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In Fish vs. Farmer Cases, the Fish Loses Its Edge

By DEAN E. MURPHY

SAN FRANCISCO, Feb. 21 - Legal fights over water in the West are as common as summer rains are rare. But a flurry of cases in California is attracting intense attention from scholars and state officials who see them as an extraordinary assault by agricultural interests on protections for endangered fish and other wildlife.

In a series of lawsuits, including one to be argued before the United States Supreme Court on Wednesday, farmers and water districts are pushing property-rights claims to the forefront of the debate over how to divvy up water among farms, cities and the environment.

In doing so, they are demanding compensation from the government for irrigation water diverted for environmental purposes, calling into question rules mandated by Congress under the Endangered Species Act that favor the protection of fish over the growing of food when water is in short supply.

It is an approach that has won sympathy from the Bush administration, which in December agreed to pay \$16.7 million to farmers in Tulare and Kern Counties in one lawsuit over reduced water supplies. But the claims have alarmed California officials and many conservation groups, who fear that demands for payment for lost water could spread to other Western states and undermine protections for wildlife.

"This is hugely important, a growing storm cloud over the American West," said Richard M. Frank, California's chief deputy attorney general, who oversees water litigation and who opposes paying farmers for water diverted to endangered fish. "We will be seeing a lot more of these kinds of claims brought not only against the federal government but state governments."

William S. Smiland, a Los Angeles lawyer representing the farmers in the Supreme Court case, *Francis A. Orff v. United States*, said they and farmers in the other lawsuits had long gotten the short end of the stick and were only demanding their due.

"Nobody really cares about them," Mr. Smiland said. "I don't mean to be melodramatic, but they have no political clout. So this is law against politics."

In the early 1990's, many farmers in the Central Valley had their irrigation water halved by federal officials because of severe drought. Flows that normally would have gone to crops were left in rivers for salmon and other fish struggling to survive.

The water shortage took a financial toll on the farmers, whose fields extend across an arid ancient seabed that is the country's most productive farmland thanks to a system of dams and canals that brings snowmelt from distant mountains.

Some of the farmers, including Mr. Orff of Fresno County, sued the federal government for damages. The case has undergone changes over the years, and on Wednesday the Supreme Court will consider only a narrow contract issue that focuses on whether farmers, rather than their irrigation districts, have legal standing to sue the federal government.

But the reverberations of the case are considered much broader, because a victory for the farmers could open the door to many more lawsuits of the sort that led in December to the \$16.7 million payment to farmers and irrigation districts in Tulare and Kern Counties, which also had their water supplies cut in the early 1990's. That settlement was the first by the federal government in a case in which farmers claimed their property rights had been violated by the taking of water to protect fish.

Though not binding on other cases, the victory has emboldened farmers and water districts across the state, prompted

similar lawsuits and panicked environmentalists and some state officials, who worry that hard-won federal protections for endangered species could be weakened. They fear that the government will not make use of protections included in the Endangered Species Act, because courts could make the protections too expensive by forcing the government to pay costly damages.

At the center of the dispute is whether farmers who have contracts through their irrigation districts to receive water from public works projects, like the federally owned Central Valley Project in the Orff case, should be paid when the water they were expecting is not delivered.

The federal and state governments have long argued that water belongs to the public, not to the farmers, and can be used as the public dictates, in this case to save wildlife. But the farmers say their contracts for water deliveries are the legal equivalent of water rights, and as with any property right, the owner must be reimbursed under the Fifth Amendment if the government confiscates the property, something known as a "physical taking."

The water cases come at a time when the property rights movement has made strides and is looking to expand. In November, Oregon voters approved a referendum that allows property owners whose investments have been hurt by environmental or zoning rules to get government compensation for the losses, or an exemption from the rules. And on Tuesday, the Supreme Court will hear arguments on whether private economic development that will add to the tax base of New London, Conn., is an appropriate "public use" for which a city can exercise its power of eminent domain to condemn property.

Roger J. Marzulla, a Washington property rights lawyer who represented the farmers in the \$16.7 million settlement, said that taking water from farms for fish was no different from taking someone's land to build a road. Since winning the case, Mr. Marzulla has filed similar claims totaling hundreds of millions of dollars on behalf of farmers in the Klamath River basin and farmers and other customers of the Casitas Municipal Water District in Ventura County and the Stockton East Water District in San Joaquin County.

"If the government had to go around seizing people's homes and farms every time it wanted to build a road or hospital," he said, "and everybody knew they weren't going to be paid, you would have shootouts."

But until a judge in the United States Court of Federal Claims sided with the Tulare and Kern farmers in 2001, resulting in the settlement in December, the case law was on the side of the government. The judge, John P. Wiese, concluded that the water cutoff amounted to a physical taking, not a routine regulatory action as federal officials argued. He set the damages at \$27 million, which was reduced in a settlement.

Judge Wiese's ruling was both unprecedented and hotly disputed, prompting a long list of government officials and agencies to recommend an appeal. Senator Dianne Feinstein, Democrat of California, said the decision could lead to large payouts in other cases and a backdoor attack on the Endangered Species Act.

"With the federal government and the State of California facing continuing deficits, the government likely could not afford to provide the water the fish need," Ms. Feinstein said in a letter to administration officials.

When the Justice Department, in consultation with the Interior Department, decided not to appeal the decision, many critics saw the political influence of conservative property-rights advocates. Mr. Marzulla worked in the Justice Department in the Reagan administration and has close ties to the Bush administration.

"It's a signal from the Bush administration that it wants to encourage these guys who are filing these cases," said John D. Echeverria, executive director of the Georgetown Environmental Law and Policy Institute, who has been involved in the Klamath lawsuit.

"It was a very extreme decision ripe for overruling," Mr. Echeverria said of Judge Wiese's ruling, "which made the decision of the United States to settle so troubling."

Bush administration officials say the settlement saved taxpayers money. The case had been in the courts for more than six years, the government had lost and by settling, the damages were significantly reduced.

Sue Ellen Woolridge, solicitor for the Interior Department, said it was unlikely that Judge Wiese's ruling would affect other water cases, because although many seem alike, the legal circumstances are different.

Nonetheless, Ms. Woolridge said she and other administration officials agreed philosophically with the farmers that all Americans, not just the few who lose water, should share the cost of protecting wildlife.

"If we have a public good which is reflected in the Endangered Species Act," she said, "it's fair that the act should be supported by all taxpayers as opposed to having only particular individuals have to pay for that public good."

Joseph L. Sax, a professor emeritus of law at the University of California, Berkeley, who was counselor to Bruce Babbitt, a Democrat, when Mr. Babbitt was interior secretary, said the Bush administration had "raised a pretty prominent flag of warning" to backers of the environmental protections.

"I am not an alarmist," Professor Sax said, "and I don't think it is appropriate to say this is the beginning of the end for regulation of water rights. But it really is a significant change."