



Western States Water

ENVIRONMENTAL QUALITY COUNCIL

September 12, 2006

Exhibit 2

Celebrating Our **40** Ann
1965 YEARS 2005

Issue #1681, August 4, 2006

942 E. North Union Ave / Suite A-201 / Midvale, UT 84047 / (801) 561-5300 / FAX 255-9642 / www.westgov.org/wswc

Chairman - Hal Simpson; Executive Director - Craig Bell; Editor - Tony Willardson; Subscriptions - Julie Groat

ENERGY/WATER RESOURCES

Geothermal Resources/Reclamation Fund

On July 11, the Senate Energy and Natural Resources Committee held an oversight hearing on renewable U.S. energy resources on federal lands, including geothermal resources. Deputy Secretary of Interior (DOI) Lynn Scarlett testified that since 2001, the Bureau of Land Management (BLM) has processed over 200 geothermal lease applications (compared to 20 from 1997-2001). Nevada BLM has issued 25 leases since the Energy Policy Act of 2005 (EPAAct) passed. EPAAct made comprehensive changes to the Geothermal Steam Act, and BLM and the Minerals Management Service (MMS) are rewriting rules to conform to the changes, revising lease terms and conditions and restructuring royalty payments. The BLM and the U.S. Forest Service (USFS) have also signed an interagency memorandum of understanding and are developing a joint data base on geothermal activity. Further, the U.S. Geological Survey (USGS) has started a 3-year effort to update a nationwide geothermal resource assessment.

Sally Collins, USFS Associate Chief, added that of the 354 federal geothermal leases, 116 are on USFS lands, including five producing leases that are part of a twelve and another 45 megawatt (Mw) power plant. Despite the environmental benefits of geothermal energy, there are significant barriers to development. A joint DOI/ Department of Energy (DOE) study concluded there is a need to streamline environmental reviews (and the permitting process as EPAAct mandates). EPAAct also provides a production tax credit, spurring increasing interest in developing geothermal resources. USFS and BLM are working together to reduce the current backlog of lease applications by 90% over the next five years. USFS conducts analysis of applications on USFS lands, provides consent and develops lease stipulations, but BLM issues the leases. USFS concurrence is pending on 65 lease applications in Arizona, California, Idaho, Nevada, Washington and Oregon.

On the same day, the General Accounting Office (GAO) released a related report (GAO-06-930T). Jim Wells, Director, Natural Resources & the Environment, testified. He said that geothermal resources account for 0.3% of the electricity produced in the U.S. annually, or

about 2,534 Mw – enough for 2.5M homes. While small, it includes 25% of Hawaii's electricity, 9% in northern Nevada and 5% in California. As of January, 54 geothermal powerplants were producing electricity with another six under construction in California, Idaho and Nevada (which will add another 390 Mw). Utah is another geothermal producing state. Future potential production from known resources ranges from 3,100-12,000 Mw, with an additional 72,000-217,000 Mw from estimated, but undiscovered sources. "In short, geothermal resources that could generate electricity are potentially significant but largely untapped," said Wells.

Developers face significant financial, technical, and logistical challenges. Geothermal electric development is a capital intensive and risky business. Obtaining financing and securing a contract with a utility are difficult. Recouping the initial investment takes many years. Transmission expenses can be costly due to remote locations or capacity constraints on the electric grid. Developers must also use exploration and drilling technologies not well suited for "the unique attributes of geothermal reservoirs," said Wells. He noted that developers on federal lands face added administrative and regulatory challenges and a complicated royalty payment system. "Businesses and individuals trying to tap geothermal resources for direct use [such as greenhouses] face unique marketing, financing, and technical challenges and, in some cases, must contend with remote locations, restrictive state water rights, and high royalties."

With respect to state water rights, Mr. Wells said, "In areas of high groundwater use, the western states generally regulate geothermal water according to some form of the doctrine of prior appropriation, under which specific amounts of water may have already been appropriated to prior users, and additional water may not be available." Also of note, EPAAct changed the distribution of federal geothermal-related royalties, with 50% continuing to go to the states in which the leases are located, but rather than 50% going to the federal government, half that amount or 25% will now go to the counties in which the leases are located. Further, while 40% of the federal 50% was deposited in a Reclamation Fund (under the Reclamation Act of 1902) to finance western water development (with the remaining 10% going to the General Fund in the U.S. Treasury), EPAAct

redirects those funds for five years into a "separate account...that the Secretary of the Interior can use without further appropriation and fiscal year limitation to implement both the Geothermal Steam Act and the Energy Policy Act."

WATER QUALITY/ENVIRONMENT

Clean Water Act/Wetlands

On August 1, the Senate Environment and Public Works Committee's Fisheries, Wildlife and Water Subcommittee held a hearing on *Rapanos v. U.S.*, the 4-1-4 Supreme Court decision redefining the scope of federal jurisdiction over wetlands under the Clean Water Act (CWA). The Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) have issued intermediate guidance to their field staff, instructing them to continue processing CWA §404 permits, but to "temporarily delay making jurisdictional calls." EPA and the Corps are working on joint guidance "clarifying CWA jurisdiction." While the Committee agrees that the "failure to swiftly act to clarify the scope and meaning of the *Rapanos* decision will result in a costly quagmire of litigation," they disagree on whether or not Congress should clarify the scope of federal CWA jurisdiction, or whether the agencies should redefine the scope of their jurisdiction through a rulemaking. Legislation to clarify CWA jurisdiction (S. 912 and H.R. 1356), it is not currently Chairman James Inhofe's (R-OK) top priority.

In his opening statement, Senator Inhofe argued that federal wetlands jurisdiction stems from the federal Commerce Clause power over interstate navigable waters, noting: "[T]hose who seek to expand federal jurisdiction must do so within the bounds of the Constitution." Moreover, he cautioned against infringing on property owners' development rights. He explained, "How we define 'waters of the U.S.' is critical to protecting the rights of citizens, local governments and states to regulate the use of their lands. I hope the EPA and the Corps will issue a new definition consistent with the *Rapanos*...decision that fully accounts for the constitutional limitations on their authority."

Senator Lisa Murkowski (R-AK) suggested the Congress allow the agencies to clarify the scope of their own jurisdiction over wetlands through rulemaking, noting: "[T]here are times when allowing another entity to make the first move can be productive...." , and I believe this is one of those times." Additionally, she cautioned against too powerful a federal role, pointing out that Alaska's Constitution protects wetlands by requiring "sustainable use" management of resources. The resulting pollution controls are among the nation's strictest. Notably, Alaska's Constitution was drafted "in response to decades of federal mismanagement."

Senators Hillary Rodham Clinton (D-NY) and Jeffords (I-VT) disagreed, arguing that *Rapanos* was

harmful to wetlands conservation and contrary to Congressional intent, calling for Congress to clarify the CWA. In addition, they have joined Senators Frank Lautenberg (D-NJ), Barak Obama (D-IL) and Russ Feingold (D-WI) in signing a letter asking the Bush Administration to rescind its "no net loss" wetlands policy. "We urge you to remove this nation's biggest obstacle to wetlands protection...by rescinding the guidance you issued which eliminates protections for... wetlands." The letter advocates an "overall increase."

John Cruden, Deputy Assistant Attorney General, Environment and Natural Resources Division (ENRD), U.S. Department of Justice (DOJ), discussed ENRD's extensive CWA docket and the ramifications of the *Rapanos* decision. ENRD has "convened an internal group of experienced attorneys to [assemble and review] cases which could be impacted by the decision." He explained that ENRD would only take legal positions consistent with the *Rapanos* decision. As for the scope of its wetlands jurisdiction, DOJ is asking courts to adopt the view of either the plurality or Justice Kennedy's concurrence. He added, DOJ will continue to cooperate with the states.

Another witness, Jonathan Adler, Professor of Law, Case Western Reserve University School of Law, argued that despite the divided opinion, *Rapanos* did resolve much of the confusion surrounding the CWA. Specifically, when "...viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," the *Rapanos* holding requires a "significant nexus" between a wetland and navigable waters to trigger federal jurisdiction, clarifying that a "mere hydrologic connection" by itself is insufficient. Adler urged the agencies to limit their jurisdiction to "areas where there is an identifiable *federal* interest," and not discourage "state and local governments... from adopting environmental protections where such efforts would be worthwhile." He believes a federal incentive program would better promote wetlands conservation.

WATER RIGHTS/WATER RESOURCES

Yellowstone River Compact/Montana/Wyoming

In a July 28 letter to Wyoming's State Engineer, Montana issued a formal "call" demanding the release of water to satisfy the 1950 Yellowstone River Compact. Mary Sexton, Department of Natural Resources & Conservation (DNRC) Director, wrote: "In mid-July this year, the flows recorded at the gauging stations closest to the Montana-Wyoming border showed that not enough water was coming into Montana to satisfy the historic uses specified in the Compact. By failing to regulate some water users, Wyoming is essentially taking water out of the Tongue and Powder rivers at Montana's expense." Tongue flows hit record lows and "there is essentially no water in the Powder River at the Moorhead gage."

The WESTERN STATES WATER COUNCIL is an organization of representatives appointed by the Governors of Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.