Judge: Smelt plan lacked critical analysis

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By John Ellis / The Fresno Bee

The federal government failed to conduct a critical environmental analysis before approving a controversial set of rules for the endangered delta smelt, a Fresno judge said Friday, providing an encouraging legal win for farmers.

The analysis was required under the National Environmental Policy Act -- and it should have taken into account the environmental effect on humans, U.S. District Judge Oliver W. Wanger said.

Wanger did not order any immediate changes in the smelt plan or the resulting water cutbacks for west-side agriculture and users in the Bay Area and Southern California. But that could happen during a critical hearing in December, when Wanger could order the federal government to rework the smelt plan -- and possibly suspend it while that revision is performed.

The decision does not open the door to considering economic effects of the plan, which have stirred widespread anguish. But a rewritten plan that takes into account the environmental effect on humans could result in more water for west-side agriculture.

In a nod to the complicated water law and legal issues at play, Wanger said he probably will bring in an outside expert -- someone who is neutral and "super qualified" -- to help him wade through the case.

Still, Wanger appears to already have concluded that the smelt plan has hurt the environment. He said it has caused dust to rise from dry fields, possibly reducing air quality. And increased ground-water pumping has caused land to sink, he said.

"How could this not affect the human environment?" Wanger asked of the smelt rules, which are known as a biological opinion. "It has had catastrophic effects."

His oral ruling -- which attorneys from both sides were still trying to understand late Friday -- wasn't unexpected. In May, he agreed with a claim in a lawsuit filed by the Westlands Water District and the San Luis & Delta-Mendota Water Authority that the new smelt plan lacked an assessment on the environmental effect on humans.

Terry Erlewine, general manager of the State Water Contractors, praised Wanger's latest decision.

"We strongly believe these other human impacts should be reviewed before you make a decision," he said.

Westlands spokeswoman Sarah Woolf said Wanger "was very fair on all fronts in trying to find a solution."

"Unfortunately," she added, "this doesn't result in any new water tomorrow, but it is a step in the right direction."

Friday's four-hour hearing stemmed from a March lawsuit filed by Westlands and the San Luis & Delta-Mendota Water Authority, which sought to stop the federal government from enforcing the new smelt-management plan.

Several other agencies -- including the State Water Contractors and the Metropolitan Water District of Southern California -- filed almost identical lawsuits.

All have now been combined into one legal action, which marks a major pushback by agriculture and urban water users to challenge the new federal rules that protect the smelt. The U.S. Fish and Wildlife Service released the rules in March.

The updated rules were drafted after Wanger had invalidated earlier regulations because they did not comply with the federal Endangered Species Act. They have been under fire ever since.

Wanger also dismissed arguments made in a related lawsuit filed by the Pacific Legal Foundation on behalf of three San Joaquin Valley farming operations.

The foundation claimed the federal government has no constitutional authority to oversee the endangered smelt, because it has no commercial value and is not involved in interstate commerce.

Because of that, managing the smelt and placing it under the protection of the Endangered Species Act violates the U.S. Constitution, which limits federal domestic authority to things involved in interstate commerce, the suit claimed.

Wanger rejected that argument.