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Protecting and Restoring Free Flowing Rivers, Presented by: Douglas W. Wolf, Center for Biological Diversity; Drevet Hunt, Lawyers for Clean Water; and Konrad Fisher, Klamath Riverkeeper.

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PUBLIC INTEREST ENVIRONMENTAL LAW CONFERENCE 2017: ONE CAUSE, ONE VOICE

Eugene, Oregon March 2-5, 2017

PROTECTING AND RESTORING FREE FLOWING RIVERS, PRESENTED BY: DOUGLAS W. WOLF, CENTER FOR BIOLOGICAL DIVERSITY; DREVET HUNT, LAWYERS FOR CLEAN WATER; AND KONRAD FISHER, KLAMATH RIVERKEEPER.

This panel explored a series of legal tools available for attorneys to protect and restore instream flows.

To begin, Douglas Wolf discussed legal tools that the Center for Biological Diversity (the "Center") and other organizations use to fight harmful seasonal flow diversions on the Gila River. Specifically, Wolf explained how the Center used critical habitat of the endangered fish to protect instream flow on the Gila River using the Endangered Species Act ("ESA") by focusing on the risk that spring-runoff diversions posed to the threatened loach minnow's critical habitat to help protect the Gila River's instream flows. In 2009, the Center won a lawsuit against the United States Fish and Wildlife Service arguing that a previous designation of five hundred river miles of critical habitat for the loach minnow was insufficient. In 2012, Service not only designated 710 miles of critical habitat, but also listed the loach minnow as an endangered species.

The next panelist, Drevet Hunt, discussed three examples of litigation tactics used to restore instream flows. First, Hunt discussed how petitioners sued under Section 9 of the ESA to increase flows on the Shasta River below the Dwinnell Dam in California by arguing the dam blocked historic runs of the endangered coho salmon and constituted an unpermitted taking. A 2013 settlement resulted in the dam operators needing to get an incidental take permit and create a long-term flow and habitat restoration plan to encourage coho salmon populations. Second, Hunt next discussed how California attorneys use the state's constitutional prohibition against waste and unreasonable use to protect instream flows. In 2014, Lawyers for Clean Water sued the state over the City of Buenaventura's over-pumping of the Ventura River affecting eleven endangered species and reducing local steelhead populations by ninety-six percent. This litigation is still pending, but the state has made some efforts in working to enhance Ventura River flows. Third, Hunt explored how petitioners successfully used Section 5937 of California's Fish and Game Code against dam operators to restore instream flows. This section of the code mandates owners of dams "allow sufficient water at all times to pass . . . to keep in good condition any fish that may be planted or exist below the dam." In one example, a federal court even enforced this law against a federal dam operator, the United States Bureau of Reclamation.

Last, Konrad Fisher discussed the impacts of diversions on the Klamath River and how he would like to see in how the public approaches water quantity issues, such as by reframing water diversions as percentages rather than total quantities. He argued the public would be more understanding of water quantity issues if water settlements apportioned seventeen percent of flows for fish.