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**INSIDE THIS ISSUE:**

What the NRDC judge ignored	2
Water supply update: 2004 looking good	3
Time is now to order float	3

## DISAPPOINTING BUT NOT UNEXPECTED—NRDC LAWSUIT DECISION FAVORS ENVIRONMENTALISTS

It took Sacramento Federal District Court Judge Lawrence K. Karlton a mere 17 days to decide a case that was 16 years in the making. And from the decision that the Judge published, one might get the idea that there was only one side of the argument presented—that of the environmentalists (*see related article on page 2*).

### **F&G Code 5937**

Originally filed in 1988, a group of environmental and fishing groups sued the federal government challenging the renewal of Friant districts, including Delano-Earlimart. Their lawsuit was later amended to include an assertion that the government was required to conform with State Fish and Game Code 5937, which

requires owners of a dam to release water in order to maintain fish below the dam in good condition.

As the years wore on, the emphasis of the environmental groups, led by the San Francisco-based Natural Resources Defense Council, became the 5937 issue and their demand that a naturally reproducing salmon and steelhead fishery be established and maintained below Friant Dam, all the way to San Francisco Bay.

### **Potential Impact Huge**

Studies have shown that doing so would decimate agriculture on the east side of the valley, requiring as much as 500,000 acre-feet from the Friant Project. That represents over one-third of the average annual

yield to the Friant Division, and would require most if not all of the Project yield in below-average years. Such economic devastation would be felt throughout the California economy.

### **Difficult Proceeding**

After a nearly three-hour hearing before Judge Karlton on August 10th, the Judge was clearly troubled by some of the arguments presented by the attorneys for the federal government and those representing various Friant Districts. In the end, Judge Karlton sided with the attorneys for the environmentalists, whose points were bolstered by an attorney from the State Attorney General's office. That attorney made his

(See NRDC: Continued on page 4)

## NRDC DECISION BY JUDGE IGNORES MUCH



*“...the government has not diverted the entire flow for 45 years. They have been making releases from Friant Dam ... and the evidence in this case is undisputed that those releases are maintaining, in good condition,...fish downstream”*

Greg Wilkinson, lead Friant attorney at the August 10, 2004 hearing before Judge Karlton.

As was reported in the page one article of this edition of the *DEID Pipeline*, Judge Lawrence Karlton seemed to all but ignore the legal points and facts that were argued by Friant and government attorneys. Here is part of what was presented to the Judge but obviously fell on deaf ears:

- In a case just decided in this session of the U.S. Supreme Court, (*Norton vs. Southern Utah Wilderness Alliance*), the high court ruled that an environmental group could not sue the federal government if there was no “discrete action” or failure to act on behalf of the federal agency. In the NRDC case, the environmental plaintiffs have never cited a discrete action taken or lack of one, making it the exact same situation as was present in the Norton case. This leaves the plaintiffs with no standing to sue the federal government.
- There is a fishery in good condition below Friant Dam consisting of both cold and warm water species. Fish and Game Code 5937 does not mandate a specific type of fishery, only that it be a fishery in good condition.
- The historical record shows that the entire river flow was diverted at times at other locations downstream of Friant Dam prior to its construction. Making the case that Friant Dam was solely re-

sponsible for the complete demise of the salmon fishery ignores the facts.

- The river’s entire flow is not diverted. An average of over 117,000 acre-feet per year is released below Friant Dam for fishery and other downstream water uses.
- Friant Dam was originally built and has been operated in conformance with permits issued by the State Water Resources Control Board. At that time, the Board considered and answered the 5937 question, and made its determination as to what the federal government’ was to do, and not do with regard to compliance with 5937.
- All water used by the Friant system has been put to beneficial use in conformance with State statues mandating same.
- Friant Dam supports a trout hatchery operated by the State Fish and Game Department that provides fish not only to the San Joaquin River, but to fisheries throughout the State.

It seems that Friant districts and the federal government have much to present before an Appellate Court on Judge Karlton’s ruling.

*A complete copy of the 41 page ruling by Judge Karlton is available by contacting the District office.*

## 2004 WATER SUPPLY SECURE FOR BALANCE OF YEAR

A late season increase to the 2004 water supply has given the needed cushion to assure all District growers that there will be adequate water supplies for the rest of the water year.

Notices were sent out earlier in the summer telling water users that District supplies were very tight, to the point that the supply could run out sometime in October. Below normal rainfall and snowfall during the past winter, along with higher than

normal water use during the spring months put a strain on the available water supply.

An unusual late season water supply increase was announced by the U.S. Bureau of Reclamation at the end of August. Storage conditions at Millerton Lake, cooperation from Southern California Edison (operator of a series of reservoirs above Millerton), and other circumstances allowed an increase in the Class 2 supply of three percent.

That brought the total Class 2 declaration for the 2004 water year to 8 percent.

In an average water year, the Class 2 declaration is 43 percent.

The 2004 water year marks the sixth straight year of below-average water supplies for the Friant Division of the Central Valley Project.

Delano-Earlimart Irrigation District receives all of its water supplies from the Friant Project.



## GROWER RESPONSE TO FLOAT SYSTEMS STRONG

The response by District water users to recent correspondence promoting the benefits of installing a pressure-compensating float system has been tremendous.

With 21 systems already installed, the District now has 103 turnouts awaiting installation of a float system. That backlog is expected to be cleared during the fall

and winter months by District crews.

The design of the float system allows greater stability in ordered flow rates by automatically compensating for pressure fluctuations within the District's distribution system. In most instances, the design also allows growers to operate their own turnout.

The float system and its installation are provided by the District at no cost. The grower is responsible for the cost of providing and installing a separate operating valve on the downstream side of the District turnout.

Growers considering a system are encouraged to contact the District office immediately.



*PROVIDING  
INFORMATION  
ON ISSUES OF  
INTEREST TO  
WATER USERS  
AND GROWERS  
IN THE DELANO-  
EARLIMART  
IRRIGATION  
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*Included in this issue of the DEID Pipeline is the latest edition of the "Irrigation Techline", courtesy of the Friant Water Authority. The District periodically provides this and other water conservation and management information as a service to our readers.*

*Please contact us if you would like additional water conservation or*



## **Inside: What the NRDC decision is, and is not.**

(NRDC: Continued from page 1)

appearance on behalf of the State Water Resources Control Board, comments hostile to the arguments made on behalf of the Friant water users and openly welcomed by the Judge.

### **All Is not Lost-Yet**

Doom and gloom aside, the Judge's decision does not have the affect of ordering water down the San Joaquin River, at least not yet. Karlton did decide that the federal government is liable for conformance to Fish and Game Code 5937, but did not decide what the remedy to that

violation would be. In other words his decision did not say how much restoration is required, the amount of water to be released, what fish are to be maintained, the extent of physical changes to the river environment that will be necessary, who will be responsible for the cost, and what balancing will be necessary between the human, economic, and environmental interests in the San Joaquin River. Those factors and more will all be determined in a whole separate proceeding.

Additionally, the liability decision may be appealed, which could

also delay the start of the remedy phase.

### **Public Not Yet Heard**

If previous reactions by the public to threats to the valley's water supply and jobs are any indication of the future, we have yet begun to fight.

In the mid-1990's, massive public demonstrations occurred at hearings sponsored by the U.S. Department of the Interior, who was beginning a planning process to restore the San Joaquin River. Thousands turned out to voice their disapproval, which was credited with stopping