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Committee on Natural Resources
Water, Power and Oceans Subcommittee

Hearing on
H.R. 3916, "The Federally Integrated Species Health (FISH) Act"
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Chairman Lamborn, Ranking Member Huffman, and Subcommittee Members:

Thank you for this opportunity to present testimony on behalf of the Family Farm Alliance (Alliance). My name is Dan Keppen, and I serve as the executive director for the Alliance, which advocates for family farmers, ranchers, irrigation districts, and allied industries in seventeen Western states. The Alliance is focused on one mission - To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

In his 2011 State of the Union speech, President Obama caught the attention of many Westerners when he remarked that "The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. And I hear it gets even more complicated once they're smoked."

While the President's freshwater/saltwater distinction may not have been *legally* correct, the moment may have provided the first, wide-spread public acknowledgement of the nonsensical reality associated with having multiple federal agencies responsible for enforcing the Endangered Species Act of 1973 (ESA).

The Alliance supports H.R. 3916, the "*Federally Integrated Species Health (FISH) Act*." This bill would amend the ESA to vest in the Secretary of the Interior functions under that Act with respect to species of fish that spawn in fresh or estuarine waters and migrate to ocean waters (anadromous fish), and species of fish that spawn in ocean waters and migrate to fresh waters (catadromous fish). We believe that by combining the ESA implementation responsibilities of both NMFS and FWS under one federal roof, we would promote more efficient, effective, and coordinated

management of all ESA responsibilities for anadromous and freshwater fish in Western watersheds, from the highest reaches of our headwaters to the Pacific Ocean.

Importance of Western Irrigated Agriculture and Key Challenges

Irrigated agriculture in the West not only provides a $172 billion annual boost to our economy, it also provides important habitat for western waterfowl and other wildlife, and its open spaces are treasured by citizens throughout the West. Family farmers and ranchers are willing to partner with constructive conservation groups and government agencies, especially if there are opportunities to both help strengthen their businesses and improve the environment.

Still, many Western producers face significant regulatory and policy related challenges, brought on – in part – by federal agency implementation of environmental laws like the ESA. The challenges are daunting, and they will require innovative solutions. The Family Farm Alliance and the farmers and water management organizations we work with are dedicated to the pragmatic implementation of actions that seek to find a sustainable balance of environmental protection and economic prosperity. The foundation for some true, collaborative solutions will be driven from the constructive "center", one that steers away from the conflict that can ensue between new regulatory overreach and grassroots activism intended to resist any changes to existing environmental and natural resource laws, regulations, and policies.

NMFS and FWS Nexus with Western Farmers and Ranchers

The very significant presence of the federal government in the West presents unique challenges that agricultural producers may not face in other parts of the United States, particularly with respect to the reach of the ESA. The Federal multi-agency implementation of this law has had very significant impacts on how producers manage land and water. Importantly, once-nearly guaranteed federal water supplies that were originally developed by the Bureau of Reclamation (Reclamation) primarily to support irrigation projects have been targeted and redirected to other uses in recent years. So, in the West, the certainty of promised Federally developed water supplies has now been added to the long list of existing "uncertainties."

Many Western irrigators – especially those who operate in watersheds that provide habitat for threatened and endangered species protected by the ESA – are significantly impacted by decisions made by FWS and NMFS. ESA consultation decisions made by either or both agencies regarding operations plans for federal water projects like those in the Deschutes River Basin (OR), Columbia River Basin (WA/OR/ID/MT), California's Central Valley and the Klamath Basin have significantly impacted historic operations by rededicating water once used to support agricultural irrigation to the perceived needs of fish, frogs and other species protected under the ESA. Similarly, non-federal projects developed by local agencies increasingly find themselves constrained by the "take" prohibition of section 9 of the ESA and accompanying regulatory oversight, demands, and permitting system operated by FWS and NMFS.

Inefficient and Wasteful ESA Implementation in Watersheds Tributary to the Pacific

Western watersheds that drain to the Pacific Ocean are home to many species of fish, some of

which are listed as "endangered" or "threatened" under the ESA and fall under the responsibility of NMFS and FWS but have different migration patterns or life histories, often leading to duplicative and sometimes overlapping actions by each of the agencies under the ESA. Several of these species – like the Lost River and Short Nose suckers in the Upper Klamath Basin, the Delta Smelt in the Sacramento-San Joaquin River & San Francisco Bay-Delta, and the bull trout in the Upper Snake River – spend their entire lives in freshwater. Other anadromous species – such as the coho salmon in the Lower Klamath River, chinook salmon in California's Central Valley, and salmon and steelhead in the Columbia River – spawn in freshwater, migrate to the ocean to mature, and return to spawn in freshwater. Still other species are polymorphic: an individual *O.mykiss* may live its entire life in freshwater, in which case the fish is a rainbow trout, or that fish may ultimately spend part of its life in the ocean, in which case it is a steelhead and potentially subject to NMFS jurisdiction if listed under the ESA.

The scope of similar or identical ESA actions performed by each agency can be extensive:

- Section 4 of the ESA requires the listing agency to designate critical habitat for endangered and threatened species;
- Section 4(f) of the Act requires the listing agency to develop and implement a "recovery plan" for endangered and threatened species;
- Section 7(a)1 requires all federal agencies, through consultation with the listing agency, to use their authority to carry out programs for the "conservation" of endangered and threatened species;
- Section 7(a)(2) requires all federal agencies, through consultation with the listing agency, to ensure that actions carried out, funded, or authorized by them do not "jeopardize" the continued existence of endangered and threatened species and do not result in "adverse medication" of their critical habitat;
- Section 9(a)(1) prohibits all persons subject to U.S. jurisdiction from "taking" endangered species unless authorized by the listing agency pursuant to appropriate provisions of the ESA; and section 4(d) allows the listing agency to extend the same level of protection to threatened species.
- Section 10, particularly 10(a)(1)(B), provides a regulatory mechanism by which FWS or NMFS may authorize parties not connected to a federal project to obtain authorization for incidental take if the agency makes certain findings.

It would seem intuitive to many that these functions would most effectively and efficiently be conducted under the roof of one government agency and not be arbitrarily split between two different agencies housed in two completely different federal departments. In fact, up and down the West coast, duplicative bureaucracies are generating ESA plans that sometimes compete with one another, as explained in the following three examples. I will start with a more detailed treatment of an example that I am most familiar with – operations of the 112-year old Klamath Irrigation Project, located on the California – Oregon state line.

1. <u>Klamath Irrigation Project (CALIFORNIA / OREGON)</u>

For its first eighty years of operation, Klamath Project irrigation supplies proved sufficient to meet the needs of the area's burgeoning farming and ranching communities. Although there were some

very extreme years where Mother Nature and Klamath Project storage capacity proved insufficient to meet one hundred percent of irrigation demands, shortages were small at most as the local community managed to stretch thin supplies and make things work. Beginning in the early 1990s, steadily more restrictive government agency decisions made to meet ESA goals began to steadily chip away at the stored water supply originally developed for irrigation. Two sucker species were listed (1988) as endangered and coho salmon were listed (1997) as threatened under the ESA. Since then, competing biological opinions rendered by FWS (for the suckers) and NMFS (for the coho), increasingly emphasized the reallocation of Project water as the sole means of avoiding jeopardizing these fish.

In essence, the two federal regulatory agencies each adopted a single-minded and uncoordinated approach of focusing on Klamath Project operations to artificially create high reservoir levels and high reservoir releases. Unfortunately, both agencies did so independent of one another.

The net result of increasing restrictions on Klamath Project water users was fully realized on April 6, 2001, when Reclamation announced its water allocation for the Project after FWS and NMFS officials independently finalized their biological opinions (BOs) for project operations in a critically dry year. Based on those regulatory actions, Reclamation announced that – for the first time in Project's 95-year history - no water would be available from Upper Klamath Lake to supply Project irrigators or the national wildlife refuges (also managed by FWS). The combined lake level and outflow regulatory requirements equated to a volume of water that was more than what was available in the system.

The resulting impacts to the local community were immediate and far-reaching. Thousands of acres of valuable farmland were left without water. In addition to harming those property owners, managers, and farm workers, the decision also imparted a negative economic "ripple" effect throughout the broader community. The wildlife benefits provided by those farms – particularly the food provided for area waterfowl – were also lost with the water.

Severe business losses echoed the hardship endured by farmers and farm employees. As farmers and laborers attempted to deal with the loss of jobs, a year's worth of income, and in some cases loss of the land itself, referrals for mental health counseling increased dramatically. The Tulelake school district lost around 50 students after farm families sold their land and moved on. Students were under stress, understandably confused as to why three species of fish were more important than their lifelong homes. Veteran homesteaders, who fifty years ago were promised reliable federally developed water, felt betrayed by that same federal government, which chose to provide water to fish instead of farmers in 2001.

It's difficult to envision that the 2001 Klamath Project water crisis would have occurred had the two fisheries agencies been housed in the same department that also includes the Bureau of Reclamation. Plus, FWS also has jurisdiction over the national wildlife refuges served by the Klamath Project. FWS managers faced a big enough challenge trying to balance the water needs of endangered suckers in Klamath Project waterways with those required to support waterfowl, bald eagles and other species in its refuges. To this date, it remains to be seen who acts as the mediator to balance the water requirements of the birds and salmon, the latter of which are overseen by another agency – NFMS.

The National Academy of Sciences (NAS) stepped in after Klamath Irrigation Project supplies from Upper Klamath Lake were cut off by federal biological opinions under the ESA in 2001. Sadly, the NAS' initial objective scientific review (NAS 2002)[i] concluded that there was insufficient evidence to support these biological opinions in restricting agricultural diversions from the Klamath system, which had led to the near collapse of the local agricultural community. Here were the actions identified in the top recommendation included in the final NAS Klamath Report:[ii]

- NMFS and USFWS should inventory all governmental, tribal and private actions that are causing unauthorized "take" (or killing) of ESA-listed fish and seek either to authorize this take with appropriate mitigative measures or eliminate it;
- NMFS and USFWS should consult not only with Reclamation, but also with other federal agencies (e.g. U.S. Forest Service) under ESA Section (7);
- NMFS and USFWS should use their full authority to control the actions of federal agencies that impair federally managed lands, not only within but also beyond the Klamath Project
- Within 2 years, NMFS and USFWS should prepare and promulgate species recovery plans;
- NMFS and USFWS should pursue opportunities for non-regulatory stimulation of recovery actions through the creation of demonstration projects, technical guidance, and extension activities that are intended to encourage and maximize the effectiveness of non-governmental recovery efforts.

These five general key actions applied to both agencies when it appears obvious that one combined agency might do the job better. Admittedly, after the 2001 water shutoff, better coordination occurred between federal agencies on Klamath Project operations, ultimately leading to the 2013 development of a joint, coordinated Biological Opinion by NMFS and FWS. Reclamation and the Services participated in extensive interagency coordination over a two-year period, with the purpose of "collaboratively developing a water management approach that has the flexibility to optimize the benefits of available water for federally listed species while providing irrigation deliveries to the Project".

While the joint BO was an encouraging development, the amount of work required for two separate agencies housed in different departments to develop Reasonable and Prudent Alternatives (RPAs) to avoid jeopardizing the continued existence of different individual fish species was incredibly inefficient compared to what it would take for one agency to oversee the effort. Months of time were dedicated to simply addressing edits bouncing back and forth between the two agencies. While both agencies attempted to streamline efforts wherever possible, each agency had its own internal protocol and authorities to satisfy, and those differences required tremendous time and efforts to reconcile.

Consolidating the NMFS functions under the Interior Department umbrella, as proposed by H.R. 3916, would put the Secretary of Interior in charge of a much more unified approach to managing threatened and endangered species in the Klamath River watershed.

2. Snake River (IDAHO)

A "Klamath-like" situation with potential future dire consequences for Idaho water exists in the Snake River Basin. The NMFS BO for the Upper Snake River Basin Projects (above Hells Canyon) requires that water be sent downstream for flow augmentation for salmon. On the other hand, the FWS BO for bull trout critical habitat requires "bank full" reservoirs in the Boise Project, one of the Upper Snake Projects. When push comes to shove – similar to what happened in the Klamath Basin – Idaho water users wonder, "how do we do both, and still provide water for our farms and communities?"

3. Central Valley Project (CALIFORNIA)

Water users served by the Central Valley Project (CVP) at one time had a fairly assured sense—early in the year, before planting and other farm management decisions needed to be made—of what their water supplies would be for the upcoming year. At the beginning of the year, the Bureau of Reclamation and the California Department of Water Resources (DWR) issues a water supply forecast and anticipated allocations for the various state urban, agricultural, and environmental water users based on snowpack in the mountains and anticipated weather conditions. However, in recent years, those once-reliable forecasts have been complicated by new regulations, litigation, and agency administrative directives. Farmers now regard water allocations with a sense of uncertainty which has helped to destabilize some agricultural decision-making and profitability within the CVP.

Since 1977, a multitude of government regulatory and policy decisions have reduced the average water supply for CVP South of Delta agricultural service contractors (farmers and ranchers in the San Joaquin Valley who receive water from the CVP) from 90 % of their contracted deliveries to 40 % of their contracted deliveries. In 2014 and 2015, agricultural contractors on the west side of the San Joaquin Valley received zero CVP supplies. In 2016, they received 5% supply.

In short, state and federal regulations have reduced water supply availability. Within this mix, NMFS is responsible for a biological opinion for winter-run chinook salmon which requires CVP operations to meet specific temperature criteria in the Upper Sacramento River. In recent years, NMFS has taken drastic measure to leave water intended for users downstream of Shasta Dam behind the dam, for fear of violating those temperature criteria. In its 2009 Salmon Biological Opinion, NMFS biologists and hydrologists concluded that water pumping operations in the CVP and State Water Project (SWP) should be changed to ensure survival of salmon, steelhead, green sturgeon, and killer whales, which rely on salmon runs for food. Meanwhile, since 1994, FWS has issued biological opinions to avoid jeopardizing the continued existence of the Sacramento-San Joaquin River Delta (Delta) smelt.

CVP water use is further constrained by the 1997 Central Valley Project Improvement Act (CVPIA), which includes an Anadromous Fish Restoration Program that seeks to at least double the natural production of anadromous fish in Central Valley streams in the long term. CVPIA Section 3406 (b)(2) provides 800,000 acre-feet of CVP water to use, in part, to achieve the fish doubling goal (which has yet to be met). The 2000 Trinity River Restoration Plan further reduced

the amount of CVP water diverted from the Trinity River watershed to the Central Valley, in an effort to provide flow-driven fishery restoration actions in the Trinity system.

In general, the focus of the "reasonable and prudent" alternatives to the coordinated export operations of the CVP and SWP has been increased regulatory restrictions on water exports to farmers in the San Joaquin Valley.

In 2009 (and in 2014, 2015 and 2106), irrigation delivery restrictions – based in large part on ESA biological opinions for fishery species managed by either FWS or NMFS in the Delta – were a primary cause for the water cutbacks and rationing afflicting a multitude of communities throughout the state and the resulting economic devastation in the San Joaquin Valley. In California in 2016 alone, 21,000 jobs were lost, equating to a $2.7 billion hit to economic activity. Over 540,000 acres of farmland were fallowed, and $2 billion in direct farm losses were realized. The lack of surface water to such a productive agricultural region has detrimentally impacted groundwater use and the economy of those communities, as well as the state. Ironically, one of the original purposes of the CVP was to shift San Joaquin well users away from groundwater by importing stored surface water supplies. Now, 70 years later, farmers and ranchers are again looking belowground to replace once-reliable CVP surface water that has been reduced due to drought and redirection to other uses.

In very simple terms, the Delta smelt BO prepared by FWS requires flushing flows released from storage to manipulate habitat while the FWS BO for salmon requires keeping water in storage for temperature control, situation remarkably similar to the Klamath example previously discussed. The FISH Act would improve things in California, as well. There, a committee convened by the National Research Council[iii] found that the lack of a systematic, well-framed overall analysis between NMFS and FWS is "a serious scientific deficiency, and it likely is related to the ESA's practical limitations as to the scope of actions that can or must be considered in a single biological opinion."

"Coordination is not integration," the NRC committee found, and concluded, "[T]he [Reasonable and Prudent Alternatives] lack an integrated quantitative analytical framework that ties the various actions together within species, between smelt and salmonid species, and across the watershed. This type of systematic, formalized analysis, <u>although likely beyond the two agencies' legal obligations</u> when rendering two separate biological opinions, is necessary to provide an objective determination of the net effect of all their actions on the listed species and on water users." (<u>emphasis</u> added).

H.R. 3916 would open the doors towards such an objective determination in Bay-Delta ESA management.

4. <u>Incidental Take Statements Pursued by Local Agencies and Farmers (WESTERN U.S.)</u>

Finally, although the examples above relate to watersheds where there is a federal project operated by Reclamation, similar issues can be present in basins where local agencies and/or farmers or ranchers themselves pursue incidental take permits (ITS) under the ESA. If there are both freshwater and anadromous species in the river system, the local interests must apply to both

NMFS and FWS for separate ITPs for the same project and experience duplicative or conflicting regulatory procedures and determinations in a process that is very challenging under the best of circumstances. This sort of waste of resources can be avoided if there is one decision-maker applying the law.

Conclusion

Again, the Alliance believes combining NMFS and FWS under one roof will provide for more efficient, effective, and coordinated management of all ESA responsibilities for anadromous and freshwater fish in Western watersheds, from the highest reaches of headwater areas to the Pacific Ocean. Even more important is what can be accomplished in the future, as FWS further emphasizes and expands on its collaborative freshwater fish habitat conservation work with local and state interests. With NMFS ESA duties brought under the Interior Department umbrella, a partnership-driven focus can spread to areas that benefit anadromous fish. Merging the NMFS ESA duties with those of FWS and tapping into the "constructive center" will lead to practical solutions that fit for ranchers, farmers, and other landowners, as well as fish and wildlife and local communities.

The time and money wasted by federal agencies and those impacted by their decisions is frustrating and unnecessary. H.R. 3916 is important step in reducing wasted time and money and represents a practical, common-sense change to the Act that we strongly support. The FISH Act provides an opportunity to enhance protections to threatened and endangered species by improving the efficiency and effectiveness of the federal government's approach to species protection through better decision-making as a result of improved communication among folks working on a range of species in the course of developing and implementing policies. Perhaps more importantly, this legislation will help lay the groundwork for more collaborative conservation that ultimately and equally will benefit communities, citizens and fish species that inhabit fresh and saltwater environments.

One additional point. While the goals of the ESA are laudable, this 44-year old law could stand some targeted reforms, including common-sense changes to make it work better, encourage incentive-driven recovery efforts, and discourage litigation. The Family Farm Alliance for decades has worked with our members and leaders to develop specific, practical changes to the ESA that we think will make it work better in the modern era.

The Family Farm Alliance stands ready to aid the committee on advancement of HR 3916 and other measures to update and modernize the ESA.

I would be happy to answer any questions.

End Notes

i. Scientific Evaluation of Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin: Interim Report (2002), NAS Board on Environmental Studies and Toxicology(http://dels.nas.edu/Report/Scientific-Evaluation-Biological-Opinions/10296).

ii. Endangered and Threatened Fishes in the Klamath River Basin: Causes of Decline and Strategies for Recovery (2004), NAS Board on Environmental Studies and Toxicology.

iii. A Scientific Assessment of Alternatives for Reducing Water Management Effects on Threatened and Endangered Fishes in California's Bay Delta (2010), Committee on Sustainable Water and Environmental Management in the California Bay-Delta, Water Science and Technology Board, Ocean Studies Board, Division on Earth and Life Studies, National Research Council.