

**JIM COSTA**

20TH DISTRICT, CALIFORNIA  
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RANKING MEMBER

September 21, 2011

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

Dear Secretary Salazar:

First, I appreciated your Sept. 19 comments at The Commonwealth Club in San Francisco. I agree with your sentiments that we need to move quickly with the Bay Delta Conservation Plan (BDCP), rely on the best science available, and utilize an open and transparent process to engage the affected stakeholders. Your comments on the San Joaquin River Restoration were also helpful. We need to be realistic about the program schedule and consider the resources available to us as this program is being implemented and make changes accordingly. We also must continue to engage the people who are most impacted by the program.

These same principles should apply to all that we are attempting to accomplish with respect to California's water supply challenges in the short- and long-term. In your prepared remarks regarding the BDCP, you said, "If we are to succeed, we need the best science from inside and outside of government. And we should not hesitate to have independent scientists review and validate what is planned. We have to get this right." I could not agree more about the need to "get it right" in everything we do.

With these thoughts in mind, I am troubled by the recent events that have transpired in the United States Eastern District Court of California (District Court) regarding the Department of the Interior's (Interior's) implementation of the fall X2 action under the 2008 Delta smelt biological opinion. On Sept. 16, the District Court denied Interior's application to stay the injunction related to implementation of the fall X2 action, and Judge Oliver Wanger's comments from the bench were more critical of federal agency scientists than ever before. As I read through a draft transcript of the proceeding from Sept. 16, I was shocked by the inconsistencies in these scientists' testimony that lead the Court to question the credibility of the Interior scientists tasked with formulating biological opinions that dramatically affect the water supply of the San Joaquin Valley, the state as a whole as well as the fisheries. Indeed, based on the conflicting testimony of the federal witnesses, Judge Wanger found that the government was acting in bad faith, that the government witnesses were incredible, untrustworthy and gave their testimony no weight. The following are representative of what the District Court found regarding Interior's case and its witnesses:



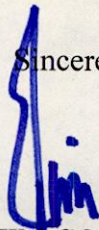
"And if anybody had been just, quite frankly, a little bit inattentive or a little bit less diligent than digging into and trying to get to the bottom of every one of these assertions, it would be very easy to simply accept these opinions with these record citations. And when the record says the opposite of what you cite the record for, or when the record doesn't say what you cite the record for, there's simply an absence of the data, then that is a further misleading of the Court. That is a further, if you will, distortion of the truth."

"And I will note that [Mr. Feyrer] is a government agent. He represents the United States. And the United States, as a sovereign, has a duty not only in dealing with the Court, but in dealing with the public to always speak the truth, whether it's good or bad. It's never about winning or losing, it's always about doing justice. And in the final analysis, protecting endangered species is crucially important. It's a legislative priority. And even the plaintiffs don't dispute that. But when it overwhelms us to the point that we lose objectivity, we lose honesty, we're all in a lot of trouble. Serious, serious trouble. And so I am unaffected, in fact, I am sad. I feel remorse for our justice system for what has been placed before the Court. It's unacceptable. It's unprecedented." (p. 29-30)

Mr. Secretary, it saddens me to read the 50 page draft hearing transcript, but I urge you to read through it personally. The District Court's comments portray conduct of Interior scientists that is nothing less than outrageous. Time and again, the science underlying the biological opinions has been questioned and discredited, and yet Interior keeps going back into the same posture to defend its science. When will enough be enough? We all lose with this failed strategy: farmers and farmworkers lose, the fishermen lose, and the species lose because they never recover. After weighing all of the information I have seen to date on this issue, it seems entirely reasonable to me that you intervene to task new scientists, in whom the public can have confidence, with the formulation of the revised Delta smelt biological opinion as required by the District Court. This is of critical importance to the interim operations of the water projects as well as any meaningful integration of the two biological opinions. Neither California nor the Department of the Interior can afford to keep going in this direction.

Thank you in advance for your prompt response and I look forward to speaking with you soon.

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

*I do appreciate all your personal efforts, but as you have stated, "We must get this right".*