



MEMORANDUM

TO: SLDWMA BOARD OF DIRECTORS
FROM: DAN KEPPEL, EXECUTIVE DIRECTOR
SUBJECT: EXECUTIVE DIRECTOR'S REPORT
DATE: APRIL 6, 2020

This memo is intended to keep you apprised as to what is happening behind the scenes on policy issues the Family Farm Alliance is engaged in. In the past month, our efforts have focused primarily on the buzz of activity surround the federal response to the COVID-19 outbreak. We also continue to track several critical rulemaking efforts driven by the Trump Administration. Some of these issues and other matters important to our members are discussed below.

Washington D.C. Federal Developments on COVID-19 Outbreak

The past month has been one of the most unpredictable, unstable and impactful periods in American history. The coronavirus crisis is driving all aspects of life, from personal matters, to work, to Wall Street, to policy decisions made in Washington, D.C. and state capitol buildings throughout the West. The coronavirus was first detected in Wuhan, China on December 31, 2019. The first case was reported in the U.S. on January 30, 2020. Currently, more than 10,000 deaths and 335,000 cases have been confirmed in the U.S., according to Johns Hopkins University. Globally, nearly 1.3 million people have caught the virus and it has killed over 69,000. More than 240,000 of those infected have already recovered.

1. Food Service and Agriculture Impacts

Even though certain items are disappearing from the store shelves, it appears that most of the food deficits are the result of panic-driven demand rather than a lack of supply. While retailers do not have a serious problem, yet, the food service industry is worried. Restaurant buying is down significantly, especially in those areas where food service has been limited to "take-out only". The National Restaurant Association believes 5-7 million people in the food service industry will be unemployed because of the fallout from the virus response. Food service

companies are hurting, and worried. They are losing their market, with the closure of arenas, stadiums, restaurants, airlines, and cruise ships. As coronavirus concerns lead a growing number of local governments to shut down restaurants and retail foodservice operations to everything but takeout orders, a sobering reality has emerged: fifty percent of our country's food supply has nowhere to go. The cattle market has crashed hard, and cattle ranchers sent a letter to the president asking for "emergency measures" to keep livestock producers afloat.

Farm labor is a big concern, and that concern will get bigger as time goes on. The U.S. Embassy in Mexico last month posted a notice on its website announcing it was indefinitely halting visa interviews needed to process applications to come to the U.S., including for seasonal farm workers under the H-2A visa program. The suspension hit growers just as they were prepared to gear up for their peak spring and summer growing seasons. The U.S. Department of Agriculture (USDA), working with the Department of State and the Department of Homeland Security (DHS), quickly engaged to ensure minimal disruption in H-2A and H-2B visa applications during these uncertain times. The State Department and DHS have now authorized temporary waivers for in-person interviews for eligible H-2 visa applicants.

2. Administration Response

President Donald Trump appointed Vice President Mike Pence to head the White House Coronavirus Task Force on February 26. Vice President Pence held a press briefing with the Task Force on March 4, and emphasized the importance of a unified federal response to the outbreak between federal agencies, and state and local health officials. The White House proposed a \$1 trillion coronavirus relief and economic stimulus plan that would include industry bailouts and payments to individual taxpayers. President Trump and the White House Coronavirus Task Force issued new guidelines on March 16 to help protect Americans during the global coronavirus outbreak. The Federal Emergency Management Agency (FEMA) released guidance on the application process for submitting reimbursement requests through FEMA's Public Assistance (PA) grant program for the COVID-19-related emergency and disaster declarations. Local governments and certain private nonprofit organizations are eligible to apply for PA assistance for so-called "Category B" activities. President Trump last week announced that he is extending the social distancing guidelines through April 30 in an effort to slow the spread of coronavirus.

EPA Assistant Administrator Susan Bodine has released guidance to all governmental and private sector entities which outlines the Agency's "temporary" policy governing issues of noncompliance that arise (1) as a result of the COVID-19 pandemic and (2) during the time period that the temporary policy is in place. The temporary policy is currently running indefinitely, retroactive as of March 13, 2020, and replaces otherwise applicable EPA enforcement response policy until EPA reports otherwise. Generally, the policy says that if regulated entities miss a deadline or exceed emissions limits, the EPA will show discretion such as by not demanding fines and penalties. But businesses must document the details and show that it was because of the coronavirus or steps taken to slow the pandemic. And the entities must make "every effort" to comply with their environmental obligations under the law.

3. “Critical Industries”

The Trump Administration has classified 16 industries as "critical" to the nation's response to the new coronavirus pandemic, including the electric power, petroleum, water and wastewater sectors. Employees in the designated industries must maintain their usual work schedules to assist with the local and federal response to the pandemic, even as other employees across the country alter their schedules or shift to telework. The industries were identified in a DHS memorandum titled, "Guidance on the Essential Critical Infrastructure Workforce." The full list of industries includes medical and health care, telecommunications, defense, food and agriculture, transportation and logistics, electric power, petroleum, water, wastewater, law enforcement, and public works.

EPA Administrator Andrew Wheeler has sent a letter to governors in all 50 states, territories and Washington, D.C., urging them to ensure that drinking water and wastewater employees are considered essential workers by state authorities when enacting restrictions such as shelter-in-place orders to curb the spread of COVID-19.

Irrigation districts and other entities that delivery water to farmers and ranchers were not specifically called out in the DHS list, but we assumed it is implied. We are working to get confirmation that irrigation employees are determined critical and would be exempt from ‘shelter in place’ rules. We have contacted senior officials at the White House and Interior Department, urging that "irrigation districts, water districts, canal or ditch companies, acequias or other local organizations with water delivery authority" be specifically treated as "essential" in this guidance. Alliance members in the West are also urging their state and federal delegations regarding the importance of irrigation districts operations during the COVID-19 public health emergency.

4. Capitol Hill Response

Within days of Vice President Pence’s press briefing with his Task Force, Congress moved to draft, and ultimately pass, an \$8.3 billion emergency funding package (H.R. 6074) to combat the coronavirus. President Trump signed the package into law in early March. Less than two weeks later, after passing through both chambers of Congress, President Trump signed into law the Families First Coronavirus Response Act (P.L. 116-127). This second coronavirus relief package included a dramatic expansion of the food safety net, along with other measures to respond to the worsening pandemic and economic slowdown.

Unfortunately, when Congress passes a bill quickly, unintended consequences can pop up. Under this new law, irrigation districts – along with most other American employers - are required to provide up to 80 hours of paid sick leave and additional extended benefits to employees who are affected by COVID-19. Irrigation districts, which are generally political subdivisions of the States, will not qualify for any of the reimbursement allowances or tax credits related to this new federal mandate. However, districts generally do not rely on taxpayer dollars to fund their budgets, and instead, rely solely on assessments to farmers. So, this new legislation imposes an unfair and likely

improper unfunded mandate on districts, that, if not corrected by Congress, will cause the districts to resort to raising farmer rates to make up any budgetary shortfall. The Ferguson Group (TFG), who represents the Alliance in Washington, D.C. is working with national local government associations to try to fix this problem in future COVID-19 legislation.

Finally, President Trump most recently signed into law the third COVID-19 piece of legislation - the largest stimulus package in U.S. history. The CARES Act is a \$2 trillion emergency package intended to stave off total economic collapse in the wake of the coronavirus crisis. The negotiations leading up to the president's signature were tense, as some environmental groups sought to attach strings to the emergency aid, and appealed to their allies on Capitol Hill to lock in policies intended to reduce greenhouse gas emissions. Republicans ripped the move as an effort to ram controversial policies through the Congress by exploiting urgent concerns about the U.S. economy.

The measure - which was finalized after hours of delays over disputes like this and others (like jobless benefits) - is the biggest economic rescue package in U.S. history. The President was ultimately able to sign the bill into law after House members traveled back to Washington to yield to the demand from one Congressman to hold a recorded vote. Rep. Thomas Massie (R-KY) upset both Democrats and Republicans – including President Trump – by insisting on a vote procedure that requires attendance of at least half of the House members. The House passed the bill by voice vote, after the Senate's 96-0 vote two days earlier to approve the measure.

The \$2 trillion package includes emergency appropriations for many federal agencies and programs; provides \$1,200 one-time payments to many Americans; sets up a \$500 billion corporate liquidity fund to help struggling industries like airlines; allocates \$377 billion for aid to small businesses; boosts the maximum unemployment benefit by \$600 per week for four months; and creates a \$150 billion Coronavirus Relief Fund for local and state governments, among many other provisions. The new law includes some \$23 billion in extra aid for agriculture. The Depression-era financial institution known as the Commodity Credit Corporation saw its spending authority replenished to the tune of \$14 billion. The package also sets up a \$9.5 billion emergency fund for producers, including fresh fruit and vegetable growers, dairy farmers and cattle ranchers, along with local food systems like farmers markets. There was talk that this package might include infrastructure provisions, and we were prepared to engage as necessary should that opportunity arise. However, the third coronavirus law was more narrowly focused on providing immediate relief to individuals, protect health care workers, and shore up small businesses.

Congress is now out of session until at least April 20. The Capitol Visitor Center and House and Senate office buildings will be closed to the public through May 1.

5. More Stimulus Packages on the Horizon?

Efforts are already underway to assemble a fourth COVID-19 relief package in Congress, intended to do more to deliver federal government help to state and local governments. House Speaker Nancy Pelosi initially told MSNBC that the fourth-phase virus legislation "will be about recovery"

and should address INFRASTRUCTURE issues, including water systems and broadband. On the other hand, Senate Majority Leader Mitch McConnell and some other Republicans in Congress want to hit the brakes and see how things are working with the other multi-trillion-dollar measures passed by Congress last month. However, President Trump has also encouraged Congress to pass a \$2 trillion infrastructure bill as the next piece of coronavirus legislation.

Everyone is preparing to line up at this enticing trough. On March 26, 43 House Democrats, including House Natural Resources Chairman Raul Grijalva (AZ) and House Transportation and Infrastructure Chairman Peter DeFazio (OR), sent a letter to House and Senate leadership requesting that the next stimulus package in response to the coronavirus pandemic include “robust assistance” for environmental justice communities - low-income, tribal and indigenous communities, and communities of color. The letter specifically suggested it must “provide quality water and ensure drinking water services” to every household. Drinking water utilities are also hoping that assistance will be provided in the next stimulus package. On March 23, eleven water groups and allied organizations sent a letter to Senate and House leaders requesting assistance to address drops in demand from industrial and commercial customers and moratoriums on shutting off water service to customers who do not pay.

It now appears that Speaker Nancy Pelosi has scaled back her ambitions for Congress’s next coronavirus stimulus package to focus on additional direct payments to individuals and expanded loans to businesses, possibly leaving an \$800 billion infrastructure plan and other Democratic priorities for a later bill. However, many believe that infrastructure will be emphasized in yet another future COVID-19 stimulus bill.

6. State of the Alliance

The Alliance and our allies assume the infrastructure bill is going to happen. We have already teed this issue up with every Western Senator's office and the key House water committees. Earlier today, we sent a letter to Senate and House leadership, with copies sent to Western Members and key committee staff who we have previously contacted on this matter. Basically, our 'ask' is "IF an infrastructure stimulus package is being considered, please make sure that ag water infrastructure is also considered." We are also working with California Farm Bureau and Western Growers Association on letters - to be signed by numerous Western water and agricultural organizations - to be sent to every Western Member of Congress and the White House, outlining the critical need to address Western water infrastructure and other related needs. Finally, we are canvassing our membership to develop a list of any shovel-ready projects they are working on or think they can complete by the end of 2021 that could benefit from federal funding assistance like low-interest, long-term aging infrastructure loans, or potentially grants.

I know many of us are apprehensive about the HUGE number of dollars that have already been spent, but the likely reality is, more will be spent, and there is an opportunity to get some of those dollars dedicated to the major rehabilitation needs of our critical water storage and delivery infrastructure that should have been addressed decades ago. We believe it is critical that we

immediately compile a realistic list of projects that could benefit from this stimulus funding.

The virtual nature of the Alliance *modus operandi* suits us well at this time. We've been operating 'remotely' for over two decades. Our representatives in Washington D.C. – Mark Limbaugh, and his team at TFG - have been working overtime in the past month monitoring the Washington response to the coronavirus crisis. We will continue our efforts to set the stage for Western Members of Congress to have water infrastructure on their screens when the next stimulus package is negotiated. We are also working with our membership and the federal government to clarify that agricultural water delivery be considered “essential”. Which it is.

Bureau of Reclamation (Reclamation) Streamlines Title Transfer Process

Reclamation last month released its final guidelines to streamline the transfer of its eligible facilities to local ownership. Title transfer is a voluntary conveyance of federal ownership of water projects or facilities, such as small dams, canals and associated lands, to local water users. Local ownership can leverage more capital funding and reduce federal paperwork requirements and costs while reducing federal liability. The title transfer streamlining guidelines will complement this Administration's Categorical Exclusion (CE) process under the National Environmental Policy Act (NEPA). The title transfer CE lists criteria that will determine if simple or uncomplicated facility transfer can be expedited under NEPA. Reclamation and water users are already working together on pending title transfers across the western states.

We are strongly supportive of the Interior Department and the Reclamation's recent and encouraging administrative efforts to help facilitate certain Reclamation project and facilities transfers of title to non-Federal ownership. Alliance members include numerous irrigation districts and water agencies who are responsible for the operation and maintenance of most of Reclamation's water supply and distribution facilities. Several Alliance members have worked over the past two decades to transfer title of all or parts of Reclamation projects to local operating entities. Reclamation's guidelines, called directives and standards, can be found on the Reclamation Manual site at www.usbr.gov/recman. To learn more about the title transfer process, contact your regional title transfer coordinator by visiting www.usbr.gov/title.

USDA Natural Resources Conservation Service (NRCS)

NRCS has sought public comments on its interim rule for the Environmental Quality Incentives Program (EQIP), USDA's program that helps producers plan and implement conservation practices. The rule takes effect upon publication and includes changes to the program prescribed by the 2018 Farm Bill. Of note, the new EQIP program can now be applied for by irrigation districts, a provision that has been advocated for by the Alliance for nearly a decade. The Alliance, working with the Western Agriculture and Conservation Coalition (WACC), developed an excellent, detailed comment letter that was transmitted to NRCS in February. The letter focuses on how NRCS will work with irrigation districts on projects, with an eye towards

making sure the rules are not too restrictive.

NRCS is also looking for input on how it administers the Regional Conservation Partnership Program (RCPP), reflecting changes to the program made by the 2018 Farm Bill. The RCPP “enhances conservation and promotes coordination between NRCS and its partners to help producers and landowners increase the restoration and sustainable use of soil, water, and wildlife on a regional or watershed scale.” The RCPP’s purpose has been expanded to include the protection of drinking water and groundwater on eligible land, and eligible partners now include acequias and conservation districts. We are again working with the WACC – which had a huge influence on the 2018 Farm Bill RCPP provisions – to develop a comment letter.

Klamath “Takings” Case

Producers in the Klamath Project have asked the U.S. Supreme Court to review decisions denying their claims that their water rights were illegally taken in 2001 under the ESA. The case, titled *Baley v. United States*, was filed 19 years ago when Reclamation re-allocated irrigation water to threatened and endangered species. The petition to the Supreme Court argues that the lower federal courts have misunderstood and misapplied the basic principles of western water law.

In April of 2001, Reclamation announced that there would be no irrigation water at all for water users who rely on water from Upper Klamath Lake and the Klamath River. Reclamation had received biological opinions from the National Marine Fisheries Service and the U.S. Fish and Wildlife Service that stated that all water in the system had to go to coho salmon and suckers protected by the federal ESA. The controversial decision caused severe local hardship, and it received international attention.

The lawsuit has a long history, including prior appeals and a request by federal courts that the Oregon Supreme Court clarify important issues of Oregon water law. The Oregon Supreme Court held a hearing in Klamath Falls in 2009 and issued a ruling supporting the irrigators' position that the original trial court had misinterpreted state law. That ruling revived the case and returned it to the federal courts. Ultimately, after a two-week trial in 2017, United States Court of Federal Claims Judge Marian Blank Horn concluded that un-adjudicated, senior tribal instream water rights must be at least as great as the ESA-based Klamath River flows and lake elevations. Therefore the water users did not have the right to the water under the western prior appropriation doctrine. Last fall, the U.S. Court of Appeals for the Federal Circuit affirmed the ruling. This ruling was a disappointment, to say the least.

The case is certified as a class action. The petition to the Supreme Court was filed by the law firm of Somach Simmons & Dunn from Sacramento, along with Timothy Bishop of the law firm Mayer Brown. Mr. Bishop is an expert in Supreme Court practice and has successfully pursued cases before the Supreme Court regarding the ESA and Clean Water Act on behalf of regulated businesses and agencies.

The Alliance board of directors last month agreed to support the irrigator plaintiffs again as this goes before the Supreme Court. The Alliance and KWUA co-hosted two webinars to further brief interested parties on this matter earlier this month. For the clarity and stability essential to economic prosperity in the arid American West, Alliance members rely on state adjudications of water rights and on state administration of those rights in conformance with due process and in compliance with state and federal law. Oregon Water Resources Congress (OWRC) will file an amicus brief in support of petitioners' petition for certiorari. The Alliance and several other Western water organizations – including National Water Resources Association, Agribusiness & Water Council of Arizona, Idaho Water Users, Washington State Water Resources Association and others – will join OWRC's brief. It is expected that the Supreme Court will decide in June whether to take the case

EPA Takes Major Step to Improve Implementation of the ESA

EPA earlier this month announced a new method for conducting biological evaluations under the ESA to assure that pesticide registration review actions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) do not jeopardize endangered species. The updated method ensures that—when available—the agency will use high-quality historical data that reflects where and how certain pesticides are used. For decades EPA's approach for assessing pesticides risks to endangered species resulted in costly, time-consuming litigation and delays in pesticide registration decision-making. EPA's new "Revised Method for National Level Listed Species Biological Evaluations of Conventional Pesticides" (Revised Method) is intended to better protect and promote the recovery of endangered species while ensuring pesticide registration review decisions are conducted in a timely, transparent manner and based on the best available science. With this action, EPA is fulfilling its commitment under the 2018 Farm Bill to ensure that pesticides can continue to be used safely with minimal impacts to threatened and endangered species.

EPA's decision was questioned by some environmental organizations but welcomed by many agricultural groups, including the Alliance. EPA in the Northwest had previously failed to establish clear procedures for its pesticide effects determinations and subsequent actions consistent with 1988 amendments to the ESA. This had resulted in unnecessary restrictions without any indication that Pacific Northwest salmon would benefit.

This is a quick summary of just a few of the issues the Alliance has been engaged in. Please do not hesitate to contact me at 541-892-6244 or dan@familyfarmalliance.org if you would like further information about what the Alliance is doing to protect water for Western irrigated agriculture.