

JIM COSTA

20TH DISTRICT, CALIFORNIA
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RANKING MEMBER

September 15, 2011

The Honorable Ken Salazar
Secretary of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Salazar:

It has come to my attention that the Department of the Interior (Interior) filed a motion to stay the most recent decision in the United States Eastern District Court of California (District Court) to enjoin the Fish and Wildlife Service from fully implementing its fall X2 action. This is disappointing news, especially given Judge Oliver Wanger's consistent rebuke of the agency's science, the National Academy of Science's initial report last year on the biological opinions in the Bay-Delta, and mere common sense. Despite the fact that agency biologists may not like the X2 decision, it is possible that Interior may lose the appeal, and the appeal would be one more instance of Interior responding in an obstinate manner. It seems to me that Interior is putting process before underlying science here, and none of us are the better for it.

Instead, I wish that Interior would have used this opportunity to try and come to an agreement with the water users about how the projects will be operated while we pursue the Bay Delta Conservation Plan, which should be our top priority as the long-term solution to our water challenges. This would give all of us an opportunity to work together.

On August 31, the District Court issued a 140 page opinion and order that enjoined implementation of "Action 4" or "fall X2." It is my understanding that this action was part of the "reasonable and prudent alternative" prescribed by the 2008 Delta smelt biological opinion to avoid jeopardy or adverse modification of critical habitat. This Action required that starting on Sept. 1, flows be adjusted to maintain a point called "X2" at not more than 74 km east from the Golden Gate Bridge. "X2" is the point in the estuary where salinity is equal to or less than 2 parts per thousand. Concerned, as he always has been, about the precipitous decline of the Delta smelt, Judge Wanger did not throw out X2 entirely. He did restrict it to not less than 79 km east of the Golden Gate Bridge, which will save the State Water Project about 210,000 acre-feet. As prescribed in the biological opinion, the X2 Action costs anywhere from 90,000 to 600,000 acre feet of water to San Joaquin Valley famers.

In his decision, Judge Wanger was very critical of the Fish and Wildlife Service's scientific basis and the methodology used to justify this Action. For instance, he found:

WASHINGTON OFFICE:
1314 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE: (202) 225-3341
FAX: (202) 225-9308

FRESNO OFFICE:
855 M STREET, SUITE 940
FRESNO, CA 93721
PHONE: (559) 495-1620
FAX: (559) 495-1027

BAKERSFIELD OFFICE:
2700 M STREET, SUITE 225
BAKERSFIELD, CA 93301
PHONE: (661) 869-1620
FAX: (661) 869-1027

"The scientific evidence in support of imposing any Fall X2 action is manifestly equivocal. There is essentially no biological evidence to support the necessity of the specific 74 km requirement set to be triggered in this 'wet' water year. The agencies still 'don't get it.' They continue to believe their 'right to be mistaken' excuses precise and competent scientific analysis for actions they know will wreak havoc on California's water supply." (p. 139)

As you well know, the science underlying the biological opinion has now been criticized in numerous court decisions. Additionally, the National Academy of Sciences has expressed doubts as to the validity of the science underlying this biological opinion. In 2008, federal agencies over which Interior has jurisdiction commissioned their own independent review of the Central Valley Project Improvement Act (CVPIA) entitled "Listen to the River." Among other things, this review found that the CVPIA program will remain unsuccessful unless the agencies make significant changes in its implementation and create metrics that link actions to concrete goals that hold the program accountable. Meanwhile, for nearly twenty years, the Valley has seen water diverted as a result of CVPIA, court decisions, and regulatory actions that use flawed science and cost us decreased and unstable water supplies, while no other region of the state has been similarly impacted. At the same time, the Bay-Delta is in worse shape and the fisheries have not recovered. But notwithstanding all of the criticisms, Interior insists on charging forward in the courts, relying on discredited science.

Now would have been an excellent time to stop this insanity and start to work together with the community on interim operations while we continue to move forward with the BDCP and integrate the two biological opinions. Instead, my constituents have to continuously fight these issues in court, and the federal agencies appear stubborn and ham-fisted while they continue to lose ground. Needless to say, I'm extremely disappointed at this turn of events.

As per our discussions over these past two weeks, I look forward to working with you and Senator Feinstein as I know we can do much better than this.

Sincerely,



JIM COSTA
Member of Congress

cc: The Honorable Dianne Feinstein, U.S. Senator
The Honorable David Hayes, Deputy Secretary of the Interior
The Honorable Michael Connor, Commissioner, U.S. Bureau of Reclamation
The Honorable Donald Glaser, Regional Director, U.S. Bureau of Reclamation