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TENSION SIMMERS IN LATEST DELTA LAWSUITS

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The imperiled delta smelt, a tiny fish found only in the Sacramento San Joaquin Delta, has become a flashpoint in the debate over how to keep up water supplies to a thirsty state while saving the collapsing delta ecosystem. The fish has been hovering near extinction for the past few years. Meanwhile, environmental groups and the Central Valley farmers who rely on water pumped out of the delta have been fighting over its protection in court. But as the environmental crisis deepens, those traditional battle lines are becoming blurred. Groups that have traditionally been at loggerheads over environmental issues have been finding themselves in an uncomfortable alliance, filing lawsuits that raise similar issues about the need to protect the delta environment.

The Coalition for a Sustainable Delta and the Council for Endangered Species Act Reliability have jumped into the fray in the last year with suits seeking to enforce environmental laws impacting the delta. However, one issue keeps traditional environmental groups such as the Center for Biological Diversity, California Sportfishing Protection Alliance and the Natural Resources Defense Council from welcoming the new groups with open arms: water pumps. The two newer groups are mostly made up of agricultural water users who rely on the delta water pumps to grow their crops - water pumps that have been attacked by environmental groups as the prime cause behind the decline of the smelt and its delta ecosystem because the fish get sucked in and killed. Recent court rulings in favor of environmentalists have brought the power of the Endangered Species Act to bear and curtailed water pumping out of the delta in order to protect both the smelt and several salmon species that have also precipitously declined.

The newer groups say too much attention has been paid to the impacts of water pumping. Craig Manson, executive director of the Council for Endangered Species Act Reliability, said more focus should be placed on other factors such as invasive species, pesticides and other contaminants from the delta's urban, industrial and agricultural operations. "We're interested in good science. What's happened thus far in the delta is we've pushed the same button again and again and focused on the water exports," said Manson, a professor at University of the Pacific's McGeorge School of Law and former Assistant Secretary of the Interior for Fish, Wildlife and Parks from 2002 to 2005, where he oversaw the U.S. Fish and Wildlife Service and the National Park Service under President George W. Bush. "It's not good science to focus on one aspect of what are many stressors," he said. While Bill Jennings, executive director of the California Sportfishing Protection Alliance, supports lawsuits to protect the delta, both the Council for Endangered Species Act Reliability and the Coalition for a Sustainable Delta are being a bit disingenuous, he said. "They're acting to divert attention from the primary threat to them - reduced water exports," Jennings said. "This is to create the impression that factors other than exports are primarily responsible for the delta's decline and to take the spotlight off the ... pumps."

Paul Weiland, a partner at Nossaman in Irvine who represents the Coalition for a Sustainable Delta, said the Coalition's goal is to promote ecological sustainability of the delta and a long term water supply.

"There's never going to be a long-term water supply without a clean and sustainable delta," Weiland said. "At the end of the day, people can question motives, but it's not unusual for people who use a resource wanting to protect it. ... People in the fishing community do that as well."

Last month, Manson's Council for Endangered Species Act Reliability filed a lawsuit against the Fish and Wildlife Service for missing a deadline to respond to a delta smelt petition originally filed by the Center for Biological Diversity in 2006. The claim, filed in Fresno federal court, demands the agency decide whether to give the smelt more protection by listing it as endangered rather than threatened, *Council for Endangered Species Act Reliability v. Salazar*, 09-02875. If the smelt gets reclassified, "the Fish and Wildlife Service will have to look at additional science and tell us one way or another what the true damage to the delta smelt has been from all the various stressors in the delta," Manson said.

The Center for Biological Diversity did not agree, and filed its own separate challenge on Nov. 13, also in Fresno federal court, *Center for Biological Diversity v. Salazar*, 09-03154. "We're very wary of their motives," said Jeff Miller, a conservation advocate with the Center for Biological Diversity, an Arizona-based nonprofit. "We're not going to work in coalition with them or trust them to bring these suits." While there are many stressors on the delta, the science shows that the impacts of pumping overwhelm any other factor harming the delta, Miller said. "You can stick your head in the sand and pretend the pumping is not the major issue, but if you don't address the record amount of water deliveries out of the delta, we could lose all the major fish runs," Miller said.

The two groups make unlikely bedfellows, as the leadership of the Council for Endangered Species Act Reliability and the Center for Biological Diversity have clashed in the past. The Center filed many challenges to decisions made by agencies Manson oversaw during his tenure under President Bush. Farmer and Council board chair Jean Sagousse is also on the board of Westlands Water District, a powerful group of farmers in the Western San Joaquin Valley that relies on delta water. Westlands opposed the Center for Biological Diversity's successful bid to get another delta fish, the longfin smelt, protection under the state Endangered Species Act.

Fellow Council board member Jim Chilton, an Arizona cattle rancher, sued the Center for Biological Diversity in 2003 for defamation after it posted information and photos on its Web site alleging Chilton's cattle grazing had damaged national forest land. A jury sided with Chilton and ordered the Center to pay \$600,000 in damages. The fact that the Council has now filed a suit in support of the Center for Biological Diversity's effort "shows how complicated the delta ecosystem really is, literally and politically," Manson said. "It's a complicated problem and its answers won't be simple. For the past 40 years we've chosen the simple answer ... water exports."

The long-simmering fight over water pumping heated up in 2005 after the Natural Resources Defense Council and others sued the government, arguing it violated the Endangered Species Act by failing to adequately analyze the impact of the state's vast water delivery system on the delta smelt. A federal judge agreed with the environmentalists in their delta smelt case and ordered the government to take a better look at the project's impacts on the smelt. Soon after, environmental groups won a parallel case that made similar allegations regarding salmon and steelhead trout. In the past year, government scientists issued new reviews of the pumps' impacts on the smelt and salmon, and ordered pumping cutbacks at certain times of the year to protect the populations. The move infuriated agricultural and urban water users in Central and Southern California, and they have sued to overturn the new rules, alleging the government did not rely on the best science and overlooked other stressors on the fish.

One group in that fight is the Coalition for a Sustainable Delta, a group of agricultural water users that has filed a bevy of lawsuits alleging failures to consider impacts to smelt as required by the Endangered Species Act. The suits include: one against the City of Stockton for the release of storm water into the

delta; one against the state Department of Fish and Game for its management of striped bass, a non-native fish that preys on smelt; another against a slew of federal agencies regarding authorization of pesticide use, granting flood insurance that encourages further urbanization of the delta and allowing mothballed naval vessels to release contaminants into the delta. All the lawsuits are pending resolution in federal court.

"Those agencies are falling short on their jobs and we're trying to make up the difference," said Weiland, who represents the Coalition for a Sustainable Delta. "The goal has never been to penalize somebody, but to equal the playing field and have fairness under the rule of law. We have no concern about the fact that the [Endangered Species Act] is applied to the export pumps - we just want that done fairly ... The bottom line is, everyone else has to live by the same rules." At the same time, Coalition for a Sustainable Delta member Stewart Resnick, a wealthy Los Angeles businessman who owns vast orchards in Kern County, has lobbied to get the National Academy of Sciences to review the pumping restrictions set by government scientists. The Obama administration has come out in support of the move, and Interior Secretary Ken Salazar announced recently that the Academy has agreed to the study and will release its findings in March.

The California Sportfishing Protection Alliance, along with other groups such as the Center for Biological Diversity and Baykeeper, have had some success with their own lawsuits tackling delta stressors. The Center reached a settlement earlier this year with the federal Environmental Protection Agency where it agreed to look at the impacts of dozens of pesticides on various Bay Area endangered species, including the delta smelt. The sportfishing group has filed multiple suits against alleged violators of the Clean Water Act around the delta. In October, the group reached a settlement with the City of Stockton where it agreed improve the performance of its aging wastewater treatment facility that drains into the delta. Meanwhile, the governor signed a comprehensive water reform package into law this month. The legislation includes policies to help restore the delta in the long term, but does little to resolve the short-term problem of ecosystem health and water supply reliability, said Michael Boccadoro, a spokesman for the Coalition for a Sustainable Delta.

While it's true that urban water users in Southern California and agricultural users in the San Joaquin Valley have been hammered by pumping restrictions, "it's pretty well determined that pumping has caused pretty adverse problems and saying that other people share the fault doesn't provide the ultimate solution to the overall problem," said Richard Frank, executive director of Berkeley Law's Center for Law, Energy & the Environment, who has served on a task force advising the governor on delta policy. "I think we're retreating to the bad old days of doing lawsuits and going into our litigation bunkers and firing away. The only people who're going to profit are the lawyers representing these people, not the species in the delta."

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