

Monthly Briefing

A Summary of the Alliance's Recent and Upcoming Activities and Important Water News

The Look Ahead: 2011 and Beyond National Water Politics in Washington

When the Republicans swept control of the House of Representatives in last November's election, a new era of environmental and energy policy emerged. The incoming wave of House Republicans will focus many of their efforts on oversight of Obama administration policies, some of which pose risks to Western irrigated agriculture and rural communities. The more narrowly divided but still Democrat-controlled Senate will likely make things more challenging for critics of irrigated agriculture. Environmental activist groups may shift efforts in the next two years away from Congress and attempt to push their agenda using Obama Administration agency rule-making channels.

Big-Picture Priorities

Spending and deficit reductions will be a top issue for the newly elected Congress – Republican or Democrat. Because several of the Democrats who lost their seats were blue dog moderates, the make up of Congress may be more polarized, with more entrenched

liberal and conservative Members in place.

"Finding common ground will be tough in the 112th Congress," predicts Mark Limbaugh, the Family Farm Alliance's representative in Washington, D.C.

Major public works programs – such

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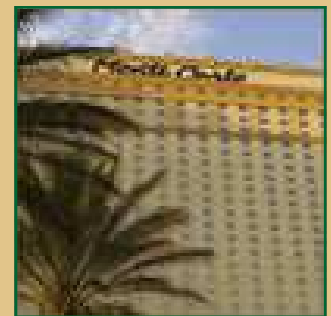
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Water Policy Outlook in D.C. (Cont'd from P. 1)

as the Water Resources Development Act (WRDA), which funds many of the activities and projects of the U.S. Army Corps of Engineers – will continue to be a bipartisan priority. Other, potential new legislation to support energy, water and environmental infrastructure enjoy bipartisan support, including by senior leadership in both parties.

On the House side, oversight hearings of Obama Administration actions will be a priority. While much of the scrutiny will be placed on the activities of the Environmental Protection Agency (EPA – see related story, page 4), oversight will also be called on the Departments of Interior (off shore oil permitting and regulation); Agriculture (Chesapeake Bay restoration/rural issues) and Energy (stimulus spending/renewable energy).

House Republicans earlier this month released the draft of a House rules package for the 112th Congress. The resolution will be voted on the first day of the new Congress and provides a series of reforms to the current rules of the House of Representatives. Changes to the House rules were one of the principal focuses of the GOP Majority Transition Team.

“If there’s one thing all Americans can agree upon it’s that Congress isn’t working the way it should. The back-room deals, curtailed debate, and disconnect from the concerns of the people have left Congress a damaged institution in the minds of too many,” said Rep. Greg Walden (OREGON), the chairman of the Republican transition team. “To begin to restore trust with the American people, Republicans have pledged to operate Congress differently: with real transparency, greater accountability, and a renewed focus on the Constitution. The sweeping reforms offered in this package make clear we intend to keep that promise.”

House Republicans will meet January 4 to consider any amendments to the rules package, and Democrats will be provided an opportunity to offer a substitute package when it is considered on the House floor January 5.

Senate Water and Power Priorities

The Senate Energy and Natural Resources Committee (which Senator Jeff Bingaman of New Mexico will still chair) will focus on energy independence through enhanced renewable and domestic energy production, including natural gas and hydropower. An oil spill policy bill -stemming from the Gulf oil spill and the recent moratorium on drilling – may also be in the mix. Other issues could include ethanol, wind, and solar subsidies and incentives programs.

“The push to reduce the deficit will cut into any extensions or expansions of these programs,” says Limbaugh.

The issues of carbon emissions reductions and climate change will be difficult for the Democrats to address, so actions undertaken by the conservation lobby may be cloaked by focusing on domestic supply

of renewable and low-carbon emitting energy. Senator Lisa Murkowski will still be ranking member of this committee, so she will continue her push for new hydroelectric programs and increasing energy production in her home state of Alaska. Senator Murkowski will also be interested in curtailing EPA greenhouse gas regulatory efforts, even though her committee does not have jurisdiction over EPA.

House Water and Power Priorities

Oversight hearings in the House Water and Power Subcommittee will likely be the first priority since there has been little oversight of the Obama Administration over the past two years. Initial hearings could be focused on how adequate water supplies impact the economy and jobs; the need for more water storage; aging infrastructure; promoting hydropower; and the impact of environmental regulations and litigation on water and power supplies.

While oversight will likely be the priority, other initiatives of interest could include finding ways to facilitate permitting low-impact hydroelectric projects and transferring ownership of single purpose federal irrigation facilities to local owner-



Image Source: Office of Rep. John Boehner

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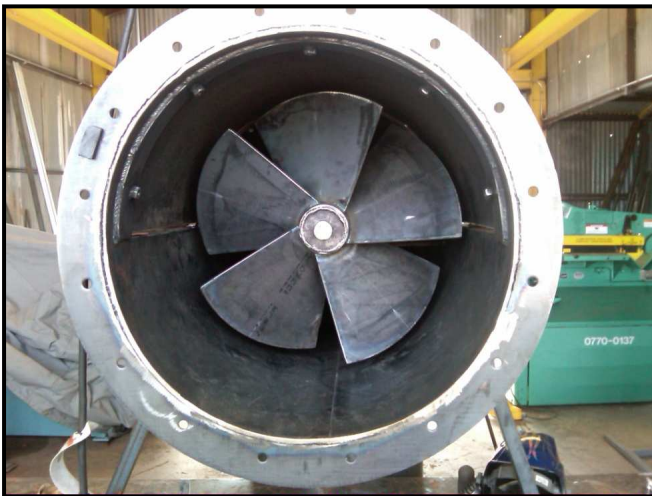
Water Policy Outlook in D.C. (Cont'd from P. 2)

ship.

“None of these proposals will be easy to pass,” said Alliance executive director Dan Keppen. “We will definitely be spending time working with Congress to help build the case for their need.”

Low-Head / Low-Impact Hydropower Legislation

In the Senate earlier this year, the Alliance worked with Senator Murkowski’s staff to craft and generate support for “The Hydropower Improvement Act of 2010” which provides: 1) the development of a competitive grant program; 2) a new conduit pilot project program; and 3) public workshops intended to improve coordination and achieve a common understanding of documented challenges associated with known regulatory barriers. On the House side, the Alliance worked with Committee staff to do the same on the “Small-Scale Hydropower Enhancement Act of 2010”, which intends to exempt any conduit-type hydropower project generating less than 1.5 megawatts from FERC jurisdiction. This bill also would require the Bureau of Reclamation to examine its facilities for more conduit generation using existing funding.



Low-head turbines like this one designed by Elephant Butte Irrigation District (NEW MEXICO) could be easier to install under potential new low-impact hydropower legislation introduced in the 112th Congress in 2011. By designing and manufacturing their own turbines, irrigators can significantly reduce costs. Source: EBID

“Both of these bills, and components of them, are likely candidates for legislation that may have bipartisan support in the new Congress,” said Keppen.

Clean Water Act

The legislative effort pushed by some national environmental organizations to expand the scope of the Clean Water Act (CWA) was dealt a severe blow on Election Day when voters declined to re-elect the two leading Congressional proponents of legislation to “restore” the CWA by overturning two Supreme Court decisions that limited its reach.

Defeated at the polls were Rep. James Oberstar (MN) and Sen. Russ Feingold (D-WI). Rep. Oberstar is the author of the last House bill (H.R. 5088) that would eliminate the term “navigable waters” from the Act and so expand the Act’s coverage to all “waters of the United States,” as defined by 1986 regulations that were struck down by the Supreme Court (in the *SWANCC* and *Rapanos* decisions). Sen. Feingold is the principle sponsor of similar Senate legislation (S. 787).

Although the Senate bill was approved by a committee last year, neither bill has advanced because of strong opposition from water agencies, small business, construction and other interests.

The defeat of the legislation’s two authors, combined with Republican control of the House, probably ends the effort to expand the CWA through legislation, at least for the foreseeable future. That did not stop some movement in the lame duck Senate, where Senator Boxer reported S. 787 to the Senate floor on December 10. However, no action was taken before the Senate and House both adjourned *sine die* for the year less than two weeks later.

The battle is already shifting to the administrative arena, where EPA last summer proposed a draft regulation governing the application of aquatic pesticides. The proposed rule uses essentially the same all-inclusive 1986 definition of “waters of the United States” as the Oberstar and Feingold bills.

“The draft regulation is still pending, and proponents of the Oberstar/Feingold bills can be expected to press hard for its final adoption by EPA,” said Limbaugh. “However, we believe that the new Congress, especially the new Republican House, will be very interested in holding oversight hearings on any EPA efforts to expand CWA regulation.”

In a Year of Record –Breaking New Rules , EPA Shows No Sign of Slowing Down

Irrigated agriculture, water infrastructure and the use of farm pesticides were in the sights of regulators at EPA in the past year, which appears to be consistent with the top-down regulatory management scheme favored by this Administration.

When one totals up all of the new regulations already passed by the Obama administration last year, using their own cost estimates, fiscal 2010 saw the largest increase in regulatory burdens placed on the U.S. economy in the nation's recorded regulatory history, according to the Heritage Foundation. A recent report released by the Small Business Administration finds that existing total regulatory costs already amount to about \$1.75 trillion annually -- nearly twice as large as the sum of all individual income taxes collected last year. Adding to this burden, federal agencies promulgated 43 new rules during the fiscal year ending September 30. On net, the Obama administration hoisted \$26.5 billion in new regulatory costs on the economy last year, says the Heritage Foundation.

Summary of Key EPA Actions

EPA for over a year has continued its vigorous efforts to re-write U.S. environmental policy through administrative rulemaking.

“For eighteen month now, we have spent many resources and much time monitoring and engaging EPA’s rulemaking efforts,” said Alliance executive director Dan Keppen. “Many of these proposed rules and policies hold potentially harmful implications for Western farmers and ranchers.”

Several actions taken by EPA in the past year have catalyzed these concerns:

- On June 2, 2010 EPA released its draft National Pollutant Discharge Elimination System (NPDES) permit for point source discharges from the application of pesticides to waters.
- EPA issued the final version of its five-year strategic plan in late 2010. The final plan is similar to a draft released in June and reiterates the agency's intention to implement strong climate change actions. While EPA focused more on incentive programs under the Bush administration, it will now mix voluntary programs with "additional regulatory actions as needed."

“It is unclear what aspects of the plan were tweaked in light of the 500 public comments received, including ours,” said Keppen.

- The release of EPA’s draft strategy- “Coming Together

for Clean Water”, which Keppen says “ carries with it the same concerns we have with the Strategic Plan”.

- The Central Arizona Project awaits a critical decision from EPA on emissions upgrades that may be mandated for the Navajo Generating Station (NGS). The emission requirements being considered by EPA are intended to satisfy unique visibility criteria – driven in part by the proximity of NGS to Grand Canyon National Park - and they carry with them a heavy cost to local farmers and ranchers.
- Recent guidance from EPA regional offices show a clear bias against water storage projects that appears to prejudice potential projects without consideration of important civic, economic and environmental needs.
- The Obama administration is reconsidering a 2008 EPA rule recently upheld in the 11th Circuit Court of Appeals that allows water transfers from one water body to another without Clean Water Act (CWA) permits. This new level of regulation, permitting and certain litigation could hamstring the economies of states like Arizona, California and Colorado, where millions of acre-feet of water are transferred every year.
- EPA has failed to establish clear procedures for its pesticide effects determinations and subsequent actions consistent with 1988 amendments to the Endangered Species Act (ESA). This has resulted in unnecessary restrictions without any indication that Pacific Northwest salmon will benefit and puts producers along the West coast at a competitive disadvantage.
- EPA and the National Oceanic & Atmospheric Administration (NOAA) agreed to a September settlement agreement with environmentalists in the case, *Northwest Environmental Advocates (NWEA) v. Locke, et al.* This Oregon settlement could set national precedent for establishing enforceable limits for nonpoint sources of water pollution, an approach that could be replicated in other regions to address nonpoint runoff from farms.
- Environmentalists earlier this year filed a petition asking that EPA take over all water pollution enforcement in Alabama, claiming that the state environmental agency is inadequate. Alabama business interests say EPA's demands would contradict state laws that allow only a single environmental enforcer.

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EPA Rulemaking Efforts (Cont'd from p. 4)

These types of federal water resources actions and regulatory practices could potentially undermine the economic foundations of rural communities in the arid West by making farming and ranching increasingly difficult.

“American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to muster even more innovation to meet this critical challenge,” said Alliance President Patrick O’Toole, who raises cattle and sheep in the Rocky Mountains of Wyoming. “That innovation must be encouraged rather than stifled with new federal regulations and uncertainty over water supplies for irrigated farms and ranches in the rural West.”

Recent Developments at EPA

As reported in “*Environmental Health News*” earlier this month, EPA Administrator Lisa Jackson and National Academy of Sciences President Ralph Cicerone have launched an effort to develop the so-called Green Book, a project to ensure all EPA policies are driven by “sustainability”. This project was commissioned by Administrator Jackson and announced as part of EPA’s 40th-anniversary celebration this year. EPA’s current policies and regulations are driven by statutes that oversee individual issues, such as pesticides, air pollution and drinking water contaminants. But the project by the National Academy will develop a framework for the EPA to link all environmental issues and ensure its policies rely on sustainable use of energy, water, land and other resources. EPA claims that current approaches are “fragmented”, instead of just focusing on risks. So, if there were a new “sustainability” approach, EPA would have to incorporate a range of sustainable approaches in its solutions to problems.

EPA spokespersons point to an example of the consequences of fragmentation: when growers want to increase crop yields to grow the food supply, this goal leads to “overuse of farm chemicals”, they say.

“It appears EPA is moving from a scientific based regulatory scheme – one where their application of true science has long been debated - to a warmer and fuzzier ‘sustainability’ format,” said Gary Sawyers, counsel to the Alliance.

Keppen and others in Alliance leadership agree.

“This could very well allow EPA to advance an agenda with potential impacts to production agriculture, development and businesses, absent congressional direction and oversight,” said Keppen. “This is pretty big, since this initiative will give EPA even more influence in the water, land, and resource planning arena with an environmental “vision” that may not work for all of America.”

This latest effort could push Republicans in Congress to become even more aggressive on oversight of the agency.

Growing Concern and Recent Response to EPA Actions

Recent and proposed hearings on EPA’s activities could be a sign of things to come in the next Congress – especially now that the Republicans have taken control of the House of Representatives. In the run-up to the election, Republicans campaigned against EPA Administrator Lisa Jackson, pointing to her agency’s new regulations as proof that President Obama and the Democrats are stifling the struggling economy. House Agriculture Committee Ranking Member Frank Lucas (R-OK), Small Business Committee Ranking Member Sam Graves (R-MO) and Natural Resources Committee Ranking Member Doc Hastings (R-WA), recently sent a letter to Administrator Jackson to recap the informal oversight hearing on EPA regulations held on September 29, 2010 that she declined to attend. Norm Semanko represented the Family Farm Alliance at that hearing.

The congressional letter accuses EPA of “overreaching in its massive effort to regulate private lands and waters” and suggests that EPA conduct listening sessions and town meetings in rural communities so that everyone understands the reasons for such proposed regulations as well as the costs and benefits. In response, Administrator Jackson claims that Americans are taking a healthy environment for granted and that younger people might not realize why the agency was created in the first place.

“We can expect numerous, similar formal oversight hearings like the one held on September 29th to be conducted by the Republican-controlled House, starting in 2011,” said Limbaugh.



A September 29th hearing focused Republican attention on EPA regulations and the impact they have on American businesses and farms. Photo Source: Agri-Pulse

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New EPA Rulemaking (Continued from Page 5)

Family Farm Alliance Action

“While it may be difficult to get EPA and other Administration agency policy makers to back off on the approach they are taking, we have alerted our members and other regulated producers to what is happening, and we have worked with some Members of Congress to raise the issue with them,” said Keppen. “Our goal - set earlier this year - was to memorialize our concerns in the public record and encourage other organizations to take a similar stand.”

The Alliance in 2010 developed detailed comment letters on EPA’s draft General Pesticide Permit, EPA’s 5-Year Strategic plan and EPA’s draft Clean Water Strategy.

“Overall, our comments reflected our concerns that EPA is moving in a direction where a heavier regulatory hammer will be wielded, litigious actions will be encouraged through the use of “citizen science”, and products used by American farmers and ranchers in the production of food and fiber will be foremost in the sights of EPA regulators,” Semanko testified on September 29th.

“We have shared our observations of EPA’s draft documents with our allies in the regulated committee and in Congress,” said Keppen. “We developed these documents with an understanding that some of our comments and arguments, if properly presented, could form the basis for future legal and or legislative action, if needed. The September 29th forum in Washington provided an excellent initial opportunity to exercise this approach.”

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**Norm Semanko, on behalf of
the Family Farm Alliance,
September 29, 2010
Washington, D.C.**

Appeals Court Rules on Inequity of ESA Standards

The Ninth Circuit Court of Appeals in San Francisco recently ruled that the federal government in a March 2008 decision failed to explain how the killing of sea lions that prey on salmon below the Columbia River’s Bonneville Dam is consistent with federal law. The latest opinion reverses a Nov. 25, 2008, order by U.S. District Court Judge Michael Mosman. The appeals court panel says targeting the sea lions was inconsistent with letting fishermen catch even more Columbia River salmon protected by the Endangered Species Act (ESA), pointing out contradictions in the National Marine Fisheries Service’s (NMFS) conservation policy that targets the natural predators while allowing fishermen to take many more of the fish.

“The court questions – like many of us have for years - how a lower rate of observed predation by sea lions can be deemed "significant" by NMFS while the take rate by commercial fisheries is five times higher and is considered to only have “minimal adverse effects”, said Alliance Executive Director Dan Keppen”

In its conclusion, the court vacated the NMFS decision and remanded it to NMFS for reconsideration.

This could have important implications: small losses of ESA-protected fish (to sea lions in the case, an argument that could also be applied to irrigation diversions) cannot be deemed significant by NMFS while large losses of fish to harvest are not.

Taking it to the Streets: Alliance Reps Engage

It's that time of year again. When farmers and ranchers are not planting and harvesting food and fiber for the country and the world, they...attend and engage in meetings and other public forums. Family Farm Alliance spokesmen are engaged in several such forums:

- Alliance President Pat O'Toole will participate in the 2011 Land Grant and Sea Grant National Water Conference to be held on January 31- February 1, 2011, in Washington, D.C. This is a national conference of Land Grant University faculty, extension and agency partners that work on agricultural water-related problems. This year, the conference will be held in Washington in order to reach out to agency partners and congressional members. Mr. O'Toole will be the sole industry spokesperson on the food and water security panel. The conference is expected to draw about 500 attendees.
- In November, Executive Director Dan Keppen spoke on Alliance initiatives at the joint meeting of the Montana Water Resources Association and the Upper Missouri Water Association in Billings. Earlier this month, Keppen participated in a panel discussion with Tom Donnelly (NWRA) and Peter Carlson (Oregon Water Resources Congress) on past and future Congressional water activities. The panel was part of the OWRC annual conference, held in Hood River.
- Pat O'Toole has been asked to serve on a Blue Ribbon Panel that will provide leadership for a project to support the development of the Natural Resource Conservation Service's (NRCS) Program and Policy Statement as a part of the process mandated by the Resource Conservation Act (RCA). The plan is to develop a set of background papers which will examine critical resource conservation issues. A series of half-day regional roundtables will be scheduled that will bring together practitioners, agricultural and environmental interests together to discuss regional perspectives on potential policy approaches related to agriculture, climate change, water resources, and landscape integrity (fragmentation and farmland protection). The regional roundtables will lead up to a national forum on agricultural landscapes to be held in Washington DC April 7-8, 2011. The Blue Ribbon Panel will be actively engaged in the development of papers, setting the agenda for the national forum and potentially chairing a regional roundtable.
- Earlier this month, Keppen also participated in a national webinar broadcast on water issues hosted by the

Council on Food, Agricultural and Resource Economics (C-FARE), Farm Foundation and USDA NRCS. Keppen discussed "Western Water Policy - Challenges and Opportunities of Times and Our Legacy for the Next Generation", the Alliance's 2008 policy paper. The purpose of the webinar was to provide an educational opportunity for NRCS personnel, policy makers, and those in the academic community to develop a better understanding of water management issues. The webinar has been posted on the C-FARE website, and this will allow the opportunity for an even broader audience to acquire the means to obtain the presentation materials electronically.

- Both O'Toole and Keppen have been invited to serve as table hosts at Water Tables 2011: *Western Water Law – Adapting to Our Changing Needs?* on February 19, 2011 at Colorado State University. Each Alliance representative will "entertain" a table of 8 or 9 guests, facilitating the topic conversation. The event is designed to facilitate a discussion, not a debate, where everyone has the chance to participate. Both O'Toole and Keppen have served as table hosts in the past at the CSU event.

Irrigation District Job Openings

Assistant General Manager Position Available in Farwell, Nebraska (150 miles west of Omaha, 35 miles northwest of Grand Island) – Exciting position with potential growth. College degree desired in Natural Resources, Public Management, Engineering, Hydrology, Business or equivalent experience to assist irrigation districts in planning, creative financing, budgeting, investments, public relations, lobbying, administration and inter-relationships with local, state, federal agencies as well as water-related associations. Be willing to travel and work with a board of directors. Salary is negotiable and commensurate with experience. Call 308-336-3341 or email T819@mainstaycomm.net for further information. Or, call Tom Knutson at 308-336-3208.

Manager of large Northern Colorado irrigation, reservoir and augmentation company. Responsibilities include: management of water storage and delivery, operation and maintenance of canals and easements, management of staff and projects, and other duties associated with the company's operations. Further details are available. Benefits include health insurance and IRA. Salary and benefits negotiable. Send resume to:

**Cache La Poudre Management Company
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Lucerne, CO 80646.**

Judge Rules for Farmers in CA Smelt Case

Earlier this month, U.S. District Judge Oliver W. Wanger issued his decision in the Delta Smelt Consolidated Cases today, granting in part and denying in part Plaintiffs' and the California Department of Water Resource's motions for summary judgment that the delta smelt biological opinion (BO) violates the Endangered Species Act and the Administrative Procedure Act. The judge ordered a remand of the BO to the U.S. Fish and Wildlife Service (USFWS) for further consideration, issuing a number of findings to support the remand. Notably, Judge Wanger's 225-page decision found that restrictions on pumping from the Sacramento-San Joaquin Delta that were set up to protect the smelt were not justified. (see inset box statement, right, from Tom Birmingham, general manager of Westlands Water District on this matter).

Unfortunately, the judge denied the Family Farm Alliance's First Claim in its IQA litigation, stating that, while there is a final agency action in this case, there are no "judicially manageable standards" in USFWS's IQA Guidelines that allow the Court to impose substantive standards on the presentation, use and analysis of data by the USFWS in the BO. The Court found only the requirement that USFWS prepare some kind of "narrative" that documents the strengths and weaknesses of the data upon which the document relies. Thus, he found no right to judicial review of the IQA claims.

"The ruling on the IQA issue is disappointing, but overall, this expansive decision represents a victory for San Joaquin Valley irrigators and urban interests who rely on water diverted from the Bay-Delta," said Gary Sawyers, counsel to the Alliance.

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Westlands Water District Statement by Thomas W. Birmingham, General Manager Regarding the U.S. District Court Ruling on Delta Smelt

December 14, 2010

Today the United States District Court for the Eastern District of California issued its decision on the validity of the Delta smelt biological opinion, which was released in December 2008. Judge Oliver Wanger's balanced and carefully articulated ruling marks another important victory for good science and the public interest. As the court concludes, "The public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs."

Westlands joined with the State of California and other public water agencies serving two-thirds of California's people in bringing this action challenging the federal restrictions on water deliveries which have severely reduced public water supplies, eliminated thousands of jobs and cost the state's economy billions of dollars. We are thrilled with the court's decision, which will send the current federal biological opinion on Delta smelt back to the Fish and Wildlife Service for a thorough overhaul.

Among other things, the district court has found that:

- The limits on flows set by the smelt biological opinion were arbitrary and capricious, relying on a deeply flawed and inappropriate methodology;
- The Fish and Wildlife Service failed to rely on the best scientific data available in violation of the Endangered Species Act;
- The Fish and Wildlife Service's manipulation of data created material bias in violation of the Endangered Species Act;
- There is no support in the scientific evidence for the biological opinion's assertion that operations of the state and federal pumps have contributed to the impacts of other stressors on the smelt.

Judge Wanger's ruling brings us another step closer to accomplishing California's coequal goals of restoring the Delta environment and ensuring that the public will have an adequate and reliable water supply. California's water needs for the future require that everyone share a commitment to conservation, strict attention to the best practices of wise water use and a readiness to making sure that our use of water is accomplishing the beneficial effects we intend. This ruling will help to assure that those same prescriptions are applied to the federal government as well.

THANK YOU

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Contributions can also be mailed directly to:

**Family Farm Alliance
22895 S. Dickenson Avenue**



www.familyfarmalliance.org