

Nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, & 11-16662

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al.,
Plaintiffs/Appellees,
CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Plaintiff-Intervenor-Appellee,

vs.

KENNETH LEE SALAZAR, et al.,
Defendants-Appellants, and
NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Defendants-Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

**BRIEF OF AMICI CURIAE FARM CREDIT WEST, ACA, COBANK, ACB,
AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM
BUREAU FEDERATION, WESTERN GROWERS ASSOCIATION, AND
NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF
APPELLEES' PETITION FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENTS

Amicus Curiae Farm Credit West, ACA is a member-owned cooperative that provides a variety of financial services to agricultural producers. It has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

Amicus Curiae CoBank, ACB is a national cooperative bank that provides a variety of financial services to agribusinesses and rural power, water and communications providers nationwide. CoBank, ACB has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

Amicus Curiae American Farm Bureau Federation is a nonprofit corporation headquartered in Washington, D.C. It has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

Amicus Curiae California Farm Bureau Federation is a California nonprofit corporation. It has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

Amicus Curiae Western Growers Association is a California nonprofit corporation. It has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

Amicus Curiae National Council of Farmer Cooperatives is a nonprofit corporation headquartered in Washington, D.C. It has no parent company and no publicly held stockholders with an ownership stake of 10% or more.

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I. INTRODUCTION.

Farm credit sustains agriculture, while water supply reliability in turn governs farm credit. The panel majority opinion profoundly exacerbates Endangered Species Act-created doubt about water supply reliability, magnifying that uncertainty to a level approaching chaos for agricultural lenders. The panel majority opinion accurately characterizes the Central Valley Project and the California State Water Project as “perhaps the two largest and most important water projects in the United States.” *See San Luis & Delta-Mendota Water Authority v. Jewell*, No. 11-1587, slip op. (hereafter “Op.”) at 23 (9th Cir. March 13, 2014). Notwithstanding the importance of the projects to water supply reliability and thus to California’s economy, the panel majority opinion would allow the United States Fish & Wildlife Service (“FWS”) to impose crushing economic hardship on the California agriculture industry with virtually no consideration of those economic impacts, contrary to the letter and spirit of the Endangered Species Act.

Despite acknowledging the opinion’s “enormous practical implications,” *id.* at 25, the panel majority grants unfettered and unpredictable regulatory control to FWS to alter project operations. If the panel majority opinion is allowed to stand, thousands of acres of Central Valley farm land will be deprived of water, reducing the production value of that land and crippling farmers’ ability to secure and repay

the loans that have enabled California to become the most productive farm state in the union.

The agriculturalists and lending institutions filing this brief urge the Court to reconsider its interpretation of how the Endangered Species Act should serve to protect endangered and threatened species while at the same time providing reasonable and prudent project alternatives that give due consideration to the economic impacts resulting from that protection. The panel majority opinion’s extreme interpretation of the ESA—in particular the limited role of economic considerations thereunder—must be reconsidered.

II. IDENTITY AND INTEREST OF AMICI CURIAE¹

A. Farm Credit West, ACA and CoBank, ACB provide critical financing that supports California and national agriculture.

Farm Credit West, ACA (“FCW”) is a cooperative lending institution that finances all types of agricultural operations throughout much of California. Its borrowers range from small family farms to large agri-business operations. The borrowers produce a broad spectrum of agricultural products including row crops, grains, fruit and nuts, wine grapes, and beef and dairy products. FCW’s borrowers represent \$31.8 billion in agricultural production in California each year. FCW is part of the 97-year-old Farm Credit System, a nationwide network of banks and

¹ No person other than Amici Curiae or their counsel authored this brief in whole or in part, or made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

retail lending associations chartered by Congress to support the borrowing needs of United States agriculture and the nation's rural economies.

FCW provides farmers and ranchers with long-term loans for the purchase of agricultural real estate and extends commercial loans and lines of credit to manage the cycles of farming and meet the day to day financial needs of farmers and ranchers. In addition, FCW extends operating credit to farmers during a year when a lack of water or other conditions make it impossible or difficult for them to produce a full crop. Providing these short-term loans on a one- to two-year basis allows farmers to stay in business and bounce back from a drought year. FCW's loans also support the critical long-term investments that have enabled California to become the most productive farm state in the union. For example, over the past several decades California farmers have invested heavily in water conservation measures (including highly efficient drip and micro irrigation systems) utilizing credit provided by FCW and others. California farmers have also engaged in cooperative ventures with environmental organizations to preserve and enhance habitat for fish, wildlife and waterfowl.

CoBank, ACA ("CoBank"), is a national cooperative bank serving vital industries across rural America. CoBank is a district bank that meets the lending needs of FCW and also is part of the Farm Credit System. The bank provides wholesale loans and other financial services to affiliated Farm Credit associations,

such as FCW, serving approximately 70,000 farmers, ranchers and other rural borrowers in 23 states around the country. It also provides loans, leases, export financing and other financial services to agribusinesses and rural power, water and communications providers in all 50 states. CoBank customers in California generate approximately \$187 billion in annual revenues.

B. The Farm Organizations protect and promote agricultural interests throughout California and the United States.

The American Farm Bureau Federation (AFBF) is an independent, non-governmental, voluntary general farm organization with over 6 million member families in all 50 states and Puerto Rico. Established in 1919, AFBF strives to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. The California Farm Bureau Federation (CFBF), as the state chapter of AFBF, represents nearly 78,000 agricultural, associate and collegiate members in 56 counties throughout California. Together AFBF and CFBF strive to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Western Growers Association ("WGA") is a nonprofit membership organization representing family farmers who grow fresh produce in California and Arizona. WGA focuses on protecting the unique interests of the specialty crop

industry; its members provide one-half of the nation's fresh fruits and vegetables and a third of America's organic produce.

The National Council of Farmer Cooperatives ("NCFC") is a nonprofit trade association composed of regional and national farmer cooperatives, which in turn are composed of nearly 3,000 local farmer cooperatives across the country. NCFC advances the business and policy interests of cooperatives and other farmer-owned enterprises. Farmer cooperatives handle, process and market almost every type of agricultural commodity; furnish farm supplies; and provide credit and related financial services, including export financing.

The American and California Farm Bureau Federations, WGA, and NCFC are referred to collectively herein as "Farm Organizations."

III. ARGUMENT

A. A reliable water supply is the one indispensable resource for both the agricultural community and lending institutions.

Unlike other replaceable elements, water supply is the life or death of all agricultural production. Reduced or uncertain water supplies preclude reliable or foreseeable production revenues. Without reliable and foreseeable revenues from farms, the ability of FCW and CoBank to provide financing for the short-term or long-term needs of agriculture would be severely restricted. And without financing, California farmers cannot invest in water conservation measures, cannot

purchase new equipment and technologies, and cannot continue to increase the productivity that feeds the state and the nation.

This interdependence between lending institutions and California agriculture heavily depends on water supply made available through the Central Valley Project (CVP) and the State Water Project (SWP). A large portion of FCW's borrowers farm in California's Central Valley and other areas the two projects serve. Just as water supply governs this interdependence between lending institutions and California agriculture, the CVP and SWP govern a substantial portion of that supply. Impaired reliability of that supply disrupts financing, impairs the agricultural economy, and may well cause some agricultural lenders to cease operations in the state. The Endangered Species Act's lawful administration does not compel these dire impacts.

B. The majority panel opinion will cause reductions in water supply that will have a crippling impact on the Central Valley's agricultural economy.

The "enormous practical implications," Op. 25, referenced by the majority panel opinion are readily seen in the debilitating economic impacts on Central Valley farm communities caused by water supply reductions. Agriculture is the lifeblood of the Central Valley's economy, and Central Valley agriculture is dependent on water exported from the Sacramento-San Joaquin Delta. The 2008 Biological Opinion upheld by the panel majority opinion requires significant

reductions in water exports from the Delta in order to protect the endangered Delta smelt. *See* Op. 1; *Consol. Delta Smelt Cases*, 717 F.Supp.2d 1021, 1052-57 (E.D. Cal. 2010). Those water supply reductions will result in the loss of agricultural production, income and jobs in the Central Valley. Cuts in agricultural production, in turn, will cause consumer food prices to increase, putting a disproportionate economic burden on low-income consumers.²

Several peer-reviewed studies confirm that depriving the Central Valley of water exported from the Delta will have debilitating economic costs for the region. Although exact conclusions differ based on methodology, there is a growing consensus that Delta export restrictions, such as those imposed by the 2008 Biological Opinion, have severe impacts on California's farm economy. For example, a 2009 study projected the direct economic and water supply impacts of Judge Wanger's 2007 Interim Remedial Order, which restricted Delta exports from both the CVP and SWP. *See* Op. 1. That study projected that the Interim Remedial Order would reduce SWP and CVP deliveries by between 266,000 and 426,000 acre-feet per year, depending on the type of water year. Those reduced deliveries,

² *See, e.g.*, Russ Parsons, "Drought likely to push up prices of lettuce, avocados, grapes and broccoli the most," LA TIMES (May 1, 2014); Paul Davidson, "Rising food prices pinching consumers," CNBC (April 19, 2014), *available at* <http://www.cnbc.com/id/101588110>.

in turn, would impose direct costs on users within the CVP and SWP contractor areas between \$34 million and \$64.3 million, depending on the year type.³

Another 2009 study estimated that zero CVP exports and 10% of normal SWP exports would cost the Central Valley region between \$1.2 and \$1.6 billion in direct revenue losses.⁴ Those losses would translate into income losses for the region between \$1.6 and \$2.2 billion, with thousands of jobs likely to be lost.⁵ A 2011 study found that a “no export” scenario would cost the San Joaquin Valley between \$153 million and \$164 million per year, and would cost the Tulare Lake Basin between \$563 and \$719 million per year.⁶ The same study found that reducing Delta exports by just 18% would cost the region approximately \$90

³ Sunding, *et al.*, “Economic Impacts of Reduced Delta Exports Resulting from the Wanger Interim Order for Delta Smelt,” UC Berkeley Department of Agricultural & Resource Economics (2009); *see also* California Department of Food and Agriculture, CALIFORNIA AGRICULTURAL RESOURCE DIRECTORY 2010–2011, p. 67 (noting reduced production due to 2009 drought conditions).

⁴ Howitt *et al.*, “Economic Impacts of Reductions in Delta Exports on Central Valley Agriculture – Update Summary,” UC Davis Department of Agricultural & Resource Economics (2009).

⁵ *See* Howitt *et al.*, “Economic Impacts of Reductions in Delta Exports on Central Valley Agriculture,” Giannini Foundation of Agricultural Economics (2009); *see also* *Consol. Delta Smelt Cases*, 717 F. Supp. 2d at 1055 (citing employment impacts analysis by Dr. Jeffrey Michael).

⁶ Tanaka *et al.*, “Economic Costs and Adaptations for Alternative Regulations of California’s Sacramento-San Joaquin Delta,” *San Francisco Estuary and Watershed Science*, 9(2) (2011).

million per year.⁷ Water availability reductions during the present drought stand to cost the Central Valley nearly \$1.7 billion and 14,500 full time and seasonal jobs.⁸

These production losses are expected to be even more acute now and in the future than in earlier periods of reduced Delta exports. Groundwater is less plentiful after three consecutive dry years, and most of the feasible significant improvements in water use efficiency have already been made.⁹ The result is that Central Valley water demand now has largely “hardened,” reducing adaptability to water supply reductions.¹⁰ With dry conditions occurring more frequently with the onset of climate change,¹¹ farm and ranch operations’ continued viability will require that they capitalize on wet years when they do occur. The Delta export restrictions in the 2008 Biological Opinion would significantly limit farmers’ ability to rely on wet year surface water supplies.

⁷ *Id.*

⁸ Howitt *et al.*, “Preliminary 2014 Drought Economic Impact Estimates in Central Valley Agriculture,” California Department of Food and Agriculture (2014), *available at* https://watershed.ucdavis.edu/files/biblio/Preliminary_2014_drought_economic_impacts-05192014.pdf (last visited May 21, 2014).

⁹ Howitt *et al.*, “Economic Modeling of Agriculture and Water in California using the Statewide Agricultural Production Model,” UC Davis Department of Agricultural and Resource Economics (2010), p. 22.

¹⁰ *Id.*

¹¹ Berghuijs *et al.*, “A precipitation shift from snow towards rain leads to a decrease in streamflow,” *Nature Climate Change* (2014), *available at* <http://www.nature.com/nclimate/journal/vaop/ncurrent/full/nclimate2246.html> (last visited May 21, 2014).

In addition to reducing farm revenues on a year-to-year basis, Delta export restrictions threaten California's longstanding market reputation as a stable supply of high-value crops. California produces many of this nation's high-value crops such as citrus, almonds, pistachios, grapes, and a variety of other produce.¹² California is the nation's leading producer of almonds, avocados, broccoli, carrots, cauliflower, lettuce, milk, spinach and dozens of other commodities, according to a 2012 Department of Agriculture report.¹³ The state produces one-third of our vegetables and two-thirds of our nuts and fruits each year.¹⁴ Simply put: The United States can't eat without California.

In this age of global food production (and global competition), purchasers can afford to look worldwide for the most secure supply of a given crop. Delta export restrictions that cut production send global market signals that California is not a reliable producer.¹⁵ Thus, even during normal years when Central Valley

¹² United States Department of Agriculture, 2012 State Agricultural Review – California, *available at* http://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=CALIFORNIA (last visited May 12, 2014).

¹³ United States Department of Agriculture, California Agricultural Statistics 2012 Crop Year, *available at* http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2012cas-all.pdf (last visited May 19, 2014).

¹⁴ *Id.*

¹⁵ *See, e.g.,* Amy Quinton, "Farmers Forecasting Less Rice, Higher Prices Because of Drought," *Capital Public Radio* (April 30, 2014), *available at*

growers have an adequate water supply, they can still face difficulties finding a market for their crops.

C. The panel majority opinion creates uncertainty that will impact California agriculture and agricultural lending nationwide.

1. The panel majority opinion creates uncertainty about the role of third-party impacts during ESA consultation, and thus wild disparities among potential outcomes.

The panel majority opinion creates uncertainty and confusion about the breadth of alternatives that can be considered “reasonable” under the Endangered Species Act (“ESA”), which is an issue with enormous implications. As explained in Appellees’ pending Petition for Rehearing En Banc, the panel opinion conflicts with prior decisions of this Court and the Fourth Circuit regarding whether and how FWS must consider economic impacts to third parties when determining whether an alternative is “feasible.”¹⁶ This split in authority leaves FWS with conflicting direction regarding the relevance of third-party impacts for biological opinions. Whether and how FWS will consider economic feasibility drastically influences the range of potential outcomes from the ESA consultation process. If, as the panel majority holds, the “downstream economic impacts” of reduced exports are irrelevant to consideration of a project alternative, Op. 117, then FWS

<http://www.caprдио.org/articles/2014/04/30/farmers-forecasting-less-rice,-higher-prices-because-of-drought/> (last visited May 12, 2014).

¹⁶ See Appellees Kern County Water Agency, Coalition for a Sustainable Delta, State Water Contractors, and Metropolitan Water District of Southern California’s Petition for Rehearing En Banc (“Petition”) 20-25.

will more readily impose regulations that result in water supply reductions. If, on the other hand, “downstream economic impacts” must be considered in the development of reasonable and prudent alternatives, then the scope of alternatives FWS deems “reasonable” will be properly constrained, in accordance with ESA.

The panel majority opinion also validates FWS ignoring the best available scientific and commercial data, creating further uncertainty about the level of record support needed for conservation measures that will have significant third-party impacts. *See* Petition 4-20. Where the potential economic impact of a project alternative is considerable (as is the case here, *see supra*, at III.B), this uncertainty can stifle planning and productive risk-taking throughout the agricultural economy. The confusion about proper ESA implementation poses potentially crippling uncertainty and unquantifiable risk that FCW’s and CoBank’s customers will be cut off from the water that makes them financially viable. As explained below, this uncertainty affects the agricultural community as a whole as FWS issues biological opinions under the ESA for water projects and other federal actions throughout the country.

2. Uncertainty regarding water supply reliability poses unique and potentially debilitating challenges for agricultural lending and agriculture generally.

California and national agriculture depend on the willingness of lenders like FCW and CoBank to extend credit to farmers. Farm credit enables farmers to make

valuable long-term investments including, for example, investments in more efficient irrigation systems. It also allows some farms to survive the short-term periods when water is unavailable and production is severely reduced. Although agricultural production necessarily involves some uncertainty, farm lenders are experienced at managing most of the risks that farmers face. However, the 2008 Biological Opinion injects into California agriculture an unprecedented type and degree of uncertainty.

Agricultural lenders evaluate risk according to the five C's of credit: Capital (borrower's ability to survive ups and downs); Capacity (borrower's ability to generate income and service the debt); Character (whether the borrower has the knowledge and experience to foster a stable farming operation); Conditions (what the funds will be used for); and Collateral (borrower's secondary source of repayment). These criteria allow lenders to limit their exposure and form reasonable expectations despite uncertainty in crop prices, land values, or even climate and weather events. Properly managed, such risks do not prevent lenders from extending farmers the credit they need to stay in business.

Water supply is the most important risk for farm lenders to manage because it significantly affects all five C's of credit. Water is *the* primary resource for a farming operation, which simply cannot work around its absence. Lenders thus scrutinize groundwater well tests and require regular water reports from borrowers

to ensure a secure water supply to generate the production and income necessary to service their debt and survive market downturns (“Capacity” and “Capital”). A borrower’s ability to influence his water supply through sound operations and, when necessary, advocacy, affects “Character.” Many agricultural loans are for infrastructure that improves the borrower’s water supply situation, such as efficient irrigation or improved wells (“Conditions”). Finally, water availability has a huge impact on the value of farm property as collateral and a corresponding influence on lenders’ willingness to extend credit (“Collateral”). In sum, the availability of water determines whether an agricultural venture is viable. Predicting water supply with some certainty governs lenders’ willingness to extend credit.

The uncertainty created by the panel majority opinion and the 2008 Biological Opinion make it nearly impossible for farm lenders to form the reasonable expectations that allow them to finance California farms. The 2008 Biological Opinion makes water availability even more variable than climate and hydrology. By preventing some water project deliveries even when there is water available in the Delta,¹⁷ the 2008 Biological Opinion would make water unavailable much more often than otherwise. Op. 25. Farm lenders are well-equipped to extend credit to farmers on a one- to two-year basis when a drought

¹⁷ See *Consol. Delta Smelt Cases*, 717 F.Supp.2d at 1070 (finding that record made it impossible to determine whether alternative restricting pumping was “overly protective.”).

makes water unavailable. But the 2008 Biological Opinion would make water unavailable in substantially more years, forcing farmers to limit production and increasingly rely on credit to stay in business.

On a broader level, the panel majority opinion compromises lenders' certainty that the laws and procedures affecting farmers' access to water will be rational or consistent. The ESA requires the Secretary of the Interior to rely on the best science available when developing reasonable and prudent alternatives to proposed project operations. The lack of scientific support for those alternatives in this instance has caused farm lenders to question whether there is any limit to the ESA's ability to restrict California farms' access to crucial resources like water.

This uncertainty will force farm lenders to lend much more conservatively, depriving thousands of California farms of credit they desperately need to continue operating. Worse yet, small family farms will be the first to suffer; they have the least capacity to absorb financial loss, making them the most risky for farm lenders to finance. In sum, it is no exaggeration to say that the uncertainty created by the panel majority's decision would decimate much of California's agricultural economy and the communities it supports.

IV. CONCLUSION

The panel majority opinion will significantly reduce the ability of the projects to supply the water they were designed to deliver to Central Valley farm

land and will create an unprecedented type and degree of uncertainty that threatens the ability of lending institutions to finance that industry. Farm Credit West, CoBank and the Farm Organizations respectfully request that the Court reconsider the panel majority's opinion to avoid potentially crippling economic impacts to the third party human interests dependent on the projects.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure Circuit Rule 29-2(c)(2), the undersigned certifies that this amicus brief in support of petition for rehearing en banc is proportionately spaced, has a typeface of 14 points, and is no more than 4,200 words.

DATED: May 22, 2014

DOWNEY BRAND, LLP

By: s/ Kevin M. O'Brien
KEVIN M. O'BRIEN

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**BRIEF OF AMICI CURIAE FARM CREDIT WEST, COBANK,
AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM
BUREAU FEDERATION, WESTERN GROWERS ASSOCIATION, AND
NATIONAL COUNCIL OF FARMER COOPERATIVES IN SUPPORT OF
APPELLEES' PETITION FOR REHEARING EN BANC**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 22, 2014, at Sacramento, California.

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By: s/ Kevin M. O'Brien

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United States Court of Appeals for the Ninth Circuit

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The following transaction was entered on 05/22/2014 at 3:43:02 PM PDT and filed on 05/22/2014

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