



Thomas Birmingham  
General Manager/General Counsel  
Westlands Water District

Testimony  
Before the Subcommittee on Water and Power  
Committee on Resources  
United States House of Representatives

*The San Joaquin River Restoration Settlement Act*  
March 1, 2007

Madam Chairman and members of the Subcommittee, my name is Thomas Birmingham, and I am the General Manager/General Counsel of the Westlands Water District (“Westlands”). I also serve as a Director of the San Luis & Delta-Mendota Water Authority (“Authority”). I appreciate the opportunity to testify today in support of H.R.24, *“The San Joaquin River Restoration Settlement Act.”*

At the outset, I would like to express our appreciation to Members of Congress and the parties to *Natural Resources Defense Council v. Rodgers*, the litigation that would be settled through enactment of the San Joaquin River Restoration Act, for their efforts to ensure that third parties will not be adversely affected by implementation of the Settlement Agreement or the San Joaquin River Restoration Act. Resolution of this longstanding litigation would be historic, and the settlement would bring water supply certainty to a portion of the San Joaquin Valley that is of critical importance to the agricultural economy of the State of California. In our view, however, it is critical that the settlement be implemented in a manner that does not shift to other agencies unwarranted burdens associated with the San Joaquin River restoration program. H.R.24 was drafted carefully to avoid creating uncertainty and risk for other portions of the Valley, and Westlands and the Authority support its enactment.

1. South-of Delta Contractors’ Experience with Water Shortages

Westlands is a public agency of the State of California, which serves irrigation water to portions of the westside of the San Joaquin Valley in Fresno and Kings counties. Westlands is comprised of more than 605,000 acres, and the demand for irrigation water is 1.4 million acre-feet per year. Historically, that demand has been satisfied through the use of groundwater, water made available to the District from the Central Valley Project (“Project”) under contracts with the United States for the delivery of more than 1.15 million acre-feet, and annual transfers of water from other agencies.

The Authority was formed in 1992 and consists of 32 member public agencies, including Westlands, each of which contracts with the United States Department of the Interior, Bureau of Reclamation (“Reclamation”), for supply of Project water. The Authority’s member agencies are entitled to approximately 2.5 million acre-feet of water for agricultural lands within the western San Joaquin Valley, San Benito County, and Santa Clara County, California. Authority members also supply water for municipal and industrial uses, including the delivery of approximately 150,000 acre-feet of water to the Santa Clara Valley Water District, which serves the Silicon Valley. In addition, Authority members provide approximately 200,000 acre-feet of water for waterfowl and wildlife habitat in the San Joaquin Valley. In addition, the Authority operates and maintains certain Project facilities under contract with Reclamation. Two such facilities are the C.W. Jones Pumping Plant (“Jones Pumping Plant”), located in the southern portion of the Delta, near the city of Tracy, and the Delta-Mendota Canal, which is used to deliver water from the Jones Pumping Plant to the Authority’s member agencies.

The area served by Westlands and other Authority member agencies is one of the most fertile, productive and diversified farming regions in the nation. Rich soils, a good

climate, and innovative farm management have helped make this area incredibly productive. Farmers in the area served by Authority member agencies produce over 60 different high-value, commercial crops that are sold both domestically and internationally in the fresh, canned, frozen and dry food markets. However, like every other region of the arid west, the ability of these farmers to produce these crops and generate the associated economic activity depends on the availability of an adequate, reliable source of water.

Our experience with the implementation of the Central Valley Project Improvement Act (CVPIA), Pub. Law 102-575, is illustrative of what can happen to an agricultural region like the area served by the Friant Division of the Project when significant quantities of water are involuntarily reallocated from irrigation use to fish and wildlife use. Project water deliveries to south-of-Delta contractors began in 1952, and up until 1991, those deliveries were highly reliable and adequate to meet the demand for irrigation water. Indeed, from 1952 to 1991, Project water was the principal source of water for irrigation within Delta Division, and the only reduction in Project water supplies resulted from the extraordinary drought conditions in 1977, the driest year on record in California. However, enactment of CVPIA made Project water supply both unreliable and inadequate. The CVPIA was implemented by the Department of the Interior in a manner dedicated more than 1,200,000 acre-feet of Project water for the restoration and enhancement of fish and wildlife. Much of this water was taken away from farms, ranches and business that had relied on it for decades. Contrary to the assumption at the time of CVPIA's enactment, that it would reduce water supplies by approximately 10% Project wide, virtually all of the water supply reductions resulting from implementation of CVPIA were imposed on south-of-Delta Project agricultural water service contractors. The reliability of water supplies for south-of-Delta water service contractors went from approximately 92% in 1991 to approximately 50% in 2000, when the CalFED Record of Decision was adopted.

In response to chronic water supply shortages caused by CVPIA, farmers have had to rely more on the use of groundwater as a source of irrigation water. As an example, in 2004, farmers in Westlands pumped more than 210,000 acre-feet of groundwater, which is significantly more than the USGS's estimate of the safe yield of the groundwater basin (135,000 acre-feet). The extent to which farmers are compelled to rely on groundwater is contrary to sound principals of conjunctive use, which dictate that in wet or above normal years of precipitation, groundwater use should be reduced to allow the groundwater table to recover. In addition, Westlands has acquired and fallowed more than 89,000 acres of land to help balance the demand for water with the District's available supply. Westlands has also acquired all of the lands in Broadview Water District and the water service contracts of Widren Water District, Centinella Water District, Mercy Springs Water District, and Ora Loma Water District. Lands in these other districts that were previously irrigated with Project water have been retired from irrigated agricultural production. In the San Joaquin Valley land fallowing results in third party impacts, which disproportionately affect the poor and minorities.

It is easy for westside farmers, who have suffered the turmoil and increased costs resulting from unreliable, inadequate water supplies, to understand the Friant water users' keen interest in resolving a conflict that has the potential of taking more than a-half-a-million acre-feet from farmers for fishery restoration. Although we have not prepared a detailed analysis of potential impacts, it is safe to conclude that a judicial decision adverse to the Friant water users would devastate the agricultural economy of the eastside of the San Joaquin Valley. For this reason, Westlands and the Authority support the Friant water users' efforts to minimize through the Settlement Agreement potential water supply losses resulting from a San Joaquin River restoration program.

#### Need to Avoid Third-Party Impacts

The Settlement Agreement among the NRDC, other environmental plaintiffs, the United States, and the Friant water users states that the parties neither intend nor believe that implementation of the Settlement Agreement will have a material adverse effect on any third parties. Given the nature of the claims that the settling parties seek to resolve through the Settlement Agreement any other intent would be unreasonable. However, in their original form, the Settlement Agreement and the proposed legislation attached thereto could be have been interpreted or implemented in ways that would have significant adverse effects on agencies that were neither parties to the litigation nor involved in development of the restoration program. For instance, without close coordination, the restoration program established by the Settlement Agreement could frustrate efforts undertaken by other agencies to restore or enhance the fall run Chinook salmon fishery on tributaries of the San Joaquin River. In addition, if as contemplated by the Settlement Agreement, spring run Chinook salmon are reintroduced into the San Joaquin River, the take prohibition of the Endangered Species Act could dramatically reduce the water supply or hydroelectric generating capability of other agencies. To avoid such unintended consequences, the proposed San Joaquin River Restoration Settlement Act was amended prior to its introduction in the 110th Congress to express an unambiguous congressional intent that third parties not suffer any adverse effects.

I am confident that other witnesses will focus their testimony on potential effects that could have been suffered by their agencies had the San Joaquin River Restoration Settlement Act not been amended. My testimony will focus on potential impacts on south-of-Delta long-term contactors that currently receive water from the Delta Division of the Project, including the San Luis Unit.

#### Use of Central Valley Project Water for Restoration of the Spring and Fall Run

The Settlement Agreement establishes a "Restoration Goal" of restoring and maintaining in good condition fish in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally-reproducing and self-sustaining salmon fisheries. Flow criteria established by the Settlement Agreement limit for a period of years the quantity of water that can be released from Friant Dam for the restoration and maintenance of fish below the Dam, but the Settlement Agreement contains no comparable limitation on the use of other Project water or facilities to

accomplish the Restoration Goal. Although the Settlement Agreement provides that the Secretary of the Interior shall comply with Endangered Species Act in connection with his operation of the Friant Division of the Project, the Settlement Agreement limits the quantity of water that can be involuntarily taken from Friant Division long-term contractors to achieve the “Restoration Goal” or to implement the San Joaquin River restoration program. There is in the Settlement Agreement no comparable protection for other Project long-term contractors.

For this reason it is conceivable that, absent clear direction from Congress, the Secretary could be required to use water from Project facilities outside of the Friant Division to accomplish the “Restoration Goal” established by the Settlement Agreement. As an example, if it were determined that the flow provided by releases from Friant Dam is insufficient to support out-migrating spring run salmon and the insufficient flow would cause jeopardy for the species, the Endangered Species Act and the San Joaquin River Restoration Settlement Act, when read together, would obligate the Secretary to look to other sources of Project water to provide additional flow. To avoid such a circumstance Section 10 was added to H.R.24. Section 10 provides:

(a) FINDINGS.—Congress finds that the implementation of the Settlement to resolve 18 years of contentious litigation regarding restoration of the San Joaquin River and the reintroduction of the California Central Valley Spring Run salmon is a unique and unprecedented circumstance that requires clear expressions of Congressional intent regarding how the provisions of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) are utilized to achieve the goals of restoration of the San Joaquin River and the successful reintroduction of Central Valley Spring Run Chinook salmon.

(b) REINTRODUCTION IN THE SAN JOAQUIN RIVER.—California Central Valley Spring Run Chinook salmon shall be reintroduced in the San Joaquin River below Friant Dam pursuant to section 10(j) of the Endangered Species Act of 1973 (16 U.S.C. 1539(j)) and the Settlement, provided that the Secretary of Commerce finds that a permit for the reintroduction of California Central Valley Spring Run Chinook salmon may be issued pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973 (16 U.S.C. 1539(a)(1)(A)).

(c) FINAL RULE.—

(1) DEFINITION OF THIRD PARTY.—For the purpose of this subsection, the term “third party” means persons or entities diverting or receiving water pursuant to applicable State and Federal law and shall include Central Valley Project contractors outside of the Friant Division of the Central Valley Project and the State Water Project.

(2) ISSUANCE.—The Secretary of Commerce shall issue a final rule pursuant to section 4(d) of the Endangered Species Act of 1973 (16 U.S.C. 1533(d)) governing the incidental take of reintroduced Central Valley Spring Run Chinook salmon prior to the reintroduction.

(3) REQUIRED COMPONENTS.—The rule issued under paragraph (2) shall

provide that the reintroduction will not impose more than de minimis water supply reductions, additional storage releases, or bypass flows on unwilling third parties due to such reintroduction.

In addition, Section 4 of the San Joaquin River Restoration Settlement Act provides:

(f) EFFECT ON CONTRACT WATER ALLOCATIONS.—Except as otherwise provided in this section, the implementation of the Settlement and the reintroduction of California Central Valley Spring -Run Chinook salmon pursuant to the Settlement and section 10, shall not result in the involuntary reduction in contract water allocations to Central Valley Project long-term contractors, other than Friant Division long-term contractors

Westlands and the Authority understand these provisions of H.R.24 to provide clear congressional direction that the implementation of the Settlement Agreement shall not adversely affect the water supply or project operations of entities, including Project water service contractors outside of the Friant Division, that were not party to the litigation.

#### Recirculation or Recapture of Water

Provisions of both the Settlement Agreement and the San Joaquin River Restoration Settlement Act direct the Secretary to develop and implement a plan or program of recirculation, recapture, reuse, exchange or transfer of water released for restoration flows, for the purpose of reducing or avoiding impacts to water deliveries to the Friant long-term contractors. It has been reported in the press that Peter Vorster, Ph.D., a hydrologist for the environmental plaintiffs has calculated that approximately 100,000 acre-feet of water released from Friant Dam pursuant to the Settlement Agreement could be recaptured in the Delta for export back to the Friant Division. If these reports are accurate, Dr. Vorster's conclusion is unrealistic.

Presently, the capacity of the Jones Pumping Plant and the permitted capacity of the Harvey O. Banks Pumping Plant ("Banks Pumping Plant") are fully dedicated to meeting contractual commitments to agencies outside of the Friant Division. Indeed, because of existing restrictions imposed at these pumping plants to protect or enhance anadromous and pelagic fish, except in extremely wet hydrologic conditions, neither the Secretary nor the California Department of Water Resources can meet water supply commitments to their respective contractors. If a program to recapture, recirculate, or reuse restoration flows released from Friant Dam were to displace existing uses of the Jones Pumping Plant or the Banks Pumping Plant, the water supplies of other agencies would undoubtedly be reduced and significant conflict would ensue.

In discussions with representatives of the Friant Division water users they stated that it was not their intent to displace existing uses of either the Jones Pumping Plant or the Banks Pumping Plant. Instead, they expect to only use excess capacity at these facilities, when such capacity is available. To avoid any future conflict concerning this issue, Section 4 of the H.R.24 was amended to provide that the Secretary shall:

(4) Implement the terms and conditions of paragraph 16 of the Settlement related to recirculation, recapture, reuse, exchange, or transfer of water released for Restoration Flows or Interim Flows, for the purpose of accomplishing the Water Management Goal of the Settlement, subject to—

(A) applicable provisions of California water law;

(B) the Secretary's use of Central Valley Project facilities to make Project water (other than water released from Friant Dam pursuant to the Settlement) and water acquired through transfers available to existing south-of-Delta Central Valley Project contractors; and

(C) the Secretary's performance of the Agreement of November 24, 1986, between the United States of America and the Department of Water Resources of the State of California for the coordinated operation of the Central Valley Project and the State Water Project as authorized by Congress in section 2(d) of the Act of August 26, 1937 (50 Stat. 850, 100 Stat. 3051), including any agreement to resolve conflicts arising from said Agreement.

Stated succinctly, Westlands and the Authority understand this provision of H.R.24 to mean that the Secretary's duty to implement a program to recapture, recirculate, or reuse water released from Friant Dam pursuant to the Settlement Agreement shall be subordinate to the Secretary's use of the Jones Pumping Plant to make Project water and water acquired through transfers available to existing Project contractors that receive water from the Delta Division of the Project. Moreover, because the Agreement of November 24, 1986, Between the United States of America and the Department of Water Resources of the State of California for the coordinated operation of the Central Valley Project and the State Water Project, authorized by Pub. Law 909-546, provides, *inter alia*, for the coordinated operations of the Jones the Banks Pumping Plant, the Secretary's duty to implement a recapture, recirculation, or reuse program will be subordinate to his performance of that agreement and any agreement to resolve conflicts arising from the coordinated operations agreement.

### Conclusion

Again, I want to express Westlands' and the Authority's support for the Friant water users' effort to minimize the water supply losses that could result from an adverse ruling in the judicial proceedings concerning the Secretary's obligation to release water from Friant Dam to restore and maintain in good condition fish that exist below the Dam. In addition, I want to express Westlands' and the Authority's appreciation of the settling parties' willingness to draft amendments to H.R.24 to ensure that implementation of the Settlement Agreement will not have a material adverse effect on any third parties. I would welcome any questions from members of the Subcommittee.