

Water users score victory in delta legal battle

John Ellis, Fresno Bee, 5-28-10

For the second time in nine days, a federal judge in Fresno has handed a victory to urban and agricultural water users who are seeking to increase pumping levels in the Sacramento-San Joaquin Delta.

Released late Thursday, U.S. District Judge Oliver W. Wanger's 126-page decision involving the threatened delta smelt has many similarities to one issued last week on endangered salmon.

As in the salmon ruling, Wanger found that water officials must consider humans along with the delta smelt in limiting use of the delta for irrigation.

He also found that water users made convincing arguments that the federal government's science didn't prove that increased pumping from the delta imperiled the smelt.

Tom Birmingham, general manager of the Westlands Water District -- which is deeply dependent on delta water -- said that after the court's finding related to the salmon management plan, he was "not surprised the court concluded the smelt [plan] suffers from the same defects."

Still, Wanger's ruling recognizes that the smelt are on the brink of extinction, and as the water users seek to increase pumping levels that have been reduced to protect the tiny fish, they likely will face a tougher challenge than with the salmon.

The water users' request for a court order lifting pumping restrictions for the smelt will be argued at a 10 a.m. hearing today. The outcome is critical in the continuing battle between water users and the federal government and its environmental allies.

On Wednesday, Wanger temporarily lifted delta pumping restrictions designed to help endangered salmon, siding with water users who said the move would not harm the fish. Those restrictions were to be in place through June 15. Since the ruling, federal water managers have gradually been increasing delta pumping.

But pumping restrictions designed to protect the smelt -- which had been on the back burner because they are less restrictive than those covering the salmon -- could now come into play. Those restrictions are in place through June 30.

Water users need to convince Wanger that the smelt are in the north and west areas of the delta, away from the pumps, and not in the estuary's south and central regions, where they could be in danger.

If Wanger isn't convinced and denies the water users' request, pumping restrictions for the smelt could erase nearly every drop of water gained by the judge's salmon ruling.

Doug Obegi, an attorney with the Natural Resources Defense Council, said there is concern for both smelt and salmon species.

"We hope the decision does not drive the smelt closer to extinction while scientists refine" plans for the fish, he said. "It is definitely a bit frustrating."

Beyond the immediate court order sought today by water users, the long-term goal -- and the crux of recent hearings -- is to overturn management plans covering both the smelt and the salmon.

A few years ago, Wanger invalidated earlier plans -- known as biological opinions -- after environmentalists sued. He ordered them rewritten. These new plans have now been challenged by water users.

Birmingham said the smelt ruling vindicates a long-standing position of water users that invasive species, pollution, and other factors -- and not just pumping -- have adversely affected threatened delta fish.

Wanger's ruling also notes that the courts have been forced into a role of protector for all the varied interests. It also notes the federal agencies that oversee the water projects "have not fully discharged their responsibility to effectively allocate [Central Valley] Project water resources."