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Can Endangered Species and Cultures Save us From Global Warming?

By Andrew Orahoske

Global warming affects the Earth's climate and ecosystems in complex ways. Measuring the effects of climate change in an effective manner is problematic. Some research focuses on using satellite technologies and complex mathematical models with hopes of simulating the Earth's climate. However, these data are often presented in confusing graphs and complicated tables that fail to convey the real life changes and impacts of global warming. Another gauge of climate change is life itself. The biological diversity of the planet, including all species and human cultures, reacts to climate change in tangible and readily observable ways. Often an individual species or traditional culture provides insight into the overall health of the Earth, a living indicator. This article examines three such biological indicators of climate change and the current legal efforts to protect imperiled species and cultures.

Often an individual species or traditional culture provides insight into the overall health of the Earth, a living indicator.

Coral Reefs

One example of a living indicator of climate change is the invertebrate coral polyps responsible for building the world's biologically rich coral reefs. Many reefs are so immense that they can be seen from space, but the individual corals are fragile and dependant upon tiny algae living within their tissues that provide the corals with energy from photosynthesis. Corals are indicators of climate change because they are vulnerable to increased sea surface temperatures which cause the corals to expel their symbiotic algae, a process known as bleaching. The

http://sunsite.tus.ac.jp/multimed/pics/animals/polar-bear.jpg

increased sea surface temperatures and coral bleaching are directly linked to global warming, and have resulted in significant worldwide coral reef destruction.

In order to protect the corals and to force the U.S. government to take global warming into account when conducting business, the Center for Biological Diversity filed a petition to list the elkhorn and staghorn corals of the Caribbean region under the Endangered Species Act (ESA) in 2004. The elkhorn and staghorn corals are the primary reef building species in the Caribbean and have declined by over 90 percent due in part to the effects of global warming. In response, the National Marine Fisheries Service (NMFS) proposed to list the species under the ESA in May 2005, and NMFS is expected to issue a final rule to list the corals as threatened in May 2006. 70 Fed. Reg. 24359 (May 9, 2005). The ESA provides strong protections to listed species and requires all federal agencies to look before they leap by consulting with NMFS over the impact of projects authorized or carried out by the agencies. For example, when a coal-fired power plant applies for an operating permit, the agencies responsible for authorizing the plant must ensure that the plant will not jeopardize the listed coral species by emitting greenhouse gases. Ultimately, the corals' survival and recovery could be one factor driving the nation's energy policy. Indeed, they may save the rest of us from global warming.

Polar Bears

Another example of a species that is an indicator of climate change is the polar bear. Scientists estimate polar bears could go extinct within the next century because of global warming. Polar bears are completely dependent on the sea ice for survival, but the ice is vanishing at a rate of eight to ten percent per decade with some climate models predicting a completely ice-free Arctic during the summer by 2050. The reduced sea ice has already affected polar bears in western Hudson Bay where they must spend an extra month onshore fasting before the sea ice returns. The Hudson Bay population of polar bears has dropped by about 14 percent in 10 years, from 1,100 in 1995 to fewer than 950 in 2004. The power of this species as an indicator is

simple: If we can do enough to provide sufficient sea ice habitat for polar bears, then we have a better chance of preventing more catastrophic effects of global warming.

In February 2004, the Center for Biological Diversity, Natural Resources Defense Council and Greenpeace petitioned to have the polar bear listed as threatened under the ESA. The ESA requires the Secretary of the Interior to respond within 90 days of receiving the petition, but the Secretary did not meet the statutory deadline. The groups filed a lawsuit in December 2005 asking a federal judge to compel the Secretary to abide by the law. On February 9, 2006, in response to the petition and lawsuit, the U.S. Fish and Wildlife Service announced that listing the polar bear under the ESA may be warranted and initiated a comprehensive status review. 71 Fed. Reg. 6745 (February 9, 2006). If the polar bear receives ESA protections, federal agencies will be required to ensure that any action carried out, authorized, or funded by the U.S. government will not jeopardize the continued existence of polar bears or adversely modify their critical habitat. Together the polar bear and coral protections under the ESA could force the U.S. to adopt a new energy policy that addresses the threats of global warming and finally comes to terms with the ultimate liabilities of an economy based on fossil fuels.

Scientists estimate polar bears could go extinct within the next century because of global warming.

Inuit People

Similar to the corals and polar bears, certain traditional cultures that are directly dependant on natural food sources are also excellent indicators of global health and climate change. The Inuit people of the Arctic have lived in an icy world for millennia, hunting seals and whales side by side with polar bears. As with polar bear, Arctic people are suffering from the environmental effects of global warming. Retreating sea ice has exposed Inuit villages to coastal erosion, and many homes have already fallen into the sea. The traditional food upon which the Inuit depend, including walrus, seals and whales, are all declining due to the loss of sea ice. Scientific consensus indicates that the Arctic is extremely vulnerable to observed and projected global warming and that over the next 100 years, climate change is expected to accelerate, threatening the ecological and cultural viability of the Inuit. The Inuit are threatened with extinction as their homeland melts from under their feet.

On behalf of the Inuit people, the Center for International Environmental Law and EarthJustice filed a petition with the Inter-American Commission of Human Rights in December 2005. Previously, the Commission has recognized the relationship between human rights and environmental degradation but this will be the first opportunity to evaluate the human rights implications of global warming. The petition focuses on the U.S. because it is the largest emitter of greenhouse gases, but refuses to limit domestic emissions or join the Kyoto Protocol. The petition urges the Commission to declare the U.S. in violation of rights affirmed in the 1948 American Declaration of the Rights and Duties of Man and other instruments of international law. A report by the Commission connecting Inuit human rights with global warming caused by industrialized nations could have a powerful impact on worldwide efforts to address global warming. Furthermore, a Commission report may establish a legal basis for holding the U.S. responsible based on inadequate greenhouse gas regulation, and provide a strong incentive for all countries to control greenhouse gas emissions.

In conclusion, the power of living indicators is in the simplicity of their message. Life is both resilient and fragile. Like an ancient tree swaying the wind, the biological diversity of the planet waxes and wanes, gaining species and losing species over the millennia. A strong wind may bend or even break some branches, signaling a threat to the tree as a whole. Global warming is a growing tempest, bending some of the strongest limbs on the tree of life.

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Sue and Settle Tactics Change BLM Plans

By Pam Hardy

In September of 2005 the BLM announced that, pursuant to a litigation settlement with the timber industry, it would be rewriting the Regional Management Plans (RMPs) for all the districts in western Oregon containing "O&C Lands." What they did not reveal is that this "settlement" came after the timber industry had lost on the merits in three courts, and there was every indication that they were about to be permanently denied in the D.C. Circuit. The settlement arose from a long delayed case challenging the validity of the Northwest Forest Plan and particularly its interaction with the O&C Act – a question that had been decided, appealed and affirmed years ago when the plan was first written. The Northwest Forest Plan with all its delicate balances was upheld. Nonetheless the timber industry, under the guise of a non-profit timber advocacy organization, attempted to have the case re-opened in the D.C. District Court, but the case was summarily rejected on *res judicata* grounds. Latin for "the thing has been judged," the D.C. District Court's ruling meant the issue had already been decided by another court, between the same parties. There was every indication that the D.C. Circuit would uphold the *res judicata* ruling. But before the appellate decision the federal government caved. BLM agreed to re-open the entire question of the O&C Lands and the Northwest Forest Plan in the court of public opinion by agreeing to rewrite the management plans of every district in which O&C Lands are found.

This article reviews the laws and legal history leading up to the settlement and explains why the government had every reason to believe that they were about to win on appeal. It reviews the origins of the "O&C Lands," the excesses and litigation that led up to the Northwest Forest Plan, the litigation challenging that plan, and the attempts to re-open the question in another forum. Finally it puts this new RMP process in its proper historical context.

1. The O&C Lands Act

BLM manages over two and a half million acres of forest lands in Western Oregon. Most of that, more than 2 million acres, is under the direction of the Oregon and California Lands Act of 1937 (O&C Lands Act). 43 U.S.C. § 1181a. O&C lands are hotly debated because, unlike most federal lands, Congressional mandates require that 50% of the revenue from O&C lands return to the county in which they are located. *Id*.

The Act gave management responsibility to the Department of the Interior and directed that these lands *shall* be managed

> for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties.

Id.

For 1937 it was a remarkably forward looking act. Apparently long-term sustainability, watershed protection, and recreation were recognized then, as now, as critical elements of a healthy economy. The Act directed that the agency determine the actual productive capacity of the lands "as promptly as possible," but until that time limited harvest to a maximum of 500 million board feet per year. For the next fifty years production continued to increase. At the height of timber production in the late 1980s BLM was authorizing the removal of over 1 billion board feet of timber per year.

> *The Northwest Forest Plan is a delicate balancing act that attempted to reserve some old growth and habitat, protect riparian areas, and still provide the timber industry with logs, and opportunities to show that they could manage land.*

In the late 1960s and 70s the public began to recognize that natural resources were not limitless, and sweeping new laws such as the Clean Air, Clean Water, and Endangered Species Acts were passed. In the 1980s environmental advocates began to realize that timber harvest on federal lands was frequently in violation of these laws. Specifically the Spotted Owl, a species dependant on old growth forests, was nearing the brink of extinction.

2. Spotted Owl Litigation & the Northwest Forest Plan

By the late 1980s environmental groups had brought, and won, numerous cases against the BLM and the Forest Service. Timber production in the Pacific Northwest dropped to 20% of its all time high, economies in timber dependant towns began to drop, and tempers began to flare. In 1993 President Clinton initiated a process to settle the ongoing disputes. *See generally Seattle Audubon Society v. Lyons*, 871 F.Supp. 1291 (W.D. Wash, 1994) (explaining the background and history of the legal struggle over management of the federal forests that are home to the northern spotted owl). The result was the Northwest Forest Plan.

The Northwest Forest Plan is a delicate balancing act that attempted to reserve some old growth and habitat, protect riparian areas, and still provide the timber industry with logs, and opportunities to show that they could manage the land. It split the timber lands into five primary categories. "Late Successional Reserves" (31% of the lands covered by the Northwest Forest Plan) are primarily old-growth, and are managed primarily for habitat conservation for endangered species. "Riparian Reserves" (11%) are areas along waterways managed specifically for aquatic health. "Matrix" lands (16%) are managed under the traditional multiple use standards. "Adaptive management areas" (6%) are essentially experimental lands in which the timber industry is given a wide authority to suggest creative management strategies. The remaining 36% of the land was withdrawn for other reasons such as national parks or recreation areas.

3. The Seattle Cases

Not surprisingly both sides, environmentalists and the timber industry, sued about the adequacy of the Northwest Forest Plan. Environmentalists thought there was not enough habitat protection; the timber industry thought there was too much. Environmentalists brought their cases in the state of Washington, *Seattle Audubon Society v. Lyons*, 871 F.Supp. 1291 (W.D. Wash, 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). The timber industry brought their case in Washington D.C. Because the two cases were so similar the Washington D.C. case was stayed, and the merits of both cases were heard together in the state of Washington (the *Seattle* cases). *See Seattle Audubon*, 80 F.3d. at 1405-06.

The timber industry has consistently sought for increased logging on O & C Lands. In *Headwaters v. BLM*, the timber industry argued that "exempting certain timber resources from harvesting to serve as wildlife habitat would be inconsistent with the principle of sustained yield" embodied in the O&C Lands Act. *Headwaters, Inc. v. Bureau of Land Management, Medford District*, 914 F.2d 1174 (9th Cir. 1990). In other words they argued that leaving any old growth habitat for spotted owls was illegal.

The Seattle Court firmly rejected this view. The Court found that, in actuality, the *Headwaters* court had affirmed a plan leaving over half the acreage out of timber production, and that because the Spotted Owl had not been listed as a threatened species yet the *Headwaters* Court had not discussed the O & C Lands Act's interaction with the Endangered Species Act. *Seattle Audubon*, 871 F.Supp. at 1313-14; *See also Headwaters*, 914 F.2d at 1184 (Ferguson, J., dissenting). The Court further found that numerous additional courts had held that the O&C Lands Act did not prevent the operation of other laws such as the Federal Land Policy and Management Act (FLPMA), and the Endangered Species Act. The result was that the *Seattle* Court firmly upheld the Northwest Forest Plan as written. Both sides appealed.

On appeal the Ninth circuit completely affirmed the District Court. *Seattle Audubon*, 80 F.3d at 1405. Curiously, though, on appeal the timber industry abandoned all substantive issues including the O&C Lands Act claims at the 9th Circuit. Instead they alleged that "the district court [had] conspired with the Unites States to manipulate the Declaratory Judgment Act and federal jurisdiction principles to thwart" having the case heard in the D.C. District Court. *Id.* The Ninth Circuit found this allegation "untenable" and upheld the District Court decision. *Id*.

4. Revitalization of the D.C. case & the Settlement Agreement

Shortly thereafter the timber industry attempted to revive the claims long stayed in the D.C. District Court. The D.C. District Court firmly rejected the effort on the basis of *res judicata*. *American Forest Resource Council v. Shea*, No. 94-1031 (TPJ) (D.C. 2001). In other words the court refused to rehear the argument on the basis that the industry had had a full and complete opportunity to present their claims, and a court of competent jurisdiction had decided the case on the merits.

It was only after this devastating loss, when virtually all prospect for rehearing of the case on the merits had vanished, did the government and the industry's attorneys agree to settle. Settlement Agreement Filed Aug 8, 2003. Case No. 94-1031-TPJ (D.C. District Court). By any measure the timber industry received an extraordinary opportunity. For some reason, when the federal government was finally in a position to put litigation over the O&C lands in the Northwest

Forest Plan to rest they agreed to re-open the question by agreeing to rewrite the management plans for all the counties in western Oregon in which O&C lands existed. Because this costly endeavor will certainly raise questions about the interaction of the O&C lands and the Northwest Forest Plan the timber industry will finally have the opportunity to re-open the question despite the fact that they have lost on this issue in three courts.

5. The Current Situation

The BLM is presenting the O & C Lands Resource Management Plan as if it is the result of a settlement in which the timber industry had brought a substantive claim about O&C lands and that there was reasonable room to dispute the outcome of the case. That is simply not true. The BLM had every expectation that they would win on the *res judicata* claim in the D.C. Circuit with just as much confidence and finality as if they had won in the D.C. District Court.

In August 2005, the BLM issued a news release announcing the scoping process stating the following:

> Recent court actions over these lands resulted in a settlement agreement between the BLM, the American Forest Resource Council, and other parties. The lawsuit asserted that BLM was violating the O&C Land Act because large blocks of O&C lands were designated as "reserves" and not subject to timber harvest.

The O&C Lands Act directed the Department of the Interior to manage these lands under the principles of "sustained yield" managing these lands for "permanent forest production" and directed that about half of the proceeds of these sales of public timber be directed to the Counties of western Oregon.

The news release did not mention that the claims "asserted" by the lawsuit had already been held to be invalid. It also failed to mention that the O&C lands are not only subject to the O&C Lands Act. They are also subject to FLPMA and the Endangered Species Act. They also blatantly failed to mention that the O&C Lands Act also calls for the lands to me managed for watershed health and recreation.

When BLM staffers were questioned about the nature of the suit that led up to the settlement all they provided was a copy of the settlement agreement, which mentions nothing about the *res judicata* ruling. They also provided a copy of the 9th Circuit *Headwaters* case, but not the *Seattle* case which actually ruled on the merits of this issue superseding *Headwaters*.

Conclusion

The timber industry is not getting just a second bite at the apple here, they are getting a second, third, and fourth. They have already lost on the merits in the *Seattle* district court, again in the 9th Circuit, and a third time in Washington D.C. Yet for some reason the U.S. government agreed to allow the case to be entirely re-opened in this RMP process. The next battle for the old growth will be in the court of public opinion. Perhaps this story in combination with the recent flood of fraud and influence peddling investigations in Washington will help Oregonians see how such political favors actually affect their own back yard. While no one loved the Northwest Forest Plan most agreed that it was a compromise that everyone – including the Spotted Owls and the Marbled Murrelets – could live with. Political giveaways have ripped open that delicate balance, and threaten to plunge the northwest back into the tumultuous days of the late '80s before any kind of balance had been established.

For more information visit: http://www.oregonheritageforests.org/ or http://www.blm.gov/or/plans/wopr

The GOP Endangers the ESA

By Jonathan Evans

The Endangered Species Act (ESA) has been America's most important law fostering the preservation of our nation's imperiled species. To date, the ESA has helped species large and small survive against the odds. From the well-known gray whale and grizzly bear to the Willamette daisy and Fender's blue butterfly in Oregon's Willamette Valley, the ESA has helped prevent the extinction of over 1200 species.

A recent scientific study in the journal BioScience found that species given more protection under the ESA are more likely to be on the path towards recovery. Taylor *et al.*, BioScience 55: 360-367 (April 2005). The study also found that species for which "critical habitat" had been designated for two or more years also appeared more likely to be recovering. *Id*.

Now more than ever the protection of the Endangered Species Act is critical. It is well documented that the world faces a global extinction crisis. *See e.g*. Thomas *et al.*, Science 303: 1879 – 1881 (March 2004); Myers *et al.*, Proc. Nat'l Acad. Scis. 98: 5389-5392 (2001). Despite this dire situation, over 98% of species listed under the ESA are still with us today. The vast majority of Americans support this success. According to a recent poll conducted by the University of Arizona, 84% of Americans support the current or stronger endangered species protections. Yet, some in Congress feel the need to weaken the ESA to appease a narrow group of property rights interests. Representative Richard Pombo (R-CA) introduced and passed the deceptively titled Threatened and Endangered Species Recovery Act, H.R. 3824, (TESRA) in the House of Representatives in September of 2005. By a vote of 229 to 193, the House approved TESRA largely along party lines.

Similarly, Senator Mike Crapo (R-ID) introduced the Collaboration for the Recovery of Endangered Species Act, S. 2110, (CRESA) in the Senate in December of 2005. Many of the troubling rollbacks of the House bill are also included in the Senate version. Under the guise of increasing the populations of threatened or endangered species these bills are thinly veiled attempts to benefit special interests in the development, logging, mining, and ranching industries. If the Senate passes CRESA, the resulting changes will tear holes in the safety net provided by the ESA. It is critical for advocates and constituents to contact their Senators in opposition to these rollbacks.

Under the guise of increasing the populations of threatened or endangered species these bills are thinly veiled attempts to benefit special interests ...

Legislative Analysis of Congressional Endangered Species Act Amendments

Recent Congressional changes to the ESA will have broad implications for habitat conservation and protection. Together the House and Senate versions of ESA "reform" threaten many crucial aspects of the nation's preeminent environmental law. This article will address only a few of the negative aspects of the House and Senate bills. As discussed below, these changes will allow development without federal oversight, require compensation to landowners when development prospects are impacted, eliminate habitat protections for species, include development interests in the development of species recovery plans, and hinder recovery by codifying the "No Surprises" policy.

1) Eliminates Federal Oversight (TESRA § 12, CRESA § 303)

TESRA limits review of projects that will impact listed species. It allows development projects harmful to listed species to proceed by default without review by government scientists at the US Fish and Wildlife Service and NOAA Fisheries. The Endangered Species Act currently prohibits projects resulting in take of listed species from proceeding until they are reviewed and approved by government scientists. 16 USC § 1538; 50 CFR 17.31. The current review can not take place unless the agency or corporation proposing the project provides detailed information about the project and its likely effects. TESRA changes this precautionary process by specifying that destructive projects are allowed to proceed unless FWS intercedes to stop them. "If the Secretary fails to provide a written determination before the expiration of the [180-day period]…the Secretary is deemed to have determined that the proposed use complies…." TESRA at 57, line 6.

CRESA would also limit Federal review of environmentally destructive projects. CRESA requires Fish and Wildlife Service to provide a "provisional permit" for any project on private property (except for "ground clearing") if there is no recovery plan in place. CRESA at 48, line 13-20. This far reaching permit only requires the project proponent to conduct field surveys to determine where species exist prior to development and begin

conservation measures. CRESA at 48, line 1-12. There is no review of the conservation measures in the permit application to ensure that they are meaningful or adequate to offset the harm. These provisions would allow "provisional" activities like mining and logging in endangered species habitat to proceed indefinitely with no federal oversight. *See* CRESA at 48.

Oversight of development interests by federal agencies is a crucial part of the species protection. Just as the Securities and Exchange Commission is charged with oversight of publicly traded companies to limit corporate abuse, the Fish and Wildlife Service and NOAA Fisheries play a critical role in policing development to ensure that endangered species and their habitat are protected. Agency roles should be strengthened in light of existing threats, not removed to favor development.

2) Compensation for Development Hinders Protections for Listed Species (TESRA § 13, CRESA §§ 30D, 303)

TESRA requires the federal government to pay private landowners for the loss of commercial value when an action is prohibited by the protections of the ESA. TESRA calls this provision "conservation aid." The bill specifies that "[t]he amount of the Aid is to be no less than the fair market value use that was proposed by the property owner." TESRA at 62, line 13. That is, the federal government would have to pay for profits developers hoped to gain by developing that portion of the land, including any profits lost due to mitigations asked of the landowner, such as retaining riparian corridors or setting aside mitigation habitat.

CRESA would create similar tax breaks to compensate private landowners for compliance with the ESA on private property. However, CRESA fails to limit these tax breaks to landowners who engage in active conservation—the creation or enhancement of endangered species habitat. "[C]osts paid or incurred… in carrying out… any [] Federal- or State-approved conservation and recovery agreement" can be compensated via tax breaks. CRESA at 57, line 12-17. That is, instead of paying private landowners to create new habitat, CRESA would primarily be paying developers to comply with the law. CRESA goes further and requires the federal government to reimburse the developers for costs incurred from environmental analysis under National Environmental Policy Act (NEPA). CRESA at 54, line 11-23.

Paying people to comply with the law sets a dangerous precedent. Compensation for compliance with the ESA and NEPA will have a tremendous impact on the federal budget. Initial estimates are staggering if every landowner who has the ability to develop on habitat that could be used by a listed species must be paid once they propose a development project. Paying large development costs would severely limit funds that could be used to pay for staff salaries, conservation agreements, recovery plans, and other conservation costs.

In addition, the compensation provision will likely reduce the enforcement of conservation regulations, as paying people to comply with the law has a chilling effect on those government agencies charged with enforcing the law. A similar compensation provision was recently passed in Oregon, under Measure 37, requiring State and local governments to pay landowners to comply with land use laws. Due to budget deficits, government agencies have "waived" land use and zoning laws and allowed development to proceed contrary to established land use laws. With the current federal budget deficit, there would be limited funds available to pay landowners, and development would likely proceed on important habitat for listed species.

3) Eliminates Habitat Protections (TESRA §§ 5 and 9, CRESA § 4)

The reduction of habitat protections for listed species will also ease restrictions on development under the ESA. TESRA ignores the crucial role of habitat in protecting species, repealing all of the critical habitat provisions of the Act. TESRA at 8, line 4. Critical habitat is the area "essential for the conservation of the species." 16 USC § 1532(5). As stated in a recent BioScience study, species for which "critical habitat" had been designated for two or more years appeared more likely to be on the road to recovery. Taylor *et al.*, BioScience 55: 360-367 (April 2005). In the place of the critical habitat provisions, TESRA requires that recovery plans identify "those specific areas that are of special value to the conservation of the species." TESRA at 20, line 20. This provides no legal protection to these areas, and allows industry and commercial interests to determine which areas are of special interest to endangered species. TESRA at 23, line 7.

In a similar vein, CRESA would eliminate mandatory timelines to designate critical habitat for endangered species, giving the Secretary of Interior complete discretion to prioritize designations and delay habitat designations based in part on "minimizing conflicts" with "construction, development…or other economic activities." CRESA at 18, line 7-10. Unlike the ESA, CRESA fails to contain mandates for completing any of these actions at any particular time and allows the Secretary to indefinitely delay action and deny critical

habitat protection altogether. CRESA at 19-20. CRESA would also eliminate essential checks and balances to protect species habitat by banning citizen groups from seeking court orders to implement any critical habitat schedules or deadlines. CRESA at 21, line 5-8.

Habitat loss is one of the key factors driving species extinction. Eliminating provisions for critical habitat designation will further erode habitat upon which species depend for conservation and recovery. Instead of substituting critical habitat designations with vague and ineffective habitat requirements, efforts would be better focused on designating and improving habitat necessary to prevent extinction.

Destroying the Endangered Species Act is like defacing America. (c) Earthjustice

4) Requires Recovery Plans to Include Development Interests (TESRA §§ 9 and 10, CRESA § 4)

TESRA specifically requires that the recovery plans include the desires of development and commercial interests. It requires the Secretary to ensure that each recovery team "includes sufficient representation from constituencies with a demonstrated direct interest… in the economic and social impacts of its conservation to ensure that the views of such constituencies will be considered in the development of the plan." TESRA at 23, line 7. Currently, recovery plans are supposed to represent the biological needs and goals for threatened and endangered species, as developed by the scientific experts. TESRA would allow commercial development interests to determine the recovery plan of the species.

CRESA would revise the recovery planning process to allow industry to influence and overrule the decisions of wildlife experts due to "economic, social or professional interest." CRESA at 24, line 9-10. A newly created "executive committee" made up in part by industry interests would make final edits and revisions to the recovery plan. CRESA at 23. Industry and economic interests do not have the scientific expertise to make effective decisions regarding conservation measures that will lead to the recovery of a species. Furthermore their interests may be directly opposed to the recommendations of scientists. Economic influence should not be substituted for sound scientific decision making in species recovery efforts.

5) Codifies "No Surprises" Regulations (TESRA § 12, CRESA § 303)

TESRA codifies the "No Surprises" policy—currently a highly controversial administrative regulation that has been widely condemned by scientists. TESRA at 52, line 12. TESRA prohibits the U.S. Fish and Wildlife Service and NOAA Fisheries from updating failing Habitat Conservation Plans unless the private land owner holding the permit agrees. Similarly, CRESA would take "No Surprises" and make it law. CRESA at 50-53. Federal agencies would be unable to update or revoke a permit that authorizes harm to an endangered species, even if new information indicates that the original plan was inadequate and even if it is causing the extinction of the species.

CRESA would revise the recovery planning process to allow industry to influence and overrule the ddecisions of wildlife experts due to "economic, social or professional interest."
CRESA at 24, line 9-10.

Conclusion

Recent amendments to the ESA approved by the House and proposed by the Senate create sweeping changes to protections of listed species and their habitat. The majority of these changes foster increased development at the expense of species and taxpayers. Habitat for listed species would receive fewer protections under the changes which, in turn, foster increased development in areas that are habitat for threatened and endangered species. The compensation provisions for private landowners would be incredibly costly to implement and set a dangerous precedent of paying people to comply with the law. This would essentially tie the hands of the FWS in protecting the habitat of listed species. Aspects of the ESA could be improved by strengthening the Act, but current proposed revisions do more to encourage development than protect listed species.

For a full analysis of the House and Senate bills visit: www.biologicaldiversity.org. The author would like to thank Brian Nowicki and John Kostyack for their contributions to this legislative analysis.

New Precedent in Colorado for Adjudication of Federal Reserved Water Rights

By Lindsay Krey Gillham

A battle is brewing in Colorado that could extend to other states where federal reserved water rights are adjudicated and quantified in state courts. In Colorado, the National Park Service (Service) agreed to relinquish certain water rights in the Black Canyon of the Gunnison National Park (Black Canyon). Environmental groups subsequently sued the Service for violating federal laws by "divesting" water rights necessary to fulfill Black Canyon's purpose. The importance of this case is twofold. First, the case creates a powerful precedent for state water courts to stay adjudication of federal reserved water rights when federal claims are at issue. Second, the outcome may determine whether and how the federal government will seek similar water rights agreements in the future.

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A. Summary of the Federal Reserved Water Rights Doctrine

The federal reserved water rights doctrine provides that the federal government reserves water rights upon reservation of federal lands. *See Winters v. United States*, 207 U.S. 564 (1908) (recognizing the existence of an implied water right for an Indian reservation); *Arizona v. California*, 373 U.S. 546 (1948) (extending *Winters* to include implied water rights for all federal reservations). Rooted in the U.S. Constitution's Commerce and Property Clauses, Art. I, §8 and Art. IV, § 3, respectively, the premise of the doctrine is that the federal government's reservation of land for a stated purpose necessarily implies an attached reservation of water to carry out the purpose. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Under the doctrine, the federal government reserves the right to "appurtenant … unappropriated [water] … needed to accomplish the purpose of the reservation." *Id*. The priority date of the right is the date of reservation of land and the quantity reserved is limited to water necessary to fulfill only the purposes of the reservation. *United States v. New Mexico*, 438 U.S. 696 (1978). Federal reserved water rights may be claimed at any time, even if the water has not been put to beneficial use. *United States v. City of Denver*, 656 P.2d 1, 21 (Colo. 1982). While the breadth of federal reserved water rights has been contested, the doctrine itself has been applied to the full spectrum of federal land reservations including Indian reservations, national parks, refuges and other public lands, and wilderness areas. *Winters*, 207 U.S. 564; *Cappaert*, 426 U.S. 128; *City of Denver*, 656 P.2d 1; *Sierra Club v. Block*, 622 F. Supp. 842 (D.C. Colo. 1985). The heart of the Black Canyon case is whether federal reserved water rights may be divested by the federal government after a conditional grant of water rights is made.

B. Background of Federal Reserved Water Rights at Black Canyon of the Gunnison National Park

The Black Canyon of the Gunnison National Monument was reserved in 1933 for "the preservation of the spectacular gorges and additional features of scenic, scientific, and educational interest." Proclamation No. 2033, Black Canyon of the Gunnison National Monument – Colorado, By the President of the United States of America (March 2, 1933). Because of its outstanding values, Black Canyon was granted National Park status in 1999. Black Canyon's wilderness designation also provides significant protection to the canyon's resources. In 1978, under a conditional decree, a Colorado water district awarded Black Canyon the instream flow of the Gunnison River necessary to carry out the Monument's purposes. Interlocutory Decree (Decree), Dated March 6, 1978. The Decree required the Service to subsequently file an application for quantification of the water rights conditionally granted. Id. The Service submitted the application for quantification with the Colorado water court in 2001, requesting 300 cfs base flow plus shoulder and peak flows under the 1933 reservation date. A

2003 settlement agreement retained base flow, but gave up shoulder and peak flows.

Upon announcement of the proposed reservation of 300cfs without peaks and flows, environmental groups sued the Service under several federal laws. The Colorado water court adjudicating the quantification of the water right granted a stay in the adjudication to allow the environmental groups' federal claims to be heard in a federal court. The Colorado Supreme Court affirmed the water court's stay and the federal claims are now before federal court.

C. State Court Jurisdiction Over Adjudication of Federal Reserved Water Rights and the *United States v. Colorado State Engineer* Opinion

The McCarran Amendment (Amendment), 43 U.S.C § 666 (2004), waives federal sovereign immunity in water rights adjudications, allowing the federal government to be brought into state court for basin-wide adjudications. *City of Denver*, 656 P.2d at 21. The Amendment is often touted as "evidence of congressional recognition of the primacy of western states' interests in regulating and administering water rights." *Id.* at 23; *California v. United States,* 438 U.S. 645, 656 (1978*)*. Many state courts have exercised jurisdiction over federal questions of fact and law, including interpreting the intent and meaning of Indian treaties and executive orders, purposes of public land reservations, and the intent of federal laws including the Wilderness Act of 1964. *See In re. General Adjudication of Big Horn River System*, 753 P.2d 76, (Wyo. 1988) (finding an implied water right for the Shoshone Indian reservation's primary purpose of agriculture); *United States v State of Idaho*, 135 Idaho 655 (Idaho 2001) (rejecting an implied federal reserved water right for Deer Flats National Wildlife Refuge); *Sierra Club v. Block*, 622 F. Supp. 842 (D.C. Colo. 1985) (holding that water rights were reserved under the Wilderness Act for all wilderness areas in Colorado). While state courts generally are afforded jurisdiction over federal reserved water rights adjudications, jurisdiction becomes a contentious issue when federal issues are at the heart of the quantification.

The Colorado Supreme Court's affirmation of the water court's stay in *Colorado State Engineer* sets a new and bold procedural precedent for federal water rights adjudications in Colorado. *United States v. Colorado State Engineer*, 101 P.3d 1072, 1079 (Colo. 2004). The Court held that the purpose of the McCarran Amendment is narrow and precise and "limited to proceedings to determine or administer the rights to the use of water." *Colorado State Engineer*, 101 P.3d at 1079, *citing Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976). The Court noted the Amendment fails to give state courts reviewability of "the decision making process of federal entities … for compliance with federal law." *Colorado State Engineer*, 101 P.3d at 1080. The majority stated that the Administrative Procedures Act (APA), 5 U.S.C. § 702 (2000), places federal issues of fact and law clearly in the jurisdiction of federal courts, and not state courts. *Id*.

Further, the Colorado Supreme Court refused to reverse the stay of adjudication issued by the water court, since stays must be upheld unless the granting courts decision is "manifestly arbitrary, unreasonable, or unfair." *Colorado State Engineer*, 101 P.3d at 1081. The Court concluded that, because federal courts have "exclusive jurisdiction over federal claims," the water court's stay was not unreasonable or arbitrary. *Id*. at 1084. Similarly, the Court rejected arguments that the stay was oppressive and extreme. *Id*. Instead, the Court ruled that, because the state water court retained jurisdiction over the quantification of water, the stay was properly within the court's discretion. *Id*. at 1085. The stay only delayed an already slow water adjudication process. *Id*.

The dissent presents a different interpretation of the Amendment, arguing that the federal claims at issue are at the very heart water quantification, not ancillary to water quantification and adjudication. *Id*. at 1084. While the dissent concedes that exclusive jurisdiction is not granted to either the state or federal courts under the Amendment, the dissent argues that the Amendment strongly favors adjudication in state courts where the court has a thorough understanding of water allocation in the entire basin and the impact of the quantification on other water users. *Id*. at 1084-85. The dissent also argues that the United States did not dispose of property since Black Canyon does not actually possess a water right until it is quantified by the water court. *Id*. at 1089.

The Colorado Supreme Court's decision is significant since it stands in contrast but not necessarily in conflict, with a trilogy of Supreme Court cases which have allowed state courts to adjudicate federal questions pertaining to water rights in spite of efforts to remove each case to federal court. *See Colorado River Water Conservation District*, 424 U.S. 800; *United States v. District Court in and for Water Division No. 5*, 401 U.S. 527 (1971); *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971). The Colorado Supreme Court considered some factual differences between the trilogy and the Black Canyon case. For example, the Court noted that, unlike in *Colorado River*

Water Conservation District where the parties involved in both the federal and state suit were the same, the parties in Black Canyon's water quantification were different parties than those involved in the federal claims case. *Colorado State Engineer*, 101 P.3d at 1081. The Court was also clearly concerned that if the water court quantified the water right before the federal claims were adjudicated, under the principle of *res judicata* the quantification question could not be reexamined even if it was determined that the federal government's application violated federal laws. *Colorado State Engineer*, 101 P.3d at 1083 *citing Nevada v United States*, 463 U.S. 110, 130-31 (1983). Finally, an important distinction between the Court's majority opinion and the dissent was the majority's conclusion that determining the legality of the application was not a quantification of the right. *Colorado State Engineer*, 101 P.3d 1084. While the dissent rejected this argument as a distinction that was easier in theory than in reality, it sets precedent for future plaintiffs seeking to have federal water rights applications reviewed first in federal courts before being adjudicated in state courts. The Supreme Court's majority opinion did not reject the jurisdiction of the state water court to hear federal questions in water rights cases, but certainly noted the federal court's strong interest and ever-present jurisdiction over federal claims.

D. Federal Claims Over Black Canyon's Water Rights Application

A federal court is now given the task of addressing important questions about what obligations the federal government has toward federal reserved water rights. The federal court must determine whether the water retained under the settlement agreement is sufficient to fulfill the purposes of Black Canyon. The court must also consider whether the argued "disposal" of the water right is a "disposal" of property and, if so, whether the Service can disclaim or dispose of the water right. Finally, the court will consider whether the Service's application for water rights, which limits the water right conditionally granted, is a federal action subject to the National Environmental Policy Act (NEPA), 43 U.S.C. § 4331 et. seq. The court's decision will determine how the federal government moves through state water rights adjudications in the future, including whether environmental analysis and public input are necessary, whether Congress must act if the government claims less water than that which was conditionally granted, and the type and descriptiveness of information that must be provided to demonstrate that enough water is reserved to carry out the purpose of the reservation.

The heart of the Black Canyon case is whether federal reserved water rights may be divested by the federal government after a conditional grant of water rights is made.

E. Overview of Policy Implications of the Black Canyon Case

The heart of the current debate is the place of state and federal courts in allocation of water. While plaintiffs argue that adjudication of federal claims, like NEPA and the National Park Service Organic Act, do not preclude subsequent water adjudication in Colorado's water courts, many argue that the water court's stay and the Colorado Supreme Court's affirmation diminishes Colorado's power over water allocation. Indeed, the Court's decision may inspire future plaintiffs hoping to litigate first in a federal court to file and argue case similar to the environmental claimants in the Black Canyon case. However, while *Colorado State Engineer* is precedent, it does not send all subsequent cases of the like directly to federal court. The Court left the discretion of the stay to the water court, discretion that other water court judges may exercise differently to protect the state's jurisdiction over water quantification. Regardless of the outcome of the federal case, *Colorado State Engineer* has changed procedural landscape of water law by giving, at least in this one instance, a federal court a role in determining issues often left to the states. All sides will be watching to see whether other state courts follow Colorado's lead.

The Coalition Against CAER Environmental Racism

Note: A version of the following articles will appear in Earthjustice's forthcoming Issue Paper on Human Rights and the Environment, *as presented to the Commission on Human Rights for the United Nations in Geneva, to be available at* http://www.earthjustice.org/regional/international, under "Right to a Healthy Environment."

Arctic Drilling Threatens the Caribou People

"The Gwich'in are caribou people… Our whole way of life as a people is tied to the Porcupine caribou. It is in our language, and our songs and stories." Sarah James, Board Member, Neet'sai Gwich'in

By Pamela Orenstein

For at least 10,000 years, the Gwich'in, or "Caribou People," of Alaska have lived by hunting on a coastal plain bordering the Arctic Ocean which contains the breeding ground of the Porcupine caribou herd. The Gwich'in depend on hunting the 130,000 head Porcupine caribou herd for approximately 75 percent of their protein and calories – as well as clothes, tools and other life-sustaining materials. The fate of the Gwich'in is inextricably linked to that of the Porcupine Caribou and the Gwich'in and the caribou live in a delicate balance. The herd and its birthing ground are so significant that the Gwich'in call the coastal plain *Izhik Gwats'an Gwandaii Goodlit*, "The Sacred Place Where All Life Begins." The same coastal plain that has been home to both the Porcupine Caribou and the Gwich'in is suspected to hold billions of barrels of crude oil and has been targeted by the federal government and oil and gas companies to be opened up for drilling.

Opening up the coastal plain to drilling threatens the breeding grounds of the porcupine caribou herd and threatens the culture and livelihood of the Gwich'in. Moreover, Congressional debates and media coverage have neglected to address that oil exploration and drilling impacts the physical basis of Gwich'in culture and subsistence. As a result, the threats facing the Gwich'in and their aboriginal land illustrate the disparate impact that minority communities often face in the constant struggle for energy security.

The U.S. Fish and Wildlife Service has recognized that major environmental impacts will result from oil and gas development on the coastal plain. Infrastructure, physical changes to the land, pollution, noise, and the presence of humans would be certain to push wildlife away from affected areas. USGS, *Arctic Refuge Coastal Plain, Terrestrial Wildlife Research Summaries*, USGS/BRD/BSR-2002-0001 (2002). The Porcupine caribou herd would be displaced from its safe calving grounds, polar bears would be displaced from their denning areas, and muskoxen would be displaced from their streams and winter forage.

Infrastructure accompanying oil extraction, such as drilling platforms, roads, power stations, pipelines, and processing, maintenance, and storage facilities, will cause substantial habitat loss and fragmentation. Habitat fragmentation resulting from oil development impairs movement of wildlife between coastal and inland habitat impacting nutrition, and herd reproduction. National Academy of Sciences, *Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope* (2003). Building roads and oil well pads in ANWR would require immense amounts of gravel, which would be mined from stream beds and elsewhere, permanently altering hydrology and fragile ecosystems. Furthermore, because the cold climate in the northern latitudes provides a shortened growing season that is more susceptible to long term damage from environmental degradation, impacts caused by oil and gas exploration would be long term, and in many cases permanent.

The Arctic Wilderness first received government protection in 1960, during Eisenhower's Presidency. The size of the protected area was then doubled under the Carter Administration, and was renamed the Arctic National Wildlife Refuge (ANWR). Arctic National Interest Lands Conservation Act, 94 Stat. 825 (1980). The coastal plane and aboriginal hunting ground of the Gwich'in has since been off limits to developers, as it falls within ANWR's 19 million acre boundary. However, in 2005, this area was closer than ever before to the threat of oil drilling.

Congressional proponents of opening ANWR to oil and gas developers had a major victory when they succeeded in getting language that would open up the refuge included in the Budget Resolution for the Fiscal Year 2006. The resolution was passed by both the United States Senate and the House of Representatives. While non-binding, it set the stage for the vote on a Budget Reconciliation Bill which would lay out instructions on how to implement the

budget resolution. Passage of the budget resolution including the ANWR provision was understood as a major threat to ANWR, in part, because such language, when included in the budget bill, would be immune from filibuster. The effort to include language opening ANWR in the budget bill was ultimately unsuccessful, as House leadership ultimately stripped the language from the bill. A second major attempt to open ANWR next appeared in the 2006 Defense Appropriations Bill. The move, however, was not immune to filibuster. Proponents for drilling in ANWR fell four votes short of the necessary 60 to stop the filibuster and pass the Defense Bill with the language to open ANWR included.

Drilling proponents predicted that Hurricane Katrina's disruptions to oil production in the Gulf of Mexico, and the recent increases in gasoline prices, would fuel congressional support for drilling in the Arctic Refuge. However, critics of opening the Refuge were quick to point out that the oil produced from ANWR would not reduce the price of a gallon of gas or help consumers. While ANWR may hold one of the nation's best on-shore prospects, environmentalists emphasize that America's petroleum reserves are tiny compared with resources in the Middle East, while U.S. consumption is enormous. According to the Wilderness Society, the amount of oil that the U.S. Geological Survey estimates could be recovered from the Arctic Refuge would amount to less than a six-month supply for American consumers. Even less natural gas occurs under the Refuge relative to U.S. demand. Moreover, oil from the refuge is expected to accommodate roughly 2 percent of U.S. demand for oil. Lastly, oil taken from the refuge wouldn't make it to the market for at least 7 to 10 years, making it impossible for drilling to correct for present day constraints on oil availability. Thus, even if the highest predictions of oil in the refuge were to come true, oil from beneath the refuge would have a negligible impact on the on the global oil market, and on the price of oil. Perhaps most importantly, drilling for oil in the refuge in no way addresses our country's long-term energy problem.

Opening up the coastal plain to drilling threatens the breeding grounds of the porcupine caribou herd and threatens the culture and livelihood of the Gwich'in.

While opening ANWR may have some minor impact on U.S. dependence on off-shore oil, it is important to consider at what cost. Moreover, it is equally important to consider how these costs will be distributed. Despite their aboriginal ties to the land, Gwich'in interests have largely been overlooked in this decades-old debate about energy security. Increased human activity and resource extraction will bring devastating impacts to their aboriginal land. The potential for oil spills, pipe leaks, and oil flares threaten the integrity of the area, which is the basis of the Gwich'ins' food and water. Adverse human health effects stemming from air pollution due to oil flaring will negatively impact respiratory health of the Gwich'in.

The Gwich'in's fundamental right to political participation has also been compromised. Although disproportionately impacted by the potential extraction of oil and gas resources from the Arctic, the Gwich'in have largely been marginalized in the discussion. Most of the Congressional debate over drilling has failed to mention impacts on native tribes, and their voices have largely been drowned out in the media.

The Gwich'in are a place-based people who look to the land and the wildlife to support their traditional, subsistence lifestyle. To threaten that land and wildlife is to threaten the very existence of the Gwich'in. While the Gwich'in were able to narrowly escape Congress' latest attempt to open their land to drilling interests, their fate hangs in the balance as Refuge defenders prepare for similar affronts to the Refuge during the 109th Congressional Session.

For more information visit: http://www.gwichinsteeringcommittee.org

Katrina Reveals Environmental Injustice

By Erin Ganahl and Pamela Orenstein

Extreme weather events threaten coastal communities around the world. The harm caused by these natural disasters is often exacerbated by previous environmental damage, such as the destruction of coastal ecology which can serve as a natural buffer. Hurricane Katrina and its aftermath bring to the forefront the potential for increased destruction where the environment has been compromised by human actions.

1. Damage Wrought by Hurricane Katrina

Hurricane Katrina caused substantial damage to the coastal regions of Louisiana, Mississippi, and Alabama. It has been declared the most destructive and costliest natural disaster in the history of the United States. Over one million people were displaced by Katrina, the death toll stands at 1,163, and the damage is estimated to cost more than $200 billion. When the storm came ashore, it caused a tremendous amount of environmental damage, swamping dilapidated drinking water and sewage systems, hitting more than 60 major industrial facilities, inundating

four Superfund waste sites, and adding unknown contaminants to the toxic flood. Katrina caused nine oil spills totaling more than 7 million gallons, together ranking as one of the biggest U.S. spills in history. *See* http://www.nrdc.org/legislation/hk/hk.pdf.

2. Contributing Factors

Environmental destruction made the gulf coast, and particularly New Orleans, Louisiana, far more vulnerable to the hurricane's destructive force. Among the environmental harms that contributed to the degree of damage caused by Katrina is the rise in ocean temperatures, which has been linked to greenhouse gas emissions and global climate change. Scientific studies have repeatedly indicated that the warming climate caused by heat-trapping pollution increases the severity of tropical storms, elevating category three storms into category four and so forth.

Furthermore, depletion of Louisiana's coastal wetlands left towns and cities more at risk to Katrina's impact. Over the past century, a widespread system of embankments, canals and levees has been constructed along large parts of the Mississippi River. As a result, more than one million coastal wetlands have been drained, lost to development, or have been deprived of the Mississippi River sediments that are necessary for their continued existence. Because coastal wetlands serve as a strong barrier to destruction from tropical storms (one square mile of wetlands is needed to reduce the height of a storm surge by one foot), the substantial loss of Louisiana's wetlands made New Orleans and other, smaller communities, much more vulnerable to the storm surges brought on by Hurricanes Katrina and Rita during in 2005. Diversion of sediment deposition also contributed to land subsidence in coastal areas such as New Orleans, as did the extraction of oil and gas from rock layers underneath the delta. The resulting subsidence left New Orleans more vulnerable to the flooding caused by Hurricane Katrina. *See* Tim Hirsch, *Katrina damage blamed on wetland loss*, BBC NEWS, Nov. 1, 2005, *available at* http://news.bbc.co.uk/1/hi/world/americas/4393852.stm.

3. Disproportionate Harm, Disproportionate Relief

Poor and minority communities suffered disproportionately from Hurricane Katrina. The city of New Orleans has a long history of unequal exposure to environmental risks along socio-economic and racial lines, highlighted by the impact of Hurricane Katrina. For example, the hardest hit areas of New Orleans – the low-lying lands – are predominantly communities of color. For example, the lower Ninth Ward, which is 98% African American and 36% below the poverty level, was one of the most devastated areas of New Orleans. Furthermore, oil refinery and petrochemical spills occurred in areas already experiencing environmental injustices due to their proximity to petrochemical plants and refineries, perhaps making parts of the region uninhabitable for years. Additionally, Katrina hit at least three Superfund sites that are located near low-income communities of color in New Orleans: Bayou Bonfouca, Madisonville Creosote Works, and Agriculture Street Landfill. It is not yet determined whether and to what extent the flooding disturbed toxic chemicals at these sites. *See* http://www.nrdc.org/legislation/hk/hk.pdf.

While the floods caused by Katrina left devastating results, the situation was made even worse by the inequities in the evacuation plan. Despite mandatory evacuation orders, roughly 150,000 people were unable to evacuate. According to the Louisiana Evacuation Plan, individual citizens were mainly left to find their own way out of the city. In a city with a 38% poverty rate, one of the highest in the United States, 27% of New Orleans households, amounting to approximately 120,000 people, were without privately owned transportation. Consequently, those stranded in the city were the poor, the elderly, and the sick. Critics say that city, state, and federal officials failed to adequately consider the difficulties faced by citizens without access to private transportation in crafting the evacuation plans.

The mayor of New Orleans established several "refuges of last resort" for citizens who could not leave the city, including the massive Louisiana Superdome. Enough food and water was delivered by the National Guard to supply 15,000 people for three days; however, by September 1, as many as 60,000 people had gathered at the Superdome, leaving 45,000 people without access to food and water. Furthermore, air conditioning, electricity, and running water all failed, creating unsanitary conditions. When the Superdome was finally fully evacuated, it was declared a potential biohazard. A September, 2005 Gallup poll revealed that a majority of African Americans believed that racial bias

played a role in the indifference shown by the Bush administration and Federal Emergency Management Agency in particular.

Aside from the lack of water, food, shelter, and sanitation facilities experienced by those left behind in the aftermath of Katrina, there is concern that the prolonged flooding might lead to an outbreak of health problems for those who remained in the area. Dehydration, food poisoning, and increased outbreaks of communicable diseases, diarrhea, and respiratory illness are all related to the contamination of food and drinking water. People who suffer from allergies or lung disorders, such as asthma, may also have health complications due to toxic mold and airborne irritants. On September 6, it was reported that *Escherichia coli* (*E. coli*) had been detected at unsafe levels in the waters that flooded New Orleans. The Center for Disease Control reported on September 7 that five people had died of bacterial infection from drinking water contaminated with *Vibrio vulnificus*, bacteria from the Gulf of Mexico.

Moreover, there is concern over the possible adverse health impacts of pollutants released into the floodwaters by the chemical plants and refineries in the area. Almost all 140 chemical plants between New Orleans and Baton Rouge have sustained damage. A toxic stew of hazardous chemicals, such as oil, gasoline, and vinyl chloride, threatens to profoundly contaminate the area for generations to come. *See* Joshua Karliner, *Hurricane Katrina and Climate Justice, at* http://www.corpwatch.org/print_article.php?id=12629. The sediment is considered likely to cause acute and chronic health problems, including nervous system damage and cancer. *See* Ronald Roach, *Unequal exposure: environmental justice advocates mobilize to ensure minority communities are not left out of the Hurricane Katrina cleanup*, DIVERSE ISSUES IN HIGHER EDUCATION, Dec. 1, 2005.

On December 9, 2006, the Louisiana Department of Environmental Quality, EPA, and other federal agencies released an analysis concluding that there are no long-term health risks from environmental contamination resulting from Hurricane Katrina in Louisiana, with the exception of one oil spill. It has been reported that some groups are considering litigation against EPA over its alleged failure to comply with non-discretionary requirements to respond to environmental health threats caused by the hurricane under existing environmental laws including the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, Resource Conservation and Recovery Act, 42 U.S.C. 9601 *et seq.*, and the Clean Water Act, 33 U.S.C 1251 *et seq. Activists weigh litigation as EPA downplays risks from contamination*, INSIDE WASHINGTON PUBLISHERS, Dec. 29, 2005. EPA maintains its position that there will be no long-term health risks resulting from the contamination.

4. Conclusion

Without increased accountability, the lives, health, and livelihoods of those burdened by depletion of coastal wetlands, the effects of global warming pollution, and unequal access to resources will continue to be threatened. Moreover, those displaced by disasters such as Katrina, mostly poor and people of color, live as "internally displaced persons" and are confronted with the question of their right and ability to return to their homes. While we may spend years trying to pin down the blame for the many injustices that surfaced as a result of Katrina, it is immediately clear that poor and African Americans suffered disproportionately from a confluence of environmental and social policy, environmental degradation, problematic resource allocation, and underlying inequality. *For further elucidation of these issues, please see* Hari Osofsky, *Katrina disaster exposes environmental injustice*, Guest Opinion, EUGENE REGISTER-GUARD, Sept. 7, 2005.

Chemical Weapons Incineration Impacts the Umatilla Tribes

By Pamela Orenstein and Jonathan Evans

The Umatilla Weapons Depot (Umatilla Depot) is a 19,728 acre military facility which sits 30 miles upwind of the Confederated Tribes of the Umatilla Indian Reservation. The Umatilla Depot is located in a rural area of eastern Oregon, approximately 3 miles south of the Columbia River on Tribal land ceded to the federal government in 1855. Despite the presence of tribal treaty rights over the area occupied by the facility, including the right to fish and gather plants and medicines, the Umatilla Depot was completed in 1941. Beginning in 1945 wastes generated at the facility have been burned, detonated, or disposed of in other fashions. Unexploded ordnances are located at over twenty sites as a result of ordnance disposal operations. In addition to storing conventional munitions, in 1962, the Umatilla Depot began storing chemical weapons.

The risk associated with future exposure to the contaminated soil in the ammunition disposal area exceeded the National Contingency Plan guidelines, indicating that remediation of contaminated areas was required by law. Comprehensive Environmental Response, Compensation, and Liability Act 42 USC §§ 9601-9675. In 1987, the site was added to the U.S. EPA National Priorities List (NPL) for cleanup and remediation under the Superfund program. The Superfund program established a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites. The NPL site at the Umatilla Depot consists of lagoons covering about 0.5 acres.

In 1990, the facility, planning for closure, shipped all conventional munitions to other installations; however, the facility retained the chemical weapons. In the 1980's, the Army had decided to dispose of all chemical weapons by incineration, on site, where they were already stockpiled. Domestic attention to chemical munitions has been guided by the congressional mandate to destroy the U.S. unitary stockpile via incineration, PL 99-145 and PL 100-456; congressional directives to examine safe disposal of nonstockpile chemical material, PL 102-484; and the January 1993 signing of the Chemical Weapons Convention banning the manufacture, use, stockpiling, and transfer of chemical weapons. *See e.g.* Ember LR., *Chem Engr News* 71:7-18 (1993). The Army cited the safety hazards involved with transportation as their justification for keeping the weapons at the Umatilla Depot. The major contaminants identified on the base include explosive-derived wastes (RDX, TNT, and nitrate), pesticides (DDT and lindane), organic solvents (tetrachloroethylene and trichloroethylene), and caustic brine. RDX and nitrates are present in ground water beneath the lagoons. The ground water contamination caused by the chemicals at Umatilla impacts public water supplies serving about 24 people.

In 1995, the Army started building a chemical weapons incinerator at the Umatilla Depot named the Umatilla Chemical Agent Disposal Facility (UMCDF). Incineration at the UMCDF was scheduled to begin in September of 2004. Possible exposure to contaminants from the Umatilla Depot and incineration threatens the neighboring community's access to clean water and negatively impacts public health. Exposure to chemical agents found at the Umatilla Depot could lead to a variety of health problems including, but not limited to, damage to the central nervous system, kidneys, and liver. According to those who oppose the activity, incineration of chemical warfare agents poses unacceptable health risks of both an immediate and long term nature. Epidemiological studies have shown positive associations between incinerator exposure and cancer, congenital malformations, and thyroid malfunctions. Franchini *et al.*, Ann Ist Super Sanità 40:101-115 (2004). The quantifiable chemicals and metals that could be released at Umatilla include unburned nerve and mustard agent; persistent and bioaccumulative organochlorines such as dioxins, furans, chloromethane, vinyl chloride, and PCBs, as well as metals such as lead, mercury, copper, nickel, and other toxics such as arsenic.

In addition to emissions, highly toxic ashes and effluents are created during incineration which would also negatively impact the health of neighboring residents. Moreover, only 40 miles north of the Umatilla Depot rests another site laden with military toxics, the Hanford nuclear site. The Hanford Nuclear Reservation has sparked a great deal of litigation over the large quantities of radioactive and non-radioactive substances that have been released from the site, beginning in the 1940s. *See e.g. In re Hanford Nuclear Reservation Litig. v. E. I. Dupont*, 292 F.3d 1124 (9th Cir. 2002).

Members of the confederated tribes feel they were not adequately consulted on a government-to-government basis about the plans to incinerate chemical weapons at the Umatilla site. Exclusion from the decision to begin chemical weapons incineration on areas over which tribal members retain treaty rights impacts tribal members' rights to information and participation. According to Donald Sampson, Chairman of the Board of Trustees for the Confederated Tribes of the Umatilla Indian Reservation, "the Army has failed to consider the threat to the Umatilla Indian Reservation." The risk of fatal exposure to chemical agents released from incineration threatens the very lives of neighboring residents.

Disproportionate Impacts

Low income residents and people of color that have been historically affected by pollution reside in the region surrounding the Umatilla Depot in greater proportions than in the rest of the state. The Umatilla Depot occupies parts of Morrow and Umatilla Counties in rural northeastern Oregon. A significant percentage of the population of both counties live below the poverty level. Latinos make up 9% of Umatilla County and 11% of Morrow County, above the state average of 4%. The percentage of Native Americans in Umatilla County is 305% higher, and in Morrow County, 47% higher, that the national average.

Of the nine U.S. military stockpile sites at which chemical weapons incinerators were built, six of them, including the Umatilla Depot, are in areas where there is a greater percentage of minorities and/or people living below the poverty level than the

national average. A 2004 study conducted at Washington State University suggests that Native Americans and their lands are disproportionately exposed to hazards posed by U.S. military explosives and toxic munitions. Hooks *et al.*, Amer. Soc. Rev, 69: 558-575 (2004). The study considered closed military bases in approximately 3,100 counties across the contiguous 48 United States. Sites containing unexploded ordnance, such as Umatilla Depot, were the focus of the study. Comparing Army Corps rankings of the hazards posed by each site to the proximity and acreage of lands owned by Native Americans, the study found that a disproportionate number of the sites deemed most hazardous lay within close proximity to Indian reservations.

Native Americans ... are disproportionately exposed to hazards ...

Applicable Laws

The situation affecting the Umatilla tribes is not unique. The Clinton administration, in response to the growing awareness of disproportionate impacts of pollution on low income and minority populations, issued an Executive Order, which was the first significant success in the area of federal implementation of environmental justice principles. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations (1994). The order requires federal agencies to collect data on the health and environmental impact of their programs and activities on "minority populations" and "low-income populations" and to develop policies to achieve environmental justice. However, the order does not create legally enforceable rights or obligations. It only requires that federal agencies make achieving environmental justice part of their missions by evaluating the effects of their programs, policies, and activities on communities that have historically carried a disparate burden of the country's pollution and waste.

Federal agencies are also required to ensure that their funding recipients comply with Title VI of the Civil Rights Act of 1964 by conducting their programs and implementing policies in a nondiscriminatory manner. However, to establish a prima facie case of discrimination under § 601 of Title VI, complainants must demonstrate that the challenged action was motivated by intentional discrimination. *See Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 680 (S.D. Tex. 1979). This intent requirement poses a near impossible burden for those wishing to bring claims of environmental injustice. Section 602 of Title VI, on the other hand, carries a less stringent burden of proof, allowing petitioners to establish unintentional discrimination by showing a disparate impact. *See* 40 C.F.R. § 7.35(b), *see also id.* § 7.35(c). However, in 2001, the Supreme Court in *Alexander v. Sandoval*, ruled that there is no private right of action to enforce disparate impact regulations promulgated under Title VI. *See* 532 U.S. 275 (2001). This Supreme Court ruling eliminated a major judicial tool for private civil rights and environmental justice plaintiffs to enforce their claims of discrimination in violation of Title VI. Thus, potential claimants looking to challenge federal agency decisions and actions which result in environmental injustice are able to find little recourse under the Civil Rights Act.

Considering the barriers to addressing contamination's disproportionate impacts on low income or minority communities, environmental and community groups have sought other mechanisms to prevent contamination from weapons incineration. Citizens and environmental organizations have appealed the validity of the order of the Oregon Environmental Quality Commission granting the United States Army a hazardous waste permit for the construction and operation of an incineration facility to destroy chemical weapons stored at the Umatilla Chemical Depot. *See e.g. G.A.S.P. v. Envtl. Quality Comm'n, 201 Ore. App. 362* (Or. Ct. App. 2005). The local citizen group called GASP together with the Sierra Club, the Oregon Wildlife Federation and others filed a series of three lawsuits (GASP I, GASP II and GASP III) to stop the Umatilla Depot incineration program. The plaintiffs in these lawsuits stated that they do not oppose destruction of the chemical weapons, but that some system other than incineration should be used. Nationwide, recent cases have challenged the Army's decision to continue pursuing incineration at half of the chemical weapons incineration cites, alleging that the Army has violated the National Environmental Policy Act (NEPA) by failing to complete a supplemental environmental impact statement for the incineration program. *See e.g.* Heather Pierce, Note, 32 B.C. Envtl. Aff. L. Rev. 459 (2005).

Minority and low income communities, such as those surrounding the Umatilla Depot, are left with limited options to address environmental injustice in its own right and must seek alternative means to address the disproportionate impact of environmental harms in their community. Thus, it becomes important that environmental justice advocates look to other local, state, and federal laws to address environmental justice and push federal agencies to abide by federally mandated environmental justice principles.

For more information see http://www.umatilla-cmp.org/

Western Environmental Law Update

The Update is published annually by Land Air Water, the nation's oldest student environmental law society.

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