the off-site mitigation area “was one of the most crucial issues that the public needed to, and had a right to, comment on.”

In their brief in support of motion for summary judgment, the plaintiffs said that “the lack of public comments on the [mitigation] site’s location subverted the service’s entire decisionmaking process, as plaintiffs were unable to point out to the service significant problems with the mitigation site, including that the service had failed to calculate the likely take of fox squirrels at the mitigation site from the adjacent houses, road and U.S. highway.”

Ned Gerber and fellow plaintiffs Defenders of Wildlife argued that a proposed highway overpass, access road and more development near the mitigation site would further degrade habitat for the fox squirrel.

The judge may have given the plaintiffs something to trumpet on appeal, however. In a footnote, he called “unpersuasive” the government’s contention that “plaintiffs slept on their rights. ... Plaintiffs admit that they never attempted to inspect the documents that were publicly available at the field office, but the omission of the map from their courtesy copy appears to have been deliberate. The mitigation site was apparently the subject of a pending real estate transaction to which the service had provided Winchester Creek some assurance of confidentiality.”

At oral argument in the case, DOJ lawyer Mark Stermitz said the highway overpass is at least 1,500 feet away from the mitigation site. He also said the plaintiffs could have gotten a copy of the map at the Annapolis, Md., field office.

Plaintiffs’ attorney Eric Glitzenstein said the “record

does not support” that the map was actually available at the field office. He charged that the service had honored a request by the developer, Winchester Creek Limited Partnership (WCLP), to keep information on the off-site mitigation parcel out of the public eye.

FWS “said point blank: we will honor your request for confidentiality,” Glitzenstein said at the April 4 argument.

Also at the argument, Winchester Creek attorney Rafe Petersen said the reason that WCLP wanted to keep the site information from being disseminated to the public was because there were fox squirrels on the property. “If this project fell through, if the HCP fell through and we decided not to go forward with it, we were afraid [release of the information] would have a stigmatizing effect on that property,” Petersen told the judge.

“I see,” said Robertson. “So you would still want to be able to sell to people without telling them there were fox squirrels on it?”

“No, not necessarily,” Petersen said. He then criticized what he said was the plaintiffs’ focus on “discrete little aspects of the project,” such as pets and neighborhood traffic.

In an interview following release of the decision, Petersen said the request for confidentiality “was made while we were in litigation and it was assumed that all documents would be made publicly available at the time we actually submitted the [ITP] application.”

“There was no cover-up,” he said. “[T]he maps were merely inadvertently left out of the documents mailed to Defenders. There were at least 20 other documents that provided even more important information that were not mailed to them.”

In his nine-page opinion, Robertson quickly dispensed with the plaintiffs’ arguments. He stuck to the conclusion he had reached when he denied a preliminary injunction motion in November 1999, saying FWS cannot require an applicant for an incidental take permit to choose one particular alternative.

“While the Administrative Record demonstrates that the service was aware that moving [an] access road might result in a slightly decreased incidence of [fox squirrel] takes, it ultimately concluded that moving the road would require WCLP to stop work on the [project] and to reinstate state zoning and permit application procedures. Given both the service’s and the developer’s expertise in such projects, their conclusion that this would render the project impractical is entitled to deference...”

FWS took the requisite “hard look” at the effects of the project and thus complied with NEPA, the judge said. He also concluded that FWS did not need to conduct another consultation on the project in light of new information about the mitigation site.

The highway project “is not close enough to the mitiga-

(Continued on next page)

Energy strategy raises property rights issue

The Bush Administration's energy strategy, which calls for use of eminent domain to acquire private land for power lines, has some Western lawmakers and property rights advocates concerned.

Two days before the report's release, the *New York Times* ran a front-page story that highlighted the concerns of Gov. Dirk Kempthorne and Sen. Larry Craig, both Idaho Republicans who believe that states should retain eminent-domain authority to locate electrical transmission lines.

Vice President Dick Cheney, the newspaper said, "has complained that the tangle of different state jurisdictions has made it difficult to plan and locate power lines that unite entire regions."

The report recommends that Energy Secretary Spencer Abraham, "in consultation with appropriate federal agencies and state and local government officials, to develop legislation to grant authority to obtain rights of way for electricity transmission lines, with the goal of creating a reliable national transmission grid." The report notes that the Federal Energy Regulatory Commission has such authority for natural gas lines.

Kempthorne issued a press release that referred to the report as "a comprehensive and forward-looking energy roadmap." But he also noted that "a number of the report's recommendations would have a direct effect on western states—both in terms of the energy resources on public lands and the transmission of energy across those lands."

Signalling a possible battle ahead, Kempthorne added, "Like my fellow western governors, I believe strongly in the sovereignty of our individual states and their local governments. And like my colleagues, I hope to work in collaboration and in partnership with the federal government to address our energy issues."

At least one property rights advocate, Nancie Marzulla of Defenders of Property Rights, did not have a problem with use of eminent domain, so long as it is done "wisely, fairly and constitutionally." Marzulla, president of the group, also said the legislation that grants the authority "has to be carefully tailored so it's fair, and constitutional rights are protected."

She said she's not just supporting it because it's a

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tion site to pose a threat to the fox squirrel under the service's guidelines, and any highway project will in any event require separate ESA consultation prior to finalization and construction." And the service knew about the development near the mitigation site when it issued the permit, which means it is not "new information" that necessitates consultation.

Web: Documents on the fox squirrel case are at <http://www.eswr.com/dfs.htm>.

Republican proposal. "I would have been thrilled for the Clinton Administration to say it was going to buy property," she said.

In fact, the proposal presents a "fabulous opportunity to craft model legislation that could help revamp the government's exercise of eminent domain."

"I can't believe huge hunks of private land will become federal," she said. "More likely than not, you're talking about easements."

Marzulla contrasted her support for the Bush approach with her group's opposition to the Conservation and Reinvestment Act, which failed in Congress last year and would have provided millions to state and local government to buy land for habitat protection.

"The purpose of the current plan is to solve a huge horrific crisis," she said, as opposed to CARA, which was not about addressing species extinction but was an example of "pork-barrel politics."

Defenders had criticized the CARA plan as a "federal land acquisition bill." Its key sponsors in the House, including Rep. Don Young (R-Alaska) and Billy Tauzin (R-La.), said, however, that the legislation protected private property rights.

Web: The energy strategy is available at www.eswr.com.

New CH decisions ordered for five California plants

The Fish and Wildlife Service must make new critical habitat (CH) determinations for five carbonate plants in the San Bernardino Mountains, a federal judge ruled May 1 (*California Native Plant Society v. Berg*, 00-1207-L(LSP), S.D. Cal.).

U.S. District Judge M. James Lorenz found that FWS's "not prudent" determination was arbitrary and capricious because it did not cite any "instances of vandalism or collection" of the plants that justified not designating CH for them.

Nor did FWS discuss the benefits of critical habitat or "engage in the requisite balancing test," the judge said.

The plants, which were listed as either threatened or endangered in 1994, are Parish's daisy, Cushenbury buckwheat, Cushenbury milk-vetch, San Bernardino Mountains bladderpod, and Cushenbury oxytheca. The judge gave FWS until Jan. 31, 2002, to make a new prudency determination, with a final rule to follow by Sept. 30, 2002.

More than likely, the order means that FWS will have to designate CH for the plants, unless it can come up with specific examples of vandalism or show that publication of habitat maps would increase the threat of collection or vandalism.

The judge said he was concerned that the 120-day timeline proposed by the plaintiffs "may jeopardize the service's obligations under other court orders and settlement agreements."

Web: The order is at www.eswr.com/cnpsorder.pdf.

Government vigorously defends revocation rule

“No Surprises” perfectly legal under ESA, latest brief filed in case also says

The federal government has fired back in the litigation over the No Surprises rule, which is now focused on a Fish and Wildlife Service regulation issued two years ago that allows FWS to revoke incidental take permits “as a last resort” if the ITP is jeopardizing species (*Spirit of the Sage Council v. Norton*, 98-1873 EGS, D.D.C.).

In a brief filed May 7 in federal court in Washington, D.C., the Justice Department, which represents FWS, said there was adequate notice and comment on the permit revocation rule (PRR), which appeared in the *Federal Register* in June 1999 as part of final regulations governing Safe Harbor and Candidate Conservation agreements.

The plaintiffs quoted selectively from e-mail communications between lawyers in the Interior Department’s solicitor office “in an effort to assert that the Interior Department attorneys were engaged in a *post hoc* scheme to bolster the [No Surprises rule] and defeat the plaintiffs’ challenges to the substance of [that rule],” the government’s brief said.

“That e-mail exchange represents a vigorous and candid discussion of competing points of view among agency attorneys and their clients,” the brief said. “The court, however, must judge FWS’s compliance with the [Administrative Procedure Act] and ESA statutory requirements for issuing, revising, and revoking permits through judicial review of formal pronouncements of the agency’s position, including the many *Federal Register* notices and rulemaking proceedings, not through preliminary, informal, non-binding emails among DOI’s legal staff. The fact that some agency lawyers and staff shared competing views in writing, ... in no way supports plaintiffs’ claim that the rulemaking contravened the APA.”

The government also attacked plaintiffs’ claims that the litigation had spurred development of the PRR. “The documents demonstrate that FWS actively considered” changing its regulations to address revocation of ITPs in September 1998, five months before the opening brief in the case was filed—which also was two months after the complaint was filed.

In any case, the public had ample warning that the service was considering a change to its permitting procedures, the government said.

In the preamble to the proposed Safe Harbor and Candidate Conservation rules, the service said it was proposing “technical amendments to its general regulations (50 CFR part 13) which are applicable to all of its various permitting programs. These proposed revisions would clarify the application of existing general permit conditions to the permitting procedures associated with Habitat Conservation Plans, Safe Harbor Agreements and Candidate Conservation agreements issued under section 10 of the Act.

“This language—specifically the relationship between the ‘general permit provisions in part 13 and more specific terms or conditions in a HCP permit’—expressly gave the public notice that FWS proposed to amend its HCP regulations to override any conflict with the general Part 13 permit regulations, including permit revocation under § 13.28(a)(5),” the government said.

The plaintiffs contend that the service weakened the revocation standards for HCPs as compared to general permits, such as for research on endangered species. While the general permit standards specifically continue to allow revocation if a species’ population declines, the new revocation rule for HCPs allows a permit to be pulled if it is jeopardizing the continued existence of a species.

Case law in the D.C. Circuit supports the proposition that “agencies are entitled to reasonable latitude in conducting rulemakings,” the government said, citing a couple of cases in which the appeals court has upheld final rules that “vary, often considerably,” from their proposals (*National Mining Ass’n v. Mine Safety and Health Administration*, 116 F.3d 520 (1997), and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506 (1983)).

Besides, FWS “cured any possible APA violation” by taking comments on the PRR after the fact, the government’s brief said. “Without regard to whether the court finds that the June 1997 proposed rule provided adequate notice, the plaintiffs—and the public at large—now have been provided with a clear opportunity to comment on the PRR before the revocation procedure was, or could have been, applied to any ITP,” the government said.

On the substance of the revocation rule itself, the government called the plaintiffs’ position on the meaning of Section 10 of the ESA “misguided and legally flawed.” The plaintiffs said that “[S]ince the ESA defines ‘conservation’ as meaning ‘recovery,’ the service’s self-imposed refusal to revoke ITPs/HCPs even where they are interfering with a species’ recovery clearly thwarts the fundamental objectives of the Act.”

There is no language in the ESA itself that addresses permit revocation, but the government said Congress made clear in committee reports on the 1982 amendments (which added HCPs to the ESA) that it “intended for the Secretaries of Interior and Commerce to implement an effective HCP program under §10(a) that authorized incidental take, often for permits of long duration, with reasonable assurances provided to landowners that they could engage in otherwise lawful activities, even where some incidental take of listed species occurred.”

“There is no merit to plaintiffs’ position here that every permit issued under §10(a) must meet the ESA’s ultimate goal of achieving recovery for each listed species. That, indeed, is the overall goal of the ESA, but it is not one that falls upon §10 permittees.”

(Continued on next page)

Enviros sue NMFS over Columbia power BiOp

The National Marine Fisheries Service's Biological Opinion for the Columbia River power system "relies on a series of improbably optimistic scenarios" in reaching its no-jeopardy conclusion, a new lawsuit filed by 13 environmental groups says (*National Wildlife Federation v. NMFS*, 01-640, D. Or.). The case was assigned to Magistrate Judge John Jelderks.

The groups charged that "NMFS' assessment of why the steps it proposed in the BiOp's [Reasonable and Prudent Alternative] will avoid jeopardy and adverse modification of critical habitat: (1) relies extensively on speculative and voluntary actions by other federal agencies, as well as state and private entities, in areas unrelated to [Federal Columbia River Power System] operations and beyond the control or authority of the action agencies; and, (2) ignores the effects of sweeping emergency exemptions that make many key RPA measures optional, contrary to the requirements of the ESA and its implementing regulations."

"In a couple of paragraphs, the [BiOp] essentially issues a license to [Bonneville Power Administration] to ignore the rest of the plan, and wipe out endangered salmon if they deem it necessary," said Jeff Curtis of Trout Unlimited. "There is no standard, no definition, no accountability, no limits; and certainly no thought to legal protection of salmon."

The BiOp, released in December 2000, "calls for more water in the Snake and Columbia Rivers for young salmon migrating to the ocean, and it requires spilling water over dams so fewer fish are run through deadly turbines and bypass systems," the groups said in a news release. "But due to this year's energy demands, low rainfall, and financial problems, BPA officials invoked vague 'emergency' clauses, which contain no standards to define 'emergency,'

to abandon these salmon protections. Huge losses of young salmon—up to 95 percent, according to salmon biologists—are expected as a result."

The lawsuit called the "degree to which the no-jeopardy/no-adverse modification finding for the new RPA depends on actions *unrelated* to operation of the FCRPS is remarkable." For all of the Snake River salmon and steelhead evolutionarily significant units for which NMFS performed an analysis, "under all sets of assumptions NMFS applies except one (the optimistic assumptions for Snake River fall chinook), substantially more than one-third, and in many cases two-thirds or more, of the survival improvements needed to avoid jeopardy and adverse modification for the RPA come from *non-hydrosystem/non-harvest* measures, most of which are to be carried out by entities other than the action agencies," the suit said.

Even assuming that NMFS can rely on these other actions to avoid jeopardy and adverse modification of critical habitat, there's no guarantee that the benefits "will, in fact, accrue to the degree (and within a timeframe) that will ensure compliance with the requirements of ESA section 7(a)(2)," the complaint says.

NMFS also has understated the risk that the salmon and steelhead ESUs face, the plaintiff groups said.

"Because NMFS bases its jeopardy analysis on population status and risk estimates that substantially, consistently, and improperly understate the risk these species face, its conclusions about what is required of the RPA to avoid jeopardy necessarily also understate the magnitude and urgency of improving population survival and are arbitrary and contrary to law."

NMFS assumes, contrary to the best available data, that the species' health is improving and will continue to improve, the complaint says.

Web: The complaint and news release, and other links, are available at eswr.com/ish68.htm.

(Continued from previous page)

The plaintiffs also "miss[] the mark" when they charge that FWS will not be able to address "unforeseen circumstances" that might arise under HCPs, the government said. (The No Surprises rule promises permittees that in the case of "unforeseen circumstances"—fire or flood, for example—the permittee will not have to provide any more land, water or money than it agreed to provide in the HCP.)

"First, plaintiffs blithely overlook the fact that the ITP and related documents, including the HCP itself and the implementation agreement, constitute a contractual commitment that binds the government," the brief said. "Many HCPs and ITPs do include provisions dealing with unforeseen circumstances, but [FWS] cannot legally extract a landowner's commitment to provide conservation benefits for species as part of the compensation for allowing incidental take, which often include donations of land or money, then turn around

and demand that the permittee commit to provide an additional increment of unlimited assets as an insurance policy if some future event, which by definition reasonably cannot be []foreseen, should arise and imperil a species with extinction."

FWS can go back to the permit-holder and ask for more mitigation; if that effort fails, it must look to its own resources, as well as other non-federal parties, such as The Nature Conservancy, the brief said.

The intervenor-defendants, who include the city of San Diego, American Forest & Paper Association, the National Association of Home Builders and other others, also filed a brief. They asserted that the plaintiffs lack standing and the case is not ripe for review and that, in any case, the service met the minimum APA standards in providing an opportunity for the public to comment.

Web: The briefs are available at www.eswr.com/ish68.htm.

Texas water pipeline can proceed, judge rules in ESA/NEPA case

The water needs of humans outweigh the needs of the Barton Springs salamander, golden-cheeked warbler and black-capped vireo, a federal judge in Texas concluded last month, denying a preliminary injunction request to halt construction of a water pipeline (*Hays County Water Planning Partnership v. Flowers*, 00-826 SS, W.D. Tex.).

U.S. District Judge Sam Sparks said the public interest would not be served if he stopped the Lower Colorado River Authority (LCRA) from continuing to build a pipeline to serve nearly 3,000 customers in Hays and Travis counties. The plaintiffs, who also include the Save Our Springs Alliance, argued that a Biological Opinion (BiOp) prepared by the Fish and Wildlife Service on the project was inadequate because it did not consider the effects on the species of any future development that would be caused by the pipeline's construction.

FWS issued a "no jeopardy" BiOp after consulting with the Army Corps of Engineers on a nationwide permit for 17 stream crossings associated with the project.

"There is ample evidence of the declining supply of water in the wells in the areas to be served by the water pipeline, as well as the declining quality of the water as the drought continued," Sparks said. "Also, there is evidence in the record that the water shortage of 2000 was not a one-time occurrence, and thus it is in the public interest to provide a reliable source of water to the residents of

Dripping Springs, Sunset Canyon, and the other areas" served by the project.

"While plaintiffs may disagree with the conclusion reached by the [BiOp], they have not shown the court evidence that the opinion was arbitrary and capricious. Instead, plaintiffs rely heavily on the argument FWS did not consider future developments that may be served by the water project, and even question whether the emergency action was even warranted."

The Corps argued, on the other hand, that the cumulative effects of potential new development were considered "to the extent they were not based on speculative projects."

Sparks also rejected the plaintiff's NEPA claims. Even though the Corps may not have prepared an Environmental Assessment on this particular permit application, the Corps did prepare an EA and Finding of No Significant Impact on the nationwide permit program as a whole, the judge said.

Sparks was not convinced that the pipeline project poses a "substantial threat of irreparable harm."

The merits of the claim can be addressed "well before LCRA initiat[es] service to any development, and perhaps even before project completion," he said.

The plaintiffs also contended that the balance of hardships weigh in favor of granting the injunction, because of the harm to species' habitat.

But "plaintiffs ignore the vast amount of public resources already poured into the project by LCRA," the judge said. He also said that defendants' witnesses had testified at a January hearing that a delay of 90 days "would increase the price tag" for the pipeline by \$3.3 million.

CMC, Turtle Island challenge Hawaiian longline BiOp

The National Marine Fisheries Service's latest Biological Opinion on the Hawaiian longline fishery does not adequately protect leatherback and green turtles, the Center for Marine Conservation and Turtle Island Restoration Network claim in a lawsuit filed May 22 (*Turtle Island Restoration Network v. NMFS*, 01-332, D. Haw.)

The CMC/Turtle Island suit noted that the BiOp said the fishery is "appreciably increasing the risk of extinction" of leatherback and green turtles.

There are now two lawsuits challenging the BiOp; the first was filed last month by the Hawaii Longline Association in federal court in Washington, D.C. That group claims the restrictions were not scientifically justified (*ESWR* April, p. 23).

The environmental groups, who are represented by Earthjustice Legal Defense Fund, also took note of the BiOp's assertion that "leatherback populations have collapsed or have been declining at all major Pacific basin nesting beaches for the last two decades," and added that "leatherback turtles in the Pacific basin are a critically endangered species with a low probability of surviving and recovering in the wild."

"There are only a few thousand adult leatherbacks remaining in the Pacific," the groups said. "NMFS also admitted that it had until now substantially underestimated the number of leatherback deaths being caused by the Hawai'i longline fishery, and that even if this fishery were the only one killing leatherback turtles, 'this impact alone could have serious consequences for the survival and recovery' of the Pacific leatherback. NMFS reached similar conclusions regarding the eastern Pacific population of the green sea turtle, which nests on Mexican beaches but is hooked by Hawai'i's longliners."

The groups' previous case resulted in Judge David Alan Ezra's issuing an injunction that banned most swordfish longlining and added observers to the tuna fleet pending preparation of an Environmental Impact Statement.

The case has been assigned to Chief Judge David Alan Ezra and Magistrate Leslie Kobayashi.

ESA “God Squad” idea floated for Klamath Project

Two congressmen have asked Interior Secretary Gale Norton to consider convening the “God Squad” to exempt the Klamath Project from the Endangered Species Act.

“While we recognize convening the God Squad is indeed a unique and rare action, there is no question that no stone can be left unturned in our efforts to sustain these farming communities, both now and for the future,” Reps. Wally Herger (R-Calif.) and Greg Walden (R-Ore.), who represent the affected districts in the Klamath Basin, told Norton in a May 17 letter.

The squad, officially known as the Endangered Species Committee, is made up of the secretaries of Agriculture, the Army and Interior, the administrators of EPA and the National Oceanic and Atmospheric Administration, and the chairman of the Council of Economic Advisors. The president also can appoint a member to represent each affected state.

Norton would be chairman if the committee were to meet. The rest of the members are Bush appointees, except acting NOAA Administrator Scott Gudes and acting Army secretary Joseph Westphal, both holdovers from the Clinton Administration.

The committee hardly ever meets because exemption applications are rarely filed. Only two exemptions have ever been issued, one for operation of a dam in Wyoming and one to allow 13 BLM timber sales in Oregon to proceed. In the latter case, BLM withdrew its application in 1993 after Bill Clinton became president.

“The main reasons for the low number of applications probably include the small number of jeopardy opinions issued, the stringent substantive standards for the grant of an exemption, and the complexity of the process,” Michael Bean and Melanie Rowland said in *The Evolution of National Wildlife Law*, published in 1997.

In their letter, Herger and Walden asked Norton for help “in understanding this process,” including who can apply for an exemption.

The ESA says a federal agency, a governor in which an

agency action will occur, or “a permit or license applicant” may apply for an exemption from the ESA’s restrictions. The congressmen said they had been contacted by “several of our constituents who have posed legitimate questions about this statutory exemption under the ESA.”

The letter followed by two and a half weeks a judge’s rejection of a request by Klamath Basin farmers for a preliminary injunction that would have restored “historic” levels of water deliveries from the Klamath Project (*Kandra v. U.S.*, 01-6124 AA, D.Or.; see *ESWR* April, p. 24).

“Given the high priority the law places on species threatened with extinction, I cannot find that the balance of hardship tips sharply in plaintiffs’ favor,” U.S. District Judge Ann Aiken said in her April 30 order.

The judge also found that NEPA does not apply to the Bureau of Reclamation’s continuing operation of the Klamath Project. At the same time, she said she was “disturbed” that Reclamation “has failed to complete an EIS analyzing the effects and proposed alternatives of a long-term plan.” She said she would “monitor Reclamation’s compliance with its representations” that it plans to complete a long-term plan by February 2002. “This dispute highlights the need for long-term planning to minimize the effects of future dry years,” she said.

On the ESA claims in the lawsuit, Aiken said, “Absent a showing that NMFS or FWS failed to consider relevant, available, scientific data [in writing their Biological Opinions], plaintiffs are unlikely to prevail.” But even if they were able to show a likelihood of success on their ESA claims, the ESA “explicitly prohibits the relief they seek” because of the prohibition against “irreversible or irretrievable commitment of resources” under Section 7(d).

“Here, release of the requested amounts of Project irrigation water would foreclose the implementation of any [Reasonable and Prudent Alternative] involving higher [Upper Klamath Lake] elevations and higher instream flows below Iron Gate Dam.”

Web: The opinion/order is at eswr.com/kandrapiororder.pdf.

Mountaintop mining lawsuit thrown out by Fourth Circuit

The Fourth Circuit Court of Appeals threw out a case that challenged mountaintop mining in West Virginia, ruling that the Eleventh Amendment barred environmental groups from suing the state in federal court (*Bragg v. West Virginia Coal Ass’n*, 99-2443).

In October 1999, District Judge Charles Haden ruled that “valley fills”—leftover rock and dirt from the mountaintop mining that is placed in valleys—had to conform with a 100-foot buffer zone regulation. The state regulation, adopted to comply with federal mining rules, prohibits filling within 100 feet of perennial and intermittent

streams, unless specifically authorized by the state.

The Surface Mining Control and Reclamation Act “provides for either state regulation of surface coal mining within its borders, or federal regulation, but not both,” Judge Paul Niemeyer wrote in the Fourth Circuit’s decision. Niemeyer was joined by Judges J. Michael Luttig and Karen Williams.

The court sent the case back to Haden with instructions to dismiss it without prejudice.

The case drew a considerable amount of interest on both sides. EPA and the Army Corps of Engineers sided with the plaintiffs, while the National Mining Association, a slew of mining companies and the Washington Legal Foundation were among those supporting the state.

Web: Go to eswr.com/ish68.htm for the decision.

Settlement allows limited development in Natomas Basin

Higher fees, 200-acre “mitigation cushion,”
\$4M for acquisitions among the provisions

Following a judge’s invalidation last year of the Natomas Basin habitat conservation plan (HCP), the parties have settled on an interim plan for a limited amount of development to continue around Sacramento, Calif., while a new HCP is written.

The settlement, accepted by Judge David Levi on May 15, requires habitat to be secured well in advance of any new development, raises mitigation fees that developers must pay, and provides \$4 million in grant money to purchase additional land to augment the mitigation habitat.

Environmental groups were concerned that the original HCP allowed developers to “pay money now and buy habitat later,” said attorney Keith Wagner of the Mountain Lion Foundation, a party to the original lawsuit.

“You might have some money in the bank, but you don’t have the land,” Wagner said. In addition, there was no guarantee that “the land acquired is occupied by the species to be protected.”

The original Natomas Basin incidental take permit (ITP) was issued on Dec. 31, 1997. National Wildlife Federation (NWF) and several other groups sued in February 1999 in federal court in California (*National Wildlife Federation v. Babbitt*, S-99-274 DFL JFM E.D. Cal.). Levi ruled in favor of the plaintiffs in August 2000 (*ESWR* Aug, p. 1) and issued a final order invalidating the HCP on Jan. 26, 2001.

“We have finally turned this around,” said NWF attorney John Kostyack, who argued the case for six conservation organizations. “Now the preserve lands acquired are based on species’ needs, not developers’ convenience.”

“This solution offers a balance between homes for people and homes for habitat,” Sacramento mayor Heather Fargo said.

Kostyack said the interim settlement sets several important precedents for future HCPs and “should give a boost to habitat conservation planning.” For example, the settlement requires a 200-acre mitigation cushion, meaning that the NBC must have roughly 200 acres more than it needs at any given time before additional grading and building permits can be issued. The cushion “reduces the risk that poor conservation strategies will be chosen,” Kostyack said.

Likewise, the settlement states that the city may acquire mitigation lands through eminent domain if necessary. It also establishes priorities for specific sites that should be preserved; first on the list is 30 parcels in the vicinity of Fisherman’s Lake. In fact, the city cannot issue any grading permits until a 100-acre parcel on the west side of the lake is acquired.

In addition, FWS has secured a \$4 million grant under Section 6 of the Endangered Species Act to buy and manage priority mitigation lands. The grant money will “not replace the developer mitigation,” Kostyack said, but “will

supplement it.”

The proposed developments include a 5,100-house community on about 1,500 acres and a 2,600-house project on about 500 acres; current developers are Natomas Estates LLC and Kern Schumacher. The development area includes habitat for the federally listed giant garter snake, as well as the Swainson’s hawk, burrowing owl and several other species.

Levi was concerned that under the original HCP, proposed mitigation lands might not be purchased or would be developed, because much of it is not actually located within the HCP region.

The new HCP is being negotiated by Sacramento, the U.S. Fish and Wildlife Service, the California Department of Fish and Game, local water and irrigation agencies, and perhaps most importantly, Sutter County, where much of the mitigation land would be located.

“We’ve always wanted a regional approach,” Kostyack said. The settlement plan “requires a lot more accountability.”

Technically, the interim settlement amends Levi’s final

NWF attorney John Kostyack said the mitigation cushion “reduces the risk that poor conservation strategies will be chosen.”

judgment; it is effective through October 2002. Throughout the court proceedings, Levi had strongly urged the parties to reach a settlement (*ESWR* Dec, p. 14).

Sacramento’s target date for completing the new HCP is December 2001, Sacramento chief assistant city attorney William Carnazzo said. “We’re busily doing the environmental impact statements and reports.”

The HCP provided a unique mitigation requirement, with a half-acre preserved for every once acre developed. The settlement allows the Natomas Basin Conservancy (NBC) to continue purchasing land. As of several months ago, NBC had secured about 1,630 acres of habitat.

The city’s “grading season” begins May 1. Anticipating Levi’s final judgment, Sacramento officials had refused to honor existing grading permits last fall, or to issue any new ones. The developers sued Sacramento in January to obtain the permits, but will dismiss that suit under the agreement (*ESWR* Feb., p. 22).

With the settlement in place, Sacramento issued about 1,000 acres of grading permits for the Natomas Basin on May 18, Carnazzo said, and the grading is underway. In lieu of a revised HCP, the interim settlement caps new development at 1,668 acres. The Sacramento city council plans to vote on significantly raising the mitigation fees next week, and is likely to require retroactive fee payments.

— Janet Byron

Groups file MSJ brief in salmon/pesticide suit

The current uses of 48 pesticides “present well-documented risks” to listed salmon and steelhead in the Pacific Northwest, a coalition of environmental groups said in court papers that called on the National Marine Fisheries Service to consult with EPA on the use of the pesticides (*Washington Toxics Coalition v. EPA*, 01-132C, W.D. Wa.)

EPA has determined that 41 pesticides are likely to result in surface-water contamination levels that threaten salmon and steelhead, the groups said in their summary judgment brief, filed with Chief Judge John C. Coughenour of U.S. District Court for the Western District of Washington. And the National Water Quality Assessment, conducted during the 1990s by the U.S. Geological Survey, determined that 13 pesticides are present in watersheds used by the fish at concentrations at or above aquatic life criteria established by governments or scientific authorities. (Some pesticides are on both lists.)

Pesticides detected in the USGS study include widely used chemicals such as atrazine, chlorpyrifos and diazinon. Pesticides that EPA has determined may be used at rates that exceed aquatic life criteria include chlorothalonil, pebulate and 1,3-dichloropropene.

“People who depend on fishing for a living have a right to expect the federal government to act when they find threats to salmon,” said Glen Spain of the Pacific Coast Federation of Fisherman’s Associations. Other members of the coalition are Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides and the Institute for Fisheries Resources.

EPA’s failure to consult with NMFS on pesticide risks, as required by Section 7 of the ESA, has been “a problem, and a longstanding one,” said Patti Goldman of Earthjustice Legal Defense Fund, which is representing the coalition.

Since 1989, NMFS has listed 25 salmon and steelhead evolutionarily significant units as threatened or endangered in Washington, Oregon and California. Critical habitat has been designated for most of the fish.

California condor eggs laid in the wild

A Fish and Wildlife Service biologist has discovered a California condor nest containing two eggs—“the first evidence that captive-bred condors have laid eggs in the wild,” according to the Interior Department.

FWS biologist Greg Austin, who works at Hopper Mountain National Wildlife Refuge near Ventura, discovered the nest discovered May 16 in southern California’s Santa Barbara backcountry. Austin saw two female condors visiting the nest site, both of which, it appears, have laid eggs.

It’s too early to say whether the condors, which were raised in captivity and then released to the wild, will be successful incubating and hatching the eggs.

“This is truly exciting news,” Interior Secretary Gale

According to the coalition, the degradation of freshwater habitat needed for spawning and rearing is a significant factor contributing to steelhead and salmon declines. “Pesticide use is one cause of such habitat degradation,” the coalition wrote. While certain doses kill fish outright, sublethal pesticide concentrations in water can interfere with food supplies and alter the aquatic environment.

EPA’s regulatory authority includes restricting the use of pesticides that cause unreasonable adverse effects to human health or the environment, including endangered species, the coalition wrote. Under ESA Section 7(a)(2), federal agencies must ensure that their activities do not jeopardize the continued existence of any listed species or their critical habitat; under Section 7(a)(1), federal agencies must use their regulatory programs to conserve listed species.

“EPA has failed to discharge either Section 7 obligation,” the coalition wrote. “Indeed, it has not even begun the formal consultations that constitute the first step toward satisfying these duties.”

Indeed, EPA has consulted with the U.S. Fish and Wildlife Service on the effects of registered pesticide uses on non-marine species (such as the impacts of strychnine on black-footed ferrets), “although these consultations have been plagued by incessant delays and little, if any, implementation,” the coalition said.

In its answer to the lawsuit, EPA claimed that it is “in the process” of consulting with NMFS on the impact of pesticide registrations on the fish. However, there has been no public notice or formal documentation of these efforts. “Engaging in vague dialogue about pesticide impacts or preliminary discussions” does not meet EPA’s legal obligation, the coalition wrote.

Furthermore, EPA has stated that it will impose limits to protect salmon from pesticides after its Endangered Species Protection Program becomes final, “sometime in the future.” However, EPA states on its Web sites that the program, initiated in 1988, “is largely voluntary at the present time.”

The lawsuit was filed January 30 (*ESWR* Feb, p. 9).

—Janet Byron

Web: Links to the brief and to EPA’s Endangered Species Protection Program are at www.eswr.com/ish68.htm.

Norton said. “Finding the eggs raises our hopes that there may soon be wild-born condors in California.”

The Interior Department capitalized on the news by recounting the history of the captive breeding program.

“In 1986, captive breeding opponents took Norton and [FWS] to federal district court to stop the removal of the last condors from the wild. Norton’s arguments in favor of captive breeding were controversial at the time. Norton was then a newly appointed associate solicitor.

“Private breeding facilities successfully bred the condors in captivity, and Norton and her colleagues were proven correct,” DOI said.

There are now 53 captive-bred condors living in the wild. Six more captive-bred juveniles are scheduled to be released in the Sespe Wilderness Area on May 22.

Wisconsin passes law to protect isolated wetlands

Wisconsin has become the first state in the nation to pass a law protecting isolated wetlands in the wake of the Supreme Court's *SWANCC* decision.

Gov. Scott McCallum signed S.B. 1 on May 7. The law gives the state authority to regulate wetlands that were left unprotected by the Army Corps of Engineers and EPA following the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (99-1178).

The new state law "covers at least 1 million acres of wetlands, among them sedge meadows, shallow marshes and seasonal wetlands that are among some of the state's most productive in providing waterfowl and amphibian habitat, storing flood waters, and helping protect water quality," the state's Department of Natural Resources said in a news release. "The law will not impose any new regulations on landowners but merely allows the state to continue following the same process that was used for the past decade to decide whether a project that potentially affects wetlands can proceed."

The bill requires the state Department of Natural Resources to issue a water quality certification within 120 days of when it receives a complete application. It also contains an exemption for public safety, and allows the same exemptions to the permitting process contained in the federal Clean Water Act, for routine forestry, farming and other activities.

The state Senate and Assembly passed the bill unanimously in a special session, and it was promptly signed by

the governor. The bill itself was the product of negotiations between the environmental and development communities in the state.

In the end, a "huge citizen campaign" galvanized support for a comprehensive bill to protect wetlands, said Charles Luthin, executive director of the Wisconsin Wetlands Association.

Luthin said that getting legislation passed quickly was of the essence, because small wetlands were beginning to be filled. DNR said that since the Jan. 9 *SWANCC* ruling, the Army Corps "had informed 37 applicants that it had no jurisdiction over wetlands the applicants' projects affected, and a handful of applicants had filled or excavated the wetlands by May 1."

The wetlands association said that in the negotiations, there was "significant pressure by development interests to 'give up' small wetlands by allowing filling of less than two to five acres, and the agri-business community wanted to change drainage ditch law with this bill, [but] we would not agree to sacrificing any of our wetlands and drew the line on any new water issues."

At the state's Conservation Congress, where conservation groups meet annually, 57 of 59 counties supported a resolution "strongly urg[ing] the State of Wisconsin to immediately protect our state's vulnerable isolated wetlands by adopting legislation assigning permitting authority for these wetlands to the Wisconsin Department of Natural Resources," the association said.

After initial negotiations in March failed to produce a legislative compromise, Sen. James Baumgart (D-Sheboygan) and Rep. Neal Kedzie (R-Elkhorn) reached agreement in late April and called on the Governor to convene a special session of the Legislature.

Corps issues water quality report on Columbia power system

Altering the operation of dams on the lower Snake and Columbia rivers will not bring water temperatures into Clean Water Act compliance with the Clean Water Act, the Army Corps of Engineers said in a Record of Consultation and Statement of Decision, technically not a Record of Decision under NEPA.

The Corps was responding to a court order from U.S. District Judge Helen Frye that found the operation of four dams on the lower Snake violated CWA standards for temperature and dissolved gas (*National Wildlife Federation v. U.S. Army Corps of Engineers*, 99-442-FR, D. Or.; *ESWR* Feb, p. 1).

"In the Corps' judgment, and consistent with the findings made by Judge Frye . . . , based on historical data as well as monitoring that has taken place since the construction of the dams, the dams are not the sole cause of the exceedances of state water quality standards in the lower

Snake River," the report said.

"More importantly," the Corps said it did not have any "reliable information that would cause us to conclude that any structural modifications of mainstem projects would reduce water temperature in the reservoirs or have a significant effect on temperature water quality exceedances."

The Corps said it was "committed to working with the states and EPA to monitor and further study this issue."

Regarding total dissolved gas (TDG), the Corps said that voluntary spill to aid fish passage sometimes pushes TDG levels above those allowed in the CWA. Although Washington, Oregon and Idaho have either passed regulatory changes or issued one-year waivers of the state water quality standards for dissolved gas, the Corps maintains that "spill for fish puts the two objectives of meeting ESA and CWA at odds with each other in some cases."

The response by the Corps to the decision could prompt the plaintiffs in the lawsuit to go back to court, either to say the Corps has not complied with Frye's order, or to file a new complaint. But no decision has been made yet.

EPA takes over J.D. from Corps in California case

The aftermath of the *SWANCC* case has EPA and the Corps scrambling to figure out what areas constitute “waters of the United States.”

One case that is being watched closely by wetland regulators in the two agencies concerns a site in Sonoma County, California, known as Westwind Business Park. A disagreement between the Corps’ San Francisco District and Corps headquarters led EPA to step in and back the district’s interpretation.

The district determined last year that three parcels on the property are “adjacent” wetlands because they are located near creeks. The developers of the property, however, claim that in light of the *SWANCC* decision, the waters are isolated and not subject to regulation.

“The fragmented, isolated wetlands fulfill few wetlands functions except for the provision of habitat for a small number of Burke’s goldfields plants,” said Robert Szabo, attorney for Westwind, in a letter to the Corps on Jan. 26 stating Westwind’s intention to begin development of the site without a permit. That plant is listed as endangered, but Westwind has committed to “gather[ing] the plants, seeds and soil from the two [goldfields] stands ... that currently exist on the project site and offer[ing] them to the California Department of Fish and Game for replanting,” according to Szabo’s letter.

But in a Feb. 12 response, Calvin Fong, chief of the regulatory branch in the Corps’ San Francisco District, said the wetlands do not meet criteria as “isolated” as set forth in a Jan. 19 memorandum from the top attorneys at the Corps and EPA interpreting the *SWANCC* decision.

Following that letter, Szabo spoke with officials at Corps headquarters in Washington, who agreed with him and disagreed with the San Francisco District. When EPA found out that Corps headquarters was planning to make its own determination of the extent of waters on the Westwind property, it quickly designated the three parcels a “special case.”

Under a Memorandum of Agreement between EPA and the Corps, EPA has the final say under the Clean Water Act on the geographic jurisdictional scope of waters.

The situation illustrates some of the confusion and jockeying going on in Washington right now for control of wetlands regulation. “Senior leadership at the Corps has recognized the importance of continued coordination with EPA and Department of Justice, but implementation of that objective has been mixed,” an EPA official said.

Corps specialist says adjacency test met

A Corps wetlands specialist in San Francisco said the parcels meet the test for adjacency. The specialist, Dan Martel, said that if the wetlands were filled, there would be “an observable and incremental impact” on two nearby tributaries.

The natural surface drainage that originally existed on the site was replaced at some point with artificial surface drainage, but the effect is the same, Martel said. He added that the jurisdictional determination was made based on longstanding district policy on adjacency.

“We have been applying those same standards since the late 1980s, early 1990s,” he said.

Martel also said that without guidance from headquarters, “we don’t have a clear method to make reasonable, rational decisions.”

Further guidance may be in the offing. In a memo approving EPA Region 9’s request to elevate the Westwind situation to special case status, EPA Director of Wetlands and Watersheds Robert Wayland said EPA is discussing additional guidance with the Corps, the Council on Environmental Quality, and the Justice Department.

Westwind representatives did not want to talk on the record about the situation because they were afraid that they might jeopardize their chances of reaching an agreement that would allow development to proceed. Szabo, however, has met with Corps and EPA officials, and is planning to brief congressional representatives on the situation.

In his letter, Szabo also pointed out the status of the site as a FUDS, which stands for Formerly Used Defense Site, because of its use as an Army Air Corps base during World War II. He said the Corps “is likely to excavate the site within the next few years to remove any ordnance and explosive waste or hazardous materials buried there.”

Lack of guidance leads to case-by-case determinations

It’s not clear how soon guidance will appear. The timing depends to a large extent on when political slots in the Pentagon can be filled. In the meantime, “the Corps of Engineers is administering and developing guidance through e-mails and conference calls and summaries,” said Jeanne Christie, executive director of the Association of State Wetland Managers.

“Interagency guidance is badly needed,” Christie said, but added that the importance of the issue “meets the test of requiring promulgation of new regulations.”

State officials would love to see some guidance or regulations. In California, officials have determined that the state’s Porter-Cologne Water Quality Control Act covers isolated wetlands, but they are not sure how much work they will have to do to fill the regulatory gap.

“It’s unclear how many of these isolated wetlands there will be,” said Oscar Balaguer, head of the water quality certification unit for the State Water Resources Control Board. “To the extent we have to do it instead of the Corps, we don’t have all the program infrastructure in place. Our wetland program evolved in the context of Sections 401 and 404; we have not been doing delineation ourselves.”

Web: Westwind documents are at www.eswr.com/ish68.htm. A substantially similar version of this story appeared in *ESWR Update*, an e-mail service for subscribers. Please send an e-mail to poplar@crosslink.net if you aren’t getting these.

Register Report

The following items summarize Federal Register notices not reported on elsewhere in this issue. Unless otherwise noted, quotes are from the Register.

To get the full text of these notices, go to www.eswr.com/frr.htm and scroll down to the date. You also may go to the notice directly by typing in the above and replacing "frr.htm" with the file name (f052201.txt for the Preble's notice, for example).

Special rule for jumping mouse is scaled back

Ongoing farming operations and the use of water within the range of the threatened Preble's meadow jumping mouse will be exempt from ESA Section 9 prohibitions, according to a special rule issued May 22 (p. 28125-31; f052201.txt).

FWS scaled back its Dec. 3, 1998, proposed rule considerably, eliminating two of the three proposed exemptions. One would have exempted areas outside of designated Mouse Protection Areas (MPAs) and potential MPAs. Another exemption would have allowed alteration of up to 4 percent of MPAs and potential MPAs, under standards approved by state or local government.

As it stands, the final rule exempts from Section 9 strictures the following activities: "rodent control, ongoing agriculture, maintenance and replacement of existing landscaping, and existing uses of water anywhere within the Preble's range."

Comments on the proposal were overwhelmingly negative, said FWS biologist Peter Plage. Three years after the listing of the mouse, which many said would bring development on Colorado's Front Range to a halt, "by and large, the system's working," Plage said.

He conceded that the listing has "slowed down some developments," but that it's not always easy to tell

whether it's ESA consultations or local permitting requirements that cause delays.

Five counties in the state where the mouse is found are working on habitat conservation plans, and a recovery plan for the mouse could be out by late summer or early fall, Plage said.

Regarding the exemptions that are left, the service said in its final rule that "ongoing agricultural activities would be considered those activities in place at the time of the 1998 listing of the Preble's."

The exemption "applies to practices customary and necessary for the continuation of existing agricultural production. It does not apply to new activities or to expansion of activities that change the existing activity footprint in size or location."

FWS exempted farmland because "lands that are currently under agricultural production are believed to have minimal habitat for the Preble's, and because agricultural activities are being conducted in a manner that causes minimal take of Preble's."

On the water exemption, FWS said that "existing water uses refers to historical water use practices. In general, any change in water use practices that would require a change of water right or a change in a water use permit will not be exempted in the final rule."

Contact: LeRoy Carlson, Field Supervisor, FWS Colorado Fish and Wildlife Office, 755 Parfet St., Rm. 361, Lakewood, CO 80225 (303-275-2370).

Ventura Marsh milk-vetch listed as endangered

The Ventura marsh milk-vetch, which survives on one acre of degraded dune habitat in Ventura County, has been listed as endangered (5/21, p. 27901-8; f052101.txt).

The plant, which was thought extinct until it was rediscovered in 1997, is threatened with direct destruction from proposed soil remediation, resi-

dential development, and associated activities, FWS said.

Considering there is only one population left, "unanticipated human-caused and natural events" are threats. Competition from non-native plants also is a threat.

The listing came in response to a lawsuit filed by the Center for Biological Diversity (CBD), which sued in January to force a final listing decision. FWS proposed it for listing in June 1999, although it first proposed to list it in 1976.

The site where the plant is located is near the city of Oxnard. "From 1955 to 1981 the land on which it occurs was used as a disposal site for oil field wastes," CBD said.

The listing is the first of the Bush Administration.

Contact: Rick Farris or Lois Grunwald, FWS, Ventura Fish and Wildlife Office, 2493 Portola Rd., Suite B, Ventura, CA 93003 (805-644-1766; -3958 fax).

CH designated for Great Lakes piping plover

FWS has designated 201 miles of Great Lakes shoreline in 26 counties in Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, and New York as critical habitat for the piping plover breeding population (5/7, p. 22938-69; f050701.txt).

Thirty-five separate units make up the final designation, which like all the CH designations being made by FWS was the product of a court order, this time in a suit brought by Defenders of Wildlife in Washington, D.C.

The economic impact of "incremental" consultations is estimated to range from \$314,200 to \$592,000, according to the final addendum to the economic analysis released last month. Consultations are defined as "incremental" when they would take place only because of the CH designation, such as for unoccupied habitat.

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“The Great Lakes breeding population of piping plovers has declined to just 30 breeding pairs, all of which nest in northern Michigan,” said Bill Hartwig, Regional Director for the Service’s Great Lakes/Big Rivers Region. The designation “will help ensure the population has enough habitat to recover and ultimately be removed from the list of threatened and endangered species.”

Among changes from the proposed rule, FWS has removed three sites from the final designation “because they do not contain and are unlikely to develop elements needed by the piping plover,” FWS said in a news release.

The service also scaled back the inland boundary for CH from 1 kilometer to 500 meters inland from the normal high water line. “The revised boundary reflects information gathered during the comment period that indicates most dune systems do not extend beyond the revised boundary,” FWS said.

Contact: Laura J. Ragan, Bishop Henry Whipple Federal Building, 1 Federal Dr., Fort Snelling, MN 55111 (612-713-5292).

Plover wintering CH delayed by 60 days

FWS received too many comments on its draft economic analysis on wintering piping plovers to meet a court-ordered deadline to designate CH for the birds, the service said in announcing a 60-day in finalizing that designation (5/7, p. 22983-4; f050701a.txt).

The proposal includes 146 areas along the coasts of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas, which includes about 1,699 miles of shoreline along the Gulf and Atlantic coasts and along margins of interior bays, inlets, and lagoons.

The “sheer scale” of the rulemaking has made it difficult to complete by the court’s deadline, acting FWS director Marshall Jones said in a declaration to the court in Washington, D.C. (*Defenders of Wildlife v. Babbitt*, 00-2695 AER, D.D.C.).

The service held 10 public hearings and re-opened the comment period

three times, Jones said.

The service is currently reviewing a revised draft of the final economic analysis prepared by its contractors.

Contact: Chris Nolin, 4401 North Fairfax Dr., Room 420, Arlington, VA 22203 (703-358-2171).

Wash. sage grouse listing is warranted, precluded

Western sage grouse in the Columbia Basin deserve to be listed as threatened, but other species have to come first, FWS said in issuing a “warranted, but precluded” finding for the bird (5/7, p. 22984-94; f050701b.txt).

The finding was made pursuant to a court-approved settlement in *Northwest Ecosystem Alliance v. Babbitt* (00-520 EAS, D.D.C.).

The bird’s population in central and southern Oregon is considered stable, at about 20,000. But in two small areas of the Columbia Basin in central Washington that are home to two subpopulations of the bird, the total number of individuals is about 1,000. The two areas occur at locations 34 miles apart in Douglas County and parts of Kittitas and Yakima counties.

“These birds occur mostly on private and state-owned lands and federal lands managed by the Army,” FWS said.

The service agreed that the “discrete population segment of western sage grouse that occurs in Washington is significant to the remainder of the taxon, and thus represents a distinct population segment.”

Activities at the Army’s Yakima Training Center have harmed sage grouse habitat. In 1995, training exercises at the 325,000-acre YTC caused “major structural damage” to over 9 percent of the sagebrush plants within western sage grouse protection areas.

Fire damage is another problem. “In 1996, over 60,000 acres of shrub steppe habitat, much of it currently and potentially used by western sage grouse, was burned as a result of training activities,” FWS said.

“A preliminary viability analysis conducted by the [Western Sage Grouse Working Group in 1998] indicates that neither subpopulation is

likely viable over the long term (approximately 100 years).”

Contact: Chris Warren, FWS, Upper Columbia Fish and Wildlife Office, 11103 East Montgomery Dr., Spokane, WA 99206 (509-891-6839; -6748 fax; chris_warren@fws.gov).

CH for Bay checkerspot could cost money

FWS has included the Communications Hill unit in its critical habitat designation for the Bay checkerspot butterfly, even though doing so means the designation could cost up to \$6.5 million over the next 10 years (4/30, p. 21449-89; f043001.txt).

The unit, a 442-acre tract of undeveloped land in Santa Clara County, may or may not be currently occupied by the butterfly, but serves as a “stepping-stone” for the threatened species’ dispersal, FWS said. Much of it is privately owned on unincorporated land, with a smaller area in the city of San Jose.

The service said it believes the butterfly does inhabit the site, which is slated for future housing development.

Increased consultations and the cost of off-site habitat mitigation could push the cost of including that unit to up to \$6.5 million over 10 years, but FWS also said the low end of its estimate is \$1.2 million.

“Depending on the extent of mitigation required, and the actual final level of residential development within the unit, we estimate that mitigation costs associated with critical habitat designation for the bay checkerspot could range between 0.07 percent and 0.6 percent of the total value of future residential development within the [Communications Hill] unit.”

But the benefits of including the habitat in the designation outweigh the costs, the service said. It also said that the designation alone could not be blamed for any future consultations or delays in development projects.

“While some project delays may occur out of concern for a project’s impact on the bay checkerspot, large real estate projects are often delayed

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Register Report

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for numerous other reasons that include compliance with various state and local ordinances and zoning regulations. It would be improper to attribute all such changes in the scope of a development project, along with associated project delay costs, to critical habitat when numerous other factors frequently contribute to these changes.”

FWS also said it has found “little evidence to date to support claims by some developers that critical habitat designation would have significant regional economic impacts. In areas where critical habitat has been designated, economic growth has continued to grow.” The service cited a study done on the impact of designating habitat for the cactus ferruginous pygmy-owl in southern Arizona that said “dire predictions made by developers in that region have not materialized” because “high-density housing development has not slowed, the value of vacant land has risen, land sales have continued, and the construction sector has continued its steady growth.”

The total amount designated for the butterfly is 23,903 acres of land in 15 units in San Mateo and Santa Clara counties. The biggest units are the Kirby unit, which includes 6,912 acres along the southern portion of Coyote Ridge in Santa Clara County; the Metcalf Unit, which includes 3,351 acres in Santa Clara County, east of Highway 101, south of Silver Creek Valley Road, north of Metcalf Canyon and west of Silver Creek; and the Santa Teresa Hills unit, which includes 4,500 acres in Santa Clara County.

FWS reduced the designation by about 2,279 acres from the proposal by excluding lands deemed “not essential” for conservation of the subspecies.

The designation was required by a court order resulting from a lawsuit brought by the Center for Biological Diversity.

Contact: David Wright or Chris

Nagano, FWS, 2800 Cottage Way, Suite W-2605, Sacramento, CA 95825-1846 (916-414-6600; -6712 fax).

Little effect seen from white sturgeon CH

A new FWS economic analysis on CH designation for the Kootenai River white sturgeon says “it is not expected that the designation of critical habitat, as currently proposed, will impose any additional regulatory burden or economic costs associated with future activities involving the species and its habitat.”

The service proposed designating 11.2 miles of the Kootenai River in northern Idaho as critical habitat on Dec. 21 (www.eswr.com/f12210a.txt).

Contact: Bob Hallock, Upper Columbia Fish and Wildlife Office, 11103 E. Montgomery Dr., Spokane, WA 99206 (509-891-6839, -6748 fax).

HCPs/Safe Harbor

Flycatcher, wolf covered by Safe Harbor plan

Caroline H. and Thomas W. Paterson have developed a Safe Harbor plan that would allow take of the endangered southwestern willow flycatcher and Mexican gray wolf; threatened bald eagle; Mexican spotted owl, and loach minnow (5/10, p. 23947-8; f051001.txt).

“The proposed take could occur as a result of conservation measures implemented on [309-acre] Spur Ranch, consisting of riparian restoration activities along Centerfire Creek, including planting native vegetation; grade control structures in Centerfire Creek to control erosion and downcutting; and upland management activities designed to improve overall habitat health, including prescribed burning, selective timber harvesting, and controlled grazing. Currently, none of the species mentioned above are known to occur on the property.”

The Safe Harbor plan has been classified as “low-effect.”

Contact: Denise Smith, FWS, 2105 Osuna Road NE, Albuquerque, NM 87113 (505-346-2525).

Boise spotted owl HCP is “low effect”

FWS has determined that a Boise Cascade application to take the northern spotted owl incidental to timber harvesting in Klickitat County, Washington, qualifies as a “low-effect” HCP that does not need NEPA analysis (5/1, p. 21776-8; f050101a.txt).

“Approval of the HCP would result in minor or negligible effects on the owl and other listed or proposed species,” the service said. “Occurrence of threatened northern spotted owls on the permit lands is limited to one occupied site.”

“The proposed permit area occurs within Boise’s 84,000-acre Simcoe District ownership in the eastern Cascade Mountains of Washington. The actual area covered by the proposed permit and HCP is 620 acres of Boise ownership within owl site #459, centered in section 27, township 6 north, range 15 east.”

Contact: Joseph Zisa, FWS, 510 Desmond Dr., SE, Suite 102, Lacey, WA 98503-1273 (360-534-9330).

Golden-cheeked warbler

Ribelin Ranch Partners Ltd., Lucia Francis, and Charles Ribelin have applied to FWS for a 30-year incidental take permit that would authorize destruction of golden-cheeked warbler habitat in exchange for preservation of habitat elsewhere (4/24, p. 20675-6; f042401c.txt).

The applicants want to build a residential and commercial development on 160 acres of the approximately 740-acre Ribelin Ranch Property on R.M. 2222, Austin, Travis County, Texas.

The development will eliminate about 168 acres of warbler habitat, which may result in the take of 10 to 12 warbler territories, FWS said. In return, the applicants have proposed preserving 240 acres of warbler habitat in perpetuity; minimizing on-site habitat destruction; “education and encouragement of the homeowners in the use of xeriscaping; clearing only between August 1 to March 1 when the

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warblers are not present; and prohibition of deer and bird feeders that encourage the growth of populations of species that parasitize, predate or out-compete the golden-cheeked warbler or destroy its habitat.”

Contact: Sybil Vosler, FWS, 10711 Burnet Rd., Suite 200, Austin, TX 78758 (512-490-0063).

Plover HCP approved

FWS has granted a permit to the Magic Carpet Woods Association in Traverse City, Michigan, for development of 14 lots on 91 acres along the Lake Michigan shoreline, about five acres of which is potential plover habitat (5/4, p. 22592; pf050401.txt).

FWS said the home construction would not directly affect plover nesting habitat because it would take place in the woods, not on the beach where nesting occurs. The HCP also includes numerous conditions to protect the birds, such as prohibiting ORVs on the beach and requiring that pets be kept on a leash.

Contact: Peter Fasbender (612-713-5343; peter_fasbender@fws.gov).

Houston toad, bald eagle

FWS has added the bald eagle to an HCP covering the Houston toad in Bastrop County, Texas. The revised EA/HCP also would allow other single-family homes to be built in 46 subdivisions, “as long as the action on the property disturbs no more than approximately [a half acre] of habitat within each eligible lot” (4/24, p. 20675; f042401b.txt).

Contact: FWS Austin office (see above).

FWS is looking at whether to add the Canada lynx to the list of species covered by a Washington Department of Natural Resources permit issued in January 1997. WDNR asked FWS a year ago to add the lynx to the permit, which covers state lands west of the Cascades (4/24, p. 20673-5; f042401a.txt).

Lakewood Development Partnership has applied for an incidental

take permit for three families of the threatened Florida scrub-jay and the threatened eastern indigo snake in Lake County, Florida (5/2, p. 21999-2000; f050201.txt).

NEPA

Spartina EIS/EIR planned

FWS and the California State Coastal Conservancy will prepare a programmatic EIS/EIR on the “implementation of a regional eradication and/or control program for nonnative, invasive *Spartina* (*S. alterniflora*), a perennial cordgrass, in the San Francisco Bay Estuary” (4/20, p. 20320-2; f042001.txt).

Getting rid of *Spartina* “could provide restoration and possible preservation of up to 40,000 acres of tidal wetlands and up to 29,000 acres of intertidal mud flats,” the notice said.

FWS has released a final EIS/EIR for the Bolsa Chica Lowland Restoration Project, Orange County, California, which involves creation and restoration of wetlands to serve as habitat for listed species (4/27, p. 21174; f042701.txt).

Recovery plans

Howell’s spectacular thelypody

This plant, which is found in the Baker-Powder River Valley in eastern Oregon, will be considered for delisting when the following goals are met, according to a recovery plan released for public comment April 26 (21008-9; f042601b.txt):

(1) At least five stable or increasing populations are distributed throughout its extant or historic range. The populations must be naturally reproducing with stable or increasing trends for 10 years; (2) all five populations are located on permanently protected sites; (3) management plans have been developed and implemented for each site that specifically provide for the protection of thelypody and its habitat; and (4) a post-delisting monitoring plan is in place that will monitor the status of thelypody for at least five

years at each site.

Contact: Edna Vizgirdas, FWS, 1387 S. Vinnell Way, Room 368, Boise, ID 83709 (208-378-5243).

NMFS/NOAA

Bowhead CH considered

NMFS will conduct a review of the available data and economic impacts to determine whether to designate critical habitat for the Western Arctic stock of bowhead whales (5/22, p. 28141-2; n052201b.txt).

The Center for Biological Diversity and Marine Biodiversity Protection Center petitioned NMFS in February 2000, and then threatened to sue if they didn’t get a response (*ESWR* Feb, p. 15).

The petition process is certain to be closely watched by the oil and gas industry, especially since the petitioners cited industrial development, especially as embodied in oil and gas projects in the Beaufort Sea, as the main threat to the bowhead.

“Further, they cite increases in noise, vessel traffic, seismic exploration, drilling and construction as having the potential to elevate threats to bowhead whales in the region,” NMFS said.

The petitioned area includes the Beaufort Sea off Alaska’s North Slope between Point Barrow and the Canadian border, from mean high tide to approximately 170 kilometers offshore.

“Bowhead whale stocks were severely depleted by commercial whaling in previous centuries,” NMFS said. “Estimates of historic bowhead abundance vary but today the Western Arctic stock is estimated at approximately 8,000 whales. Many individuals in this population migrate annually from wintering grounds in the Bering Sea north into the Beaufort Sea where the whales spend the summer. It is this summering area that the petitioners recommend for critical habitat designation.”

Contact: Brad Smith, NMFS, Alaska Regional Office, 222 West 7th Ave., Anchorage, AK 99517 (907-271-5006; -3030 fax).

www.eswr.com/frr.htm

“Attenuated” groundwater connection not covered by OPA, Fifth Circuit rules

The Fifth Circuit has held that the Clean Water Act does not cover discharges onto dry land that seep into groundwater and “that have only an indirect, remote, and attenuated connection with an identifiable body of ‘navigable waters.’” (*Rice v. Harken Exploration Company*, 99-11229).

In an April 25 decision that appears to be the first by a circuit court to construe the *SWANCC* decision, the appeals court also held that “subsurface waters are not ‘waters of the United States’ under the [Oil Pollution Act] (OPA).”

D.E. Rice and Karen Rice sued Harken for damages arising from discharges of hydrocarbons, produced brine, and other pollutants onto their ranch in Hutchinson County, Texas, and into “Big Creek,” “unnamed tributaries of Big Creek” and other “independent ground and surface waters.”

The case was brought under the OPA, but the Rices argued that since the language in the OPA and CWA is the same, the scope of the two laws should be similar.

But under the *SWANCC* decision, “it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water,” the court said.

“[T]here is nothing in the record that could convince a reasonable trier of fact that either Big Creek or any of the unnamed other intermittent creeks on the ranch are sufficiently linked to an open body of navigable water as to qualify for protection under the OPA,” the court said. There also was no evidence of any oil discharge directly into Big Creek or any other intermittent creek, the court said.

The court seemed to hold the door open a crack for the assertion that the CWA and OPA may cover discharges from groundwater into surface waters. But the court found the Rices’ case weak that the Canadian River—considered a navigable water by all the parties—had been contaminated by groundwater.

“[W]e hold that a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA.”

Ex-FWS director going to NWF

Former FWS Director Jamie Rappaport Clark will be “moving into the top conservation post at the National Wildlife Federation,” NWF announced May 2.

Later this month, Clark will become senior vice president for conservation programs at the organization.

NWF President Mark Van Putten said Clark “will be a tremendous asset She knows conservation, she knows the obstacles and she knows how to surmount them—that’s a recipe for real success.”

“I’m anxious to keep building on the progress we’ve made in improving the health of our environment, our wildlife and our wild places,” Clark said. “But it’s going to take hard work and a commitment to building new alliances. I’m excited to be working with a group that believes as I do that conservation is not a partisan issue and that crafting win-win solutions is the key to success.”

Smithsonian secretary drops plan

Smithsonian Secretary Lawrence Small has dropped his controversial plan to close the institution’s Conservation and Research Center in Front Royal, Va.

Small announced his change of heart to the Smithsonian’s Board of Regents May 6. The board voted to set up an advisory panel on the Smithsonian’s scientific programs. Scientists both in and outside of the institution had been highly critical of Small and his planned cutbacks in the fiscal 2002 budget (*ESWR* April, p. 3).

S. 1180 is back; now it’s S. 911

The old Kempthorne-Chafee ESA reauthorization bill is back, this time introduced by Sens. Max Baucus (D-Mont.) and Gordon Smith (R-Ore.).

Baucus, along with Sen. Harry Reid (D-Nev.), was part of the group that introduced S. 1180, which died in late 1998, at the end of the 105th Congress. But Kempthorne, now the governor of Idaho, was the main sponsor.

The new bill, S. 911, includes deadlines of 18 months for a proposed recovery plan and 30 months to come up with a final plan. It also would require FWS to consult with the recovery team before proposing a critical habitat designation, 18 months after a listing is final.

The bill also would allow private parties to participate in interagency consultations under Section 7, and require FWS and NMFS to explain to private parties who propose Reasonable and Prudent Alternatives why those RPAs are not in the final Biological Opinion. Agency actions covered in recovery plan implementation agreements would not be subject to consultation requirements.

The bill would add the No Surprises rule to the ESA, as well as a permit revocation provision. The permit can be revoked “if the Secretary finds that the permittee is not complying with the terms and conditions of the permit or the conservation plan.”

The situation in the Klamath Basin “highlights many of the current problems” with the ESA, Smith said. “We are managing the water resources in this basin for two fish species, at the expense of all other wildlife, including bald eagles. We are also forgetting our human stewardship, and to date have failed to provide assistance to the farmers and ranchers who are facing economic ruin over this water allocation decision.”