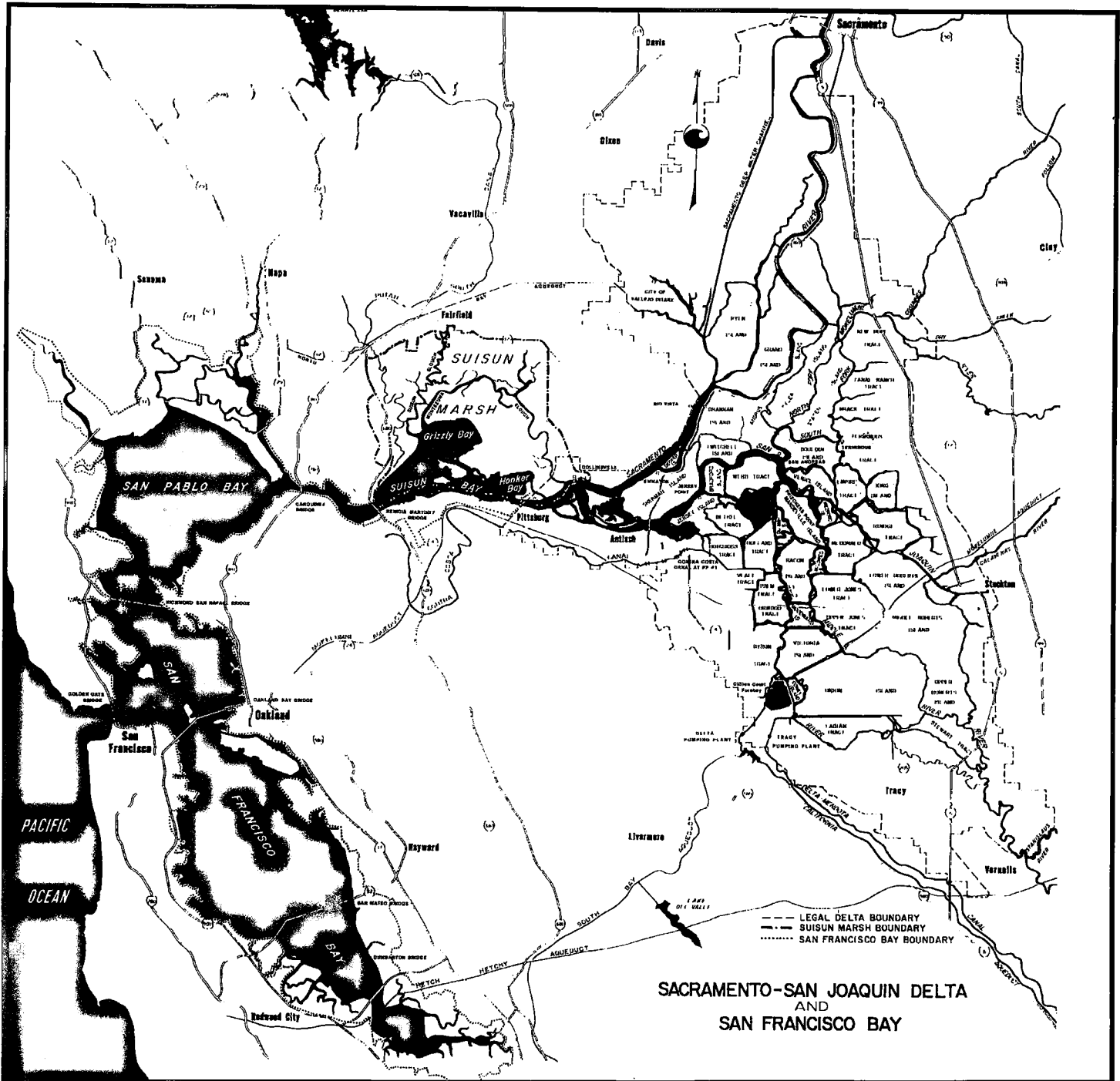




## Banking on the Conquest of California's Delta



### Purpose and Scope of Publication:

The PUBLIC TRUSTee is an independently published periodical designed to provide all segments of the public with information and insight on how "our" government develops, manages, and distributes public trust resources. The primary purpose of this publication is to monitor government's activities to ensure that government performs its mandated constitutional, legislative, judicial and administrative duties to carry out its public trust responsibilities. The public has every right to expect government to carry out its trust responsibilities.

The PUBLIC TRUSTee is founded on the belief that many natural resources held in trust for the people of the United States and California, such as, our rivers, wetlands, bays, fisheries, wildlife and public lands, have not been adequately protected. A corollary belief is that government officials at federal, state and local levels, especially appointed members of regulatory boards and commission, but also career civil service workers, have lost sight of their trustee duties and instead have been captured and co-opted by the very industries and special in-

terests they are supposed to regulate. As a result, elected and appointed officials suffer from a self-imposed credibility crisis and have lost the trust of knowledgeable citizens and conscientious government employees who see natural resources plundered, scarce financial resources for the protection of public trust resources squandered, and intelligent resource planning thwarted by the amoral avarice of a few.

The United States and California Constitutions, as well as case law, provide the basis for the Public Trust Doctrine through which individuals can preserve and protect air, water, fish and wildlife resources from degradation or destruction. Under the Public Trust Doctrine, federal and state governments are trustees and responsible for the stewardship of these valuable resources. Under the Public Trust Doctrine, federal and state governments are the legal guardians of those natural resources that are not capable of self-generation or renewal without man.

Recent events in American history have made it clear that the citizenry has become disenchanted and disillusioned with ineffectual and self-serving officials. This is all too obvious in the area of resource management where daily news accounts remind us of our poisoned land, air and water, our disappearing fisheries, our deformed birds and our public health epidemics. As the Hopi say "We are eating our grandchildren." Who then, will speak for future generations of Americans and their natural resources if not The PUBLIC TRUSTee and its advocates?

The PUBLIC TRUSTee will not limit itself to just publishing information, it will take an active role to ensure that the financial and natural resources that are held in trust are being used in accordance with law, and, when necessary, petition our government through the regulatory process for redress of our grievances and to use the courts to force obedience of the law. The PUBLIC TRUSTee is a nonpartisan, apolitical publication, which will hold all parties to the same standard.

The PUBLIC TRUSTee will:

- Support government policies, actions and programs that are in conformance with its duties. Conversely, it will take the necessary actions to hold government accountable when it fails to properly serve the public.

- Expose government harassment of private citizens and conscientious government

Please see PURPOSE AND SCOPE, page 7

### A Note From the Publisher:

I have 25 years of experience in examining federal, state, regional and local governments performance, roles, and actions, and their impact on both the private and public sectors' financial and natural resources. In the process, I assisted, directed and/or compelled government to fulfill its respective duties to protect all segments of society and its resources.

I worked on a host of issues and completed a plethora of fact-finding reports on financial waste in government, government boondoggles, toxic waste, water pollution, pesticides, urban development, air pollution and abatement, timber management, fish and wildlife destruction and enhancement, government's selective enforcement practices, water resources development, financing and management, flood management and dam safety, government-private sector contracts, water rights identification and adjudication, military expenditures and related activities, petitioning government, abating red-tape, urban and agricultural land development, protecting and/or supporting conscientious government employees, and many related activities that either exposed government's illegal activities and/or held it accountable for its actions.

As publisher, I will continue to conduct fact-finding studies, and use the information to implement cost-effective, socially acceptable and environmentally sound solutions to problems that threaten or impair the public's health and safety and its financial and natural resources.

I am fully cognizant of the role and influence that vested-interests exert over the government and intends to use this knowledge to establishing a level-playing field for the public at large.

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## BANKING ON THE CONQUEST OF CALIFORNIA'S DELTA

In a carefully orchestrated and access-controlled news conference, Gov. Pete Wilson recently announced a "cease-fire" in California's never-ending water wars that supposedly will ensure protection for the Delta's water supply and dwindling fishery. Most of the media bought it hook, line and sinker.

Interior Secretary Bruce Babbitt and EPA Administrator Carol Browner stood supportively at Wilson's side during the Dec. 15 Sacramento news conference. Wilson, conceding there might be some "major sledding ahead", nevertheless contended a "truce" hammered out by the U.S. Bureau of Reclamation, California's Dept. of Water Resources (DWR), the mammoth Metropolitan Water District of Southern California, California Urban Water Association, banking interests, western San Joaquin Valley farming barons and token representation from grower-friendly environmentalists, will finally begin to "fix" the broken Delta. Don't hold your breath.

Conspicuous by their absence at the news conference (and the truce talks) were officials of the commercial and sports fishing industries, many major environmental groups, public trust advocates, and critics of California's crumbling state and federal water delivery systems who see the "peace pact" as a last ditch effort (no pun intended) by vested interests who want to continue hogging the public water that made them wealthy and created the Delta crisis in the first place.

To the skeptics, Wilson's claim of cease-fire is about as reassuring as a claim by the Serbs that they are peace-loving and want only what's best for Bosnia.

The volume of water that will be left in the Delta to meet salinity standards and protect endangered species is the big issue in the 16-year battle over Delta protection and the governor's number crunchers were busy literally right up until the time of the news conference changing those figures to quench the thirst of existing water users. And even then they were still classified as preliminary numbers. The clear intent is to squeeze every possible drop out of the Delta and hope the weather will save us from our greed.

Government officials intentionally decided not to have copies of the most recent revised plan available for the press at the news conference. In addition, the "Principles

science all right, political science.

### Bank of America's role in the Delta conquest.

Wilson singled out Bank of America Vice-President and senior economist Fred Cannon for special praise in the negotiations which raises questions about B of A's interest. Could it have anything to do with the fact that Bank of America has a substantial financial investment in the western San Joaquin Valley agricultural empire? Or because bank officials were concerned about the fact that a number of farm water contrac-

tors have been unable to pay their water bills and default on payments could have a significant impact on the bank? B of A already reluctantly owns (through repossession from hapless cotton farmers) huge tracts of western San Joaquin Valley alkali farmland that is virtually worthless without water.

Bank of America is also a trustee for a portion of the State Water Project's (SWP) funds, and it purchased/syndicated

about \$800 million of the General Obligation Bonds that were used to finance the initial development of the SWP. Simply stated, B of A has a great deal at stake in maintaining current methods of distributing Delta water.

In addition, B of A and other banks, insurance companies and lenders make a tidy annual profit from government-guaranteed crop production loans on that western valley desert. Why rock the boat, even if it does scrape bottom once in a while?



U.S. Bureau of Reclamation Photo

### The Governor's Press Conference Announcing the Delta Water Deal

for Agreement on Bay-Delta Standards Between the State of California and the Federal Government" was not made available to reporters until after the news conference, presenting a convenient obstacle for any intelligent questions on the details of the plan. Praise and mutual-backslapping, however, flowed in abundance.

Even Rep. George Miller, D-Calif., outgoing chair of the Congressional subcommittee that oversees the Bureau, joined the love-in, calling the plan a "comprehensive and scientifically sound approach to water management and species protection." It was

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## DELTA CONQUEST

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### Lending and banking institutions warned California's credit rating - cash flow - could be damaged if conflict over Delta water diversions was not resolved.

Indeed, water world insiders say it was the banking and lending institutions that prodded Wilson to stop his stonewalling of Delta reforms. Last March, Standard & Poor's, the nation's largest financial rating service, warned that California's credit rating could be damaged if something wasn't done to resolve the long-festering battle over Delta water diversions. B of A and other banks and business executives began pressuring both Wilson and President Clinton to cut some type of a deal, which is what Interior Secretary Bruce Babbitt called it at the December 15 news conference. A deal. And while it may be a good "deal" for the "corporate species" in the water world it may be a "very bad deal" for the Bay-Delta Estuary and public trust interests in the long run because of several serious flaws, such as;

□ The plan admittedly, does not guarantee the reasonable protection of the Estuary's fish and wildlife beneficial uses. Instead, the Plan will "...protect fish and wildlife beneficial uses at a level which stabilizes or enhances the conditions of aquatic resources..." However, when it comes to other uses, the Plan will "...ensure the reasonable protection of municipal, industrial, and agricultural beneficial uses..." However, as one probes it becomes clear that all of the numbers are fluid.

□ The State Board's estimated the water costs of the new Plan at 300,000 acre-feet in average years and 900,000 acre-feet in drought years. These water costs, however, are estimated by comparing the Plan's Delta export rates with inflated base export rates, thus producing inflated water costs. A better approach is to compare the Plan's Delta exports with the historical (actual) Delta exports that caused the decline in the Delta fisheries. When this comparison is done, the results show the decline that the "State Board's Plan" allows the state and federal

projects to INCREASE EXPORTS.

□ The new Plan discards "QWEST" flow criteria that requires the streamflow in the Delta to flow downstream, the natural direction. Instead the Plan substitutes a less restrictive "Export/Inflow" ratio that allows Delta exports to continue at rates that are damaging to the Delta's fisheries. The ratio was substituted even though, "[n]o definitive studies or analyses were completed to support these export/inflow restrictions".

□ According to the Governor, "No additional Endangered Species Act listings will occur within the three-year term of the agreement absent unforeseen circumstances."

□ To add insult to injury, the "Export/Inflow" ratio even allows the state and federal water projects to increase their exports to the San Joaquin Valley and Southern California when upstream nonproject water users have to give up water for the Delta. This will happen when the Board reallocates responsibility for meeting the objectives and require other water right holders in the system to contribute water to the Delta.

□ State Water Board staff made several groundless environmental determinations in the environmental checklist. For example, the checklist concludes that the Plan will cause "substantial reductions in the amount of water otherwise available for public water supplies". It also concludes that the Plan will result in no "deterioration to existing fish and wildlife". Finally, the checklist concludes that the "project will result in increased groundwater withdrawals to replace decreased water supplies".

□ The new plan opens the door to another Peripheral Canal proposal, sure to reignite the north-south bitterness that earmarked the 1982 Peripheral Canal battle.

□ The truce was hammered out by the same interests and agencies which have been overdrawing Delta supplies for decades, and omitted a number of people that participated in the board's hearings.

□ Current water users are relieved of any liability or pressure to give up more water if endangered species in the Delta continue to decline because of a lack of clean water.

□ The new plan is unlikely to end the continued pollution of the Delta from toxic drainage water from Western Valley factory farms. This bottleneck in any comprehen-

sive Delta protection plan remains unsolved a decade after the Kesterson National Wildlife Refuge disaster put food chain poisoning and deformed ducks on the front pages of America's newspapers. Indeed, after \$100 million in studies and cleanup, the growers that polluted Kesterson are still pushing for a master drain canal to the Delta to dump the ag drainage into the Delta near Chipps Island. And on Dec. 17 a federal judge in Fresno, at the request of Westlands Water District, ordered the Bureau to apply to the State Water Resources Control Board (SWRCB) for a permit to finish the agricultural drain to the Delta.

□ Most important of all, there is no guarantee that the water quality standards contained in the plan will ever be enforced by either the state or federal government. The principles contained in the so-called "peace agreement" are not binding.

A little history is in order here. In August 1978, the SWRCB exercised its reservation of jurisdiction over the water right permits for the federal Central Valley Project (CVP) and the SWP by adopting Water Right Decision 1485 (D-1485). At the same time, the board adopted the Delta Water Quality Control Plan. Together, the 1978 Delta Plan and D-1485 revised existing standards for flow and salinity in the Delta's channels and ordered the Bureau and DWR to meet these standards by either reducing pumping, releasing water stored in upstream reservoirs, or both. To address the continuing uncertainties associated with possible future project facilities and the need for additional information on the Estuary's ecosystem, the board committed to reviewing the Delta Plan in 10 years.

In the 1980s, it became apparent due to the precipitous decline in many species of fish that D-1485 was inadequate to protect beneficial uses of all Delta water users.

In July 1987, the board began proceedings to reexamine water quality objectives for the Bay-Delta Estuary and consider how water right permits would be modified to meet new objectives.

The water quality hearings continued through 1993. Over \$10 million was spent on the hearings, which included testimony from dozens of experts on the Delta. Some said the Delta was fine. Others said the

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**DELTA CONQUEST**

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Delta was in its death throws and in danger of ecological collapse. In 1993, the board finally came up with some numbers for fresh water flows to protect the Delta estuary. Western San Joaquin Valley growers, and landholders, who include some of the biggest farmers in America, and development interests in Southern California who dream of Los Angelesizing the entire state, screamed long and hard. Gov. Wilson responded by rejecting all of the "science" from the six years of water board hearings and called for some new "sound science" more friendly to his political backers.

In March 1994, the SWRCB, once again, commenced proceedings to review the Bay-Delta plans. While every one was seemingly preoccupied with a new plan to protect the Delta, current standards were being flagrantly violated and in some cases simply ignored by the Bureau and DWR officials.

**During the first four years of the last drought more water was exported from the Delta than in any other four years of history.**

During the first four years of the extended California drought that began in

1987, more water was exported from the Delta than any previous four-year period in state history. During the severe drought years of 1991 and 1992, the Bureau and DWR, the two largest exporters of water from the Delta, violated existing 1978 salinity standards more than 200 times and illegally impounded and/or exported about 300,000 acre-feet of water from the Delta worth \$29 million.

This publisher went to the SWRCB to formally complain about the water theft and violations and the board held a hearing and conceded the violations occurred but refused to hold either the Bureau or DWR responsible for their infractions.

**The Publisher and CSPA filed a Public Trust Lawsuit against the government for illegally exporting millions of dollars of water from the Bay/Delta Estuary.**

This author and the California Sport Fishing Protection Alliance (CSPA) then filed a public trust lawsuit (Superior Court, County of Sacramento, Case No. 537641), in December of 1993 to recover the \$29 million value in lost

water. The suit set the stage for an injunction should future violations of the Delta standards or illegal exports occur. Since the filing of the suit, both agencies have ostensibly obeyed the export and salinity rules but there is concern that the new plan may make enforcement of any new, complex standards even more difficult.

**More water quality violations occurred during Governor Wilson's tenure than in all of his predecessors combined.**

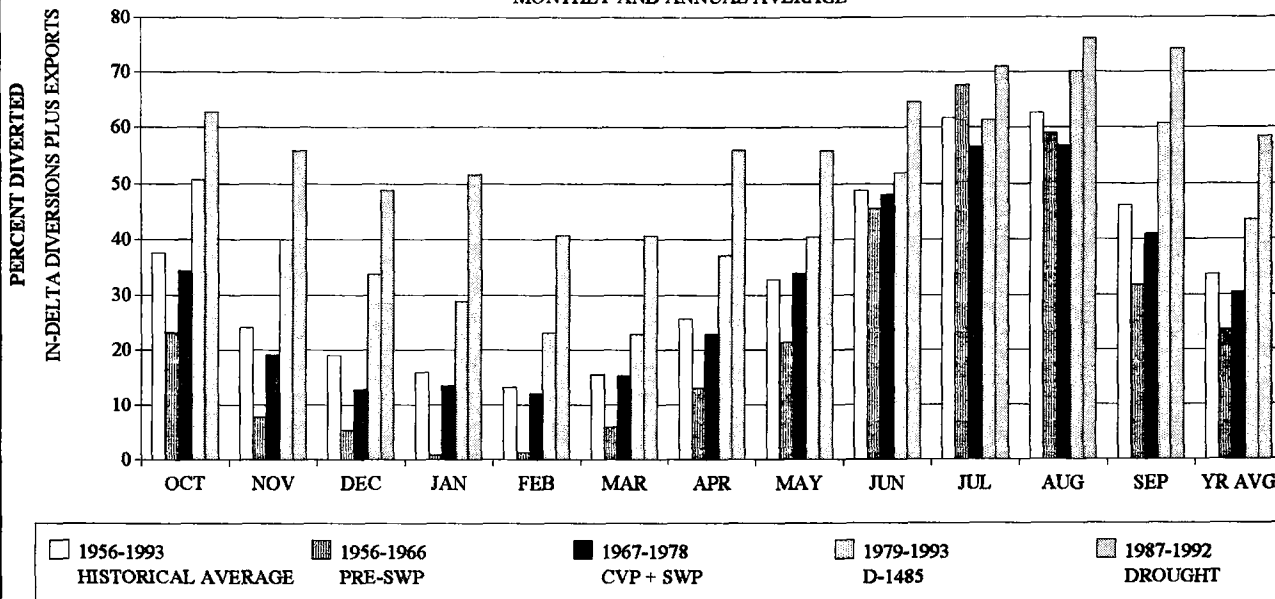
Indeed, Interior Secretary Babbitt, with no apparent consultation with Congress, foolishly agreed to buy any additional water that the two agencies failed to relinquish to meet Delta standards, over and above what is required to protect existing threatened or endangered species. However, when federal officials were later asked where the money would come from to buy this water that the agencies were legally obligated to give back to the Delta, they said they didn't know.

The new plan is a long way from being in place. If it gains EPA approval, it must undergo a SWRCB hearing on Water Rights. This proceeding could take 3 to 5 years and will fo-

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**Sacramento-San Joaquin Delta**

**DELTA: PERCENT INFLOW DIVERTED**  
MONTHLY AND ANNUAL AVERAGE



Data from DWR's DAYFLOW database

Graphics by: Bud Brown / LogiCall Services (916) 482-8282



## DELTA CONQUEST

Continued from page 5

cus on how much water the government water projects and upstream depletors will be required to provide to meet the water quality standards contained in the plan, which in theory will reduce their share of the water pie.

At this point, it is unclear whether the Board intends to make compliance with the plan mandatory forthwith or if compliance will be voluntary until the Board completes the hearing process. In an earlier draft of the new plan, there was language that would have required both DWR and the Bureau to implement the standards immediately, without waiting for the completion of a water rights proceeding. DWR is required to comply with California Water Code section 13247. The code section requires any state agency to comply with water quality control plans adopted by the state board. The Bureau is subject to a similar measure under the federal Clean Water Act, section 313(a) which requires federal agencies to comply with state requirements. However, the plan that was released excluded this mandatory language.

The critics may get some answers on what it all means when state Sen. Tom Hayden, chair of the Senate Natural Resources and Wildlife Committee, holds hearings (tentatively scheduled for February), on what it will mean to the Delta salmon fishery.

"On the basis of respected independent scientists, there is no assurance that California salmon will survive this political compromise," Hayden said at the time the plan was announced.

The environmentalists who participated in some of the peace talks admit the salmon fishery is not assured protection by the plan. Many governmental fisheries biologists were upset with the plan and the apparent sellout by the environmental groups. The Environmental Defense Fund has been in the doghouse with even mainstream environmental groups since it joined forces with the Westlands Water District a decade ago in an effort to find a way for the factory farms to export their drainage water laced with the deadly element selenium. An official of an environmental group who did participate in some of the "truce" talks defended his group's position and said they assessed the November elections and the prospects that the Endangered Species Act may be gutted by a Republican Congress next year and decided to cut their losses and take the best deal that they could get. See DELTA CONQUEST, page 27

## STATE PUMPING WATER FROM DELTA IN EXCESS OF FEDERAL PERMIT

According to the California Department of Water Resources' (DWR's) records, it has pumped more water from the Delta, on certain days in January, than is allowed under the operational restrictions imposed by the U.S. Army Corps of Engineers (Corps). The historical pumping limitations is covered by the Nationwide permit for work completed before 1968.

If the historical levels of pumping are exceeded then DWR would be required to obtain a Section 10 permit (Harbors and River and Harbors Act of 1899), from the Corps.

**The PUBLIC TRUSTee took the liberty to formally notify the Corps of the department's excessive pumping and is awaiting a reply from the Corps.**

According to the Corps' the historic pumping limits at Banks pumping plant, established on August 7, 1981, is 6,880 cubic feet per second (cfs), averaged over three days. This may only be increased when flows in the San Joaquin River at Vernalis exceed 1,000 cfs during the mid-December to mid-March period. The amount that it may be exceeded is one third of the flows above 1,000 cfs.

The one and three day maximum pumping limitations are not a part of the federal-state Water Quality Control Plan. The department appear to be operating its project in accordance with the plan; however, on some days it has operated its pumps in excess of the amounts allowed under the existing Corps pumping limitation. However, to our knowledge, the Corps did not grant the department permission to exceed the pumping limitations.

The draft State Water Quality Standards and the U.S. Environmental Protection Agency's proposed standards allow exports at Banks and the U.S. Bureau of Reclamation Delta - Tracy Pumping Plant to occur as a function of total Delta inflow, regardless of flows in the San Joaquin River. Both are similar, allowing approximately 35 percent of total Delta inflow to be exported during February through June, and 65+ percent during July through January.

It is important to note that the Corps was not a party to the "Delta water quality agreement" nor was it a member of ClubFed.

## CALIFORNIA'S MILLION DOLLAR DRAIN GAME

**THE DRAIN GAME:** Profits from the Past and Prospects for Future Commodities

Although the agricultural drainage problem was recognized long before most of the current lands were put into production, the government, in its infinite wisdom, built massive publicly-funded water projects. Today these projects are faced with billions in cost overruns and annual repayment deficits in order to irrigate even more lands without providing a viable solution to the drainage dilemma.

The big GAME players in the San Joaquin Valley, like Southern Pacific Railroad (which receives much of its land for free), J.G. Boswell and Salyer Land Company, have continued to amass fortunes from government subsidized water projects and at the same time they are bailed-out for the expense attributed to their self-induced drainage problems which continue to put a "drain" on the public's financial and natural resources—all part of the GAME.

If one was an entrepreneurial type and wanted to profit on a losing proposition, they would invest in California's multimillion dollar DRAIN GAME. To get into the GAME and become a viable player, one would need to develop a private corporation, preferably for tax shelter purposes. The company would then buy a few acres of desert land in the San Joaquin Valley that has access to government subsidized water. In order to qualify for a government source of revenue, the company would want to establish a special district, i.e., water irrigation or reclamation district, so that you would have the ability to float tax-free government bonds. If you had a green thumb, you could go into a lucrative cash-subsidized crop such as cotton. Or, if you were just in it for the money, you could lease the land out to some willing serf-type farmers like the policies followed by big oil and lending institutions.

However, if you want to be even further removed from the agricultural end of the GAME, you can still qualify as a player provided you can find a viable source of drainage water from other agricultural drainers or water districts. They would pay you to receive drainage from their lands and in es-

Please see DRAIN GAME, page 13

## PURPOSE AND SCOPE

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employees just because they are "doing their job," even though their job may conflict with the status quo's political agenda.

- Disclose how and why government has become self-serving and dysfunctional. It will provide insight into the relationships between big government and big business.

- Monitor government's relationship with free-enterprise, and it will expose any and/or all activities that are in conflict with the Public Trust Doctrine and other applicable laws.

- Provide the reader with data on how government projects and actions continue to destroy both private and public trust resources.

- Reveal what is being done to either minimize or eliminate the negative impacts of government's actions.

- Disclose how government officials employ dual enforcement procedures and/or selective enforcement actions, and in the process exempt themselves from complying with the law.

- Show how government officials and attorneys move into the private sector to work for the same entities that they once "regulated".

- Assess government issued contracts with the private sectors to determine if these contracts are being issued in accordance with procedure. It will also determine if the government is receiving the services it procured or if the services are even necessary.

- It will assess the political forces and the socioeconomic and ecological factors that are an integral part of the government decision-making process.

The Public Trustee will contain investigative articles and analysis of the performance of government agencies, as well as the individuals that are "responsible" for administering the respective agencies and resources.

It is intended that The PUBLIC TRUSTee be a forum for private citizens who wish to voice their insights into how government officials have breached their moral, ethical and fiduciary duties in mismanaging the natural treasures they are entrusted with protecting. Perhaps more importantly, the PUBLIC TRUSTee will also provide a platform for scientists, professionals and workers at all levels of government who are not allowed, because of politics and reprisals, to freely voice their views within their agencies. Their numbers, sadly are legion.

It is the policy of this publication to publish articles anonymously, when necessary, to protect the jobs and careers of conscientious and whistleblowing government employees and also because, ultimately, it is the validity of the information contained in the article that counts, not the source of authorship. We have all too often seen the messenger blamed for the message. We will protect our writers and sources.

The Great Law of the Iroquois Confederacy, which inspired our Founding Fathers when they wrote the U.S. Constitution, stated "In our early deliberations, we must consider the impact of our decisions on the next seven generations." We think that is a good model to follow. Hopefully, The PUBLIC TRUSTee will serve as a conscientious prod for public officials misguided by hollow values, blind ambition and greed. Our reward, and the reward of those that support this effort, will be the gratitude of our relatives to come.

**Note: The PUBLIC TRUSTee will present some articles in the spirit of provocation. For example, please see page 6, California's Millon Dollar Drain Game. ■**

## WE THE PEOPLE

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect of humankind requires that they should declare the causes which impel them to separation.

We hold these truths to be self-evident, that all men (and women) are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, governments are instituted among men, deriving their just power from the consent of the governed, — That when any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to their Safety and Happiness. "Declaration of Independence July 4, 1776." ■

## CODE OF ETHICS FOR GOVERNMENT SERVICE

- I. Put loyalty to the highest moral principles and to the country above loyalty to persons, party, or Government department.
- II. Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.
- III. Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.
- IV. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
- V. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors of benefits under circumstances which might be construed by reasonable persons as influencing the performance of government duties.
- VI. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
- VII. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of government duties.
- VIII. Never use any information gained confidentially in the performance of government duties as a means of making private profit.
- IX. Expose corruption wherever discovered.
- X. Uphold these principles, ever conscience that public office is a public trust.

Source: Authority of Public Law 96-303, unanimously passed by the Congress of the United States on June 27, 1980, and signed into law by the President on July 3, 1980.

## ENVIROCRATS LOSE SIGHT OF DEAD DUCKS AND SHOOT FOR BIG BUCKS

In a guest column in the Los Angeles Times on January 5, the Nation's Alexander Cockburn wrote a scathing column excoriating top officials of the the Wilderness Society for toadying up to the Clinton Administration.

Time after time they stoop eagerly to kiss the book that has struck them in the teeth a moment before," Cockburn wrote.

**Nearly a billion dollars of taxpayers money has been spent on the agricultural drainage crisis in the West. The problem is not only worst but, the "experts" concede that there is no guarantee of success as they plan to spend another billion reassessing the problem.**

One wonders what Cockburn would say about the mainstream environmental groups' approach to the agricultural drainage crisis in California and the American West. This taxpayer-funded fiasco is rapidly closing in on \$1 billion' worth of endless studies with no results with the possibility that another billion or two will be fruitlessly spent. The "green bureaucrats" (Cockburn's term) in the big environmental groups have either cashed in on the research bonanza or sat on their hands.

In 1993, the Inspector General's office of the Department of the Interior (DOI) stated that \$660 million had been spent on the boondoggle desalination plant on the Colorado River at Yuma, Ariz. and ANOTHER \$1.5 BILLION would be spent at the Yuma plant by the year 2010 with NO GUARANTEE OF ANY SUCCESS. According to another recent Inspector General's Report over \$110 million has been spent by the Interior Department's Bureau of Reclamation on the drainage debacle at the Kesterson National Wildlife Refuge and associated drainage studies and cleanup since 1981. That \$110 million tab is accumulating interest at the rate of \$7 million a year with the taxpayers picking up the tab because the Bureau is afraid to give the bill to the Westlands Water District. Moreover,

another estimated \$40 million has been spent by the California Department of Water Resources on drainage or drainage studies in the San Joaquin Valley. Additional tens of millions of dollars have been spent by the University of California and individual irrigation districts or individual farmers not only in the San Joaquin Valley but at the Salton Sea in the Imperial Valley, which is the biggest agricultural waste dump of all. Sort of the Mother of All Kestersons.

The main culprit in the drainage crisis in the American West is selenium, a trace element that occurs naturally in shale-based soils throughout the American West. Selenium contamination of the Kesterson food chain is what triggered the headline-grabbing bird deformities. Famed U.S. Geological Survey super scientist David Love warned the federal government in 1949 that intensive soil surveys should be done throughout the west and high selenium soils should be identified and kept out of planned irrigation projects. His advice was ignored by the Bureau of Reclamation and the U.S. Department of Agriculture.

Nearly 12 years ago, it was discovered that selenium, leached from western San Joaquin Valley soils by flood irrigation methods and concentrated in drainage water flowing off factory farms, had poisoned the food chain at Kesterson, triggering the bird deformities and embryo deaths. Scientist soon discovered that Kesterson was not an isolated incident, but was occurring throughout the American West with bird deformities caused by farm drainage occurring in a number of states where federal water projects were located on shale soils.

Now in 1995, the shocking inescapable truth is that there is no written federal drainage policy and the Department of Interior's unwritten "drainage policy" is to run the toxic effluent from dozens of federal irrigation project into national wildlife refuges in low-lying wetland areas. Teratogenesis in birds is occurring everywhere from food chain contamination caused by agricultural drainage. Rachel Carson's Silent Spring is alive and well and caused by federal drainage policy.

It seems to be an insoluble dilemma. Irrigation districts have no answers,

engineers have no answers, science has no practical or economical answers. Bruce Babbitt has his head buried deeply in the sand on this one. No one in Congress knows how, or even wants to try, to solve the drainage crisis; some government officials have said it would be political suicide. There has been talk of idling the toxic farmland but not one acre has been retired through any government program for fear that shock waves would rumble through the real estate market for the tainted farmlands.

Predictably, the U.S. Justice Department has refused to initiate any prosecutions of corporate farmers for the bird deformities under the Migratory Bird Treaty Act, even though the Treaty was the legal rationale for the closure of Kesterson in 1985.

The best that can be said a billion dollars into the crisis is that elected officialdom is going to be leaving one hell of a mess to the next few generations: poisoned wildlife refuges, polluted aquifers and vast wastelands of salted up former farmland.

While the political timidity is unsurprising, indeed even anticipated, what is less understandable is why the major environmental groups in America, from the Natural Resources Defense Council to the Sierra Club to the Environmental Defense Fund, have all seemingly abandoned the protection of the birds they fought for at Kesterson. Even big environmental groups like the National Audubon Society have been missing in action in the drainage fight, except for some token lip service comments.

In the mid-1980s, the Environmental Defense Fund (EDF), joined forces with the Westlands Water District to explore the concept of drainage disposal by building evaporation ponds that would generate solar electricity. Westlands had been funnelling its wastewater to Kesterson.

EDF claimed that it was taking a new approach, consensus building, rather than confrontation, as a means to resolve the drainage conflict. Historically, EDF employed a more litigious approach, however, an attorney for EDF said that this approach has not been as productive as it was envisioned.

Please see DEAD DUCKS, page 9



## DEAD DUCKS

Continued from page 8

Cynics said EDF had its hand out for some of the tens of millions of dollars the U.S. Bureau of Reclamation (Bureau) was dispensing to consultants and engineering firms in a desperate attempt to extricate itself from the bog of Kesterson.

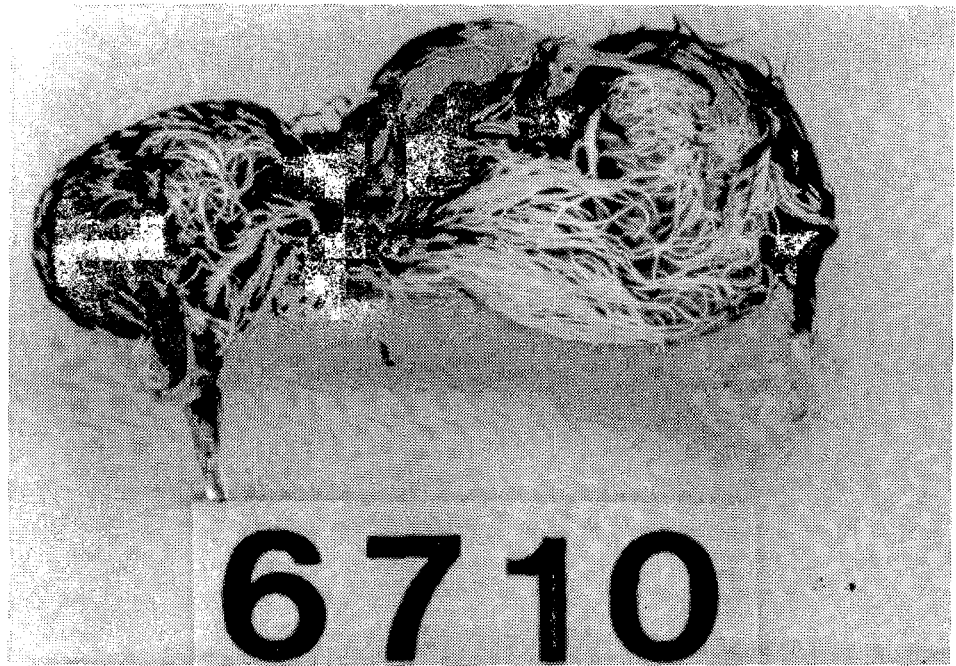
EDF, no surprise, never launched any bird protection suits against its new partner, Westlands, even though privately operated mini-Kestersons in the Westlands continue to impact birds to this day.

Terry Young, staff scientist for EDF, insists "the measures we took to try and resolve the drainage problems did not consider what Westlands had to say, we did not pull any punches."

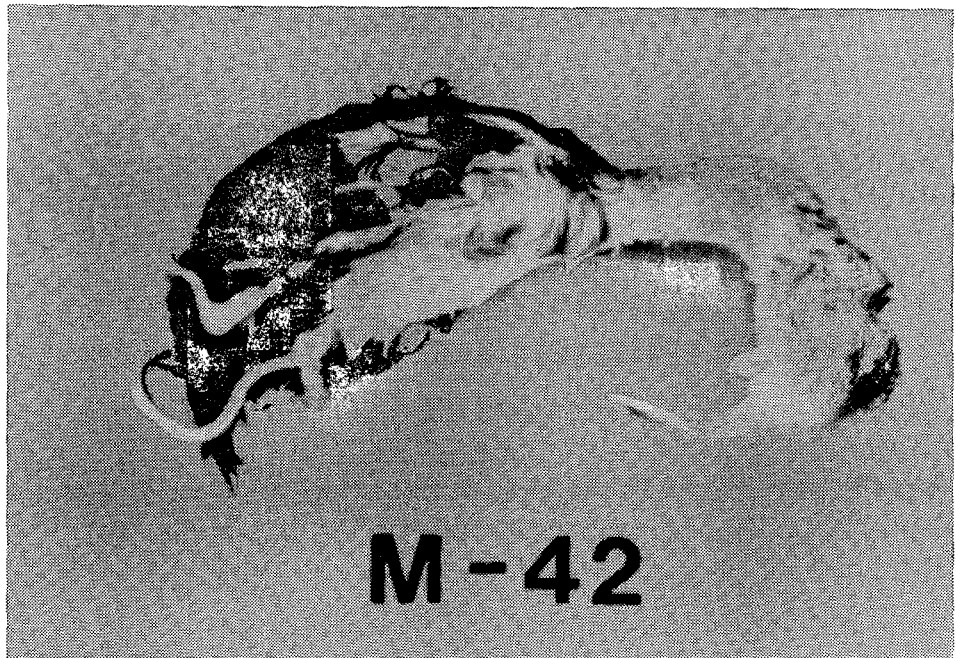
Although Congress approved the funds for the EDF-Westlands solar drainage project, EDF never got the money because the Department of Interior's attorneys ruled against the disbursement of these funds.

Jim and Karen Claus, Kesterson neighbors who won the state water board cleanup order for Kesterson, went to the Sierra Club in 1984 and asked the board of directors for help. The Clauses said they were met with skeptical questioning and no action.

"The Sierra Club was co-opted by the government employees who serve on its board," Jim Claus says. In fact, Gov. Wilson's Secretary of Resources, Douglas Wheeler, who hasn't been known to go around giving speeches on the drainage crisis, was Executive Director of the Sierra Club in the late 1980s. Whatever the substance of Claus' charge, the Sierra Club has not been a factor in the post-Kesterson era and has never taken any legal action to shut down the evaporation ponds in the Tulare Basin which are unquestionably triggering deformities in federally-protected migratory birds. After being rejected by the Sierra Club, the Clauses then approached EDF attorney Tom Graff and staff Scientist Terry Young for assistance. Jim Claus claims that he turned information over to Graff and Young, including a number of internal memos from the U.S. Fish and Wildlife Service that he planned to use in his lawsuit against the Bureau of Reclamation for damage to his ranch caused by Kesterson's leaking evaporation ponds.



**Deformed hatchlings that were victims of toxic agricultural drainage water in the San Joaquin Valley.**



Shortly thereafter, Claus said, Bureau attorneys had copies of the memo he had entrusted to EDF. Although he has no proof, Claus says he is convinced Graff or Young gave the memos to the Bureau.

"When I accused them [EDF] of turning over the information, Terry Young told me that the only way to resolve the drainage problem was for me to work with

the Bureau and study the problem. Young said at the time EDF was working to obtain funds from the Bureau and Westlands to do research on the drainage issue, and that they could not afford to work with someone like me in public," Claus charged.

Young admits that Claus gave her the memos but denies turning them over to the

**Please see DEAD DUCKS, p. 10**

## DEAD DUCKS

Continued from page 9

Bureau. When Graff was asked if he gave the memos to the Bureau he responded, "I don't believe so."

After the incident with EDF, Claus said that he then appealed to the Natural Resources Defense Council (NRDC), another nationwide environmental group, for legal help.

NRDC became briefly active in the battle to close Kesterson in early 1985 and filed a lawsuit in Sacramento challenging the State Water Resources Control Board's February, 1985 Kesterson cleanup order as being too lenient. Claus was named as one of the plaintiffs.

That suit was soon dropped because NRDC Attorney Hamilton Candee later said, "Kesterson had been shut down and there was little more to gain."

Claus takes vehement exception to Candee's claim. "I truly believe when NRDC took over my lawsuit, which I would have won, they intentionally trashed it. I believe that NRDC deliberately filed the lawsuit and had me named so that they could drop it and ruin my chances of ever going to court," Claus says.

Claus adds, "I think they got some kind of a payoff for doing this. I have no idea what it is. But if anybody thinks they can trust those environmental groups not to do what is best for that organization, they're crazy. NRDC sold me out. They settled that case without any agreement whatsoever with me, and that was absolutely contrary to the agreement they made with me."

And now comes a different and revealing explanation from Phil LeVeen, a University of California economist and lunchtime critic of the public financing of western valley agribusiness, about the puzzling absence of the environmental groups in the drainage battle. LeVeen has been a forerunner in exposing the financial and ecological abuses of both the CVP and the SWP. He has testified as an expert witness before various government bodies and completed a number of reports on the economic aspects of these projects.

LeVeen contends that the environmental groups have been ducking the drainage battle because they have been receiving big grants

dollars from corporations and foundations sympathetic to the plight of western valley farming.

LeVeen says that in 1984, as Kesterson was exploding on the front pages around America, the Ford Foundation gave NRDC \$127,000 to launch a study of water pricing in the western valley and its effects on public policy.

Over the next several years, NRDC received similar sums of money (hundreds of thousands of dollars) from the Ford Foundation. Records obtained from government files also disclosed that the Ford Foundation contributed hundreds of thousands of dollars to EDF; however, the records did not distinguish how those funds were spent.

LeVeen was hired by NRDC to join NRDC scientist Laura King in the production of a study, titled "Turning Off the Tap", which was issued in 1985. The report examined U.S. Bureau of Reclamation water pricing policies and the need to reduce federal water subsidies. The report claimed that the federal Central Valley Project was a \$3.5 billion subsidized water giveaway, predominantly to agriculturalists in the Westlands Water District.

Ironically, the report also noted that it was the cheap subsidized water that led to the crisis at Kesterson, and that Kesterson was not an isolated problem. "Rather, it is a harbinger of broader agricultural drainage problems found throughout the west side of California's San Joaquin Valley ...", the report said.

For some time after the report was published, LeVeen insisted that NRDC pursue the drainage issue. LeVeen says that in 1987 King and NRDC attorney Hamilton Candee both told him that Ford Foundation officials -- and he presumed they meant Ford's Norm Collins, an agricultural economist, who had handled the Ford grant to NRDC - warned NRDC that continued Ford grants depended on avoiding a public fight with EDF on the drainage crisis.

"Ford was saying that if you guys want funding, you can't fight each other. So they wanted NRDC to stay out of a fight with EDF and that is when NRDC told me to shut up because I was critical of EDF. I said I would not shut up and that they should take my name off their proposals." LeVeen

said.

LeVeen said King told him that Ford officials "said they were not going to fund a fight between the environmentalists in California over the government's role in the Central Valley Project drainage problem. EDF was taking the position that the government should subsidize Westlands to build reverse osmosis plants and all that, which was crazy."

"Basically," LeVeen added, "Ford said, 'you go out and work on something else, do not go out and work on the drainage problem, and you do not fight EDF on the Westlands' drainage issue.'"

King and Collins both deny LeVeen's charges. King declines to discuss the status of her relationship with LeVeen.

Collins, who in 1993 worked for the Ford Foundation in Mexico, denied he ever attempted to pressure NRDC officials to ignore the drainage crisis. King also denied that she was ever pressured to lay off drainage issues but did say that Collins once told her he was concerned that if the price of water went up too much, it might drive farmers out of business.

Collins, who said he didn't remember much about the project, said the grant was for water pricing research and not legal action. He said the annual NRDC grants were phased out after four years because the goal of the research had been accomplished.

Ford Foundation funding of the four-year water pricing project was terminated in 1988 for reasons King says were "unclear and unsatisfactory" to her.

In October of 1992, U.S. Fish and Wildlife Service (USFWS) officials met with NRDC's King and Candee to bring them up-to-date on the drainage crisis. Federal biologists Joe Skorupa and Joy Winckel were introduced to another participant in the meeting, Francis Korton, Program Officer for Ford Foundation's Rural Poverty and Resources Program. This was the same Program that Collins directed when he was at Ford. When King was first asked about Korton's attendance at the meeting, she said "It is none of your business." Later, King relented stating the purpose of the meeting was merely to introduce Korton to the drainage issue. King strongly denies any ulterior motive for

Please see DEAD DUCKS, p. 11

## DEAD DUCKS

Continued from page 10

### Ford's involvement.

Skorupa said, as far as he knew "there were no follow up actions resulting from the NRDC meeting."

Ford Foundation's motives, if LeVeen's charges are true, are not clear. What is known is that Ford Motor Company's tractor division is second only to John Deere in sales of farm machinery in North America. Any major contraction of farm land on high-selenium soils in the American West would have a significant impact on the sale of farm vehicles.

What is clear is that neither NRDC nor EDF had been active in the drainage crisis for several years, both had failed to take legal action to halt the Tulare Basin bird killings. Neither group had even taken the simple step of petitioning the Central Valley Regional Water Board to stop the bird deformities, an action that the Clauses took as average citizens.

In 1989, Jim Claus, a non-lawyer acting as his own counsel, attempted to launch a lawsuit over the Tulare Basin (western San Joaquin Valley) bird killings in 1989 but was knocked out of court by procedural technicalities.

EDF's Young offered this explanation for her group's passivity in the continued bird mutations in the Tulare Basin. "The questions is if you want to do something about it you not only want to make people aware that there is still a problem but you want to make sure that workable solutions are available," she says.

Since 1987, the USFWS has conducted an extensive investigation into the drainage problem and has documented thousands of bird losses attributed to toxic agricultural drain water being stored at numerous ponds in the San Joaquin Valley and Tulare Lake Basin.

The USFWS officials drew up a formal complaint seeking criminal prosecution of the pond operators, which are operated by large growers and districts that control some of the nation's largest farming companies. However, as of January 1995, the Justice Department has declined to file criminal charges.

The latest Justice Department rationale for failure to prosecute is that they are waiting for The PUBLIC TRUSTee's publisher to complete his petition process to the State Water Resources Control Board to overturn the waste discharge permits issued to the Tulare Basin pond operators in August of 1993.

NRDC defended its inactivity with a different rationale. Although NRDC is a multimillion dollar a year national operation,

staff scientist King said the San Francisco office had only four staffers who are stretched thin fighting environmental battles on a number of fronts.

"Drainage hasn't been our top priority," King says, pointing to an NRDC suit over renewal of Central Valley Project long-term irrigation water contracts as a more important issue.

The top priority for the big environmental groups, it can be argued, is raising money and groups like NRDC and EDF spend millions of dollars a year in fund-raising, utilizing Madison Avenue advertising techniques and expertise. Executive directors of these groups now make salaries comparable to corporate CEOs and even staff attorneys like EDF's Graff makes around \$100,000 a year for a 40-hour work week. Graff's salary almost tripled in eight years.

Mainstream environmentalism, in other words, has become big business in the last decade.

Since the mid-1980s, EDF and NRDC financial statements reveal that the bulk of their funds are derived from major foundations and corporations, contributors who have their own subtle ways of influencing the behavior of their beneficiaries.

EDF boasts a nationwide membership of 200,000. Approximately 40,000 to 50,000 members reside in California. EDF's contributions and revenues for 1992 exceeded \$20 million. EDF expended about \$19.5 million on a variety of programs during that same period.

Records obtained from the Charitable Trust Division of California's Department of Justice revealed that NRDC had investments in companies with questionable environmental records: companies like Ford, Reynolds Tobacco, Reynolds Metals, General Motors Corporation, McDonnell Douglas Corporation, Safeway Stores Inc., General Electric, Kaiser Industries, Texaco, Westinghouse, IBM, Honeywell Inc. (This data may be dated.)

Meanwhile, federally-protected migratory birds of the Pacific Flyway who linger in their passage over the Central Valley and stay to nest, face the distinct possibility of genetic carnage.

With the environmentalists preoccupied developing their investment portfolios and raising funds, the birds' only hope is protection by the government.

But at the Bureau of Reclamation in Sacramento, with the \$100 million research nest egg cracked and devoured, only a skeleton crew remains.

Currently, there are only three full-time

persons assigned to work on drainage in the Bureau of Reclamation's Mid-Pacific Office, with some additional staff assistance.

With the research boom days over, the Bureau and the California Department of Water Resources are formulating a task force to look at an old solution: retiring farmlands located on high selenium soils. The problem is, until recently there was no money available, and the Bureau's land retirement program is voluntary, and the agriculturalists are resisting change. Despite the fact that over \$100 million has been spent on drainage issues, not one acre of agricultural land has been retired because of toxic drainage problems.

Higher up the political ladder, Interior Secretary Bruce Babbitt has not yet staked out a position in the drainage crisis or the continued destruction of the birds.

The U.S. Justice Department, which dragged its feet during the Reagan-Bush years over initiating prosecutions under the Migratory Bird Treaty Act, continues to be reluctant to take on America's richest corporate farmers in the Tulare Basin.

And in the minds of Jim Claus and Phil LeVeen, few in the environmental community, for reasons ranging from the fear of agribusiness to apathy to alienating potential corporate contributors, seem to want to do much about dying birds either. There's no money in it.

In August 1993, the publisher filed a petition with the State Water Resources Control Board to appeal a Regional Water Quality Control Board decision dealing with the inadequacy of the waste discharge requirements set for drainage ponds in Tulare Lake Basin. Prior to that action, both the government and the major environmental groups were locked into the consensus building mode. The publisher and other interested citizens were applying constant pressure on the government and the environmental groups to "get off the dime". Subsequent to that time, several environmental groups filed similar petitions with the board, all of which are still pending. The State Board has scheduled a hearing on our petition in April 1995.

In the interim, the pond operators were fined for violating their waste discharge requirements. This is the first time in history that such an enforcement action was taken against the pond operators. ■

**Note: This story was composed over an extended period of time and some of the information is dated. Ms. King no longer is employed by EDF, and Mr. LeVeen no longer teaches at UCB.**

## HIGHWAY ROBBERY AT CALTRANS

Professional Engineers in California (PECG) government challenged Governor Wilson to a debate any time, any place to defend his record on contracting out of state services and his proposal in his State of the State speech for a Constitutional Amendment to allow further contracting. "The Governor has a four-year record of giving contracts without any competitive bidding to private companies which contribute to his campaigns," said Brett Barnett, President of PECG. "The courts, former Legislative Analyst A. Alan Post, and even Republican Attorney General Dan Lungren, have concluded that the Wilson administration's pattern of giving contracts to political contributors without competitive bidding costs twice as much as having state employees do the job. For freeway design and construction inspection, the waste to the taxpayers during Wilson's first term exceeded \$325 million. That money could have been used to seismically retrofit hundreds of highway bridges before they collapsed in last January's Northridge earthquake."

Although the Governor says he needs a Constitutional Amendment to authorize contracting with private companies "to get the most bang out of the taxpayers' buck," existing Government Code section 19130 allows contracting out to achieve cost savings when "the contract is awarded through a publicized, competitive bidding process" and the public's interest is served. The courts have found that Article VII of the State Constitution, adopted overwhelmingly by the voters to establish a state merit system and prohibit the graft and corruption of the spoils system, has been repeatedly violated through the Governor's contracting with private firms to design and inspect freeways.

"The Governor noted in his speech that the Santa Monica Freeway was rebuilt in just 64 days" said Barnett. "What he failed to point out is that the bulk of the construction inspection was done by state engineers and the only design work done by a private firm required the state to go back in afterward and seismically retrofit the bridges."

At his State of the State speech, the Governor introduced and praised George Schultz before proposing his contracting out

Constitutional Amendment. He neglected to mention that George Schultz is a Senior Vice President for Bechtel Corporation, a major campaign contributor to the Governor and the recipient of numerous no-bid engineering contracts.

In complaining about the court which ruled that he has repeatedly violated the Constitution, the Governor claimed "the law is an ass." Actually, as a legislator, Wilson voted to pass many of those laws and, as Governor, he signs them.

As an example of the inefficiencies under the Wilson Administration, PECG noted that the budget shows that Wilson uses taxpayer dollars to pay each private engineer an average of \$130,000 per year which, with additional oversight costs, is about double what it costs to pay a Caltrans engineer. Meanwhile, some Caltrans engineers have been sent by the Marysville office up into the mountains to perform chain control in snow season so that the private engineering contracts can continue.

"The law and the Constitution allow contracting with the private sector for cost savings when it is done in the best interests of the public and the taxpayer," said Brett Barnett. "The only reason to pass a Constitutional Amendment would be to allow the Governor to continue his currently illegal process of giving no-bid contracts to his political cronies and campaign contributors. To make it clear that his unconstitutional, wasteful spoils system must stop, PECG will be proposing legislation to ensure that all contracts are competitively bid, generate real cost savings to the taxpayers based on an impartial audit, and are not awarded to finance the campaigns of those who award the contracts. In the meantime, we challenge Governor Wilson, or any representative he selects if he doesn't wish to personally participate, to an open and public debate on these issues. We'll bring our facts and arguments and he can bring his. It's time the people of this state knew what was really going on."

PECG is the organization representing the more than 10,000 Engineers, Architects, Engineering Geologists, and other related professionals in state service.

Source: This story was obtained from a PECG News release, January 10, 1995. ■

## ENGINEERING CONTRACTORS CONTRIBUTIONS TO GOVERNOR WILSON AS OF MAY 1994

The governor received over a quarter million dollars in campaign contributions from engineering contractors.

Total Amount Received as of May 1, 1994

Wilson:	\$287,081
Contenttal	David Evans
PBQ & P	Parsons DeLauw
Harris & Assoc.	ASL Consultant
Brian Kangas F.	KeWes & Assoc
BSI	Ruth & Going
Tudor Engineer	Flour-Daniel
O'Brien-Kreitz	Dokken Engr'g
JMK & Assoc's	Kawaski Theil
Psomos & Assoc.	CIC Assoc.
*Bechtel Corp.	TJKM
Daniel, Mann	Creegan & D'An
Brown & Root	Willdan Assoc's
Robert Bein	ICF/Kaiser
Far West Anthr	PSC Assoc's
Howard, Needle	Boyle Engineer
CA Architects	Nolte & Assoc's
CELSOC	CA Landscape
TAMS Consultant	Homes & Harver
Klienfelder	Barton-Aschman
CA Toll Rd Devlp.	Lubono Armstrong
J Muller Intl.	Gannett Flemin
URS/Saar-Brown	CRSS
Soh & Assoc's	Kercheval Engr.
Winzler & Kall	Leroy Crandell
Rick Engineering	Consulting Eng
Bissel & Karn	
Mark Thomas & Assoc.	
Chaudhary & Assoc's	
CA for Better Transportation	

\* Bechtel Corp. contributed \$109,000.00 to Governor Wilson's campaign, which amounts to more than one-third of the total amount he received from all engineer consultants.

Note: The names of the aforementioned firms were listed as campaign contributors with the Secretary of State; however, their being listed here does not imply that they all received "No-Bid" contracts. ■

## Judge Rules CALTRANS Director in Contempt of Court for "No-Bid" Contracts

Sacramento Superior Court Judge Eugene Gualco ruled on January 10 that Caltrans and its Director, James Van Loben Sels, have intentionally and willfully violated a 1990 injunction which prohibited the issuance of state contracts without complying with constitutional and statutory safeguards.

In dispute are hundreds of highway engineering contracts which Caltrans has given to private firms without any competitive bidding, rather than having Caltrans engineers do the work. In 1994, former Legislative Analyst A. Alan Post concluded that contracting out of such work is far more expensive than doing it in-house. Based on that report and state budget data, the Professional Engineers in California Government (PECG), which filed the lawsuit, found that the no-bid contracts, which are typically awarded to firms which make campaign contributions to key political decision-makers, have wasted more than \$325 million in tax revenue during the past four years.

Since issuing the injunction in 1990, Judge Gualco has repeatedly found that Caltrans has violated his order. This is the first time he ruled the violations are "intentional and willful" "beyond a reasonable doubt". Finding Caltrans' assertions that they acted "in good faith are not credible", he gave Caltrans 30 days "to purge themselves of the contempt" or risk "confinement" of the Director.

"For four years we have been unable to convince the Wilson Administration to stop wasting millions of taxpayer dollars by giving huge no-bid contracts to the Governor's political contributors" said Bruce Blanning, PECG Executive Assistant. "Just ten days ago, the Caltrans Director threatened to lay off hundreds of Caltrans engineers, who have historically done the job at half the cost. We hope this ruling will cause the Administration to rethink its position. The taxpayer ripoff has gone on far too long." (Source: PECG, January 20, 1995, news release. ) ■

**Ed. Note: Both the Governor's Office and Caltrans were contacted, neither had released any formal comment about the court's decision at the time this edition of The PUBLIC TRUSTee went to press.**

## DRAIN GAME

Continued from page 6

sence you would become a depository for the waste water.

Now the average thinking person might ask if accepting this drainage water could cause a problem especially if it becomes so toxic that it kills wildlife and diminishes other natural resources like wetlands and rivers. This is not an insurmountable problem. The creative investor asks for government money to document the problem in what is commonly referred to as the "endless studies" approach. Once the problem has been documented in excruciating detail by the cottage industry consultants or government bureaucrats who swarm around such problems, chances are that regulators still may not be impressed enough to act. History of the State and Regional water boards are on the investors side here. The endless regulatory paperwork helps too. The game is played on both sides with "drainage operation plans" and "waste discharge requirements" winging back and forth from discharger to regulator vying for equal time in 2 to 3 year increments of response time. This increases the overall time for worry-free investing.

Redirecting the focus onto how to convert the toxic by-products into viable consumer conscious commodities is an addendum to the "studies" process that can always be counted on to extend the "do nothing" policy in the name of the common good. This is where we mobilize all available government resources, including the university system, to pursue alternative "environmentally friendly" products made from the waste. In the DRAIN GAME this is particularly applicable since in any business the key to success is a cheap source of raw materials that is both readily available and will not be diminished anytime in the near future. SALT fits both of these criteria in addition to the toxicity qualification which raises the game to higher stakes. And here is the beauty of the DRAIN GAME, as long as you continue to use water to irrigate the desert lands you will have a constant supply of toxic salts measured on a geologic time scale. Even though players are still collecting the aforementioned subsidies, any business needs to expand its markets and diversify. Of course this may involve the need to retain a public relations firm to determine the viability of converting

SALT into a commercial success.

Consider the following scenarios. With the proper advertising campaign, SALT becomes a cost/benefit marvel as great as that of the soybean, in every step of its production. Complements of "Drainers Unlimited", we see an endless stream of boxcars of SALT being loaded in the San Joaquin Valley and pulling out from Southern Pacific railyards for markets and points unknown.

The Department of Food and Agriculture is already entertaining the concept of using high-selenium biomass, a by-product of interceptor drain agroforestry sites that is infused with the dreaded SALT, to be converted into floor tile and sold for a profit to environmentally conscious consumers doing their part in the global economy.

The UC system has also been brought into the GAME and is currently conducting a pilot project in which high-selenium crops grown on the Kesterson toxic waste dumpsite are fed to unsuspecting cows. The future may see endless lines of these cows driven to markets far removed from the San Joaquin Valley, each removing a bit of selenium as they are marched to the slaughter. Again, environmentally conscious consumers may win, as burgers become selenium supplements available under the "Golden Arches" across the U.S.

All of the above scenarios have a bit of truth in them, for better or worse. But farmers, drainers, environmentalists, and even California and Central Valley water board members seem a bit worried.

What will be the next move in the DRAIN GAME?

Let's look into the astroburealogical crystal ball.

Recently (1/27/95), not even a water quality violation of 11 months out of 12 months of the selenium standard in the San Joaquin River, failed to move regulators to act as they cited the selenium values as "unexpected" and a mystery of "science". Suspending consideration until at least April, 1995, that move was in the time-honored tradition of the "stall". Stall until the "Master Drain" is complete now that this "solution" to the drainage dilemma has been revived by the recent Wanger decision (see story page 25. Stall until the "pilot" land retirement program has been initiated—still a good in-

Please see DRAIN GAME, page 23



## FLOOD CONTROL: HOW SAFE IS SAFE

### THE COSTS OF THE '95 FLOODS TOP \$1.3 BILLION AND COULD GO HIGHER

The Flood of January 1995 has come and gone. A century and a half after Californians first began flood control works, the fragile nature of all human attempts to control the forces of nature has been revealed once again and California's flood control policy is in question.

"California's total losses from this month's floods appear to be the highest from any flood in the state's history" according to Richard Andrews, Director of the Gov. Wilson's Office of Emergency Services (OES).

"We are at \$1.337 billion and counting," Andrews said. "The previous most expensive flooding in California occurred over a two and a half month (January-March) period in 1983. That disaster produced \$523.6 million damage. Remember, this year we had virtually simultaneous damage in counties from Oregon to the Mexican border."

Some losses are covered by insurance, but the utter destruction of homes, businesses and crops last month was often uninsured. Based on an estimate of \$430 million insured losses (and a pattern of disasters producing at least as many uninsured ones) total private losses may be \$860 million; public losses \$294.8 million, agricultural losses \$92.5 million and highway damage \$90 million, according to an OES news release issued on January 27, 1995.

"These are still very preliminary es-

timates," Andrews said. "The nature of a flood makes damage assessment an intensive and time consuming process. As inspectors visit individual victims' homes, these numbers may go up." added Andrews, who urged a new reexamination of flood control policy.

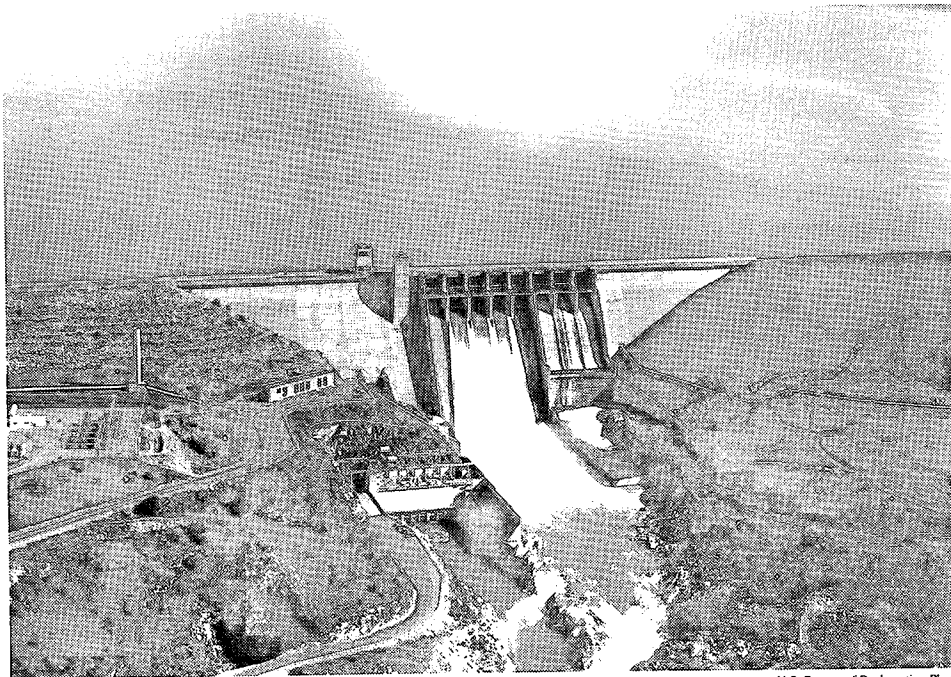
Just how prepared California is for natural and/or human induced floods and

outs and then like lemmings rebuild in the same doomed area," Hayden said.

Hayden noted that many of those areas that were hardest hit by the January floods have historically been inundated by floodwater. Time and again, he said, it appears the government has not only encouraged flood victims to rebuild in "known" designated floodplains, but has used taxpayer money to refinance reconstruction in flood prone areas.

PUBLIC TRUSTee Publisher Patrick Porgans was invited by Hayden to testify at the hearing. Porgans said California's government officials need to reevaluate conventional flood control procedures and practices and refocus on non-structural flood damage prevention.

"To begin with, we should never lose sight of the fact that those



U.S. Bureau of Reclamation Photo

### Floodwater Releases at Folsom Dam into the American River

other related disasters such as an earthquake shattering a dam is unclear. Flood policy was the subject of a series of hearings conducted by the State Senate Natural Resources and Wildlife Committee in January and February.

Sen. Tom Hayden, D-Santa Monica, chair of the Natural Resources Committee, raised questions and doubts about the state's existing flood control plan and policies.

"No one is opposed to flood control systems, but where is the balance?" Hayden asked.

"We need to break the cycle of development in areas of high risk from floods, fire and quakes, which is followed by predicted disaster and death, after which we apply for more taxpayer bail-

of us that reside here in California's Great Central Valley have taken up residence in what was once an inland sea", Porgans stated.

Porgans added that there are two basic ways to prevent or limit major flood damage: (1) by keeping the water, debris, mudflow, and erosion hazard away from people (with structural facilities such as levees), or (2), by keeping the people away from the water and related hazards with non-structural flood plain management, i.e. flood control zoning to prevent construction in flood prone areas.

Porgans noted that the great floods of the 1850s-1870s, when water filled the Sacramento Valley from Marysville to Colusa, are not factored into the flood con-

Please see FLOOD CONTROL, page 15



## FLOOD CONTROL

Continued from page 14

trol programs now operating. Much of our knowledge that we rely on for the "successful" operation and maintenance of our structural flood control facilities is premised on historical rainfall and runoff which are based on a limited amount of recorded data; since the early 1900s.

"The experts can provide us with their best flood protection concepts and flood-flow "guesstimate", which in the final analysis may or may not hold water", Porgans said.

If history is any guide, Porgans' warning is a sobering one. In the Midwest Flood of 1993, damages may have gone as high as \$16 billion. Despite billions spent for flood

In spite of the enormous expenditures of taxpayers money to provide flood protection the annual losses attributed to flood damages nationwide have continued to escalate to \$3 billion, over the last 10 years.

During the decade ending in 1993, average annual flood damages in the United States exceed \$3 billion. In the proceeding 20 years flood damages average about \$2 billion annually.

The Northern California flooding of 1986 revealed that the City of Sacramento has significantly less than 100-year flood protection, as defined by the Federal Emergency Management Agency (FEMA)

The term "100-year flood" relates to flood magnitude and does not mean that the flood will occur one time in a 100-year period. The 100-year flood is one with a peak flow magnitude that has a 1 percent chance of being equalled or exceeded in any given year, and a frequency of about once in 100 years on the long-term average.

The current storm of record occurred in the Sacramento area in 1986, and that was only classified as about a 70 year event yet described as "perilously close" to a full flood disaster by U.S. Army Corps Engineers. Under existing operating conditions at Folsom Reservoir, the Corps estimate American River flood control system can provide up to about a 78 year level of protection.

**Merritt Rice of the Corps said "Expected monetary damages resulting from a single 100 year and 400 year flood in Sacramento are estimated at \$8 and \$15 billion."** ■

## 1994 CALIFORNIA SUFFERS ITS MOST COSTLY DISASTER

Since Governor Wilson took office in 1991, California has suffered more than \$26 billion in losses from natural and human-caused disasters, far exceeding any other four-year period in the state's history.

"Never before have the citizens in California faced as many large and varied calamities as they have these last four years" said Richard Andrews, Director of Governor's Office of Emergency Services (OES).

The devastating January 17 Northridge Earthquake, with property damage exceeding \$20 billion and 57 fatalities, made 1994 the costliest year for natural disaster losses in California's history, even though the number of major disasters in the state was down, according to figures released by the Governor's Office of Emergency Services.

In addition to the devastating Northridge temblor, Governor Wilson proclaimed states of emergency for four other events during 1994:

- Mediterranean Fruit Fly Infestation, Riverside, declared in January.
- Salmon Fisheries Disaster, Sonoma, Medocino, Humbolt and Del Norte counties. Declared in May. Losses since 1988 estimated at \$100 million.
- "41 Fire", San Luis Obispo County, in August. Losses totaled \$6.2 million.
- Mediterranean Fruit Fly infestation, Ventura County. More than \$400 million in threatened loss of crops.

During 1991, the East Bay Hills Fire destroyed nearly 3,000 and took 25 lives, causing more than \$1.5 billion in estimated losses. A multiple vehicle accident on Interstate-5 during a blinding dust storm killed 17 and injured 150 people. The Sierra Mare Earthquake resulted in \$33.5 million loss and one fatality.

In his State of the State Address, the Governor said "These past four years have shown the world what Californians are made of. We've conquered every challenge that man or Mother Nature could throw our way. The earth ripped apart, but Californians came together and showed heart and guts to overcome it."

It is difficult to comprehend the Governor's machismo "consciousness"; which appears to be founded on the "we can conquer nature misconception". The aforementioned figures should tell the story; namely, our unplanned and/or haphazard

growth, increased population density and failure to acknowledge the forces of Nature, increase our vulnerability to natural and human induced disasters. Perhaps, it is time to reassess many of the preconceived - gung-ho - misconceptions that serve as the basis of our mercantile "idiot-ology." (See next issue.)

**1994:** 5 Gubernatorials (earthquake, fire, Mediterranean fruitfly, (2) Salmon Fisheries); 2 Presidentials (earthquake and fisheries). 57 deaths, Estimated loss: \$20+ billion.

**1993:** 11 Gubernatorials (flooding, fires, sewages); 2 Presidentials (flooding, fires). 26 deaths. Estimated loss: \$1.3 billion.

**1992:** 7 Gubernatorials (sewer, flooding, earthquake, civil unrest, fires); 5 Presidentials (sewer, flooding, earthquake, civil unrest, fires). 60 deaths. Estimated loss: \$1 billion.

**1991:** 6 Gubernatorials and 3 Director's Concurrences (fire, earthquake, flooding, freeze, drought, toxic spills, and pest infestation); 2 Presidentials (freeze, fires). 43 deaths. Estimated loss: \$3 billion.

**1990:** 12 Gubernatorials (rain and snowstroms, earthquakes, Mediterranean fruitfly, Mexican fruitfly, wildland fires, drought, freeze); 1 Presidential (wildland fires). 4 deaths. Estimated loss: \$317 million.

**1989:** 8 Gubernatorials (4 medfly, 4 earthquake); 1 Presidential (earthquake). 63 deaths. Estimated loss: \$5.9 billion (earthquake only).

**1988:** 10 Gubernatorials (freeze, wildland fires); 3 request to U.S. Department of Agriculture (drought). 0 deaths. Estimated loss: \$11 million.

**Note:** (1) A Gubernatorial Proclamation of a State of Emergency formalizes state assistance to local government and allows for state reimbursement on a matching basis of local jurisdiction response, repair and restoration costs. It is also a prerequisite to requesting a Presidential Declaration. (2) A Presidential Major Disaster Declaration authorizes a number of assistance programs for both individuals and public agencies in the disaster areas. (3) Dollar loss estimates provided by county Office of Emergency Services. (4) A Director's Concurrence makes financial assistance available for repair/restoration of damaged/destroyed public property under the state Natural Disaster Assistance Act. **Source: OES.** ■

## THE PERSECUTION OF JERRY MENSCH

How the replacement of a tiny ferry slip led to a vendetta against a 30-year veteran of the Department of Fish and Game and trampled whistleblower-protection laws.

By Tom Turner and Jacqueline Volin

ON NOV. 18, 1993, A LONGTIME employee of the state Department of Fish and Game named Jerry Mensch learned that he was losing the promotion he'd been expecting and was being reassigned to a job that didn't exist. His crime? Trying to protect the people and wildlife of California from a highly toxic chemical, then blowing the whistle on the man who had forced him to go against his better judgment and allow the poison to be used on pilings near the Sacramento River Delta town of Rio Vista.

Many longtime observers of Sacramento see the Mensch case as part of a pattern that has emerged in the Wilson administration over the past few years — a deliberate, secretive effort to scuttle environmental protection laws by refusing to enforce them at the bureaucratic level.

**"Pete Wilson is on a mission to destroy protection for endangered species," Mark Palmer, executive director of the Sacramento-based Mountain Lion Foundation, told the Bay Guardian. "He wants to rewrite the California Endangered Species Act to drastically reduce its power, then offer the new law as a model for the nation."**

It all started with the state-owned and -operated Ryer Island ferry, which plies the 200 or so yards of water from just east of the town of Rio Vista to Ryer Island at the mouth of Cache Slough. The ferry transports people, cars, bicycles, an occasional ambulance, and small trucks loaded with tomatoes, corn, asparagus, kiwi fruit, and other products of the fecund delta farms; it has been operating since 1945.

By early 1991 the California Department of Transportation needed to rebuild the docks and slips on either side of the river. According to documents obtained by Mensch's attorneys under the state Public Records Act, Caltrans reached a "streambed alteration agreement" with the Department of Fish and Game (DFG), the agency responsible for the good health of the waters of the delta and the fish that swim in them. The permit ran for one year, beginning Nov. 1, 1991. New concrete would be poured for the ramps, new pilings driven for the slips and fenders.

In May 1992 Caltrans awarded a contract to Sloat and Associates for the reconstruction. It specified the use of pilings treated with creosote, a wood preservative made of a complex mixture of chemicals obtained during the distillation of coal tar, a compound that is produced when coke is extracted from coal. Creosote contains scores of chemicals, many of which — benzo(a)pyrene and dibenzanthracene, for example — are known carcinogens in mammals. Two, benzene and styrene, are suspected human carcinogens.

Studies conducted by the National Marine Fisheries Service (NMFS) in Washington State have indicated that some of the chemicals that creosote releases when it breaks down may cause lesions and tumors in bottom-dwelling fish. Young salmon can take up some of the chemicals as they pass through contaminated water. A preliminary study completed in October 1993 by the DFG confirmed that creosote is lethal to fathead minnows and that pilings can continue to leach creosote 10 years after being placed in the water.

Regulation 5650 of the California Fish and Game Code explicitly bans "coal-tar derivatives" in state waters. Proposition 65, which prohibits the release of chemicals known to cause either cancer or reproductive toxicity into a source of drinking water, bans creosote by name. Yet the ferry slip project would put some 70 creosote-treated pilings — containing upwards of 10 tons of creosote — into the delta.

"Creosote is impregnated with extremely toxic chemicals. I can't imagine a worse substance to use," said Marc Lappé, a toxicologist and health policy specialist, former official with the California Department

of Health Services, and now director of the Center for Ethics and Toxic Substances in Gualala, Calif. "The evidence is absolutely clear. Anyone who claims not to know that creosote is directly harmful to organisms in the environment either hasn't done his homework or is not telling the truth."

Before construction began, Don Sloat, president of Sloat and Associates, pointed out that a readily available alternative existed: lumber treated with ammonia copper zinc arsenate (ACZA). According to a statement Sloat later made to an investigator for the Solano County district attorney, Caltrans insisted that creosote-treated pilings be used, though no one in the agency would tell him why.

Later, when asked about his agency's insistence on creosote, Howard Sarasohn, chief of the environmental division of Caltrans, told the Bay Guardian, "Creosote is the most effective wood preservative known. It's commonly used all over California — in the delta and San Francisco Bay — and it's been used for well over 100 years."

Craig Manson, the general counsel of the Department of Fish and Game, told the Bay Guardian that his department had never objected to the use of creosote and that he knew of no court cases indicating that creosote was harmful.

Construction had been scheduled to begin in June 1992, but because Caltrans had received several requests from local farmers to delay it until after the harvest, work did not begin until Oct. 1. It was halted a month later, when the streambed alteration agreement expired.

Caltrans asked DFG to extend the agreement, and the request was forwarded to Carolyn Doody, who had taken over as game warden for the Rio Vista area in September 1992. Doody objected to the use of creosote-treated wood and, seeking support, called Jerry Mensch, environmental supervisor for the Department of Fish and Game's region two.

No radical, Mensch had spent the previous 14 years as an environmental supervisor for DFG. He was hardly a no-growth environmental radical: In fact, he was well known and respected in the region largely

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**MENSCH****Continued from page 16**

for his work with local governments, developers, and environmentalists in hammering out programs that allowed development to go forward without unduly sacrificing fish and wildlife habitat.

In early November Mensch visited the construction site along with several Caltrans representatives and saw piles of lumber oozing creosote. He agreed with Doody that the pilings could not be used.

"At least three endangered or threatened species, including winter-run chinook salmon and delta smelt, inhabit the immediate area around the construction site," Mensch told the Bay Guardian.

Mensch said he told the Caltrans representatives at the meeting that creosote-treated lumber would violate section 5650 of the Fish and Game Code, and that he thought it would violate the safe drinking water protections of Prop. 65 as well. Not far from Ryer Island are two freshwater pumping stations that pull water for the city of Antioch and much of Contra Costa County.

But in early November — according to testimony DFG Lt. Bruce Sanford would deliver to the Assembly Committee on Water, Parks and Wildlife, which looked into this issue in June 1994 — Sanford and his boss, Jim Messersmith, decided to allow Caltrans to proceed with the creosote-treated lumber. Messersmith, then manager of DFG region two, had discussed the issue with DFG chief of environmental services John Turner, Sanford testified, and Turner had seen no problem with using creosote.

Sanford also testified that neither he nor his boss had ever heard of problems with creosote. "We just felt, let's let them continue the project," Sanford told the committee. "[It] wasn't our position to establish statewide policy for the use of creosote."

But statewide policy already existed, in section 5650 of the Fish and Game Code and in Prop. 65. Furthermore, Mensch insists he had forwarded scientific information on the hazards of creosote — the NMFS studies and other information — to Messersmith weeks before the final decision had been made.

According to Mensch, Messersmith in-

structed him to tell Warden Doody to approve Caltrans's permit as it was. Mensch protested, and Messersmith gave him a direct order to tell Doody to approve the permit.

When called for comment on the Mensch case, Messersmith told the Bay Guardian, "I don't know anything about it — I haven't worked with Jerry for a couple of years, and I've been retired since July." He referred other questions about the case to his lawyer, Clyde Blackmon, who had not returned calls by press time.

**Legal advice**

At that point Mensch called his lawyer, Michael Jackson, for advice. He didn't want to approve an illegal action, he said, but he also knew that insubordination was the only first offense for which a state employee could be fired.

Jackson advised him to approve the permit and alert the Solano County District Attorney's Office to the imminent violation of the law. Mensch followed his lawyer's advice, touching off a chain of events that leaves many political and legal observers scratching their heads.

In February 1993, Solano County deputy DA Mark Pollack's records show, Pollack sent out private investigator Brook Byerley to look into the matter. In June, after Pollack had left the District Attorney's Office for private practice, his successor, Jackson Harris, filed criminal charges against Messersmith: two violations of DFG 5650 and one violation of Prop. 65.

By then, Messersmith had been transferred to another job. His replacement, Ryan Broddrick, informed Mensch that a promotion Mensch had been expecting since August 1993 had been cancelled. Less than two months later, Mensch was informed in a terse Nov. 18 letter from DFG director Boyd Gibbons that he had been transferred to a new position in DFG's wildlife management division.

The administrative transfer, ostensibly because of Mensch's expertise in the California Environmental Quality Act (CEQA), gave Mensch six working days to report to the new position — a lesser one than the supervisory role he had played for the last 14 years.

"I had only a working knowledge of the laws they said I was an expert on and had not had a CEQA brush-up for more than 10 years," Mensch said. "But they said I was an expert, and that was that."

When Mensch reported for duty Dec. 2, he noticed that his new job description had been written six days after Gibbons's letter. In the 11 months that he has been in his new job, Mensch has had little substantive work to do.

**Missing Files**

In the meantime, some strange things had been happening to Mensch. Someone rearranged his papers in the department's central files, he said, and other documents were removed and never returned. Still others were removed from his personal files and briefcase in his locked office, only to turn up days later in a drawer where he never kept such papers. Mensch's calendar and notes from the Ryer Island incident were stolen, and Mensch said they still have not been recovered.

**Subsequently Mensch's office was burglarized, his home was broken into, and he was transferred to a dead-end job in the department's main headquarters.**

**Break-in**

In December 1993 someone broke into Mensch's house and disturbed some of his personal effects. Mensch discovered that one of his pistols, which he keeps loaded, had been arranged in a drawer to point directly at the midsection of the next person to open the drawer. "I've had guns all my life," Mensch said. "I would never in a million years store a gun that way."

In October Mensch had asked Broddrick, his supervisor, to have the state police investigate the tampering in his office; nothing happened. In December he asked the county sheriff to look into the entering of his house; the sheriff refused even to take a report, Mensch said, because nothing had been stolen and there was no evi-

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**MENSCH**

Continued from page 17

dence of forcible entry. Mensch's theory is that someone was trying to find stolen state property or anything else that would impeach his testimony at Messersmith's upcoming trial.

The trial, however, was not to be.

**Your Taxes at Work:**

The Department of Fish and Game had ponied up \$20,000 in public funds to hire the Sacramento law firm of Blackmon and Drozd to defend Messersmith. When Assemblymember Jackie Speier (D-South San Francisco) questioned why the attorney general didn't provide the defense, Roderick Walston of the Attorney General's Office explained that "it would be inappropriate for the attorney general to represent criminal defendants."

According to his testimony to the Water, Parks, and Wildlife Committee, Jackson Harris of the Solano County DA's Office wondered as the trial date approached if he could justify spending the time and money it would require to try a three- to four-week trial on what would result a relatively small fine. He worked out a settlement of sorts: He would defer the trial for six months — a maneuver known as prosecutor's probation. If the defendant kept his nose clean for that period, wrote a letter of explanation (Harris wanted an apology, he said, but Messersmith refused), and reimbursed the \$5,000 the county had spent on its investigation, the matter would be dropped.

Messersmith's six months were up Oct. 7, though he told the Bay Guardian that he has not received any written assurance that the case against him has been dismissed. His April 6, 1994, letter of explanation admits no wrongdoing. The \$5,000 was paid to Solano County this month by Fish and Game — the taxpayers.

In two separate memos — one dated July 9, 1993, the other dated March 4, 1994 — DFG director Gibbons ordered his staff not to approve the use of creosote in state waters. Gibbons explained

in his testimony to the legislature that he issued the ban out of "concern that other employees may well be subject to similar prosecutions" — not out of concern for the environment.

Meanwhile, using his own funds, Jerry Mensch filed suit in state court against Fish and Game in December 1993, seeking reinstatement in his old job. The state maintains that Mensch's transfer was routine. Former DFG deputy director John Sullivan told the Bay Guardian that personnel transfers "go on all the time ... the staff rotates all the time to give field people experience in administration." He would not discuss the Mensch case in particular.

Fish and Game, defended against Mensch's suit by Deputy Attorney General Andrew F. Loomis, argued before Judge Earl Warren Jr. that Mensch should take his beef to the California Department of Personnel Administration (DPA) before he could have his day in court. In February 1994, both sides signed a binding agreement in court stipulating that DFG would not give Mensch's old job away permanently until his case was finally settled.

But by late spring Mensch was almost out of money. He turned in desperation to Steve Volker, a lawyer with the Sierra Club Legal Defense Fund, whose path Mensch had crossed in earlier litigation.

As this story went to press, Jerry Mensch's future was very much in question. Judge Warren dismissed Mensch's suit in September 1994 on the grounds that Mensch had adequate remedy before the DPA, a process that could take three years.

Subsequently another judge ruled that DPA does not have jurisdiction, because the agency is required to decide such appeals within six months. Volker appealed Judge Warren's dismissal Oct. 4. He also is considering a federal suit over violations of Mensch's civil rights.

The state has hamstrung Mensch and his lawyers to this point: No official of Caltrans, the Department of Fish and Game, the Department of Justice, or any other agency has had to testify under oath. Volker faces a steep road.

In the end we're left with a lot of questions and little more than supposition for answers. Why was Caltrans so determined

to use creosote even though its use is a clear violation of Fish and Game Code and Prop. 65? Official explanations that "We've always done it that way," and "There are thousands of creosoted pilings in the delta" do not satisfy. As Mensch pointed out: "We used DDT for years. It was a very effective chemical. When we found out that it was detrimental to wildlife, we switched to something else."

Darryl Young, a consultant to state senator Tom Hayden (D-Santa Monica) who has followed this matter closely, said there are two main theories among people who pay attention to DFG.

"The more outlandish [one] is that port officials and marina operators panicked and thought that if creosote were denied at Ryer Island, they might have to yank out all the creosote-treated pilings in the state, and there are thousands of them.

"The more conservative theory is simply that Caltrans is hidebound: It has always used creosote-treated pilings and it isn't interested in having anyone tell it to change its ways.

Until some lawyer gets Caltrans and DFG officials under oath, we won't know for sure."

Why the vendetta against Jerry Mensch? Observers such as Young and the Mountain Lion Foundation's Palmer point back to the Wilson administration. "Jerry Mensch's case is part of a pattern," said Palmer. "Dissent [from the administration's objectives] will not be tolerated. Anyone who steps out of line will be stripped of responsibility."

Wilson's press office did not return calls by press time.

Chris Voight of the California Association of Professional Scientists — which counts as members 2,000 of the 2,400 scientists who work for the state, 400 of them at DFG — said,

**"Fish and Game is especially suspect for catering to the interests of timber harvesters, water users, and developers."**

Unless you're Jerry Mensch, the intimi-

ation of state employees may be the most important effect of this case. As Voight said,

**"It is incredible that the stewards of the state's fish, water, and wildlife would allow the release of [creosote] at all. Even more shocking is that they would punish the only man who tried to act responsibly."**

**UPDATE**

JERRY MENSCH, the California Department of Fish and Game (DFG) biologist who was demoted and harassed by his employer for trying to stop the illegal use of creosote in the Sacramento/San Joaquin River Delta ["The Persecution of Jerry Mensch," 11/9/94], took his case to federal court Nov. 18. Mensch is seeking not only reinstatement in his old job, but also damages from six DFG officials: director Boyd Gibbons; former deputy director John Sullivan; chief counsel Craig Manson; deputy director Banky Curtis; Ryan Broddrick, regional manager for the department's region two; and lieutenant Bruce Sanford.

Filed in federal district court in Sacramento, Mensch's suit alleges illegal retaliation against him for his having reported the violation of state law to the Solano County District Attorney's Office. The DA eventually filed charges against Mensch's then-supervisor, James Messersmith.

Subsequently Mensch's office was burglarized, his home was broken into, and he was transferred to a dead-end job in the department's main headquarters. Steve Volker, the Sierra Club Legal Defense Fund lawyer who is representing Mensch, told the Bay Guardian that the suit cites violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution (freedom of speech, unlawful search and seizure, and due process, respectively) plus violations of the California whistle-blower protection law. It also accuses some or all of the defendants of slander and intentional infliction of emotional distress. Volker has asked for a jury trial. ■

Note to the reader: The publisher was going

**INTEGRITY, ETHICS and MANAGING THE PUBLIC TRUST**

**By: Felix E. Smith**

In our society all natural resource decisions are ultimately validated or rejected by the bar of public opinion. Scientific findings and the freedom of speech right are vitally important in the public's rejection or acceptance of such decisions.

In our form of government, the Legislative Branch passes laws on behalf of the people. The Executive Branch is supposed to support and carry out those laws. Agencies implement these laws thereby assisting the people to manage their trust properties, resources, uses and values. The duties and responsibilities delegated to an agency, department, individual, or any other body are held as a sacred trust. The people do not yield their sovereign rights to the various agencies which are supposed to serve the people. The people have a right to be informed, they have a right to know all that there is to know to remain informed. Agency administrators are not to decide what is good for the people to know or not to know. The people must insist on being honestly and truthfully informed. The people also must insist that government business be conducted in the sunshine.

The key to carrying out trustee responsibilities are the powers to regulate as well as the powers to protect the people's properties, interests, uses and values covered by the public trust. Public policy should be that assets "held in trust" must be considered as common property owned by all

to write a story on Mensch; however, after having had made contact with Mr. Mensch about the Bay Guardian story, he was assured by Mr. Mensch that the aforementioned article was very accurate. It was for this reason the publisher opted to obtain permission from the Bay Guardian to simply reprint the article.

Tom Turner is the staff writer at the Sierra Club Legal Defense Fund.

Jacqueline Volin is a copy editor at the Bay Guardian.

The Mensch articles were published in *The Bay Guardian* in November of 1994, and are reprinted with permission.

the people and especially future generations. This "held in trust" must be taken seriously. The stewardship of our natural resources and the core of this sacred trust is that agency administrators must conduct their responsibilities consistent with trust purposes, uses and values. However we have all witnessed career aggressive employees who are more concerned about the Governor's or Secretary's desires and special favors for special interests and "'lets make a deal'" than for scientific findings, integrity, long term credibility and a solid commitment to protect the people's interests.

The mission of the various agencies managing our lands, water, renewable and non-renewable resources, vegetation, habitats, scenic, and recreational amenities is to conserve, protect and enhance these amenities for the continuing benefit of the people and future generations. Ecological and biological diversity and continued resource renewability is the bottom line.

**Government accountability is the most essential factor in the the protection of the public and its resources.**

Natural resource administrators and scientists should be held accountable for their actions. They also should be held to the highest standards of professional ethics and integrity. For Example, at the Federal level, the Code of Ethics for Government Service (Public Law 96-303, 1980) should be equal to a written contract and a part of everyone's job description. Professional societies should have a Code of Ethics with all members being held accountable. However, the code of conduct for some natural resource professionals all too often is "We are responsive to the needs of our clients".

A few things are very true. (1) You can not buy integrity or professional ethics, one either does or does not have them. (2) The promise of higher salaries or a promotion does not bring better people to the job, it

Please see INTEGRITY, page 20

**INTEGRITY, continued from page 19** corrupts the situation. (3) It may be the duty of political-type managers to be politically correct, but it is the responsibility of scientists to be scientifically correct. (4) The threat of losing one's job or other harassment can affect the objectivity of a decision. And (5) scientific findings will continue to undermine politically motivated actions.

We have all witnessed the failure of administrators to properly exercise their sacred trust, in their rush to be politically correct, these folks and those who aspire to a part of the exclusive club of biopolitical administrators, frequently allow perceived political pressure and special favors for special interest, to influence their decisions, while denying same.

Here is an example. An administrator from the Mid-Pacific Region of the Bureau of Reclamation called the California Department of Fish and Game (CDFG) trying to negotiate reduced flows in the American River. This reduction would dewater and expose salmon nests thereby impacting incubating eggs deposited in the gravels by Chinook salmon a month or two earlier. When the word about the discussion got out, it was first denied, but later verified as having occurred. The thought of the public having knowledge of the discussion enraged the federal administrator. He called the folks at the CDFG, complained loudly wanting to know how word of the discussion got out. CDFG folks were told that such discussions must be considered proprietary, not for the public's eyes or ears. How is that for arrogance!

Clearly this federal administrator did not want the public (the actual owners of the state's fish and water resources), to find anything out about the discussion until after pressure from special interests had been applied and the CDFG had capitulated (agreed) to the desires of the Bureau of Reclamation.

Single-purpose governments or districts also should be watched. Such entities do such things as generate hydro-electric power, and supply domestic and irrigation water. While they are government agencies, they act and operate like closed private entities. They have political clout and do not hesitate to use it. These special gov-

ernments do not desire to conduct their activities with fish, wildlife, water quality or environmental protection agencies in the sunshine. The East Bay Municipal Utility District (EBMUD) is such an agency. EBMUD administrators have strongly objected to the presence or input from any third party interests (members of the public) observing or attending negotiation meetings with State or Federal fish and wildlife conservation or water quality agencies.

These special governments apparently believe that the public has no right to oversee or monitor such meetings. They point out that it is the obligation of the trustee to protect the public interest and to inform the public of any decision after the fact. The end result is that the people who actually own these resources and in whose name permits and licenses are issued are being excluded from viewing their trustees in action. Recently EBMUD involving flows on the Mokelumne River. EBMUD administrators complained loudly to several folks about the uncooperative nature of the Fish and Wildlife Service biologist involved. This time members of the public were in attendance and observed the process. They stated that the biologist acted in a professional manner, used the best available scientific information coupled with knowledge gained over many years of field experience. The actions of the EBMUD administrator stretched the meaning of ethics and integrity.

Why do administrators do this? An explanation could be protecting one's self interest gets one a promotion or maintains his or her power base within an agency. Another could be "this is what the Directors or our clients want". Another could be arrogance. These people believe they can get away with such actions because fish and wildlife conservation agencies are easy whipping boys and it makes for political grandstanding (people vs. fish) for the home folks. It is also difficult for environmental, fish and wildlife public interest groups to monitor "behind-closed door" decisions. And if special deals are discovered, not much can be done about them after the fact. Administrators recognize and exploit this. If taken to court for

failing to protect the public trust, these folks do not pay for their own legal costs, but have the agency's deep pockets to pay for legal assistance while conservation groups must tin-cup on the good will of the people.

The people's right of Freedom of Speech is a key factor in exercising this sacred trust and stewardship obligations. It must not be abridged by zealot managers who believe that they have been anointed by some political fiat to carry out verbal trashing or any kind of character assassination in order to get their way, control employees or situations.

Integrity, professional ethics and scientific credibility must come down from the top administrators. The sorry condition of many of the State's parks, forests, lands, waters, fish and wildlife resources is evidence that agency administrators have failed to fully exercise their sacred trust and carry out good stewardship.

Effective government means that our laws will be faithfully carried forth without prejudice, that career civil servants responsible for conserving and protecting our environmental resources, uses and values covered by public trust protection, will be allowed to do their job without fear of political pressure or reprisal for exercising their freedom of speech rights.

If the people don't demand integrity and professional ethics, if scientists are not allowed to speak good science and resource management truths, if people can no longer trust agency officials to tell the truth, our democracy could fall to a political system of special favors for special interests run by political cronies. ■

Felix Smith is a retired employee of the U.S. Fish and Wildlife Service. He is now actively involved in public trust issues. We should note that he was a former "whistle-blower" and a victim of government harassment tactics because he was a conscientious employee.



**QUINCY LIBRARY GROUP PURPOSE AND OBJECTIVES**

**By Michael B. Jackson**

The Feather River watershed is among the most productive areas in California, it contains vast coniferous forests, primarily owned by the citizens of the United States and administered by the federal Forest Service. It is the source of waters for the largest facility in the State Water Project (Lake Oroville) which provides the lion's share of drinking water to Southern California. Undammed creeks in the Lassen National Forest provide spawning habitat for endangered salmon. Pacific Gas & Electric Company's and the California Department of Water Resources' hydroelectric generation facilities provide low cost power to millions of Californians. Millions of visitors enjoy the lakes, streams and forests annually.

Yet the Feather has become, in recent years, a battleground for competing interest groups that seek to use or conserve its resources. Lawsuits and appeals have followed most proposed actions in the area, particularly in regards to implementation of the congressionally mandated National Forest Land Management Plans on the Lassen, Plumas and Tahoe National Forests, each of which is under appeal. Shrinking USFS budgets have drastically limited their ability to carry out their leadership role. The most recent addition to the gridlock has been the USFS imposed (March 1993) California Spotted Owl (CASPO) guide-

lines that serve to greatly modify and restrict timber harvest practices. There are lumber mills in this region from Bieber in the north to Loyalton in the south. Each of these mills is faced with imminent demise, given the current condition since the federal government owns upwards of three-quarters of the land base. The counties involved

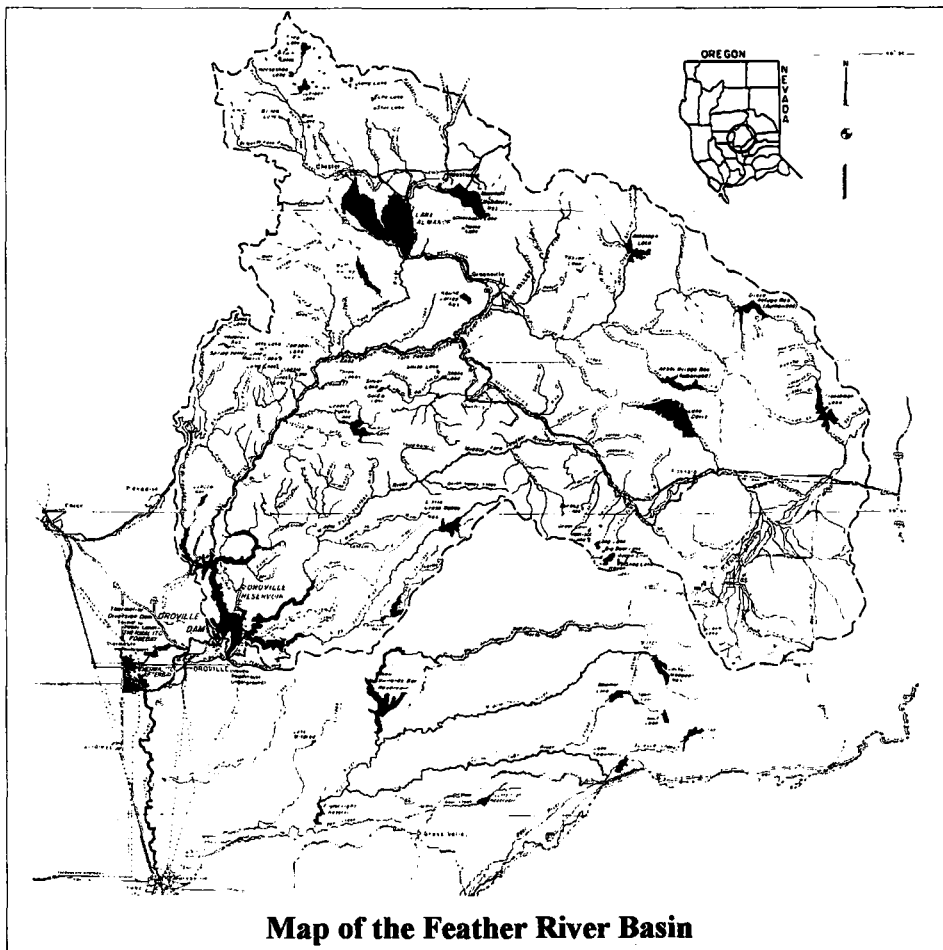
(Lassen, Plumas and Sierra) are the most timber dependent areas in the Sierra, so the mills' problems have horrific effects upon employment, schools, hospitals, law enforcement, roads and retail businesses in the area.

Three veterans of the "Timber Wars", Bill Coates, the chair of Plumas County Supervisors, Michael Jackson, an environmental attorney and Tom Nelson, a forester from Sierra Pacific quietly began a series of meetings in late 1992 in an attempt to break the gridlock.

Their primary concerns were devising common ground that would lead toward "Community Stability" and "Forest Health". The group gradually broadened to include other local interested parties (e.g. environmental, timber industry, recreation) and soon

three affected national forests (Lassen, Plumas, and Sierraville Ranger district of the Tahoe National Forest) that has at its heart a basic agreement as to what constitutes the "land base" available for timber harvest and other activities. The agreed upon land base is defined through digitized maps and includes "off base", deferred and wilderness areas as well as areas available for timber harvest under new prescriptions. The group has adopted an aggressive fuels reduction program, including salvage of bug-killed trees, that seeks to reduce the threat of "Stand-destroying fires"— noted by the CASPO scientists as a major threat to the owls and other values in the Sierra. The group has defined a timber rotation or harvest cycle that exceeds 100 years. A major

stream protection and improvement protection and improvement program (along the lines of the eight year old Feather River Coordinated Resource Management group-CRM) will enhance the region's most undervalued product and improve biodiversity. Ongoing monitoring will define progress in improving the forest ecosystem. Single tree and group selection harvest regimes that foster "uneven aged management" will supplant even aged management and clearcuts. A "working circle" would be established within the geographic area for the five year period to insure that the preponderance of timber harvested in the area be milled



**Map of the Feather River Basin**

CA Dept. of Water Resources Map

took on the name of the Quincy Library Group, their gathering place for semi-monthly meetings.

**Progress and Proposals**

The local group has produced a proposed five year management plan for the

in the area in order to preserve local employment and community stability. ■

Michael B. Jackson is an attorney and a member of the Quincy Library Group. He does a great deal of *pro bono* work on public trust issues.

## Major Issues Anticipated in the 1995-96 Legislative Session before California Assembly Water Parks and Wildlife Committee

### WATER

#### Bay-Delta Oversight

On December 1, 1994, state and federal officials announced proposed new water quality standards for the Bay-Delta. State and federal officials ("CalFed") also have embarked on a two to three-year effort to identify alternatives for long-term, physical solutions to Bay-Delta problems. The WPW committee will have a continuing oversight role in the adoption of standards and development of long-term solutions.

#### User-initiated water Transfers

In most cases, a farmer would be the "user" proposing to transfer (sell) water, and the water district would be the water right holder. The Miller-Bradley bill enacted by Congress in 1992 allowed "users" of federal Central Valley Project water to sell their share of water allocated by the water right holder. However, efforts at the state level to enact "user-initiated" water transfer laws have been unsuccessful, primarily due to opposition from water districts and northern California interests. Renewed efforts to enact state "user-initiated" Water transfer legislation can be expected in 1995.

#### Water Supply Planning

The most controversial water bill in 1994 was AR 2673 (Cortese), which required cities and counties to identify a water supply to support new development prior to approving a development project. This bill was supported by agriculture, industry, environmentalists, and most major newspapers, including the Los Angeles Times, the San Francisco Chronicle, and the Sacramento and Fresno Bee. It was opposed by development interests. The bill was held in the Senate; a revised version of AR 2673 is expected to be introduced in 1995.

#### General Obligation Bonds

The state historically has provided funding for loans and grants to local agencies to

fund safe drinking water, water conservation, wastewater treatment, flood control and water recycling projects; however, most of these programs are virtually depleted of funds. There may be legislation in 1995 to place a water bond measure on the 1996 ballot.

#### Water Development

State General Obligation bond measures proposing to finance a multipurpose Auburn Dam on the North Fork of the American River can be expected to be reintroduced in 1995. Legislation that failed last session assumed total project costs of \$1.9 billion, with a federal contribution of approximately \$700 million for the flood control portion of the project.

There also may be efforts to pass legislation to "fix" the Delta (such as a Peripheral Canal). A coalition of rural and urban business leaders, the "Delta Restoration Coalition", has been formed to encourage a legislative solution in the 1995-96 Session.

### FISH AND WILDLIFE

#### Threatened and Endangered Species

A four-bill package was introduced last legislative session to address the regulated communities' concerns regarding the California Endangered Species Act. The primary goals of the package were to (1) clarify the Department of Fish and Game's authority to issue "2081" take permits, (2) provide some exemption to take requirements for agriculture, and (3) provide for scientific peer review of proposed listing petitions.

#### Mountain Lions

Through a vote of the people of the State (Proposition 117), the mountain lion is currently classified as a "specially protected" mammal. There may be legislation introduced to reclassify the mountain lion as a game mammal which would allow for potential sport hunting of the animal. At a minimum, probably a less restrictive depre-

dation system for the take of lions which threaten private property and lives.

#### Proposition 117

Proposition 117 also ensured \$30 million annually to fund wildlife habitation acquisitions and park projects. There may be legislation to repeal the \$30 million annual Habitat Conservation Fund. This proposal may be coupled with the removal of the hunting ban on mountain lions.

#### Environmental Filing Fees

Previous legislation imposed development fees to pay the Department of Fish and Game's environmental review costs. Legislation may be introduced to eliminate these fees or in the alternative to significantly reduce the fees.

#### Ferrets

Possible legislation to legalize ownership of ferrets as domestic pets.

#### General Obligation Bond

Currently, the only continuing funding source for acquisition, restoration, and preservation of fish and wildlife habitat is Proposition 117 funding. There may be legislation in 1995 to place a habitat/park bond measure on the 1996 ballot.

### PARKS AND RECREATION

#### Public/Private Partnerships

Public/private partnerships are gaining more support as a source of funds for the state park system. The Department of Parks and Recreation (DPR) is becoming proactive in creating a favorable climate to support these partnerships. Two organizations, the State Park Foundation and the newly formed State Parks Partners, are assisting in this realm. DPR is expanding its concessions, and AB 3748 (Cortese) passed this year to provide more flexibility to DPR in

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**LEGISLATION**

**Continued from page 22**

awarding concessions. There is also a recognized need for more expertise in this field in DPR.

**Park infrastructure backlog**

There is a tremendous backlog in park infrastructure repair needs for both state and local parks. This includes repairs needed to restrooms, irrigation systems, roads, playgrounds, campgrounds, picnic areas, visitor centers and other visitor serving facilities. This backlog has caused some facilities and portions of parks to be closed. This issue will be a concern during the adoption of the State Budget.

**Asilomar Oversight**

Allegations of mismanagement, theft and destruction of natural and cultural resources by the nonprofit corporation contracted by the Department of Parks and Recreation to operate the Asilomar Conference Center led to an extensive investigation by the Water, Parks and Wildlife Committee. The resulting bill, AB 2674 (Cortese) called for cancellation of the current contract and a request for proposal (RFP) to be issued for bids. The bill (now statute) also made provisions for protection of the employees and the natural and cultural resources and provided other guidelines for writing the rfp which should be completed by January, 1995.

**The Role of Parks and Recreation in Public Safety**

The Water, Parks and Wildlife Committee, in conjunction with the California Park and Recreation Society (CPRS), held a hearing on this subject in San Jose on October 27, 1994. Experts from law enforcement, park administration, local government as well as affected youth all testified. The unanimous conclusion was that park and recreation agencies through facilities, professional staff expertise and programs, can and do provide preventive measures which serve as highly cost effective alternatives to incarceration. Interagency cooperation and collaboration in planning, funding and

implementation are key factors in the success of these programs. A written summary of the hearing is being prepared. CPRS and other groups are very interested in pursuing legislation to further support and expand these efforts.

**Playground safety standards**

Changes in playground safety standards, including the Americans with Disabilities Act (ADA), mandates changes with no funding source to assist with compliance. This situation has forced some park agencies to close playgrounds and/or remove playground equipment due to lack of funding and potential liability problems. This results in furthering an already critical need.

**Performance Based Budgeting (PBB)**

The Department of Parks and Recreation is one of four agencies taking part in a pilot program to incorporate performance based budgeting. A memorandum of understanding (MOU) has been signed between the Department and the Legislature which obligates the Department to specified performance measures in return for an effort to stabilize the parks budget. The review of the existing measure and the adoption of new measures is an annual task by a legislative committee made up of representatives from appropriate policy and fiscal committees. PBB also reflects a weaning from the General Fund.

**General Obligation Bonds**

General obligation bond funds, general fund and user fees have been the traditional major funding sources for state parks. The last bond act was passed in 1988, and no unallocated money remains. The general fund portion has decreased steadily, with the 1994-95 budget receiving only 27% or \$47.8 million from the General Fund. This number is predicted to decline further. The user fees account for 29% of the revenue and have reached a maximum level for most fees.

There is a lot of interest and support for proposing a general obligation bond for the 1996 ballot which would emphasize urban parks and youth programs. ■

**DRAIN GAME**

**Continued from page 13**

vestment since the program is voluntary and if you can hold out, higher prices will be paid for "premium" toxic lands. Even if that program is put "on hold", EDF has stepped in with a market-based approach which will funnel monetary fines back to drainage districts who exceed water quality standards. Again, worry-free investors sit back and enjoy pollution. But can the status quo be maintained in the light of so much negative data documenting the effects of drainage on the environment? With birds dying now at Tulare Basin ponds where drain water is at its concentrated worst, can subtler effects be far behind as selenium is dispersed, for example, in groundwater aquifers as part of a "no discharge" policy of Westlands Water District? As one farsighted regulator viewed drainage, "it is not a problem until it surfaces". But where will the toxic effects surface??

We have been at a stalemate for over 100 years in the DRAIN GAME. However, the fact that "a little selenium goes a long way", even 2 ppb's worth, may be a little too well-documented after the \$200 million spent on studies in an attempt to obfuscate and dilute its importance. In the ultimate MOVE, State and Federal agencies may move from the sphere of "no action" to "negative action" and declare the drains exempt from "any" regulation. A key element in the GAME is the crisis management component which now enables the regulatory agencies to justify any level of toxics that may be generated by simply exempting them because it has now become technically and economically infeasible to clean it up, due to the long-standing "do nothing" policy. This "California solution" may be seen as visionary in the eyes of GOP Congressional House Representatives as they seek to "challenge" regulations before they even take effect and redefine the relationship of government regulatory action and the cost of compliance. The drainage problem in California may typify battles that may go on across the U.S. as we progress into the first 100 days of the "Contract for America". The ramifications of this battle over drainage may be felt in unsuspecting ecosystems across the U.S. and eventually be identified as the NAME OF THE GAME.

The DRAIN GAME is open-ended and never-ending. pipeline to prosperity. ■



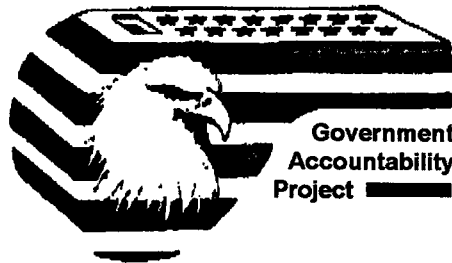
Jeff DeBonis, the founder and former Executive Director of the Association of Forest Service Employees for Environmental Ethics (AFSEEE) is launching a new organization dedicated to protecting the integrity and ethics of all federal and state employees in a broad range of natural resource management agencies.

**PEER, Public Employees for Environmental Responsibility**, will expand the AFSEEE model to organize staff within government agencies. It will work to protect whistleblowers, encourage other public workers to speak out about ethical and environmental violations of law, and press for changes in agency policies.

"Since AFSEEE started, we have been inundated with request for help from employees of other state and federal agencies, such as the Bureau of Land Management, the Environmental Protection Agency, the National Park Service, and various fish and game departments," DeBonis said. "They admired the AFSEEE concept, but didn't feel comfortable joining a group focusing solely on the Forest Service. Unfortunately, issues such as repression of ethical dissent and good science are just as prevalent in the other agencies."

After working with AFSEEE for three years and building it into a 10,000 member organization that is a major player in the debate over management of public lands, DeBonis decided that it was time to expand the model to other agencies. "Following the Clinton Administration's commitment to a healthy environment and honest government," he explained, "PEER will go on the offensive against political appointees who have allowed illegal exploitation of our nation's heritage."

"(For)Twelve years Washington has encouraged the dismantlement of environmental protection and the demoralization of public servants," DeBonis concluded. "PEER will demand that all resource agencies start fulfilling their public trust to protect the environment instead of the profiteers."



### About the Government Accountability Project

Fundamental to our democratic form of government is the right of citizens to criticize and challenge their leaders and institutions. To fulfill the noble aspirations of our founders, we must see to it that all citizens are able to exercise these freedoms without fear of reprisal.

The Government Accountability Project enables citizens to help government fulfill its democratic promise. In pursuing this goal, the Project provides legal help. Our attorney's represent those individuals who suffer for speaking out, investigate their legitimate and substantive concerns, and see that problems are corrected. Like those courageous individuals, and society at large, we seek honest, open, accountable govern-

**PEER** is a national alliance of federal, state and local government employees and agency contract staff who share a commitment to accountable management of natural resources and pollution control. The **Government Accountability Project (G.A.P.)**, the nation's premier whistleblower protection group, represents **PEER** members and other public employees needing legal assistance.

**PEER** can be reached at its headquarters, P.O. Box 428, Eugene, OR, 97440, telephone number is (503) 484-7158 and the fax number is (503) 484-3004. **PEER** also has a Washington Office located at 810 First Street, NE, Suite 630, Washington, DC, 20002, telephone number is (202) 408-0041 and the fax number is (202) 408-9855.

**The PUBLIC TRUSTEE supports PEER's in its efforts and encourages public employees to join that organization. In addition, we encourage the public to support PEER's and the California Association of Professional Scientists (CAPS) and all conscientious public employees. ■**

ment.

Each year thousands of these concerned citizens participate in or witness wasteful, illegal or health-threatening activities at the workplace. Some exercise their right to speak out. Instead of receiving praise for their integrity, they are silenced. Instead of employers correcting the problem, employees, become scapegoats, harassed on the job, demoted, or blatantly fired, with little hope of finding further employment. In addition to the personal cost to honest employees, there is a larger, unacceptable, societal cost. Employees who challenge waste and fraud can save billions of dollars. When they are ignored the cost to the public, already enormous, grows even larger.

The detailed knowledge that employees have of unsafe practices alarms and ultimately galvanizes citizens groups to action. The Project works with employees and grassroots citizens groups. We help make the most effective use of the information from employees while also ensuring that the employees suffer the least possible risk to their careers.

The Project works at highlighting employee grievances which threaten the public good in a number of significant ways, including -

- listening to concerned USDA meat and poultry inspectors, and alerting the public to the massive bacteria contamination at poultry and meat processing plants;
- assisting concerned quality control specialists at a number of commercial nuclear power plants and nuclear weapons production facilities publicize unsafe conditions;
- and helping environmental watchdogs report a number of hazard, including mineral contamination in California and remiss cleanup practices of hazards waste sites around the country.

The Government Accountability Project is a nonprofit, nonpartisan organization which is tax-exempt under section 501(c)(3) of the Internal Revenue Code. The Project receives virtually no support, financial or otherwise, from the government. Major funding has been provided by foundations, hundreds of private citizens who support honest government, and federal employees through the Combined Federal Campaign. ■

## JUDGE WANGER RULES IN FAVOR OF MESOPOTAMIAN SYNDROME

**"Those who cannot remember the past are condemned to repeat it."**

George Santayana  
The Life of Reason  
Vol. 1 (1905-1906)

The December day after Gov. Wilson announced his "truce" in California's water war, a Fresno federal judge issued an order which could shatter that ephemeral truce and force the State Water Resources Control Board to finally resolve the drainage issue that has always blocked any long-lasting peace for the Delta.

Interpreting statutory language, U.S. District Court Judge Oliver Wanger ordered the U.S. Bureau of Reclamation (hereafter Bureau) to continue pursuing a State Water Resources Control Board permit to complete the San Luis Drain to the Delta to discharge agricultural drainage water.

**Wanger signed the order on Dec. 2 but it was not released until after Gov. Wilson staged his chimerical truce.**

When the judge quietly filed his order late on Dec. 16 and then promptly went on Christmas vacation, the combined unpaid bill for the debacle at the Kesterson National Wildlife "Refuge", (with its unsettling images of horribly deformed bird embryos) and its aftermath of interminable drainage studies with no results, stood at \$110 million, accumulating interest at the rate of \$7 million a year.

Wanger had actually signed the order on December 2 but for unstated reasons released it the day after Wilson staged his chimerical truce. Mere coincidence? Perhaps. But for Western San Joaquin Valley agribusiness interests, who had lain in the bushes for a decade, the one-two punches of the Wilson-Wanger pronouncements were strong signals that Big Growers, corporate and family dynasties, still retain much of their legendary political clout.

Wanger specifically ruled that the

Department of Interior had failed to comply with Congressional instructions in the 1960 San Luis Act, which made provision for a drain to the Delta from the 600,000-acre Westlands Water District and a few smaller irrigation districts in the western San Joaquin Valley rainshadow desert known as the San Luis Unit. Farming districts to the north of Westlands, in danger of being waterlogged by the salty groundwater migrating downslope on to their lands, were also plaintiffs with Westlands in seeking a court order.

Wanger found that the "Secretary of Interior through the Bureau of Reclamation has made the policy decision not to complete the San Luis Drain, in violation of Section 1 of the San Luis Act. This action constitutes agency action unlawfully withheld", pursuant to the Administrative Procedures Act, 5 U.S.C 706(1).

Wanger, by injunction, then ordered that the Bureau "take all reasonable and necessary actions to apply for a discharge permit for the San Luis Drain."

Within a month of Wanger's decision, Bureau officials made a decision not to appeal the judge's order and to go ahead and apply for a State Water Resources Control Board permit. This decision was made despite a strong recent indication that Wanger's interpretation of federal statutes may not be shared by the Circuit Court of Appeal.

Wanger's most recent effort at divining Congressional intent ended in reversal just a few days after his drainage decision. The U.S. Ninth Circuit Court of Appeals (See *Westlands Water District et al. v. Dept. of Interior et al.* (Dec. 21, 1994) 94 Daily Journal D.A.R. 17892) reversed Wanger for granting an injunction to Westlands last year to halt implementation of a provision of the Central Valley Project Improvement Act of 1992 which called for diverting 800,000 acre-feet of Delta water now provided to agribusiness contractors. The court's terse order invalidating Wanger's injunction (which came too late to be of any use) found Wanger's version of statutory language construction at odds with canons of conventional judicial doctrine. (Wanger had concluded that general

statutory language should override specific language.)

Wanger's half page order instructing the Bureau to apply for the state water board permit was preceded by 47 pages of findings of fact and conclusions of law.

Among those findings (with appropriate editorial comments in parentheses):

- The State Water Quality Control Board, not its staff, will make the ultimate decision on whether a drain is built. (This stated the obvious.)

- The evidence establishes that, at present, an estimated 120,000 acre-feet (an acre-foot is 352,851 gallons) of effluent will have to be drained from the San Luis Unit, unless significant changes are made in irrigation practices, not required by law. (The Westlands Water District's expert, Bill Johnston, who left Westlands to start a lucrative consulting firm, estimated the drainage generated per acre of farmland at .03 acre-foot, roughly 100,000 gallons an acre a year. The court dryly noted that the drainage system theorized by Johnston does not exist anywhere and that the lack of groundwater data "does not support" Johnston's estimate of drainage. The expert for the Central California Irrigation District, which drains its wastewater into the San Joaquin River virtually unregulated, estimated Westlands' drainage at .08 per acre-foot, more than twice Johnston's estimate. Prior studies of the amount of wastewater that will be generated have fluctuated wildly over four decades, with some estimates triple the amount "established" as evidence in the Wanger order.

- There are no figures on the amount of groundwater actually pumped in the San Luis Unit. (This is because farmers have resolutely resisted any efforts to monitor their groundwater usage.)

- "A prudent engineering design of the drain would include one or more regulating reservoirs or basins along its course, to allow immediate shutdown of the drain without risk that continued drainage flows would overtop the sides of the canal." (The Kesterson Reservoir, which doubled as a National Wildlife Refuge, was also a regulating reservoir.)

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## MESOPOTAMIA

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□ 100,000 acres of land need drainage systems now.

□ Wanger found that "the Federal agencies [i.e. the Bureau of Reclamation and other Interior agencies] that have responsibility for providing drainage to the San Luis Unit have not effectively addressed the serious problems of waterlogging and salt accumulation that are destroying the plaintiffs' ability to farm their lands in the San Luis Unit." (One expert testified, "under the Corcoran Clay, you know that water is getting saltier and saltier. It's not going to get any better.")

□ Experts for both the Bureau and Westlands agreed that selenium concentrations in the drainage water are "likely to be in the range of 300 parts per billion." (These are the levels of selenium, a trace element leached from ancient seabed soils in the Westlands, that ravaged Kesterson's food chain. Government biologists have estimated selenium levels of 2 to 5 parts per billion in water can have deleterious consequences on avian and aquatic food chains.)

□ All of the experts on all sides, including the Bureau's John Fields (who argued on behalf of keeping Kesterson open a decade earlier), "questioned" whether the data collected by the San Joaquin Valley Drainage Program (a \$50 million federal-state study in the late 1980s that gathered data from over 684 observation wells, sumps and ponds) "adequately represented" the San Luis Unit as a whole. Moreover, Wanger found that "an arbitrary method was used to 'screen' the SJVDP data and that the government's witnesses did not testify that the data constituted a representative sampling of the San Luis Unit. Moreover, the court found the government's witnesses were not expert statisticians or geologists." Finally, Wanger found that "the selenium study data are too sparsely sampled to represent a scientific method or a statistical sampling." The government's linear interpolation technique to analyze data from the 684 sites produced values different from the actual measured values at those sites due to extreme variations in selenium levels. (What a "representative" sample of

selenium distribution in the Westlands shallow groundwater might be, the significance of highly variable local selenium findings, or how "representative" was to be defined, was never clarified in Wanger's order. The U.S. Geological Survey (USGS), whose scientists did much of the selenium mapping of San Luis Unit groundwater and soil selenium levels, did not have any experts testify. The agency, which describes its timidity as scientific cautiousness, had refused to offer scientists to testify on anything but peer-reviewed published articles in scientific journal.

Two days before a USGS scientist was to be deposed to testify on the results of the San Joaquin Valley Drainage Program selenium studies, it was discovered that the published selenium map for the San Luis Unit was in fact a map of molybdenum concentrations. Embarrassed and flustered USGS scientists withdrew in confusion and Justice Department attorneys decided to proceed without them. The choice of the Bureau's John Fields as its water quality expert witness, who had been an ardent advocate of the San Luis Drain since 1980, was an even odder choice to bolster the case against completion of a drain. Indeed, it was Fields' denigration of the SJVDP methodology that helped to sway Wanger that millions of taxpayer dollars spent in the USGS San Luis Unit studies were of no value in settling the lawsuit.)

- The court also found that "the evidence adduced fails to establish by a preponderance that there is, at present, an actual risk to aquatic life and wildlife in the San Francisco Bay and related areas proposed as receiving waters caused by elevated selenium levels." Wanger noted that state and federal water quality standards must be met before issuance of a drain discharge permit and "the environment will be adequately protected by the regulatory process." (This logic, of course, ignores the fact that the "regulatory process" is what allowed Kesterson to happen in the first place and what is now permitting the deaths and mutations among protected bird species nesting at Tulare Basin evaporation ponds.)

- Wanger found that "the evidence did not prove that present levels of selenium

in the proposed receiving waters make impossible the issuance of a water discharge permit." The judge noted that the government's primary toxicological expert, U.S. Fish and Wildlife's Dr. Joseph Skorupa, testified: "The most we can say based on the current data is that 'there is no evidence of adverse effects' on Bay-area fish and wildlife." Wanger also noted that Skorupa had testified that Bay area birds "are the end point of the most proficient pathway for bioaccumulating selenium in the Bay" and had testified that the selenium levels in white sturgeon and San Francisco Bay Harbor seals all establish that selenium levels in the Bay-Delta "are increasing to a level that threatens both [sic] aquatic life, wildlife and human health." But Wanger concluded that no evidence had been presented of actual harm to Bay birds, no firm evidence of sturgeon reproduction impairment had been introduced, and that the elevated selenium levels of Clapper Rail eggs collected from Wild Cat Creek, a Bay estuary outfall for selenium-enriched wastes from oil refineries, was not "representative" of San Francisco Bay Estuary conditions because "it is a known toxic hotspot". (Confirmation of selenium-caused bird mutations at Wild Cat Creek came after the close of evidence in the drainage trial. Why Skorupa, a respected and courageous scientist known for his work confirming mutations at farm drainage water ponds in the Tulare Basin, was chosen to speak on the Bay - not his area of expertise - is another puzzle in the government's trial tactics. Even more puzzling, however, is Wanger's apparent conclusion that selenium "toxic hotspots" were of no concern in his deliberations because they weren't "representative", whatever that means.)

- Wanger found that conclusions drawn from federal data on Killdeer eggs along the San Luis Drain and in the Grasslands Resource Conservation, which showed selenium egg concentrations above embryo toxicity levels and at the threshold of triggering mutations, was unconvincing, stating "the representativeness [there's that word again] and extent of data underlying these opinions are limited." Wanger went on to say that if such risks

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## MESOPOTAMIA

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"actualize and are not mitigated, they may prevent the Bureau from obtaining a discharge permit. However, the evidence does not establish that such prohibitory conditions now exist." (Why the government chose not to have Skorupa testify on his voluminous data on the selenium impacts in the Tulare Basin is one of the great mysteries of the trial. Can the judge really be saying that there is no evidence that "prohibitory conditions", i.e. bird mutations, are occurring, or is he just saying that the government failed to put on enough convincing evidence?)

- Expressed in 1994 dollars, the estimated project cost to complete the San Luis Drain to Chipps Island in the Delta is approximately \$232 million, or \$272 million at Martinez, plus costs of right-of way from Antioch to Martinez. The cost to restore drainage to the 42,000 acres of Westlands acreage that formerly drained to Kesterson is \$5 million, and the cost to extend the drainage system in Westlands to all lands that will eventually need drainage is \$47.3 million. Annual costs of operating the San Luis Drain will be \$4 million a year. Treatment facilities for selenium removal (to less than 50 parts per billion in the drainage water, still highly toxic to fish and birds) will cost from \$2.76 million to \$30 million and cost from \$1.9 million to \$6 million a year to operate. (Anyone remotely familiar with drainage costs estimates knows that they have ranged from \$7 million in 1956 to \$13 billion, the figure used by former Bureau Regional Director David Houston when he was interviewed on CBS' "60 Minutes" on March 9, 1985. The government revises them so frequently it is hard to keep track.)

Significantly, Wanger found that the Westlands Water District has the ability to repay the costs of the Drain and "has the financial ability to finance the cost of treatment facilities and their operation." (The Government did not dispute this point. Westlands farmers, of course, argued during the Kesterson days and for years thereafter that it would be too expensive to treat the drainage water to remove most of the selenium.)

- As a matter of law, Wanger found that the Migratory Bird Treaty Act (MBTA), invoked by former Interior Secretary

Donald Hodel in the closure of Kesterson in 1985, would not prevent the Bureau from seeking a state permit for the drain. "Even if applicable," Wanger wrote, "the MBTA is not mandatory. It directs the government to determine when, and to what extent, and by what means "to allow" the taking of any migratory bird." (For the government attorneys, who have failed since 1987 to take any enforcement action to stop bird mutations in the Tulare Basin caused by mini-Kesterson drainage evaporation ponds, it must have been somewhat embarrassing to claim the Migratory Bird Treaty would block completion of a drain. As the judge well knew, the government can hardly argue that it is against the law (MBTA) to dispose of drainage when birds are being killed, if that same government is not enforcing the bird protection act against current violators.)

- Wanger also found, as conclusions of law, that the Endangered Species Act, the Clean Water Act, and the 1992 Central Valley Project Improvement Act, were no impediments to an order to the Bureau to seek a permit to complete the drain.

Some background on Wanger is appropriate here. Wanger and Robert Coyle, the presiding justice of the Fresno federal court, are both former partners in the Fresno law firm of McCormick Barstow Sheppard Wayte & Carruth, which has many agribusiness clients in the western San Joaquin Valley. According to an April 22, 1987 article in the Fresno Bee, Coyle was among 28 investors ordered to repay \$1.4 million in subsidies for 1986 cotton crops in Kings County. Karen Sorlie Russo, a Sacramento attorney hired to represent Coyle and the other investors, was quoted as saying that Coyle had first bought farmland in 1966 and had been "very active in farming."

The Agricultural Stabilization and Conservation Service, an arm of the U.S. Department of Agriculture, had found that Coyle, 24 other individuals and three trusts had all leased individual blocks of land from a 6,600-acre parcel of land subleased to them by M.A.C Management, that they had all used the same lender, Western Cotton Services, and that all 6,600 acres were farmed for the 25 investors and three trusts by a custom farming company, California Ag Management. Russo, however, claimed that Coyle and all the others were each "independent" farmers and thus eligible for payments of up to \$50,000 in subsidy price

supports. She said each of the investors had "extensive farming experience and each qualified as a "farmer" under the Department of Agriculture's definition: someone who earns at least \$5,000 annually from farming. How an incorporeal concept such as trust can be a "farmer" was left unexplained by Russo.

Whatever the real motivations of Wanger, Coyle, the Westlands, the Justice Department and the Bureau of Reclamation in the prolonged litigation, Wanger's order, if not appealed, will finally force some hard choices by the State Water Resources Control Board, which has ducked the drainage issue since the 1960s. Wanger ruled explicitly that the State Water Board can reject a drain to the Delta if it wants to. For that, Wanger is to be commended. ■

## DELTA CONQUEST, from page 6

While some feel the standards are a giant step backwards from recent levels of protection in the Delta, which were derived from Endangered Species Act actions for Delta smelt and winter-run salmon, the Department of Water Resources views the standards as an opportunity to resume planning with a vengeance to increase exports from the Delta. Once the new Delta standards were signed, the department immediately resumed discussions with the California Department of Fish and Game for signing-off on the long awaited Article VII Agreement. In so doing, Fish and Game would: (1) release the department from any further mitigation requirements for offsetting the indirect and direct effects of their existing Delta pumping operations, (2) give the department the green light to construct and operate the South Delta Facilities and the first stage of the Kern Fan Element of the Kern Water Bank, and (3) would allow the department to proceed with modifying their Corps of Engineer permits to increase their average daily divisions into Clifton Court Forebay (Banks Pumping Plants) and to allow the department to bring their new pumps on line, pumping at maximum design capacity (10,300 cfs).

Wet winters may save the plan from being tested but the next long drought will undoubtedly reveal any substantive flaws in this plan to protect the Delta, which is home to 120 species of fish and provides 60 percent of the fresh water used in California. Unfortunately, as fate would have it, the Delta fish will be the guinea pigs. ■

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