

**Green**



A Blog About Energy and the Environment

September 21, 2011, 5:39 PM

Search This Blog

Search

Previous Post

◀ **In the Green Race, the U.S. as Also-Ran**

Next Post

**A Giant Nuclear Project Awaits Its Federal Loans** ▶

**More Interior Scientists Are Taking Heat**

By FELICITY BARRINGER

FOLLOW THIS BLOG



Scores of scientists work for the Interior Department on issues involving birds and bees, foxes and foxgloves, and all manner of other species and their habitats. But in the eyes of the general public they tend to be virtually anonymous, at best names in italics at the end of a Federal Register notice.

Nonetheless, a spotlight has been trained recently on a few department employees: some National Park Service scientists at Point Reyes National Seashore on California's northern coast, and an Arctic wildlife biologist working for the Anchorage office of the Bureau of Ocean Energy Management. And this week, two Interior fish biologists were excoriated as deceitful zealots in an unusual diatribe by a federal judge, Oliver W. Wanger.



Center for Biological Diversity  
The endangered delta smelt.

The two scientists' testimony has been a crucial element in a lawsuit over who gets how much of California's fresh water.

The scientists, Frederick V. Feyrer of the Bureau of Reclamation and Jennifer M. Norris of the Fish and Wildlife Service, have testified about what habitat must be protected to save the endangered delta smelt, a small minnow-like fish. The smelt's populations have been decimated in the decades since the delta where the San Joaquin and Sacramento Rivers meet was re-engineered to send water to farms and cities in southern California.

The scientists testified that by flushing more fresh water from the Sacramento River to the briny eastern marshes that open out to San Francisco Bay, the smelt, which prefers lower salinity, will have access to more habitat, which it needs to survive and reproduce.

The area of ideal salinity for the smelt shifts back and forth, eastward and westward, depending on the time of year, the amount of rain and the decisions of federal and state water managers. (A fuller explanation with

About Green

How are climate change, scarcer resources, population growth and other challenges reshaping society? From **science** to **business** to **politics** to **living**, our reporters track the high-stakes pursuit of a greener globe in a dialogue with experts and readers.

• [Read more about the blog](#) » | [Follow Green on Twitter](#)

Topics

SCIENCE

Forests, oceans, air, species, land use and the climate debate.

• [More in Green Science](#) »



BUSINESS

Renewable and conventional energy, markets and green technology.

• [More in Green Business](#) »



POLITICS

Legislation, lobbying, policy debates, regulation and international diplomacy.

•

diagrams can be found at the [Bay Delta Blog](#).)

This zone of ideal salinity for young smelt to feed is known as the X2; the Interior Department had decided that in wet years like this one, it should be no farther than 46 miles east of the Golden Gate Bridge. The decision was challenged in the lawsuit by the state and agricultural water interests, which prefer that less go out to the bay.

In a [decision](#) two weeks ago, Judge Wanger sent an Interior Department plan for water distribution that is intended to help protect the endangered delta smelt back for reworking.

And on Monday, he detailed some of his thinking in open court in Fresno. His dissection of the scientists' testimony is worth quoting at length.

“The court finds that Dr. Norris’s testimony, as it has been presented in this courtroom and now in her subsequent declarations, she may be a very reasonable person and she may be a good scientist, she may be honest, but she has not been honest with this court. I find her incredible as a witness. I find her testimony to be that of a zealot. I’m not overstating the case, I’m not being histrionic, I’m not being dramatic. I’ve never seen anything like it. And I’ve seen a few witnesses testify.”

A Department of Interior spokesman said Wednesday that neither Dr. Norris nor Dr. Feyrer would comment on the judge’s remarks because of the ongoing litigation.

“Our priority is simple and clear: to help the population recover in wet years like this -- activities supported by science and the law -- as part of our overall efforts to improve the long-term health of the delta for water users, fish and wildlife, and communities across California,” the spokesman, Adam Fetcher, said.

“We will carefully consider Judge Wanger’s finding, and will review our legal options with the Department of Justice,” he added.

**Thursday, 11:08 a.m. | Updated** Mr. Fetcher, the Interior Department spokesman, issued a follow-up statement Thursday morning defending the work of Drs. Feyrer and Norris. He said in an e-mail: ““The Department of the Interior has been diligent responding to the varying matters before Judge Wanger’s court, including in the formation of the delta smelt biological opinion, first in 2005, which was then rewritten at the judge’s request in 2008. We stand behind the consistent and thorough findings by our scientists on these matters and their dedicated use of the best available science.”

Judge Wanger had plenty more to say on Monday.

“The suggestion by Dr. Norris that the failure to implement X2 at 74 kilometers, that that’s going to end the delta smelt existence on the face of our planet is false. It is outrageous. It is contradicted by her own testimony, it is contradicted by Mr. Feyrer’s testimony, it’s contradicted by the most recent adaptive management plan review, it’s contradicted by the prior studies, it is — candidly, I’ve never seen



[More in Green Politics »](#)



LIVING

Lifestyle changes and environmentally pitched products and services.

[More in Green Living »](#)

TIPS & SUGGESTIONS

**Talk to Green**

Have a news tip or a suggestion for coverage overall? E-mail us at [greenblog@nytimes.com](mailto:greenblog@nytimes.com).

Q & A

**Green Interviews**

Chatting with scientists, policy experts and activists about environmental issues.

[More Green Q & A »](#)

What We're Reading

Archive

Select Month

**VIDEO »**

[More Video | Multimedia »](#)

MULTIMEDIA SHARE

**Chris Gregoire Welcomes Salmon**  
Elwha River Dam Removal Ceremony

Blogroll

BLOGS

- AutoBlog Green
- Blue Marble Blog
- Climate Progress
- Climate Shifts
- Coal Tattoo
- Conscious Consuming
- Cool Green Science, The Nature Conservancy
- Dominion Energy's E-Conserve Blog
- Environmental Economics
- Forrest for the Trees
- gGadget.org
- GoodCleanTech
- Green Business
- Green Energy Reporter
- Green Herring
- Green Trust Sustainability
- Groovy Green
- Joel Makower
- Livable Future Blog
- Los Angeles Times: Greenspace
- MapAWatt Blog
- RealClimate
- Reuters Environment Forum
- Sustainablog
- The Goat
- The Inspired Economist
- The Oil Drum
- The Vine
- World Changing

CONSUMERS

- Climate Ark
- Green-e
- MetroGreen+Business
- National Geographic Green Guide

anything like it.”

As for Dr. Feyrer, the judge said:

“And I am going to make a very clear and explicit record to support that finding of agency bad faith because, candidly, the only inference that the court can draw is that it is an attempt to mislead and to deceive the court into accepting not only what is not the best science, it’s not science. There is speculation. There is primarily, mostly contradicted opinions that are presented that the court finds no basis for, but they can’t be anything but false because a witness can’t testify under oath on a witness stand and then, within approximately a month, make statements that are so contradictory that they’re absolutely irreconcilable with what has been stated earlier.”

He added:

“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 data, then that is a further misleading of the court. That is a further, if you will, distortion of the truth.”

And a few minutes later, the judge, whose words in open court were transcribed, said of the scientific analysis that Dr. Feyrer presented to the court:

“Does the court reasonably rely on this kind of analysis? What the court uses as the term to describe it is it is opportunistic. It is an answer searching for a question. It is an ends/means equation where the end justified the means no matter how you get there. Whether you use science, whether you use statistics, whether you use anything that is objective or not.”

Noting that the scientists were agents of the federal government, he then reflected:

“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 and 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.””

(The Pacific Legal Foundation’s [Liberty Blog](#) covered both the judge’s decision to ask the Interior Department to go back to the drawing boards to justify its plan of action for the delta salinity issue and his criticism of the scientists.)

It will be interesting to see if the same scientists are involved in the next round of analysis, and what they say; they won’t be saying it to Judge Wanger, who is in his final days on the bench (which may have loosened his tongue a bit). He retires at the end of this month and will join a private practice.

Greener Choices

- Grist
- Jumble Magazine
- Solar Buzz
- The Daily Green
- Treehugger

INSTITUTIONS

- DOE: Office of Energy Efficiency and Renewable Energy
- Energy Star
- European and Chicago Climate Exchanges
- European Commission Directorate General for Environment
- European Federation for Transport and Environment
- International Energy Agency
- National Renewable Energy Laboratory
- United Nations Environment Program
- United Nations Framework Convention on Climate Change
- US Department of Energy
- World Meteorological Association

JOBS

- Bright Green Talent
- Clean Edge Jobs
- CleanTechies
- CleanTechRecruits.com
- EcoEmploy
- Green Career Central
- Green Dream Jobs
- GreenCareers from Monster
- GreenJobs from Treehugger
- Grist Jobs
- Renewable Energy Jobs

NEWS SOURCES

- Alternative Energy Investments
- Alternative Energy News
- BBC News: Global Climate Change
- Clean Edge, Inc.
- Climate Biz
- Climate Change News Digest
- CNet: Green Tech
- Consumer Reports: Greener Choices
- Environmental News Network
- Green Business News
- Green: From the Washington Post
- GreenBiz.com
- Greentech Media
- Greenwire
- Grist
- High Country News
- Point Carbon
- Renewable Energy World
- The Environment Report
- The Green Blog
- Yale Environment 360

ORGANIZATIONS

- American Society of Landscape Architects
- American Wind Energy Association
- Association for the Study of Peak Oil
- Carbon Disclosure Project
- Climate Matters @Columbia
- Environmental Defense
- Friends of the Earth
- Independent Energy Producers Association
- Interstate Renewable Energy Council
- Johns Hopkins Center for a Livable Future
- National Biodiesel Board
- Natural Resources Defense Council
- Rocky Mountain Institute
- Solar Energy Industries Association
- Sustainable Buildings Industry Council
- The Pew Center on Global Climate Change
- The Post Carbon Institute
- United States Energy Association

Follow The New York Times »

- Facebook
- Twitter
- YouTube
- RSS

TimesLimited E-Mail



Sign up to receive exclusive products and experiences featuring NYTimes.com's premier advertisers.

[Sign Up](#)

[Privacy Policy](#)

Ads by Google

what's this?

[Affordable Solar Energy](#)

\$800 Promotion. Go Solar by 9/30 & Reduce Energy Bills for Decades.

On another front, scientists at the Point Reyes National Seashore who have found that a controversial oyster farm is disturbing harbor seals have also been accused of overstating its case over the last two years, even by an Interior Department lawyer and by other scientists.

In both the case of the smelt and the case of the harbor seals, the scientists' findings have been the underpinning of policy decisions. A preliminary decision on the oyster farm is imminent.

The scrutiny of Charles Monnett, an Arctic scientist who reported on the sighting of drowned polar bears and was placed on administrative leave this summer, has different implications. He is now under investigation by the Interior inspector general; of all of the scientists mentioned here, he is the only one against whom some agency action is known to have been taken.

Many have noted that Dr. Monnett's observations could be marshaled against decisions by his employer, the Department of Interior, to grant permission for oil and gas drilling in the Arctic.

E-mail This Print Recommend Share Twitter

Breaking News, Endangered Species, Water Conservation, Water Quantity, water quality, wildlife, Bureau of Reclamation, California, Charles Monnett, Delta smelt, Department of Interior, Fish and Wildlife Service, Frederick V. Feyrer, Jennifer M. Norris, Judge Oliver Wanger, Point Reyes National Seashore, water diversions, water rights, wildlife habitat

### Related Posts

- FROM GREEN
- A Small Compromise in California's Water Wars**
- How to Choose Between Fish and Farmers?**
- Judge Blocks Species Accord for Now**
- An Accord on Endangered Species**
- A Snake Invasion? Debating the Risks**

Previous Post  
◀ **In the Green Race, the U.S. as Also-Ran**

Next Post  
**A Giant Nuclear Project Awaits Its Federal Loans** ▶

### 7 Readers' Comments

[Post a Comment](#) »

ALL COMMENTS HIGHLIGHTS READERS' RECOMMENDATIONS

Oldest | Newest

#### 1. HIGHLIGHT (What's this?)

Wasting time DC September 21st, 2011 4:41 pm

Wanger was nominated by President George H.W. Bush on January 8, 1991. He was confirmed by the United States Senate on March 21, 1991, and received his commission on March 25, 1991. He assumed senior status on May 31, 2006. In September 2011, he announced that he would retire on September 30, 2011.

He has apparently outlasted any judicial temperament and impartiality he might have had over his two decades on the federal bench. And his reading comprehension. Because Jennifer Norris did not say that "that's going to end the delta smelt existence on the face of our planet "

Here is what she really said: "By implementing the Fall X2Action, by placing X2 at 74km this year, delta smelt produced this past spring are much more likely to survive and reproduce next year, thereby adding to the population overall. This improvement in the population status is essential to reverse the species downward decline toward extinction. Without the fall X2 action, the ability of the RPA (reasonable and prudent alternative) to avoid jeopardy will be eliminated and the harm to the species would be irreparable."

Read it yourself, especially the two final paragraphs.

<http://plf.typepad.com/files/x2feddec1.pdf>

[Recommend](#) Recommended by 3 Readers

2. Motherof3  
sacramento, ca  
September 21st,  
2011  
5:28 pm

"He has apparently outlasted any judicial temperament and impartiality he might have had over his two decades on the federal bench. And his reading comprehension. Because Jennifer Norris did not say that "that's going to end the delta smelt existence on the face of our planet "

For your information 'jeopardy' is a term of art used in the application of the ESA. It means that if the federal agency is allowed to take the action it will 'jeopardize the continued existence of the species' ... ie: wipe if off the face of the earth.

The Judge's opinion addressed the fact that the FWS, acting on behalf of the Secretary of the Interior stated that if water deliveries to farmers are continued, the continued existence of the species will be jeopardized, and as a result of the FWS opinion, driven by these scientists, orchards were killed, crops died, and people were unemployed... up to 40% in some towns. She used the word irreparable... that means, no return, it can't recover. Jennifer Norris's statement in her deposition (included in the link to your document) is that these conditions may not occur again until, '...the smelt population is past the tipping point and extinction cannot be prevented...'

Now, consider what he based his opinion on... there is a clear record of the FWS failing to rely on data, and instead substituting opinion even when the data demonstrated otherwise. There is a clear record of the FWS and DOJ attorneys misstating the record, cherry picking and taking statements out of context and the Judge actually spent the time to review and document those misstatements. And his point is, despite the fact that there was clear agency bad faith, despite the fact that there will be untold damage done to people, and despite the fact that after 15 years of mismanagement the government still will put the health of smelt populations before those of people.

That's what he means about the government winning... the deck is stacked against ordinary people.

[Recommend](#) Recommended by 1 Readers

3. harry  
michigan  
September 21st,  
2011  
7:45 pm

Yeah , I'm gonna believe everything judges have to say. Citizens united is a perfect example of our highest judges being corrupted by big money.

[Recommend](#) Recommended by 4 Readers

4. HIGHLIGHT (What's this?)

Flowing uph...  
Santa Cruz  
September  
22nd, 2011  
4:14 am

The sad thing about this is that it wasn't the scientists that were exaggerating about the impacts on the smelt. They really are on the verge of extinction. If the fish don't get more habitat in wet years, they have almost no chance. The

X2 requirements are needed to provide that habitat.

The water districts, on the other hand, have made huge exaggerations about the impacts on their regions. The West side of the San Joaquin Valley is former desert that has had huge problems with salinity and toxic minerals for 100 years. While one water district claimed 150,000 acres of land fallowed because of the drought and pumping restrictions, in reality it had a huge amount of land that had been retired from irrigated production because it had salted up and was no longer profitable to farm -- over 100,000 acres.

This is happening more and more with desert reclaimed by federal water projects in the first part of the 20th century.

[Recommend](#) Recommended by 4 Readers

5. N A Fortis  
Los Altos CA  
September  
22nd, 2011  
4:15 am

All this over a tiny fish? What judiciale wonderfulness goes on when the (figurative) fish is bigger?

Dear me.

Naf Los Altos CA

[Recommend](#) Recommended by 0 Readers

6. HIGHLIGHT (What's this?)

Wasting time  
DC  
September  
22nd, 2011  
4:49 am

Mother of 3 - I know what the term jeopardy means in the context of the ESA. I also know - and have known - the superb scientists of the USFWS and the USGS, among others - and their leadership for many years. I do not work for any federal agency and I never have. I am proud to be a colleague of these people. Although I have had my differences with them, I have never once doubted their integrity and sincerity. They absolutely, definitely understand the impacts of their findings on not only the species they are charged by law with protecting, but also on the other species - including humans - that will be impacted. You can't believe that they've been embroiled in these water use disputes for all these years without having developed an ounce of regard for the farmers and other water users in the area. Knowing them as I do, it is impossible for me to believe that they acted in bad faith. I am sure that they would not deliberately misstate the science or the implications of the science.

I read Ms. Norris' statement with an understanding of population biology and it is clear to me that they are on sound scientific ground when they say that taking advantage of a good year to increase the population is a very sound strategy. It will help bring the population help, which will help guard against extinction in a bad year. What the judge is ignoring or not understanding is that this action is not taken to guard against immediate extinction, but rather to bring about a healthier population that is more resistant to extinction in the future, when, as is inevitable in nature, there will be bad years. In reversing species' declines, you don't want to continue to live on the edge, just one fish more than absolutely necessary. You want a healthy population that can withstand the normal population fluctuations that occur, not to mention the occasional catastrophes.

[Recommend](#) Recommended by 4 Readers

Z. claire solt...  
undefined  
September  
22nd, 2011  
7:42 am

The constitution begins with we the people and it does not ever say of the people, by the people, and for the fish. Perverting the institutions formed under the constitution, such as courts, so that they disadvantage people is obviously perverse.

On the West coast, radical enviros have forgotten the category of species. Smelt are abundant all over the world and should not be called endangered. Most of all I object to the patronizing attitude towards animals and organisms that have survived successfully for eons without the nannys of the gov. Watch and leasrn, instead of trying to keep every population in some niche that may or may not be ideal.

[Recommend](#) Recommended by 1 Readers

[Post a Comment](#)

[Suggest a Correction to This Blog Post »](#)

You must [log in](#) to post a comment ([Register](#)).

Ads by Google

[what's this?](#)

### [Affordable Solar Energy](#)

Sign Up for Solar by Sept 30 to Get \$800 Off Your Home Solar System

[www.SolarCity.com/SeptBigSolarSale](http://www.SolarCity.com/SeptBigSolarSale)

[Home](#) | [World](#) | [U.S.](#) | [N.Y. / Region](#) | [Business](#) | [Technology](#) | [Science](#) | [Health](#) | [Sports](#) | [Opinion](#) | [Arts](#) | [Style](#) | [Travel](#) | [Jobs](#) | [Real Estate](#) | [Autos](#) | [Site Map](#)

© 2011 The New York Times Company | [Privacy](#) | [Your Ad Choices](#) | [Terms of Service](#) | [Terms of Sale](#) | [Corrections](#) |  [RSS](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Advertise](#)