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ESA and Water Law - The Impact on Water Projects

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because the tribe felt state law did not apply to them. This conflict led to a settlement and the creation of a tribal water code; however, Florida area flood control projects have affected the local water quality and vegetation. These flood control projects disrupted the entire ecological system and the Seminole tribes are attempting to remedy the issue.

Douglas W. MacDougal, Shareholder at Schwabe, Williamson & Wyatt in Portland, Oregon, distinguished the Klamath River Basin issues. He stated the Klamath is unique because it includes federal reserved rights, a general stream adjudication, and a habitat recovery program. Power generating dams create issues with fish passage and local tribes sought instream flows to maintain historical fishing rights. Settlement efforts are in place to restore the Klamath Basin.

Amy Petri Beard

ESA AND WATER LAW – THE IMPACT ON WATER PROJECTS

This panel provided an update on the ESA's current reach, the intersection between the ESA and other environmental statutes, and the ESA's impact on water projects. Thomas R. Wilmoth, Partner at Blackwell Sanders LLP in Lincoln, Nebraska, moderated the session.

Christopher Keifer at NOAA in Long Beach, California, began the panel by discussing some of the current issues under the ESA. Mr. Keifer suggested that one key provision of the ESA - to encounter significant litigation in the near future - is the requirement for a determination of the "action area" in a biological opinion. An important question to consider is whether an aggregate approach should be used, or rather a comparative approach.

F. Lorraine Bodi at the Bonneville Power Administration in Seattle, Washington, continued the panel discussion with her experience in the "religious wars" over the Columbia River dams. Although this litigation has been long-lasting, Ms. Bodi sees good news. She commented that the abundance of fish is up in the river and that the "shuttle diplomacy" is working to patch together a solution among the thirteen Indian tribes, seven states, and two countries. Some of the emerging issues currently on the Columbia include whether the parties must guarantee recovery from all sources of impact and how to effectively address climate change.

John Kostyack at the National Wildlife Federation in Washington, D.C., ended the panel with a discussion on the intersection of climate change, endangered species protection and western water management. Mr. Kostyack suggests that the ESA is a first generation environmental law and that a new approach is needed to effectively address climate change issues. His specific suggestions on creating a new strategic approach include involving the stakeholders, resolving issues of scale, and emphasizing locally available data.

Maria Hohn