Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER
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UPCOMING "BREAKFAST BRIEFINGS" IN IDAHO FALLS AND TWIN FALLS

The authors of this newsletter are pleased to announce that they will be presenting a brief program regarding how to identify and address environmental and water rights issues that may arise in real estate transactions. The program will take place at the AmeriTel Inn in Idaho Falls on Thursday, June 3, 2010, and at the Canyon Crest Dining & Event Center in Twin Falls on Friday, June 4, 2010. The program will begin at 8:00 a.m. in both locations and is free of charge. RSVPs are requested. If you would like to attend or would like additional information, please contact Moffatt Thomas's marketing coordinator Jenn Hill at (208) 345-2000 or jdh@moffatt.com.

SAGE GROUSE UPDATE

Over the past few months, there has been much activity regarding the protection of the sage grouse. The sage grouse is native to three Canadian provinces and thirteen Great Plains and western U.S. states, including Idaho. Despite that wide native range, scientists report that sage grouse populations have been on a long-term decline through much of their range due primarily to loss and fragmentation of the sagebrush-steppe habitat on which they depend. The status of the sage grouse, both biologically and legally, is important to the state of Idaho, because so much of southern Idaho consists of sage grouse habitat.

Perhaps the most significant recent development with respect to the sage grouse is the U.S. Fish & Wildlife Service's ("USFWS") finding that listing the greater sage grouse as endangered under the federal Endangered Species Act ("ESA") is "warranted but precluded." 75 Fed.Reg. 13,910 (March 23, 2010). In other words, the sage grouse is sufficiently endangered that federal protection under the ESA is now warranted, but USFWS's listing of the sage grouse is currently precluded by other, higher priority listing actions.

Therefore, essentially, the sage grouse is currently not federally protected under the ESA, though it appears likely that it will be at some point. Once that occurs, federal agencies will be required to consult with USFWS on projects and approvals that may affect the sage grouse, "taking" a sage grouse will be illegal, and the USFWS will be required to designate "critical habitat" for sage grouse, resulting in further restrictions upon activities in those areas. USFWS's "warranted but precluded" finding automatically triggers a requirement that USFWS re-visit that finding every 12 months.

After USFWS announced its findings, the Western Watersheds Project ("WWP") filed its First Supplemental Complaint in its ongoing litigation with USFWS over sage grouse. *Western Watersheds Project v. U.S. Fish & Wildlife Service*, No. 06-CV-277-BLW (D. Idaho). This filing specifically challenges the "precluded" aspect of USFWS's recent findings. WWP initiated litigation against the USFWS in 2006, after the USFWS's 2005 finding that listing of the greater sage grouse under the ESA was not warranted. The district court agreed with WWP in ruling in 2007 that USFWS's "not warranted" finding was arbitrary and capricious, and remanded the sage grouse listing issue back to the USFWS, generating this more recent USFWS action.

In anticipation of the eventual listing of sage grouse under the ESA, the USFWS, the Natural Resources Conservation Service, and the Idaho Department of Fish and Game recently entered into a "Candidate Conservation Agreement with Assurances" ("CCA") for the protection of sage grouse habitat in west-central Idaho. Under the agreement, landowners within the subject area who implement an approved site-specific sage grouse management plan for their property would be protected from additional regulatory requirements in the event sage grouse is ever listed under the ESA. It is reported that this is the first CCA in the country for sage grouse.

Similarly, after the issuance of USFWS's "warranted but precluded" finding, the U.S. Departments of Interior and Agriculture entered into an agreement providing for the protection of greater sage grouse habitat within the eleven western states where sage grouse still occur. The agreement provides funding and assistance to farmers and ranchers who implement sage grouse habitat improvement projects on their lands. The Department of

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Agriculture announced that $16 million would be available this year for such projects in the eleven western states. Under the agreement, the USFWS is to provide participating landowners with "reasonable assurances" that such projects will comply with the ESA and that no further action will be necessary, in the event that listing of the sage grouse ever occurs.

While, as a result of the recent USFWS findings, the sage grouse is not currently listed under the ESA, it is important to note that the sage grouse is still afforded some protection under other federal laws. A good example of that is provided in the Ninth Circuit Court of Appeals's recent decision in *Native Ecosystems Council v. Tidwell*, No. 06-35890. In that case, the U.S. Forest Service ("USFS") was updating grazing allotments in the Beaverhead-Deerlodge National Forest in Montana, and analyzed the effects of those grazing allotments on the sage grouse under the federal National Forest Management Act and National Environmental Policy Act. The plaintiffs argued, and the court agreed, that USFS's analysis of the effects on sage grouse was flawed under both of those federal laws.

IDAHO CONSERVATION LEAGUE SUES EPA OVER LACK OF IDAHO WATER QUALITY RULES

On April 19, 2010, the Idaho Conservation League ("ICL") sued the U.S. Environmental Protection Agency over its alleged failure to promulgate (or require IDEQ to promulgate) a Clean Water Act-based antidegradation implementation plan. ICL is demanding that EPA take action in light of IDEQ data demonstrating that only 27 percent of Idaho streams, lakes, and rivers meet current state water quality standards, and that 36 percent of Idaho waters exceed pollution thresholds for one or more pollutants.

The ICL suit likely comes at a particularly opportune time for coaxing EPA action. This is because IDEQ, like other state agencies, is contending with substantial budget cuts. This will be the second year in a row where budget cuts have forced IDEQ to suspend its water quality monitoring programs. The IDEQ water quality monitoring cuts bolster ICL's contentions because the monitoring programs are crucial to measuring water pollution levels and generating data used to track pollution trends.

ICL contends that its lawsuit is necessary because IDEQ's failure to implement satisfactory antidegradation rules has less to do with budget shortfalls than it does with a history of agency and EPA ambivalence. ICL's suit points to the facts that EPA has known for nearly 15 years that Idaho lacks any antidegradation implementation plan, and that it took Idaho over a decade to submit its first set of water quality standards after the enactment of the Clean Water Act in 1972.

The ICL complaint fails to acknowledge, however, is that IDEQ is currently participating in a negotiated rulemaking process to develop a suitable antidegradation implementation plan. The negotiated rulemaking process stemmed from negotiations between the agency and ICL beginning in Fall 2009. Rather than continue with a negotiated process, ICL has chosen to sue EPA to further force the issue.

ENVIRONMENTAL POLICY THINK TANK REPORT CALLS FOR STATES TO BETTER REGULATE POLLUTION FROM AGRICULTURAL RUNOFF

In its recent report entitled *Cultivating Clean Water: State-Based Regulation of Agricultural Runoff Pollution*, the Environmental Law & Policy Center recommends that states enact tougher agricultural runoff regulations. The report examined the non-point source discharge regulatory regimes of seven states: California, Delaware, Iowa, Kentucky, Maryland, Oregon, and Wisconsin.

Generally speaking, the states examined all implemented strategies for addressing non-point source agricultural runoff through the implementation of best management practices and regional watershed planning. However, the report also noted that each of the states failed to follow through on compliance monitoring, largely due to funding constraints. The compliance and monitoring programs reviewed were limited at best, and many only performed inspections in response to citizen complaints as opposed to on a reliable monitoring schedule.

The report acknowledged the fact that the CWA explicitly exempts agricultural stormwater runoff and irrigation return flows from regulation under the Act and its NPDES discharge program. The report contended that this lack of federal regulatory oversight is why states need to fill the regulatory gap, particularly concerning the control of nitrogen and phosphorus runoff, which EPA cites as two of the most significant pollutants threatening U.S. rivers and lakes. The report concluded that state non-point source regulations should be implemented, that they need to apply broadly to all agricultural operations, and that implementing agencies must be funded sufficiently to oversee meaningful compliance programs.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Peña at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Peña if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.