

# SPILLWAY

California Water,  
Land, and People

Fall 2001

## Editorial

### Klamath Drought and Irrigation Dogma

by Tim Stroshane

*"[A] sprawling congregation of western irrigators...have fashioned a religion unique to the arid American West. Its fundamental precept is that the only godly work a man can do is grow food....The rites of irrigation theology include constant and aggressive litigation, intense lobbying, and large donations to sympathetic local, state, and federal politicians, as well as vituperative attacks on the jobs, values, and patriotism of those who doubt that giving large subsidies makes economic or environmental sense....The orthodoxy...teaches that subsidies are freedom, salmon are frivolous, Indians are suspect, and rivers are fuel for sprinklers. Finally, the Dogma of Irrigation seems designed to be inscrutable to the non-irrigator."*

— Blaine Harden, *A River Lost*

"The Sucker Fish gets the Water...the Farmers get the Shaft," blared an e-mail alert in early May 2001. In it, the Land Rights Network invited readers to a bucket brigade action in Klamath Falls, Oregon to protest a government decision to withhold irrigation water from local farmers. "No compensation is being tendered by the government for its 'taking' of land value or the 'investment backed expectations' of these small farmers....It is time to stand with these hard-working families against a federal bureaucracy running wild and against all reason."<sup>1</sup>

Since April the United States Bureau of Reclamation's (USBR) Upper Klamath Lake reclamation project has been a lightning rod for Klamath River Basin farmers and property rights activists who claim the government took their water rights illegally. The USBR says drought forced withholding

*Tim Stroshane edits and publishes SPILLWAY.*

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of water from irrigators to ensure sufficient flows in the Klamath Rier to protect three fish species listed under the Endangered Species Act (ESA).

The Klamath River flows about 180 miles from near Crater Lake, Oregon to the Pacific Ocean to the southwest near Eureka, California. The Bureau's Klamath River Basin project consists of three reservoirs storing nearly 1.1 million acre-feet, delivering as much as 500,000 acre-feet of water in

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Klamath Basin farmers are missing a grand opportunity — while they have the nation's attention — to expand political, economic, and even ecological connections beyond their own selfish interests.

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normal years via 1,400 miles of canals and drains. Four wildlife refuges are located in the Klamath Basin and receive water from the Bureau's facilities.<sup>2</sup>

"I hope all America gets this," Nevada congressman Jim Gibbons thundered to a Klamath Basin audience last June. "It's time to amend the Endangered Species Act. We can't save every species, and maybe that's the way it should be."<sup>3</sup>

A cabal of Klamath farmers adhering to a "dogma of irrigation" are abetted by property rights ideologues of the Pacific Legal Foundation and ex-colleagues of Interior Secretary Gale Norton when she worked at the Mountain States Legal Foundation.<sup>4</sup> The farmers sued USBR for \$1 billion in federal claims court alleging a violation of the U.S. Constitution's fifth amendment when Klamath irrigation water was withheld.<sup>5</sup>

Farmers' protest tactics escalated from bucket brigades, headgate vandalism, and tunneling a pipe into Upper Klamath Lake to class-action litigation against fishermen's and environmental organizations, and a property takings suit against the federal government. Most recently, 300 protesters trespassed onto USBR property to serve papers on federal marshals stating the headgates belong to local irrigators, not the federal government.<sup>6</sup>

Some 500 farms are affected by the water cut-off, involving 200,000 acres of cultivated land.<sup>7</sup> Additional water was made available this summer by intensive well-drilling funded and executed by the states of Oregon and California as part of both states' disaster responses to the area, which would add about 100,000 acre-feet of supply. Another

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Letters to the Editor

On Delta Decimation

Dear Editor:

Your article regarding decimating Delta farming ("Decimating Delta Farming," *SPILLWAY* Spring and Summer 2001 issue) is quite appropriate as it applies to the South and Central Delta water agencies. It also appropriately covered potential disasters of floods or catastrophic earthquake, at least should such an earthquake occur in close proximity to the Delta.

As to the concern regarding water quality and water availability and cost, however, it is not relevant to the area within the North Delta Water Agency (NDWA), which comprises the northern half of the Delta covering approximately 300,000 acres. The NDWA has a contract with the State of California, entered into in 1981, which provides for a specific level of water quality (at least from the risk of salinity intrusion) which poses the most serious threat to water of agricultural quality in the Delta. That agreement also assures that, to the extent water is not otherwise available under the rights of the diverters in the North Delta for reasonable and beneficial use, the State (through the SWP) will make available the water needed for that purpose. The landowners within NDWA have, since 1981, been paying the State of California annually for this assurance, or as it could be described, insurance policy, for both water availability and quality. It has been possible, however, for this to be spread over the entire acreage within the NDWA and, therefore, it amounts to only a few dollars per acre for this insurance policy.

I suggest that in a future issue you might wish to include some discussion of the NDWA situation. The contract with the State of California was entered into by the NDWA at a time when the peripheral canal seemed to be virtually

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**SPILLWAY**

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**CyberSPILLWAY!**

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inevitable. The purpose of the contract was, of course, to provide insurance against an adverse impact of such a canal, which would potentially take a substantial amount of water away from the northern part of the Delta and divert it around through the Central and South Delta to the [State Water Project] pumps [near Tracy]. The NDWA is fortunate to have been able to achieve such a contract at a time when it was attractive to the State and the State was desirous of having some kind of understanding with as much of the Delta as possible. It is my understanding that the opportunity for similar contracts for South Delta and Central Delta is, unhappily, not presently available and these agencies have not sought to pursue or negotiate for such a contract, although their agency acts [that is, state enabling legislation] provide for such agreements.

George Basye, Attorney  
NDWA  
Sacramento, CA

**Holding CalFED to Its Word**

Tim Ramirez, Resources Agency  
Sacramento, CA

Dear Mr. Ramirez:

I solicit your interest in the content of the April edition of *SPILLWAY*, copy attached hereto. The issue includes several articles (including one of mine) that address CalFED. In order for CalFED to succeed it must acknowledge, and where possible correct, its failure to abide by its own announced commitment to be "durable," to be "equitable," to avoid "redirected impacts," and that "solutions will solve problems in all problem areas" such that "improvement for some problems will not be made without corresponding improvement for other problems."

I also attach copies of letters to Senator Dianne Feinstein and Secretary Ann Veneman regarding the relation between future domestic production of food for the growing population and the land and water that must be available for that purpose.

Thank you for your good work with the San Joaquin River Management Program Council and elsewhere.

Alex Hildebrand  
Manteca, CA

## Arresting Developments

- Siskiyou Drought
- Taking Tulare and Kern Property

### **Siskiyou Drought: Limits of Cooperation**

While the Klamath Basin in southern Oregon grabbed national headlines for its water standoff amidst drought (see Editorial, this issue), central Siskiyou County in northern California 90 minutes south also faced drought this year. The state declared the County a disaster area, but as of early September a federal disaster declaration had not occurred.

The Siskiyou drought hit headlines in northern California in June when the *San Francisco Chronicle* reported that ranchers diverted most of the flows of the Scott and Shasta rivers — which are tributary to the Klamath River north of Mount Shasta — to irrigate alfalfa fields and pastures, “leaving thousands of young salmon and steelhead without enough water and facing imminent death.”<sup>1</sup>

Diversions that de-water river channels are illegal under California Fish and Game Code Section 5937, which requires dam owners to maintain water in state streambeds sufficient to keep fish healthy. However, state fish and game wardens were directed not to cite offending ranchers for fear that ranchers would walk away from voluntary state fish restoration programs.<sup>2</sup>

“This thing is out of whack,” said one warden, “I get my orders.”<sup>3</sup>

As Shasta and Scott river desiccations continued, *Chronicle* outdoors columnist Tom Stienstra wrote, “If a small group of farmers can divert an entire river for their personal benefit, there is nothing to stop Los Angeles from taking all of the San Joaquin and Sacramento River Delta, and in the process devastate San Francisco Bay, right?”<sup>4</sup>

Talks between state water, and fish and game officials were under way in late August when Siskiyou rancher and county supervisor Bill Hoy told a California Farm Bureau news service that state listing of Coho salmon under the state’s Endangered Species Act “would take precedence over our adjudicated water rights.”

State officials asked Hoy and other Siskiyou farmers “if we could get the county to agree to give up 10 percent of their water,” said Hoy. “I told them to forget it, and said, ‘There’s no way in hell I’m going to give you 10 percent of my water for a stinking fish.’”<sup>5</sup>

#### NOTES

1. Glen Martin and Tom Stienstra, “Young fish die as water laws go unenforced,” *San Francisco Chronicle* 22 June 2001.
2. California Fish and Game Code Section 5937 states: “The owner of any dam shall allow sufficient water at all times to pass through the fishway or in the absence of a fishway, allow water to pass over, around or through the dam to keep in good condition any fish that may be planted or exist below the dam.”
3. Martin and Stienstra, op. cit., note 1.
4. Tom Stienstra, “Water battle rages on,” *San Francisco Chronicle* 22 July 2001.

5. Christine Souza, “Central Siskiyou: Will it be the next Klamath Basin?” *Ag Alert*, 5 September 2001. *Ag Alert* is published at the California Farm Bureau Federation’s web site, <http://www.cfbf.com/>.

### **Taking Tulare and Kern Property**

Acting under authority of the federal Endangered Species Act (ESA), the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) reduced California State Water Project (SWP) deliveries so water could be released through the Sacramento-San Joaquin River Delta to ease the survival and migration of delta smelt and winter-run chinook salmon from 1992 through 1994.

But federal judge John Paul Wiese ruled in April 2001 that the fisheries services exceeded their authority by interfering with their water rights — an authority substantial case law reserves to the California State Water Resources Control Board (SWRCB) — when they got the California Department of Water Resources (DWR) to shift water from irrigation deliveries to fishery protection. “The federal government is certainly free to preserve the fish,” writes Wiese, “it must simply pay for the water it takes to do so.”<sup>1</sup>

The United States Constitution’s Fifth Amendment simply states that private property shall not be taken for public use, without just compensation.<sup>2</sup>

Plaintiffs in the case were led by two of the largest agricultural water districts in the San Joaquin Valley: Tulare Lake Basin Water Storage District and Kern County Water Agency (which itself is a wholesaler of water to other smaller retail districts in its jurisdiction). These districts alone possess annual contractual entitlements to over 1.4 million acre feet of SWP deliveries.

Federal ESA restrictions on irrigation deliveries through the SWP reduced Tulare Lake Basin WSD’s irrigation deliveries by about 58,000 acre-feet, and cost Kern County a cumulative 319,420 acre-feet of irrigation deliveries between 1992 and 1994, according to Judge Wiese’s decision.

From 1987 to 1994, only 1993 was not a critically dry year in California, and the threat of low river flows from prolonged drought led federal fishery agencies to act on behalf of two ESA-listed fish species, delta smelt and winter-run chinook salmon. Delta smelt are a freshwater fish species endemic to the Delta. Salmon are an anadromous fish species that reproduces and rears its young in fresh river water. Young salmon migrate to sea to spend their adult lives until they return to their native freshwater streams to spawn and die.

Property rights advocates hail the decision in *Tulare* as a huge victory, claiming it sets a precedent that will aid Klamath Basin farmers facing similar — though not identical — circumstances with the U.S. Bureau of Reclamation

*continued on page 4*

## Tulare and Kern

*continued from page 3*

(USBR) this summer in drought-stricken southern Oregon.

Attorney for the *Tulare* plaintiffs, Roger Marzulla, told Klamath Basin farmers in July that their case may be even stronger than *Tulare*, and that “the Klamath Basin looks like *Tulare* case No. 2.”<sup>3</sup>

While trumpeted as a precedent-setting property rights case by Marzullo, the case is significant for other reasons.

First, *Tulare* reaffirms the SWRCB’s role as sole allocator of water rights in California and implies that enforcing the ESA obligates federal agencies to seek direct blessings from the SWRCB in advance of any reallocation, or pay compensation to water districts facing delivery reductions.

*Tulare* also reaffirms SWRCB’s responsibility for enforcing the public trust doctrine in the area of water rights. But apparently since federal fishery agencies did not go to the State Board for action in that connection, the reallocation of water property became compensable as a taking.

Second, Judge Wiese reasoned that DWR is not liable for damages when reducing water deliveries due to circumstances beyond its control. This is crucial should another case return to trial in Kern County later this year which questions the legality of water market-style transfers occurring within the State Water Project, and of the environmental report used to justify the transfers.<sup>4</sup>

Activists in that case urge DWR to acknowledge that it cannot possibly fulfill its stated entitlements to contractors; and that to allow sale of these “entitlements,” puts unreasonable claims on actually available SWP water.

Finally, it’s less clear the *Tulare* case can be used against USBR by Klamath Basin farmers, who also faced reallocations of irrigation deliveries to meet ESA requirements. In the southern Oregon case, the water project is federally-

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“The federal government is certainly free to preserve the fish,” writes Wiese, “it must simply pay for the water it takes to do so.”

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owned and operated. Lawyers will study the Bureau’s water service contracts with Klamath farmers to determine whether the federal government has language similar to DWR’s SWP contracts limiting liability for deliveries where drought and other conditions are beyond their control, possibly including endangered species.

The *Tulare* case’s next phase will determine what the compensation will be. A decision is not expected for a few more months. No appeal is expected.

### NOTES

1. Tulare Lake Basin Water Storage District, Kern County Water Agency, et al v. United States, *United States Court of*

*continued on page 12*

## Book Review

# River City Los Angeles

Blake Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth*, Baltimore, MD: Johns Hopkins University Press, 1999.

by Nathan Landau

*Someday it's going to rain  
Somebody it's going to pour  
Someday that old dry river  
Won't be dry no more.*

— Dave Alvin, “Dry River,” *Blue Boulevard*

In most cities, even California cities, rivers are civic assets. Sacramento made the American River a recreational centerpiece. San Jose — often viewed as a “little Los Angeles” — reclaimed the Guadalupe River to create both parks and urban renewal.

But in Los Angeles, the river is a civic tragedy. Dave Alvin, a Los Angeles singer and songwriter, who bemoans the Los Angeles condition, treats the “drying” of the river and the uprooting of orange groves as a loss of urban innocence, and yearns for their return.

As an urban icon Los Angeles’ modern river has a car driving through its channel, a scene I witnessed recently (as filmed for a movie). Despite recent reclamation efforts, most of the Los Angeles River remains forbidding and inaccessible, with “trespassing” forbidden.

To native Los Angeles author D.J. Waldie, the trajectory of the Los Angeles River is a tragedy of privatism. The problem is not that the River has been socially constructed; so too is New York’s great greensward Central Park. Instead, the River’s tragedy is its construction solely to protect private property at the expense of its role as the public resource and amenity it could have been.

In *The Los Angeles River*, Blake Gumprecht, a geographer and former journalist, tells the baleful story (with a possible happy ending) of how the river got from there to here. He tells the tale with passion, scholarship, and vivid writing. He carefully explains why decision makers acted as they did on the River, so they emerge as people with specific agendas, working in specific technical/political circumstances, rather than as demonized figures.

*The Los Angeles River* advances environmental history by bringing environmental history of flooding to a central city site. Gumprecht’s book also adds a new dimension to U.S. urban history. Previously, historians treated Los Angeles’ interurban trolleys, long distance water lines, and freeways as the structuring elements of metropolitan Los Angeles. Now Gumprecht tells us it wouldn’t have been built the way it was without controlling the River, and therein lies his contribution.

To define the watershed and course of the Los Angeles River is difficult, because it is so thoroughly transformed.

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*Nathan Landau is a professional urban planner with AC Transit District in the East Bay.*

Today's river flows some 51 miles — almost exclusively in concrete channels — from Canoga Park in western San Fernando Valley, through the Glendale Narrows in Griffith Park, along the eastern edge of downtown Los Angeles, past the industrial suburbs of Southeast LA and Compton to Long Beach.

The premodern river was a wandering, meandering affair prone to sudden shifts of course and even direction, and was shorter than the current one, arising to the surface at a natural underground reservoir near the current location of Encino. (The river was later extended to connect with creek channels in the western San Fernando Valley.) Its watershed is virtually the entire Los Angeles basin, from Santa Monica on the west to the San Gabriel Valley on the east, from the San Fernando Valley on the north to Newport Beach on the south — sometimes flowing west into Santa Monica Bay along roughly the channel of modern Ballona Creek.

Arid Los Angeles was founded as a river city, says Gumprecht, although the LA River was never usable for transportation. Gabrieleno Indian villages, to the extent they can be located, were generally close to the river to tap its water supply. In 1769, Spanish explorer Father Juan Crespi declared the Los Angeles to be a “good sized full flowing river...with very good water, pure and fresh.” The first Spanish pueblo, established in 1776, was located near the largest Gabrieleno village, and near the river. Downtown Los Angeles to this day is adjacent to this original pueblo site.

In the 20th Century, with water supplies assured by the notorious Owens Valley aqueduct, government activity on the river increasingly focused on flood control. “Despite its reputation as a land of perpetual sunshine and little rain,” Gumprecht declares, “Southern California probably faces a

ditch after two decades of largely unsuccessful local efforts to control floods on the Los Angeles and tributary rivers. In 1915, state law authorized the creation of a flood control district, which could pass bond issues by a majority vote rather than the usual two-thirds. It won a narrow majority in 1917, despite opposition from the *Los Angeles Times*, for a measure protecting LA's harbor. A 1924 bond spread flood control benefits throughout the county, receiving a 70 percent vote.

But later proposals in 1926 and 1934 were defeated, reflecting public dissatisfaction with failed flood control efforts. Poorer, more industrial, downriver communities supported these measures more heavily than upriver ones. After the second defeat, the county asked the federal government for \$19 million in economic recovery funds to begin a \$99.9 million anti-flood plan, a good example of a federal subsidy for urban development.

Meanwhile, new federal legislation in 1936 made the Army Corps of Engineers solely responsible among federal agencies for flood control nationwide. Gumprecht reports public relief at allegedly competent feds taking over flood control duties from the apparently incompetent County of Los Angeles.

A disastrous 1938 flood killed 87 people, despite previous flood control measures. Ever-increasing urbanization of the LA basin — a dynamic continuing today — produced ever-larger amounts of impervious surface and fast-draining runoff into the river, making flood control even more difficult, putting more people in harm's way, and making condemnation and acquisition of floodplain land nearly impossible. Even undeveloped areas had already been subdivided as potential lots, including land in the river channel itself (then permissible because the river was not considered navigable).

To open the wide, meandering channels for the river that Frederick Law Olmsted supported in his 1930 park plan would have taken millions of dollars to purchase land. Funding was not forthcoming, particularly since at the time Los Angeles already received half of all federal flood control spending for the entire country. Gumprecht notes that simpler, less expensive steps to control hillside erosion and runoff, proposed by federal agencies such as the Forest Service, were not implemented until decades later.

Gumprecht's chapter “Exhuming the River” chronicles growing interest in revival of the Los Angeles River. A flood of plans, studies, and proposals pour forth. The Taylor Yards (the former railyards near Chinatown) — and other such battles for private sector riverside park space — draw support from nearby low-income communities. This demonstrates that reclaiming the LA River for public use does not fit the caricature of environmental issues as strictly elitist and upper class concerns. The challenge for 21<sup>st</sup> Century Los Angeles, says Gumprecht, is going “back to the future” of the Los Angeles River and making it a river for all its people once again.

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**The Los Angeles River's tragedy is its construction solely to protect private property at the expense of its role as the public resource and amenity it could have been.**

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greater natural hazard from catastrophic floods than any other metropolitan area in the nation.” This statement has not earned Gumprecht the opprobrium heaped on Mike Davis' disaster-driven history of Los Angeles *Ecology of Fear* because in fact the LA River flooded 11 times between 1850 and 1900, flooding downtown Los Angeles in 1897 even after levees had been constructed. Flooding became a real obstacle to further growth in Los Angeles, always the city's most fundamental reason for being.

“Fifty One Miles of Concrete” describes how federal engineers decided to make the river into a narrow concrete

## Pronsolino TMDL Case

# Cleaning Up The Garcia

by Alan Levine

*The menace is in the place, elemental, but the menace doesn't reign alone. Its consort is raw beauty. A complicated duality of place. Unapproachable, the Redwood Coast beckons. Inhospitable, it invites. Attractive, it forbids. Exotic/provincial. Bounteous/closefisted. Binary compounds, matched pairs.*

— NancyKay Webb<sup>1</sup>

A place where river meets sea, and where wind and water sculpt its landscape, the North Coast of California is a collision of geologic plates where sea floors smashed against continents become mountains and erode to create river systems like the Garcia River. The San Andreas fault rips right through the Garcia watershed.

Frictions occurring in the Garcia River watershed — in rugged coastal hills some 35 miles southwest of Ukiah — involve more than shifting land masses; there are frictions from cultures and values shifting as well. The peoples inhabiting the Garcia are a rare mix of old-time settlers, young and aging hippies, dope growers and artist intellectuals.

One intense conflict in the Garcia River watershed is over “Total Maximum Daily Loads” (or TMDLs, for short) for reducing pollutants from all potential sources, a method by which the state and federal governments will regulate water quality for years to come. Garcia River ranchers Guido and Betty Pronsolino sued the U.S. Environmental Protection Agency (EPA) to invalidate TMDLs as beyond the government’s authority.<sup>2</sup>

Logging and farming practices harmed the land, and ensuing high rates of erosion harmed fisheries of the Garcia. At stake in *Pronsolino* is survival of anadromous salmon fisheries and regulatory control of farm cultivation and timber harvest practices that load the Garcia River and its steep tributaries with eroded sediments of the geologically tortured North Coast.

And while EPA and environmentalists prevailed at the federal district court level in *Pronsolino*, the Pronsolinos and their co-plaintiffs — local, state, and national Farm Bureau organizations — appealed the case, which will be decided in the coming months.

### **Impaired Water Bodies**

Under the federal Clean Water Act, the United States Environmental Protection Agency (EPA) or a state lists a body of water as polluted — or impaired<sup>3</sup> — beginning an often lengthy process in which states (and in some cases, EPA) measure pollutants and then set a “Total Maximum Daily Load” or a pollutant loading level for different

pollutants needed to return the water body to health through pollutant reductions from farms, timber harvesting, factories, and all other land uses causing pollutant loads in our waterways.

Twenty-one rivers on the North Coast are listed by EPA as impaired.<sup>4</sup>

Pollution comes from either “point” or “nonpoint” sources. A “point” source is typically a sewer outfall or end of a pipe, whereas “nonpoint” pollution can come from a variety of places: sediment eroding from exposed hillsides, oils dripping onto roads and pesticides sprayed on crops that eventually wash into storm drains, streams, and river channels. The list of potential point and/or nonpoint pollu-

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**“TMDLs provide an indispensable means for restoring impaired waters,” says attorney Joe Brecher.**

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tion sources depends on the land uses in a watershed. The more complex the watershed’s economy, the more varied the potential sources of pollution.

Total Maximum Daily Load sounds rather abstract, but a TMDL specifies the amount of pollutant — whether from point or nonpoint sources — that needs to be reduced to meet water quality standards. The TMDL program then allocates pollution control responsibilities between pollution sources (that is, factories, farms, urban neighborhoods, timber harvest lands) in a watershed.<sup>5</sup>

TMDLs sound simple in theory: reduce the sources of pollution fouling our lakes, rivers, and streams and water quality and ecological habitats should recover and improve. But TMDLs are highly controversial in practice.

TMDLs have friends in point-source polluters who will be regulated by TMDLs: Currently, point source polluters bear the lion’s share of the burden of Clean Water Act compliance while nonpoint source polluters go relatively unregulated. Sharing the burden of pollution reduction relieves this inequity by imposing reductions across all sources of pollution. Inclusion of nonpoint sources would also make attainment of water quality standards much more likely.

But in watersheds like the Garcia there are no significant point sources causing sediment pollution of the river. *Pronsolino* tests the legality of government regulating nonpoint pollution sources not only in the Garcia River watershed, but throughout the United States. Fortunately, government won the first round.

### **The Pronsolino Case**

For being set in one of the smaller watersheds along California’s North Coast, the *Pronsolino* case has big implications.

The case originates with Guido and Betty Pronsolino

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*Alan Levine is a retired rancher and business man living on the North Coast of California. He spends his time running, coaching, and as an advocate for forest and aquatic resources.*

seeking a permit from the California Department of Forestry (DOF) to act on a timber harvest plan (THP) on their largely forested property in the Garcia River watershed. DOF imposed restrictions, following their own plan for implementing the Garcia River TMDL, to reduce soil erosion from the Pronsolinos' THP.<sup>6</sup> The Pronsolinos complain that Forestry's restrictions are onerous and costly, and challenge EPA's authority to impose TMDLs on rivers polluted only by timber-harvesting and agricultural runoff and/or other nonpoint sources.

The Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation joined their lawsuit. They argue that runoff control programs should be entirely "voluntary" and full authority to regulate them should be vested in the states, not EPA.

They claim that the Clean Water Act of 1972 (CWA, Section 303(d)), authorizes EPA neither to list water bodies nor develop TMDLs for water bodies impaired solely by nonpoint sources. *Pronsolino* plaintiffs contend that other sections of the CWA are meant to deal with nonpoint source pollution controls, and that EPA has no authority to impose land use controls — such as streamside protections — claiming that the Agency did so in this case.

While federal district court judge William Alsup agreed with the Pronsolinos that Congress did not authorize EPA to regulate land use to control nonpoint sources of pollution, he pointed out that the Garcia River TMDL was freely chosen by California agencies, and that "California is free to select whatever, if any land-management practices it feels will achieve the load reductions called for in the TMDL." Even a state agency dependent on federal funding tied to TMDL regulation "is not direct federal regulation," said Alsup.<sup>7</sup> The Farm Bureau claimed victory, but Judge Alsup's decision did not really favor them.

"For the first time," announced an EPA media release after Judge Alsup's decision, "a federal judge has upheld the EPA's longstanding interpretation and practice that the EPA and states have the authority to identify which U.S. waterways are polluted by runoff from urban areas, agriculture and timber harvesting — 'nonpoint sources' of pollution — and to identify the maximum amount of pollutants that may enter these Waterways."<sup>8</sup>

### **Logging and Farming**

The Garcia River flows northwest for most of its 20-mile length, before turning west to empty into the Pacific, just as the San Andreas fault zone plunges into the ocean near my home town of Point Arena in Mendocino County. It is one of the steepest North Coast watersheds.

Like its nearby coastal watersheds, the Garcia was a prodigious producer of salmon. Complex soils, erosion, food, shade provided by vegetation, and clean, cold water created habitat conditions where salmon could spawn, thrive, and migrate to sea where they live their adult lives.

Buffeted by wind and water, the Garcia River watershed was also hammered by European and American settlers

bringing logging in the 1860s. But mechanized logging in the post-World War II era unleashed havoc.

Harvesting, yarding, and particularly road construction in the Garcia watershed left much to be desired. Logging roads and skid trails occupy an area of 24 linear miles per square mile. Take one square mile and put a road around its circumference and then grid that square with a tractor-cut road every 200 feet. Recall that all of this occurred on steep unstable ground, and you can expect massive erosion as storm runoff courses its way down roads and gullies draining back to the ocean.<sup>9</sup>

Of its 79,000 watershed acres (about 114 square miles) approximately 50,000 acres have long been used for timber production. Satellite imagery reveals the sobering fact that most of the Garcia watershed appears to have been nuked.

Conifer inventories decreased from an average over 80,000 board feet per acre to less than 10,000 board feet per acre (an 87 percent decline), with 24,000 acres (over 40 percent) of the forested area of the Garcia drainage reduced to less than 4,500 board feet per acre.<sup>10</sup>

### **Can Clean Water Act Protect Fish?**

The coastal ranges became home to 49 types of Pacific salmon and anadromous trout. The Garcia was home to three types: chinook (King) salmon, coho (Silver) salmon, and chum Salmon, with only Coho listed under ESA protection. The other fishes are gone — forever.

Thus far, ESA listings for salmon and steelhead have not successfully protected these fishes.<sup>11</sup>

Garcia River old-timers still remember the abundant fish: "I have seen the river so full of salmon that you couldn't see the ground under them," and "all of these little streams were full of salmon. When the farmers wanted fish they would just go out with a pitch fork and get fish. Those days are gone. They will never come back."<sup>12</sup>

But TMDLs may be an answer. A coalition of fishery and environmental advocates (of which I was a member) sued EPA in 1995 demanding the Agency clean up North Coast rivers, including the Garcia. EPA settled the suit in 1997, agreeing to establish TMDLs on 18 North Coast rivers by 2007.<sup>13</sup> The *Garcia River Sediment TMDL* was the first approved by the EPA — but not yet adopted by California — following this litigation.<sup>14</sup>

"TMDLs provide an indispensable means for restoring impaired waters," says Joe Brecher, the attorney for the fishermen's and environmentalists' coalition which sued EPA.<sup>15</sup>

### **Garcia River TMDL**

EPA estimates that an annual average of 1,380 tons of sediment per square mile washes anew out of the Garcia River's steep hills. This is a total load of 157,000 tons or some 315 million pounds of sediment the Garcia must move.<sup>16</sup> Small sediments fill in and bury spawning gravels; while larger stones and cobbles fill in deep pools where fish hide.<sup>17</sup> Excessive sediment and aggregate also warm the

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## Garcia River

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river's water, making the Garcia River inhospitable to anadromous salmonids, who need colder temperatures.

Agriculture bears some responsibility for erosion in the Garcia watershed too. But the Garcia River TMDL assigns much of the Garcia's erosion problems to the mass wasting of soils due to logging road construction. It sets a goal of reducing sedimentation along the Garcia by 60 percent by the year 2048, or an average of 552 tons per square mile per year (or over 69,000 tons throughout the watershed).<sup>18</sup>

The Garcia River TMDL's flexibility allows landowners to assess and eliminate sediment sources over a 30 to 40 year period; they're to achieve 3 to 5 percent reductions in sediment sources every year. Realistically speaking the TMDL is a way to get folks moving in the right direction with monitoring and effectiveness assessment as a backup.

California's proposed *Garcia TMDL for Sediment* imposes restrictive land use controls in road construction, wet weather activities, operations on unstable ground, erosion control measures, and stream protection. It will also allow landowners to develop their own site-specific plans with protections equal to the TMDL's requirements. Reduced sediment loadings are likely right away.

While large scale erosion on the North Coast rivers cannot be solved immediately, it can be addressed meaningfully on a project-by-project basis. Under the Garcia TMDL, with each project, erosion sources get repaired and operations controlled to limit or reduce erosion. This will doubtless help fish in the Garcia over time, and they're put in place so as not to place too onerous a burden on landowners.

### Eluding Political Heat

A long-awaited report to Congress on Clean Water Act administration, published June 15th by the National Research Council (NRC) of the National Academy of Sciences, found grave problems with our nation's waters and the process for achieving water quality standards in polluted water bodies.

But the NRC also recommends EPA nonetheless move ahead with TMDLs, saying, "The NRC committee feels that the data and science have progressed sufficiently over the past 35 years to support the nation's return to ambient-based water quality management [such as TMDLs]." However, the report concludes that money and commitment are likely to limit TMDL success.<sup>19</sup>

Foes seized on TMDL problems cited in the NRC report with a "see I told you so," hoping to derail TMDLs or make them useless. But solving problems is part of the regulatory process, according to Merritt Frey, policy analyst and TMDL coordinator with Clean Water Network. She dismisses their claims, saying, "We need to tackle cleanup. More data is always better, but data collection can be part of the process, not a reason to avoid action."<sup>20</sup>

The Bush administration would like to elude political heat for failing to enforce yet another environmental pro-

gram, but delayed "new" TMDL rules for 18 months so EPA could "review" them (which stalls their implementation until at least 2003), and Congress has cut off funds for implementation. With controversy raging over nonpoint source control issues, implementation planning, assurance of attainment, scheduling and timelines, and biological factors, among other things, the Bush regime may skirt the issue by giving states responsibility to set water quality criteria, list or delist water bodies, and develop their own TMDL programs.

EPA, under former New Jersey governor Christine Todd Whitman, can "adjust" the new rules to satisfy regulated industries, such as making compliance "voluntary" or putting regulatory review on the back burner, perhaps indefinitely.

Currently, regulated industry lobbyists are beating on EPA's doors to relax the rules and establish state control entirely. The threat of our supposedly endless war against terrorism could further weaken EPA and Clean Water Act implementation.

But there may be some hope for TMDLs in California. California was one of a few states to support the "new" rules,

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Logging roads and skid trails  
occupy an area of 24 linear miles per  
square mile. Take one square mile and  
put a road around its circumference  
and then grid that square with a  
tractor-cut road every 200 feet.

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and to help file a 7-state amici brief in the *Pronsolino* case.<sup>21</sup> There, Attorney General Bill Lockyer wrote that the "[Farm] Bureau and their amici supporters seek to limit the reach of the Clean Water Act to protect their own interests, at the expense of our needed efforts to improve water quality. But the Clean Water Act does not support their arguments."<sup>22</sup>

And State Water Resources Control Board Chairman Art Baggett states that "we are fully behind TMDLs," and moving forward with TMDL-related assessments and monitoring processes.

It is plausible that California will actively develop and implement TMDLs. But with 509 TMDLs left to do, and only two or three already adopted by the state, it is too early to tell how serious California is about TMDLs and about solving its water quality problems using them.

And with the federal government equivocating or trying to scuttle TMDLs, the fate of the Garcia River's symbol of wildness, anadromous salmon, hangs in the balance.

### NOTES

1. *From Webb's forthcoming book on the Garcia River.*
2. Guido A. Pronsolino and Betty J. Pronsolino, the Mendocino County Farm Bureau, the California Farm Bureau Federation, and the American Farm Bureau Federation v. Felicia Marcus, Regional Administrator, U.S. Environmental Protection Agency (EPA), Carol Browner, Administrator, U.S.

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## Klamath Drought

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75,000 acre-feet was also released for irrigation from Upper Klamath Lake by the Bureau of Reclamation when Basin runoff was a bit higher than expected, but well below the half million acre-feet delivered in normal years.

The plight of the Klamath farmers inspired sympathy from truckers who organized a convoy to show support in August. That noted advocate for rural America, the *Wall Street Journal*, also denounced the federal government's actions in the Klamath Basin as a form of "rural cleansing," encouraged by environmentalists.<sup>8</sup>

While pesky and tenacious, in the wake of the World Trade Center atrocity September 11th, the farmers promoting their water war called a truce until January 2002 in their assault on the Endangered Species Act and the actions of the U.S. Bureau of Reclamation.<sup>9</sup> But it's only a truce.

### Irrigators vs. Fishermen and Indians

Judge Ann Aiken ended the Klamath Basin irrigation party, making Klamath irrigators accountable to the ESA and their downstream neighbors for the first time. Before doing so, she clearly recognized in her June decision "the harm that could be suffered by" the Klamath farmers and their communities. "However," she noted somberly, "the court must balance that harm against the harm to the suckers and salmon, those who rely on the fish, as well as the public interest.

"The public interest weighs heavily on both sides of the dispute," wrote judge Aiken.<sup>10</sup>

The USBR decision withholding irrigation deliveries was to prevent harm to three federal ESA-listed fish species: the Link River and shortnosed sucker fishes and coho salmon. Due to drought, as many as 900 bald eagles — our national bird — rely on wildlife refuges in the Basin and face loss of their habitat this year, and many other migrating birds could lose key stops along the Pacific Flyway.

Meanwhile, commercial fishermen, and Karok and Yurok Indian tribes (who rely heavily on salmon fisheries of the

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**"This isn't a fish-versus-people issue, as it's been framed," says Troy Fletcher, executive director of the Yurok Indian tribe in northern California. "There are people behind the fish, real people on which this has real impact."**

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lower Klamath River) claim water in Upper Klamath Lake is desperately needed to protect these fish for their livelihoods downstream.

Klamath irrigators claim they face dire economic consequences, including bankruptcy, with damages ranging from \$250 million to \$1 billion.

"This isn't a fish-versus-people issue, as it's been framed," says Troy Fletcher, executive director of the Yurok Indian tribe in northern California. "There are people behind the fish, real people on which this has real impact."<sup>11</sup>

Wendell Wood of the Oregon Natural Resources Council told the *Medford Mail-Tribune* that the government promised Klamath farmers more water than it can deliver. "We hear the farmers and irrigators say, 'This is just not fair.' But it's also not fair that we got only 20 percent of the snowpack this year. Fishermen and the tribes tell us it's not fair that their cultural resources and economies have been sacrificed year after year."<sup>12</sup>

In the midst of the Klamath tempest, the Dubya Bush Administration proposed in May to strip the federal government of legal obligations and funding for enforcement of ESA protections.<sup>13</sup> For this administration, sophisticated seductions of ESA-sponsored habitat conservation plans are insufficient protection for property rights.<sup>14</sup> They apparently hope to save the ESA by destroying it; their chances improve with Gale Norton at Interior's helm.

### Klamath's Gordian Knot

Other Klamath Basin citizens (including farmers) and sovereign Indians of the Klamath Basin work on practicalities of undoing Klamath's gordian knot: Some low-lying croplands may be restored as wetlands for the Pacific Flyway. Other croplands may shift from Upper Klamath Lake water to reliance on pumped groundwater for irrigation.

Compounding the problem is that Klamath Basin wetlands were converted to farmland in the last century, reducing the basin's natural storage and water-cleansing capacity.

Moreover, Oregon has not resolved water rights in the Klamath Basin, though the state is expected to take action soon. "The burden is unfairly falling on the project users because we don't have any real regulation management [sic] of water rights," says attorney Bob Hunter of Oregon-based WaterWatch.<sup>15</sup>

The kernel of truth in the Dogma of Irrigation is that the family farm in America has been on the ropes since the Populists 120 years ago — and as an institution is itself in danger of extinction. This is a fraction of the whole story, but large newspapers accept this as the full story, preferring to dumb down the story as "fish versus farmers."<sup>16</sup>

Fortunately, smaller "upstate" California papers in Eureka and Redding, and Oregon papers in Medford and Portland, provide fuller coverage.<sup>17</sup>

The *Eureka Times-Standard* reports that a farmland boom in the past few decades also stressed Klamath Basin water supplies.<sup>18</sup> Possibly, some farmers are caught by this drought carrying significant debts. This is not new, for most farmers borrow heavily to stay afloat when anticipated harvests provide only one chance a year to earn income to last them the winter.<sup>19</sup>

Farming's difficulties are also compounded by the concentration of food wholesaling and retailing. Farmers

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## Klamath Drought

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become price-takers when monopolistic corporations dictate prices they will get for their crops.

Unfair “free” trade affects this picture too. California farmers tell me that “free trade” is free only for big retailers buying imported low-cost produce from Asia, Australia, and Latin America. American farmers must lower their prices to compete, while their costs increase each year. Meanwhile, overseas markets for their harvests are restricted.

Hmm. Few doubt an economic squeeze on Klamath farmers. Why wouldn’t these same farmers protest their debt burdens? Why blame sucker fish, coho salmon, and environmentalists? Why not take protests to banks and government farm credit offices instead? Since when are these institutions exempt from populist agitation?

Environmentalists must remind the public that expulsion of humans from the rural West results from mechanization, automation, computerization, and genetic modification of farm and timber production, far more often than regulation.

Too many people forget this (if they ever knew it), and their forgetting makes these processes seem inevitable. They’re not.

Neither the *Wall Street Journal*, nor apostles of Irrigation Dogma and property rights bother with these inconvenient realities when it’s time to harangue the Endangered Species Act. But Klamath Basin farmers are missing a grand opportunity — while they have the nation’s attention — to expand the political, economic, and even ecological connections beyond just their own selfish interests. Perhaps with a truce in the Klamath region, cooler heads will prevail, and thoughtful analysis for broader economic and ecological coalitions may begin.

### NOTES

1. “Farmers — Water — Money” e-mail distributed by American Land Rights Association and Land Rights Network, P.O. Box 400, Battle Ground, WA 98604. Their URL is <http://www.landrights.org>. The organization also has a legislative office in Washington, DC, with email address <landrightsnet@aol.com>.
2. An acre-foot of water is about 326,000 gallons of water, or about the volume of water used by two southern California families in a year. The Klamath River Basin project is described in detail at the Bureau of Reclamation’s web site at [www.mp.usbr.gov/kbao/](http://www.mp.usbr.gov/kbao/).
3. Gibbons quoted in Michael Milstein, “Endangered Species Act reform urged,” *Portland Oregonian* 17 June 2001.
4. On irrigation dogma, see Blaine Harden, *A River Lost: The Life and Death of the Columbia*, New York, NY: W.W. Norton, Inc., 1996, pp. 123-4. Now a New York Times journalist Harden is a native of the Columbia River Project area in central Washington state. Interior Secretary Norton’s MSLF friends are Roger and Nancie Marzulla, principal attorneys of Marzulla and Marzulla, a Washington, DC law firm specializing in property rights cases. Mr. Marzulla was an assistant attorney general under President Ronald Reagan, and recently won a water rights-takings case in the Tulare Lake

- area of the Central Valley of California. (See *Arresting Developments*, this issue.) See John Bragg, “Lawyer: Water loss a taking worth \$1 billion,” *Klamath Herald & News* 12 July 2001; also “Klamath farmers plan to sue government for up to \$1 billion,” *Associated Press* 25 August 2001.
5. Jeff Barnard, “Klamath farmers file new suit over water,” *Contra Costa Times* 12 October 2001.
  6. Jeff Barnard, “Protesters say Klamath owned by local irrigators,” *Associated Press* 30 August 2001.
  7. This means an average farm size of about 4,000 acres, not exactly small family-sized operations, though some could be. *SPILLWAY* sympathizes with family farmers when there is a reality behind the mantle; but our political rhetoric often obscures realities they’re intended to address. Nor is the Klamath Basin immune.
  8. Kimberley A. Strassel, “Rural Cleansing,” *Wall Street Journal* 26 July 2001. See also Michael Kelly, “Evicted by environmentalists,” *Washington Post* 11 July 2001.
  9. *Associated Press*, “Oregon protesters give up effort, for now,” 12 September 2001; Eric Bailey, “Water war truce declared by Klamath Basin farmers,” *Los Angeles Times* 16 September 2001; and Christine Souza, “Klamath Project protesters call it quits, cite patriotism,” *Ag Alert* 19 September 2001 (the publication of the California Farm Bureau Federation, at URL: [www.cfbf.com](http://www.cfbf.com)).
  10. Deborah Schoch, “Dreams dry up in Klamath Basin,” *Los Angeles Times* 23 July 2001.
  11. Steven Lewis Kandra; David Cacka; Klamath Irrigation District; Tulelake Irrigation District; Klamath Water Users Association; City of Klamath Falls, Klamath County, Modoc County, and Lon Bailey; v. United States of America; Gale Norton, Secretary of the Interior; Don Evans, Secretary of Commerce; and Klamath Tribes; Yurok Tribe; the Wilderness Society, et al, *Civ. No. 01-6124-AA, U.S. District Court of Oregon, Judge Aiken presiding, April 2001, p. 15-16*.
  12. Editorial, “Basin’s water troubles are more than fish vs. farmer,” *Medford Mail-Tribune* 28 May 2001.
  13. Glen Martin, “Bush Proposal Imperils Part of Species Act: Citizens could sue, but US would not pay for enforcement,” *San Francisco Chronicle* 11 April 2001; and John Heilprin, “Interior secretary rips cost of fighting lawsuits: Actions hurt aid for rare species,” *Associated Press* 13 April 2001.
  14. Roanne Withers, “No Surprises?: Habitat Conservation Plans,” *SPILLWAY* v1n3&4, Spring and Summer 2001, p. 12.
  15. *Medford Mail-Tribune* editorial, op. cit., note 14.
  16. The most egregious examples of this disservice to the California and western publics are: Jeff Barnard, “Drought, federal law pit farmers against fish in Klamath Basin,” *Associated Press/San Diego Union Tribune* 8 April 2001; Yvonne Condes, “Parched farmers cry out: Scarce water is allocated to endangered fish near Klamath Falls,” *Contra Costa Times* 8 May 2001; Eric Bailey, “Water War Pits Farms Against Fish,” *Los Angeles Times* 6 May 2001; and even as late as 18 July 2001, the Santa Rosa Press-Democrat ran an editorial titled, “Fish or farmers? Feud in Oregon is symptomatic of what awaits California.” Finally, see Brad Knickerbocker, “Fish vs. farmers presents a test case for Bush,” *Christian Science Monitor* 11 July 2001.
  17. John Driscoll’s “Klamath symposium calls for interests to band together,” *Eureka Times-Standard* 23 May 2001, and “A Klamath Confluence?” *Eureka Times-Standard* 24 May 2001, were examples of good Klamath coverage; see also Michael Milstein’s, “Clearing up water issues on Klamath Basin,”

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Portland Oregonian 29 August 2001, and "Mediation efforts resume today over Klamath water," 18 July 2001. In addition, the Eureka paper's editorial staff consistently recognize the need for compromise among all the Basin's water users. See "Klamath dispute offers no viable compromise," 23 May 2001, and "We cannot pick and choose which laws we will obey," 8 July 2001; of course the paper's position would foreclose on the genuine ethical stance that civil disobedience provides citizens of a democracy. Finally, see also Alex Breittler's "Ancient tradition vanishes: Endangered fish have role in American Indian culture," and "Beauty of wetland paradise perishes in season of despair," Redding Record-Searchlight 21 August 2001.

18. John Driscoll, "Feds hear coastal concerns on Klamath River," Eureka Times-Standard 19 May 2001.

19. A provocative study of the relationship of finance capital to agriculture in historical California is George Henderson's California and the Fictions of Capital, New York, NY: Oxford University Press, 1999.

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EPA, and the U.S. EPA, No. C 99-01828, United States District Court of Northern California, 91 F. Supp 2d, 1337. Hereafter cited as *Pronsolino v. Marcus*.

3. Clean Water Act of 1972, cited as Section 303(d), at 33 U.S.C. 1313(d). "Impaired" means a water body does not meet water quality objectives/criteria of fishable/swimmable and beneficial uses are not being met. Impairment can be a result of pollution delivered by point sources (factory discharges, wastewater facilities) or nonpoint sources (runoff from rangelands, urban runoff, road construction, logging operations — responsible for 60 percent of all pollution), or from combination of the two.

4. Over 500 impaired California water bodies (that is, lakes,

estuaries, rivers, streams, and bays) are to receive TMDLs. Thousands more in other states await scheduling and completion by states or EPA (if states fail to act).

5. In *Pronsolino v. Marcus*, Judge William Alsup cites the definition of pollutant in the Clean Water Act's Section 502, concluding that sediment would be part of the intended scope of Clean Water Act regulation.

6. *Pronsolino v. Marcus*, p. 2, note 2, where Judge William Alsup indicates DOF's restrictions which prompted the *Pronsolinos'* complaint.

7. *Ibid.*, p. 23.

8. Department of Justice and EPA Press Release, April 5, 2000.

9. EPA writes in its Garcia River Sediment TMDL that "an analysis of the road density indicates that road densities in the Garcia River watershed are well above the desired density to protect instream habitat, also indicating that erosion from roads is a probable source of concern." Garcia River Sediment TMDL, p. 12.

10. Data from the California Department of Forestry (CDF), Coastal Foreslands Option A and Sustained Yield Plans. Data are also available from CDF field analysis of existing inventories. The figure of 10,000 board feet per acre is for all of Mendocino County, not just the Garcia, the latter of which is obviously worse.

11. See Roanne Withers, "No surprise?: Habitat Plans Undoing Species Protection," *SPILLWAY v1n3&4*, Spring 2001, p. 12.

12. Anonymous, historical interviews with author.

13. Pacific Coast Fishermen's Federations Associations, Coast Action Group, et al v. Felicia Marcus, EPA Region IX, No. 95-4474 MHP, March 11, 1997.

14. U.S. Environmental Protection Agency, Region IX, Garcia River Sediment Total Maximum Daily Load, March 16, 1998, 51 pages. Available at EPA's web site, <http://www.epa.gov/OWOW/tmdl/index.html>. Hereafter Garcia River Sediment TMDL.

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- 15. Joe Brecher, *Brief of Defendants — Intervenor — Appellees*, Pronsolino v. Marcus.
- 16. Garcia River Sediment TMDL, *op. cit.*, note 13, p. 26.
- 17. *Ibid.*, p. 11, *Problem Statement*, "Aquatic Habitat."
- 18. *Ibid.*, Table 16, p. 36, and p. 44.
- 19. Committee to Assess the Scientific Basis of the Total Maximum Daily Load Approach to Water Pollution Reduction, *Water Science and Technology Board, National Research Council, Assessing the TMDL Approach to Water Quality Management*, Washington, DC: National Academy Press, June 15, 2001, 122 pages. Available on the web at <http://www.nap.edu/catalog/10146.html>.
- 20. Frey quoted from Clean Water Network's response to the 2001 National Research Council report.
- 21. The other states were: Oregon, Washington, Delaware, Maine, Maryland, and New Jersey.
- 22. *Amici Curiae Brief*, Pronsolino v. Marcus Appeal.

4. Tulare Lake Basin v. United States, p. 12. That case is Planning and Conservation League, et al v. California Department of Water Resources. See Tim Strohane, "Monterey Agreement: A Bloodless Coup" and "A History of the Monterey Agreement: Glimpsing California's Future," *SPILLWAY* v1n2, Winter 2000. Judge Wiese specifically cites Article 18(f) of State Water Project water service contracts. Wiese's interpretation of Article 18(f) could prove important for public trust and endangered species rulings undertaken by the State of California (should the state ever find such backbone to enforce their obligations in these areas of law). "The inclusion of Paragraph 18(f) in the contract does not render plaintiffs' interest in the water contingent; it merely provides DWR with a defense against a breach of contract action in certain specified circumstances," writes Judge Wiese. "With that exception, plaintiffs' contract rights are otherwise fully formed against DWR, and certainly against a third party seeking to infringe on those rights."

**Tulare and Kern**

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- 1. *Federal Claims*, No. 98-101 L, April 30, 2001, Judge John Paul Wiese presiding, p. 19. Hereafter cited in endnotes as Tulare Lake Basin v. United States, and cited in the article as Tulare.
- 2. *United States Constitution*, Article V.
- 3. Marzulla quoted in John Bragg, "Lawyer: Water loss is a 'taking' worth \$1 billion," *Klamath Herald & News*, 12 July 2001.

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