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Finding Water Supply Solutions Through Environmental Protection Law

Westlands Water District is the largest irrigation district in the nation. It provides irrigation water to over 600,000 acres of farmland within an area that is 15 to 25 miles wide and 70 miles long. In recent years, Westlands Water District has had its water supply from the federal Central Valley Project severely reduced due to drought and the enforcement of federal restrictions adopted under the Endangered Species Act. Mr. Thomas W. Birmingham, general manager of the Westlands Water District, recently discussed how the very laws that initially shut down the district's water deliveries have been helpful in restoring some of those supplies. Below is the transcript of the September 27, 2010, interview by Kris Polly, editor-in-chief, Irrigation Leader magazine.

Kris Polly: How have the Endangered Species Act (ESA) and the National Environmental Protection Act (NEPA) helped Westlands Water District in the current controversy over water supplies in California?

Tom Birmingham: Neither the Endangered Species Act nor the National Environmental Policy Act is a bad law, but as in many other circumstances, the impact of those statutes depends entirely on how they are implemented. The U.S. Fish and Wildlife Service and NOAA Fisheries have been selective in their enforcement of the Endangered Species Act. They tend to ignore the provisions of the law that require that decisions be based on best scientific and commercial information available, and we have been able to use those provisions as a means to challenging jeopardy determinations and the imposition of restrictions that may reflect a federal biologist's best professional judgment but are not based on scientific data. I think the same is true for NEPA. Federal agencies have been selective in its application. However, NEPA doesn't exempt major federal actions that are proposed to protect the environment. To the contrary, it applies to all major federal actions. We have been successful in asserting that the impact on the human environment must be analyzed before the biological opinions are implemented. In this way, we have been able to use the two laws in the current controversy over water supplies in California to seek to have the laws fully implemented. And to date I believe we have had some success.

Kris Polly: What projects has Westlands undertaken to help resolve California's delta and water supply issues?

Tom Birmingham: The water supply for major areas of California is conveyed through the Sacramento and San Joaquin River Delta. Because of efforts to protect fish species in the delta, our water supply has been significantly curtailed. It's our view that there are many factors that limit the abundance of those species beyond the operations of the two water projects in California. Because there are many factors that limit the abundance of at-risk species in the delta, and because we need to better understand those factors in order to be able to restore our water supply, Westlands has put its money where its mouth is. Working with other public water agencies that depend on water supplies pumped through the delta, we have purchased approximately 3,500 acres of land in the delta and we are in the process of restoring approximately 2,000 acres to tidal marshland habitat. This will benefit native fish species that either inhabit the delta or rely upon the delta for part of their life cycle. Westlands has done other things, such as funding California game wardens, so that the Department of Fish and Game can go out and address such things as poaching and other violations of the fish and game code that affect those at-risk species.

Kris Polly: Westlands, the largest irrigation district, and the Metropolitan Water District of Southern California, the largest municipal water supplier, are working together to address some of the biggest water supply issues in California. In the past, these two agencies have sometimes been at cross purposes. How did this alliance come about and how is this relationship working out?

Tom Birmingham: Well, it is my view that the conflict between agricultural water agencies and urban agencies has been exaggerated. I don't mean to suggest there has not been conflict in the past. For example, when Congress was considering the enactment of the Central Valley Project Improvement Act in the early 90s, there certainly was a conflict between the Metropolitan Water District and Westlands Water District concerning the enactment of that legislation. However, I think that at least in California there is a recognition that urban agencies and agriculture agencies share much more in

common than they have differences. That is the basis for the very good working, cooperative relationship between Westlands and Metropolitan. Over the course of the last seven or eight years, we have recognized that if we work together for common solutions, we will have a much greater chance each other. Westlands farmers have benefited from our relationship with Metropolitan. We have been able to implement a number of programs where we have utilized some of the flexibility that Metropolitan has in its water delivery system to address or to mitigate some of the limitations that exist within the Central Valley Project. As an example, we share capacity in San Luis Reservoir with Metropolitan and we have actually borrowed water from Metropolitan to avoid the reduction of deliveries to Westlands during the peak of the irrigation season. This year we are implementing an exchange with Metropolitan that will allow us to bank our Central Valley Project water in Metropolitan's storage facilities in southern California in order to avoid losing that water under federal policies that make it likely the water will spill out of the San Luis Reservoir. So at least from our perspective, our relationship has been very, very beneficial, and it is our hope that Metropolitan's ratepayers have benefited as well.

Kris Polly: You are engaged in the development of a Bay Delta Conservation Plan that is intended to help restore the fisheries and other natural resources in the delta and, at the same time, restore the reliability of the water system itself for all the people who depend on it. What have you learned from that process that may be important to anyone else who is thinking of undertaking a major infrastructure development project?

Tom Birmingham: That is an incredibly difficult question. First, tenacity is a key. We engaged in the California Bay Delta conservation program because it became apparent to us that if we were going to implement programs or projects that have been on the drawing board for a number of years to improve our water supply, it would be necessary to develop a comprehensive solution to the problems that are affecting the delta. If we are going to be successful, that success will result from a genuine interest on the part of the public agencies and nongovernmental organizations to recover the species in the delta and the water supplies California needs. It has been a long, arduous process. I think the key is establishing realistic objectives and then insisting that a program be developed to achieve those objectives. We cannot lose sight of the objectives that were established early in the process.

Kris Polly: What are some of the issues that you are facing today in California that are likely to come up for the more than 600 irrigation district managers in the 17 western states who read *Irrigation Leader*? How would you advise them to address ESA and NEPA issues?

Tom Birmingham: First, hire a good lawyer. Beyond that, I think the simple answer to this question, in view of the increasing conflict between competing uses of water and environmental regulation, is to seek collaborative solutions.

My advice about hiring a good lawyer is only partly tongue-in-cheek. I think whether an irrigation district manager is dealing with the Endangered Species Act, NEPA, the Clean Water Act, or the Clean Air Act, there are provisions within the law that will help protect the interests of his or her district. For that reason, having the advice of a knowledgeable lawyer certainly will be valuable.

As an example, we have recently been involved in litigation concerning the implementation of federal laws that require the use of good science—in particular, the Information Quality Act. It is a little known federal law that sets standards for the type of scientific analysis that has to be done by federal agencies when they are making important decisions. Without the assistance of some very competent, knowledgeable lawyers, that law would not have ever come to our attention.

Beyond that, I think we have had as much success seeking collaborative solutions as we have had litigating. The key there is dealing with other agencies and nongovernmental organizations that are genuinely interested in finding solutions that will serve the interests of everyone involved. As an example, our district has recently been involved in the development of regulations by a state agency that are intended to protect ground water quality. We initially were very concerned that those regulations would only create tremendous conflict between the district and the state agency that was developing those regulations. But early on, we established a collaborative relationship. To our pleasant surprise, we have been able to work out most of the issues that were of concern to us with respect to those regulations.

I think the same is true in the application of the Endangered Species Act or NEPA. We have had tremendous success sitting down with the Fish and Wildlife Service, as an example, working together to find a means of improving our water supply or for reducing the impact of the Endangered Species Act on our water supply while at the same time enabling the service to fulfill its obligation under the Endangered Species Act. The key to achieving that kind of success is dealing with those people within the agency who recognize there may be alternatives that will serve the interests of both the irrigators and the species that the service is trying to protect.

The last piece of advice I would give applies in any area of federal environmental law, and that is to develop good science. Everyone wants to base decisions on good, sound science. The water users in California have invested a tremendous amount of money and other resources in the development of good scientific information and that has served us well. We have been able to use that scientific information in both the administrative arena as well as in litigation. Having good science available to us has enabled us to pursue solutions that ultimately help protect our water supply.