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THE SAN JOAQUIN RIVER RESTORATION SETTLEMENT ACT

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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OVERSIGHT HEARING ON THE SAN JOAQUIN RIVER RESTORATION SETTLEMENT ACT

Thursday, September 21, 2006
U.S. House of Representatives
Subcommittee on Water and Power
Committee on Resources
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:09 a.m. in Room 1324, Longworth House Office Building, Hon. George Radanovich [Chairman of the Subcommittee] presiding.

Present: Representatives Radanovich, Napolitano, Pombo, Costa, Miller and Cardoza.

STATEMENT OF THE HON. GEORGE P. RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Good morning, and welcome to the Subcommittee on Water and Power. It will now come to order.

Today's hearing is a crucial step toward resolving a long and bitter war in the San Joaquin Valley. For 18 years a legal battle to restore a salmon fishery on the San Joaquin River has been fought in the courts. Hard-working family farmers whose future depends on the dam have been left in doubt, and fish restoration is nothing more than a pipe dream for other Californians.

In the meantime, many of us were worried that a judicial decision would be controversial and be appealed to the Supreme Court, costing millions of dollars more, and leaving the issue unresolved for many more years. For that reason, Senator Feinstein and I joined together last year to urge the parties to take their fight out of the courtroom and back to the negotiating table.

Friant Water Users Authority, the NRDC, and the U.S. Government began to sit down in good faith to try to end years of stalemate. The result is what we have here before us today. The San Joaquin River Restoration Settlement is an unprecedented effort to restore a dead fishery and give certainty to many Friant farmers.

Now that much of the hard work has been done in California, it is up to us in Congress to bring the settlement across the finish line and provide the necessary funding for the improvements. We have a lot of work to do, and this hearing today is part of our recent efforts to make this settlement a reality.

As we will see, the settlement has many benefits, but it may also have some unintended consequences. That is why we have asked some of the best and the brightest to speak here today about the need to address third-party concerns. And I am confident that we can resolve these concerns if we all continue to work together in good faith, as we have for the last 13 months.

As we march toward our objective, it is important not to repeat Congress's past mistakes of enacting vague legislation, leaving the courts to decide the details. We don't want another CVPIA on our hands, which will result in new water litigation, which would be the goal of this hearing, the resulting legislation.

We have an historic opportunity to put an end to this long episode in California's water wars. Time is very limited to pass this settlement into law, but we will make every effort to resolve the remaining concerns, particularly with respect to third-party impacts and the funding of the project.

I commend those who have worked so hard on this effort. The more recent negotiations occurred over the past 13 months, and the success in the settlement was and will continue to be found in a series of 10-yard passes, not one Hail Mary pass.

Diligent efforts by Kole Upton, Chairman of the Friant Water Users Authority, Dan Dooley, a Friant attorney, and Hal Candee with the NRDC, and others from the State and Federal Governments have helped achieve this settlement. Now those of us here in Congress have to close the gap on the remaining critical issues. Let us make it happen.

I now defer to the Chairman of the full Resources Committee, Richard Pombo—excuse me, I am sorry. I will now recognize our Ranking Member, Grace Napolitano, for her opening statement. Grace?

[The prepared statement of Mr. Radanovich follows:]

Statement of The Honorable George Radanovich, Chairman, Subcommittee on Water and Power

Today's hearing is a crucial step towards resolving a long and bitter war in the San Joaquin Valley.

For eighteen years, a legal battle to restore a salmon fishery on the San Joaquin River has been fought in the courts. Hard-working Valley farm families whose futures depend on the Dam have been left in doubt and fish restoration was nothing more than a pipe dream for many other Californians. In the meantime, many of us were worried that a judicial decision would be controversial and be appealed to the Supreme Court, costing millions more and leaving the issue unresolved for many more years.

For that reason, Senator Feinstein and I joined together last year to urge the parties to take their fight out of the courtroom and back to the negotiating table. Friant Water Users Authority, NRDC and the U.S. government began to sit down in good faith to try and end years of stalemate. The result is what we have here before us today. The San Joaquin River Restoration Settlement is an unprecedented effort to restore a dead fishery and gives certainty to Friant farmers.

Now that much of the hard work has been done in California, it's up to Congress to bring the settlement across the finish line and provide the necessary funding. We have a lot of work to do. This hearing is part of our recent efforts to make the settlement a reality. As we will see, the settlement has many benefits, but it may also have some unintended consequences. That's why we've asked some of the best and brightest to speak today about the need to address third-party concerns. I'm confident we can resolve these concerns if we all continue to work in good faith together.

As we march toward our objective, it's important not to repeat Congress' past mistakes of enacting vague legislation—leaving the courts to decide the details. We don't need another CVPIA on our hands and new water litigation.

We have an historic opportunity to put an end to this long episode of California water wars. Time is very limited to pass the settlement into law, but we will make very effort to resolve remaining concerns, particularly with respect to third party impacts and the funding of the project.

I commend those who worked so hard on this effort. The more recent negotiations occurred over the past 13 months, and the success in the settlement was and will continue to be found in a series of 10 yard passes, not one Hail Mary pass.

Diligent efforts by Kole Upton, Chairman of the Friant Water Users Authority, Dan Dooley, a Friant Attorney, Hal Candee, with NRDC, and others from the state and federal governments helped achieve the settlement. Now those of us here in Congress have to close the gap on the remaining critical issues. Let's make it happen.

STATEMENT OF THE HON. GRACE F. NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. NAPOLITANO. Thank you, Mr. Chair. I first want to recognize the hard work that all the parties have put into this, actually the settling parties put into this settlement. But most of all I wish to thank my Chair, because I know he put a lot of hard work in it; and of course Senator Feinstein, with whom he was able to sit down and work through the settlement.

And whether or not you agree with the terms of it or how it might affect anybody, yourselves, there is no question that many of our witnesses this morning have put heart and soul into the agreement. Making any change, big or small, to the Western Water Policy is a very difficult and a very slow process, and I truly appreciate the hard work that has gone into the settlement, and the commitment of the settling parties to its success.

I am a very strong supporter of the settlement, and I assure you that we need to see the San Joaquin River brought back to life, to see the fish in the river, and to end the costly non-productive lawsuits. They must stop.

We have an historic opportunity to repair some profound environmental damage, and we should take advantage of that opportunity, and this will create a win-win situation for all. But it has taken many years to get this settlement pulled together, and I think we all have to recognize that it will take us here in Congress more than just a few weeks to sort out the many complex issues.

I do support the settlement, but I am not about to be rushed into approving the settlement until we give full consideration to the issues that will be raised by our second panel of witnesses, and I am looking forward to their testimony.

I will work hard for the enactment of the settlement, with reasonable safeguards to protect the interests of those who are not parties to the settlement. And I do look forward to the testimony.

Mr. RADANOVICH. Thank you, Mrs. Napolitano. I now defer to the Chairman of the full Committee, Mr. Richard Pombo.

STATEMENT OF THE HON. RICHARD W. POMBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. POMBO. Thank you. I want to congratulate the Chairman for all of his hard work on this and his efforts to bring this to a close.

And I commend the parties that worked on the settlement for finding a solution outside of litigation, because I believe that that is the right way to settle this.

And the settlement does bring certainty to Friant water users, and it helps many in the Delta. I know many of my constituents have expressed support for the settlement. They believe that this is the direction that we need to go.

But the problem that we have in front of us is that it does bring uncertainty to third parties who could be affected, including many of my constituents in the Delta.

All of the parties agree on the need to restore the river and to restore the salmon fishery, and that is something that I believe that this committee will move forward on helping to settle that part of the agreement. And all parties theoretically agree that we need to protect the third parties who were not part of this original agreement, and that is another area I believe this committee will move forward on.

This hearing is an effort for all of us to hear what concerns people have, what solutions, possible solutions are brought to the table, and that is something I look forward to working with all of you on. And I hope that those who worked so hard on this settlement over so many years have the ability to come to a conclusion. It would make our job easier.

But at some point this committee is going to have to step forward with a legislative solution. And I am hoping that we can take a lot of the work that went into this settlement and put that in the legislation. But all of us have a responsibility not only to our constituents, but to the taxpayers of the entire country, and we have to take that into account.

Today's hearing is a start of the Congressional process as we move forward working with the Subcommittee Chairman, the Ranking Member, the other Members from California, and our colleagues from across the country. We will come up with a legislative package that settles this.

And I appreciate all of the hard work that has gone into this, especially by those who worked on it and by the Chairman of the Subcommittee. And I yield back.

Mr. RADANOVICH. Thank you, Mr. Chairman. I ask unanimous consent that the gentleman from California, Mr. Nunes, be allowed to join us on the dais and participate in today's hearing. Hearing no objection, so ordered. Right?

I welcome our colleague from California, Mr. Nunes. I will get to you for your opening statement. I defer to Mr. Miller for his first. And you may begin.

STATEMENT OF THE HON. GEORGE MILLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. MILLER. Thank you, Mr. Chairman. And I want to commend you for this hearing, but more importantly for all of the work that you and other Members of our Committee from the Central Valley have put in on behalf of this effort, and certainly to those that we will be hearing from this morning who have spent more hours than God allowed them to try and negotiate this out. And I think it is commendable what they have done. I share the enthusiasm for it,

and certainly the hope and the desire that we can bring it to a successful conclusion outside of litigation. And I look forward to reading the testimony.

Unfortunately, I am going to have to go to an Education Committee hearing that is called, that I requested. I didn't know they would be on the same day. But anyway, so I look forward to reading the testimony. And also, I look forward to that discussion of the remaining issues that have not yet been tentatively—and I understand that it is not done until it is all done—but have been tentatively resolved.

Certainly I am very deeply concerned with all that is going on in the Delta, that we not undermine the opportunities that we may have, that we will have to take out of necessity to try and restore the health of the Delta. Everyone in this room recognizes the attention that it has gotten over the last year, as it has been headed for a collapse. So I am very concerned that these agreements be consistent with the protections and the health of the Delta region of our state.

I think that is all possible. And again, with all of the positive energy and all of the effort that has been made to date, I think we can accomplish that.

I would like to certainly welcome my Assemblyperson, Lois Wolk, here from the California Assembly, and her committee, for her input on some of the ramifications of the tentative agreement.

Thank you very much, Mr. Chairman.

Mr. RADANOVICH. Thank you, Mr. Miller. Mr. Nunes.

STATEMENT OF THE HON. DEVIN NUNES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. NUNES. Thank you, Mr. Chairman. I want to thank you for your leadership on this issue. If it would not have been for all your hard work on this, we wouldn't be to this point yet, so I want to thank you for that.

I have a letter that I sent to Chairman Pombo last week that I would like to submit for the record that basically states a lot of my concerns on the issue.

Mr. RADANOVICH. If there is no objection, so ordered.

Mr. NUNES. Essentially what it comes down to is, and not to reiterate what Mr. Pombo has already said, but this agreement is a step in the right direction. I think that most of the parties involved want to rewet the river. Most of the parties involved want to ensure that a salmon run comes back, and that there are no third-party impacts.

And the Congress needs to take its time. And I know that the time is short, because I know that we need to get this done by the end of the year. But I think today's hearing will be a start. And hopefully, if not next week, after the election we can come back and hopefully get this done by the end of the year.

And with that, I yield back, Mr. Chairman.

[The letter submitted for the record by Mr. Nunes follows:]

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COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEES:
OVERSIGHT
HUMAN RESOURCES

September 18, 2006

The Honorable Richard Pombo
Chairman, Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Pombo:

After extensive negotiations, we have finally witnessed the climax of eighteen years worth of legal wrangling over the San Joaquin River. The parties have come to an agreement and the focus has shifted to Congress. We have been asked to enact legislation outlined by the court settlement which will put the restoration of the San Joaquin River in motion.

Let me begin by expressing my full support for restoring the San Joaquin River. This goal has always been in the forefront of my efforts to provide a more secure, abundant and reliable water source for the San Joaquin Valley. I remain committed to this goal and believe it can be accomplished in this Settlement in coordination with numerous other water management and supply projects. Nevertheless, I have strong reservations about the position in which this agreement has placed the Congress. On occasion, the courts have approved the settlement of litigation with the stipulation that Congress enact legislation. However, it is highly unusual for settling parties, urged by the courts, to submit lengthy and detailed legislation to Congress.

The restoration of the San Joaquin River has been the subject of litigation for nearly two decades. Settlement negotiations have been off and on for more than five years. During this time, those involved in the litigation have had the opportunity to assess the intricate details of this highly complex agreement. However, those same individuals have insisted that Congress review the San Joaquin River dispute and legislate a settlement prior to the end of the year. Such a time-table is problematic given the limited time remaining on the Congressional schedule. However, I am optimistic that Congress can fully discharge its deliberative duties on a complex issue in such a short period of time. The hearing scheduled for this Thursday is a start and I believe we can successfully complete this process under **regular order**. This will provide committees that have jurisdiction and those legislators that have an interest the opportunity to fully examine the proposed Settlement, as well as subsequent legislation.

I understand the unique circumstances of this situation and appreciate the hard work of all parties in reaching this agreement. However, there can be no doubt that this action will have far reaching implications and should be carefully weighed by elected Representatives prior to becoming law. Neither unelected courts, nor settling parties in a legal dispute, should be delegated this important responsibility.

Despite my reservations and in the interest of restoring the San Joaquin River, I would like to outline some areas of initial concern that I have noted with the proposed Settlement:

- The Settlement requires the release of hundreds of thousands of acre feet of water without clear direction on how that water will be replaced. This can be addressed by the Upper San Joaquin

River Storage Investigation. We need to have confidence that this project will be completed before full restoration flows occur;

- The legislation provides for $250 million worth of direct appropriations when there are other avenues that can be explored. This can be addressed by increasing the number of years of redirected capital repayments from 9 to 20 years, thereby dedicating an additional $110 million. Furthermore, we can increase the amount of redirected CVPIA Restoration Fund payments from $2 million annually to $11 million annually, thereby dedicating an additional $180 million;

- Neither the Settlement nor the legislation provides a clear resolution to the concerns of third parties in reference to the Eastside Bypass of Reach 4B and the implications of the Endangered Species Act in relation to spring-run Chinook salmon. This can be addressed by exempting the tributaries to the San Joaquin River from the Endangered Species Act in relation to spring-run Chinook salmon. Furthermore, we can mandate the use of the Eastside Bypass rather than restoring the old river channel, thereby saving millions of dollars and protecting private property rights;

- Neither the Settlement nor the legislation provides clear prohibitions on Eminent Domain. This can be resolved by including explicit language that prohibits its use;

- The Settlement calls for a recirculation plan, however it fails to outline exact details. This can be resolved by prohibiting full restoration flows until Banks Pumping Plant is operating at 10,300 cfs and a detailed plan is developed and implemented.

Again, I want to reiterate my belief that the restoration of the San Joaquin River can be accomplished in this Settlement in coordination with numerous other water management and supply projects. Furthermore, I want to, once again, **request that this process be done under regular order.**

Thank you for your serious consideration of my request. I look forward to addressing this issue so we can accomplish complete and judicious action. Should you have any questions, please do not hesitate to contact me.

Best regards,

Devin Nunes
Member of Congress

CC: The Honorable Dianne Feinstein, United States Senator
The Honorable William M. Thomas, Chairman, Committee on Ways and Means
The Honorable George Radanovich, Chairman, Subcommittee on Water and Power
The Honorable Dennis Cardoza, Congressman
The Honorable Jim Costa, Congressman

Mr. RADANOVICH. Thank you, Mr. Nunes. Mr. Cardoza.

STATEMENT OF THE HON. DENNIS CARDOZA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. CARDOZA. Thank you, Mr. Chairman. I would like to start today by thanking you for holding this hearing, and commend you for the work that you and Senator Feinstein have done encouraging the parties to reopen the settlement and the discussions almost a year ago. I would also like to thank Chairman Pombo for his good offices in this effort, as well.

I want to start as well by applauding the parties. They have worked hard, they have worked diligently, as you have all said.

And we are here because of their efforts to bring this resolution to this problem.

The litigation has created an atmosphere of uncertainty and has not been beneficial for the environment or interested parties. Although the settlement appears to resolve most of the issues among the parties to the litigation, it raises another set of issues for downstream landowners, for flood control systems, and for water districts.

Additionally, the agreement could impose significant costs, in the millions, for downstream landowners and flood control operations, and would also have an untold impact on water delivery systems in the state.

On February 13 of this year, I wrote a letter to the Department of the Interior that I would like to insert into the record at this time.

Mr. RADANOVICH. There being no objection, so ordered.

Mr. CARDOZA. It raised third-party concerns, and requested that these issues be resolved as part of the settlement.

Although the settling parties have met with representatives of the impacted groups prior to coming to an agreement, several significant issues were not addressed in the settlement. Specifically, resolution of the Endangered Species Act issues; reintroduction of a Spring Run Salmon into one river system could end up causing Endangered Species Act impacts and resulting water supply impacts on the tributaries, as well as the Delta.

Feasibility. Reach 4B of the river does not have the capacity at this time to handle increased flows. An alternative is the flood control bypass system, but using the bypass system will result in significant potential flood impacts, and also has impacts potentially with too much heat to the water, and could have other fishery impacts down the river.

Before releasing the water, a feasibility study must be conducted to determine the best option and what funding is needed for improvements and mitigation.

Funding. In an effort to provide a more reliable funding stream, all, rather than just a portion, of Friant's capital repayment obligation should be directed toward this program.

Water rights. The settlement caps Friant's exposure on water releases, but does not clearly provide for the protection of water rights for other water users. This legislation needs to clarify that these water rights will not be impacted by the agreement.

Process. There needs to be an ongoing, inclusive process for impacted third parties to provide meaningful input.

Temperature. If releases of water for Spring Run Salmon are not timed properly, they could have an impact on Fall Run Salmon on the tributaries. That is what I was referring to before. The agreement needs to provide that fisheries on the tributaries will not be adversely impacted.

Mr. Chairman, I am supportive of this settlement if we can get these third-party issues resolved. Yesterday many of us met with stakeholders and Senator Feinstein in her office. I understand, and we all were part of the discussions, where we believe significant progress was made on all these points.

But certainly some significant issues remain, and this has got to be an entire deal. We can't accomplish three quarters of it, and go home happy. We have to deal with all of the third-party impacts.

As much as I want this agreement to go forward, I need to make it clear that I cannot support a settlement at the expense of those not party to the litigation.

Mr. Chairman, I am very hopeful that we can get through these things. I believe we can. With your leadership, Senator Feinstein's leadership, and the Members of this committee, I think we can create a win-win for the Valley and for the State of California.

[The letter submitted for the record by Mr. Cardoza follows:]

DENNIS A. CARDOZA
16TH DISTRICT, CALIFORNIA
COMMITTEE ON AGRICULTURE
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February 13, 2006

Mr. Mark Limbaugh
Assistant Secretary for Water and Science
U.S. Department of the Interior
1849 C Street, NW MS6640
Washington, D.C. 20240

Dear Assistant Secretary Limbaugh,

As you are aware, the Natural Resources Defense Council (NRDC) and the Friant Water Users Authority (Friant Water Users) have been negotiating a settlement of the litigation brought by NRDC against the United States Bureau of Reclamation, and it appears settlement is imminent. I applaud the parties involved for their sincere efforts to resolve this decades-long dispute. I also appreciate the efforts made by the Friant Water Users to keep potentially affected agencies apprised of the status of the negotiations to the extent that they are legally able.

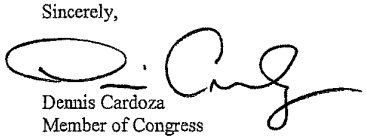
However, I am becoming increasingly concerned about the third-party impacts that the settlement may cause, particularly to my constituents in the 18th Congressional District. Based upon preliminary information that has been shared, there is significant potential that the San Joaquin River Exchange Contractors, San Luis & Delta Mendota Water Authority, Merced Irrigation District, Modesto Irrigation District, Westside farmers and certain Delta water users and agencies could incur significant financial burden should this settlement and subsequent enabling legislation be approved. Moreover, there is significant potential that the operations of other water projects, including those operated by Merced Irrigation District and Modesto Irrigation District, and other units of the Central Valley Project could be affected by the settlement.

While I realize that the details of the settlement must be kept confidential between the negotiating parties, these process restrictions should not prevent the parties from negotiating a settlement that would ensure that the financial or water supply burden of river restoration is not shifted to third parties, whose business and livelihood will be greatly affected, and who have no involvement in these negotiations. Further, while I realize that legislation to implement a settlement has not been formally drafted, I am told that potential language has been circulated among the parties, with the intention of moving the legislation quickly once the settlement is approved.

I appreciate the commitment that my colleagues in Congress and the Friant Water Users have made regarding pursuing legislation that ensures fairness to all affected parties. However, given the heightened sensitivity and the numerous issues that this settlement will generate, I am requesting a meeting with you to be fully briefed on the status of the negotiations and future implementation. This will also present an opportunity for me to express my views and concerns prior to legislation moving forward. I am sure you agree that once a settlement is formally adopted, the third parties' ability to effectuate changes will be severely hindered. It would be in the best interest of all concerned if the parties would adopt a settlement that will be embraced, and not opposed, by the Congress.

Be assured that I remain committed to supporting a settlement that resolves the long-standing issues raised in the litigation Given the long road ahead and the need for cooperation among all affected, I would like to discuss this matter as soon as possible. Please contact Jennifer Walsh of my staff at (202) 225-6131 to arrange a meeting at your earliest convenience.

Sincerely,



Dennis Cardoza
Member of Congress

Cc: Honorable Dianne Feinstein
Honorable Barbara Boxer
Honorable Richard Pombo
Honorable George Radanovich
Honorable Devin Nunes
Honorable Jim Costa
Honorable Bill Thomas
Honorable Arnold Schwarzenegger
John Keyes, U.S. Bureau of Reclamation
Kirk Rogers, U.S. Bureau of Reclamation
Bill Luce, U.S. Bureau of Reclamation
California Department of Water Resources
Friant Water Users
Natural Resources Defense Council
Merced County Board of Supervisors
Merced Irrigation District
Modesto Irrigation District
Turlock Irrigation District
San Luis & Delta Mendota Water Authority
San Joaquin River Exchange Contractors
Westlands Water District

Mr. RADANOVICH. Thank you, Mr. Cardoza. Mr. Costa.

STATEMENT OF THE HON. JIM COSTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COSTA. Thank you very much, Mr. Chairman. I, too, want to commend you and Senator Feinstein's efforts over the last year almost in trying to get the parties focused on reaching an agreement. And I want to commend the parties to the suit for being able to come to us with an out-of-court settlement agreement that I think reflects the best efforts on the part of all those who have partaken.

When I associate myself with comments of Congressman Cardoza, because he, I think, very specifically indicated points that yet have to be resolved as it relates to third-party impacts, I, too, have a letter that I would like to submit to the record that I have addressed to the Chairman.

Mr. RADANOVICH. No objection. So ordered.

Mr. COSTA. Thank you very much. Mr. Chairman, in the letter—and I think it is worth underlining, because I think we have all commented on it—having been one who has been involved in water-related issues in California for now over two decades, I was 15 when I started.

But the fact is I think notwithstanding the success of the parties in reaching agreement, we all know in California that these water issues either directly or indirectly impact others not only within the region, but in other parts of California, because of the way that California's complex water system, its plumbing system is interconnected with local, state, and Federal water projects.

The fact of the matter is that you cannot have one impact, or make changes in one area of the water plumbing system of California, with it not impacting, either directly or indirectly, other water users.

So the third-party issues are critical. And I was pleased to hear in yesterday's meetings an agreement around the room by all the signers of this agreement that they had no intention of creating third-party impacts. I think that is important to note, it is important to underline.

Now, I know there has been a lot of effort taking place, not only yesterday afternoon, but previously, to try to reach that goal.

But let me say that the cloud that hangs over the discussions and the ultimate determination as to whether or not I can support this, is whether or not we are able to eliminate any third-party impacts. As I have tried to remind people in discussions that we have had on numerous occasions, the cloud that exists is the fact that, under CVPIA in 1992 agreement, there was a reallocation of 800,000 acre-feet of water. In that negotiated agreement there are still today discussions as it relates to the B2 water and the environmental water account.

This proposal has a reallocation of 200,000 acre-feet of water. I think it is very important, as Congressman Cardoza has noted and others, that the tributaries not be impacted as it relates to their water supply. And of course, the recirculation effort as it relates to the Delta, the Delta which is such an important environmental asset to California. But not only is it an important environmental asset, it is the linchpin of our plumbing system as we try to manage our water needs in California and provide water supplies not just for Northern California, but to Central California and to Southern California.

So I think it is important that the discretion, as we work on this effort, be made available to the Secretary under current law, as it relates to physical structures, channel improvements, and water flows. And I think that that has to be understood. And I think that defining successful implementation of this agreement must be understood by all the stakeholders, and that I think specifically relates to the third-party impacts.

Having worked with all of the parties in the past, I can tell you that ambiguity, ambiguity in past water negotiations oftentimes has led to the law of unintended consequences. What do I mean by that? I mean that those unintended consequences later on result in disputes and reinterpretation that has unfortunately oftentimes led

into further litigation. I don't believe that furthers anybody's interest.

We have come a long way in 18 years in this restoration agreement. But the fact of the matter is we haven't finalized the effort, and we have to finalize this effort by providing the third-party impacts. If we do that successfully, I will be happy to support this effort.

And I yield the balance of my time.

[The letter submitted for the record by Mr. Costa follows:]

JIM COSTA
20TH DISTRICT, CALIFORNIA

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WEB PAGE: www.house.gov/costa

COMMITTEE ON RESOURCES
SUBCOMMITTEE ON WATER AND POWER
SUBCOMMITTEE ON ENERGY AND MINERAL RESOURCES

COMMITTEE ON AGRICULTURE
SUBCOMMITTEE ON LIVESTOCK AND HORTICULTURE
SUBCOMMITTEE ON DEPARTMENT OPERATIONS, OVERSIGHT, NUTRITION AND FORESTRY
SUBCOMMITTEE ON GENERAL FARM COMMODITIES AND RISK MANAGEMENT

COMMITTEE ON SCIENCE
SUBCOMMITTEE ON SPACE AND AERONAUTICS

Congress of the United States
House of Representatives
Washington, DC 20515

September 19, 2006

The Honorable Richard Pombo
Chairman, House Resources Committee
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

After decades of disagreement, the San Joaquin River settlement agreement offers an opportunity for historic compromise if successfully implemented. This letter is intended to suggest what language is necessary to gain the positive support from third-party water users in our efforts to enact required enabling legislation. I believe Congress must resolve the interest of third-party water users. Although they were not direct parties to the lawsuit, the water users in the San Joaquin Valley will be impacted directly or indirectly if the settlement is successfully implemented. Third-party water users do, in fact, have legitimate economic and environmental interests that need to be considered as this legislative process moves forward.

Specifically, third-party water users have an interest in the restoration of the San Joaquin River's fishery. These water users who I represent believe they have complied with state and federal law. More importantly for them, they want guarantees and thus assurance that their existing water supply for beneficial use will not be taken away. In a region of California where the current demand for water exceeds the supply, this request, I believe is reasonable and essential.

Furthermore, flexibility and discretion must be available for the Secretary of Commerce to use in current law and what language we craft for restoration of the San Joaquin River. The ability to combine efforts of local, state and federal agencies as to the physical structures, channel improvements and water flows will be critical to the success that is achieved. Therefore I believe it is not possible to predetermine what changes are necessary without successful implementation of each phase in a step by step process.

Finally, defining successful implementation must be clearly understood by all involved stakeholders. Having worked, as you are well aware, for many years on complex water issues, it is my belief that legislation we enact must be clear in its intent and very specific. Ambiguity in past water negotiations, I have found, has led to the "law of unintended consequences" which subjects the best of intentions to disputes and reinterpretation in years ahead, that usually result in further litigation. I do not believe this furthers any party's interests.

So let us as legislators do our work to implement this agreement with enabling legislation that creates the assurances necessary for third-party interests to be supportive. This effort will create a positive climate for successful implementation of this historic agreement that could set national precedent.

Sincerely,

Jim Costa
Member of Congress

Mr. RADANOVICH. Thank you, Mr. Costa. There being no further opening statements, I am going to go ahead and introduce the first panel.

We have two panels here today. Joining us on the first panel today is Mr. Kole Upton, who is the Chairman of the Friant Water Users Authority from Chowchilla, California; Mr. Hal Candee, Senior Attorney of the Natural Resources Defense Council in San Francisco; Mr. Jason Peltier, Principal Deputy Assistant Secretary for Water and Science of the Department of Interior in Washington, D.C.; the Hon. Mike Chrisman, Secretary of the Resources Agency of the State of California in Sacramento; and the Hon. Lois Wolk, Chair of the Committee on Water, Parks, and Wildlife, the California State Assembly, in Sacramento as well.

Ladies and gentlemen, welcome to the Subcommittee. Many of you were diligently working on getting us up to this point, and I appreciate the fact that you are here to explain all the good work that has happened, not only over the last year, but also over the last 24 to 36 hours.

As the hearing goes, we would like to hear from each one of you with an opening statement of about five minutes. Please feel free to be extemporaneous in your remarks, as your full written testimony is submitted for the record. And then we will open up the dais so Members may ask any questions they might have.

So Mr. Upton, welcome to the Subcommittee, and you may begin your testimony.

STATEMENT OF KOLE UPTON, CHAIRMAN, FRIANT WATER USERS AUTHORITY, CHOWCHILLA, CALIFORNIA

Mr. UPTON. Thank you, Congressman. We appreciate your leadership on this.

I will start by apologizing. You asked for the best and brightest; Brian sent me instead.

[Laughter.]

Mr. UPTON. But they did send a keeper with me, and I would like to introduce Dan Dooley behind me, who is one of the lead negotiators. So if the questions become too difficult, Dan can step in.

Mr. RADANOVICH. Certainly, and that is not a problem at all, Mr. Dooley. If you would just recognize yourself before you speak, that would be just fine.

Mr. UPTON. I am a family farmer. I actually farm and live in Congressman Cardoza's district, which means he probably has every water issue in the State of California right within his district. It was started by my father, and then we are now farming with my brother and two sons. And we farm almonds, pistachios, cotton, wheat, and corn.

We are typical of the Friant-type farmer. There are 15,000 farmers in the Friant service area, from Merced County to Currant County, about a million acres. In addition, there are about a million and a quarter people that are embedded in the Friant service area, that depend on the Friant surface water either directly, like Orange Cove or the City of Fresno, or they depend on the percolation into the aquifer so they can pump it out from the underground.

This is a highly productive area; it is a very vibrant society. And it is a conjunctive-use area, which is an important thing to remember.

Congress dried up this river in the 1930s by specific design. And the idea, I think, was to give an opportunity to people, and also to redress the underground overdraft of the aquifer that had occurred. And a lot of people took this opportunity, and it is a government program that has actually worked pretty well.

In 1988 NRDC sued the government. And it came down to basically that Congress was violating the law by drying up a river, a California law, that there had to be a live river below every dam. Law 5937.

Well, we have battled on this thing for 18 years. And last year the judge basically said the jig is up, he had had enough, and he was going to rule. And he had indicated that he had very crude tools, like a sledgehammer, a meat cleaver; and if we were smart as settling parties, we would get together and try to settle this thing.

Well, it became pretty obvious to us that whatever he used, the sledgehammer or the cleaver, it is going to be on Friant's back primarily. So when Senator Feinstein and you, Congressman, requested that we try one more time to settle this thing with certain conditions, we jumped at that chance. And the conditions that you encouraged us were caps on the Friant water, so we could have some certainty.

The Friant guys didn't go to San Francisco, to Mr. Candee, and say hey, let us make a deal here, we think it is a good idea to rewater this river. This is the result of a lawsuit where we had two choices: we could take the judge's ruling, or we could take a settlement that you and Senator Feinstein had offered us under those conditions.

And so that is what we did. And we negotiated for about three months with NRDC, and we were able to come up with the concept of caps on the water and caps on the funding for the Friant folks. And neither one of those is available in a court judgment.

At that point then we had to bring in the Federal team, because the feds are part of this. And to their credit, they brought in their A team. Some of them are here today: Steve MacFarlane, Barbara Geigle, two sharp attorneys that really helped us, and Bill Luce, the Area Manager for Fresno.

During this time we also negotiated some water management tools for Friant that are going to help us mitigate the losses that we are going to have when we release water out of our districts. And these are the water management, excuse me, or the recirculation, where we are going to take the water down to the Delta, and if we are able to, without hurting anybody else or infringing on their rights, we want to recirculate that, which will mitigate some of the losses.

The second thing, which will require some Congressional legislation, is a recovered water account, where water will be available during wet conditions for the Friant farmers that have given up water as part of this restoration, to buy it at a low price, so we can bank it, so we can use it as inland recharge, and that kind of thing.

The next step for the Friant folks is to get together as a group, all the contractors, and say how are we going to take care of the losses that our guys have. Because some of our districts are along the mountains; they have no groundwater whatsoever. So when they lose some surface water for this restoration, they are either going to have to fallow their land or go out of business. That is unacceptable. So what we have to do as Friant is work with our class-two districts and make some trades so those folks can stay in business. And we can do that. And we have started that process already.

There are basically three legs to this agreement as I look at it. First is the restoration of the salmon. That is what Hal wants. OK, we have agreed to that.

Second is the water management tools that are available to us, that are not available under a judgment. And I have just explained those.

The third leg is the third parties, which several of you Congressmen have mentioned. It is not fair to have this settlement on the backs of some other water user. We don't want to do that. It is in the settlement document that there will be no material adverse impact to third parties.

The question is, how do you do that? How do you set that up? And that is what we have been working on here for the past two days, and I think we are very close to it.

I will just conclude by saying that the farmers——

Mr. RADANOVICH. Go ahead, I want you to finish your statement. So go ahead and ignore the red light.

Mr. UPTON. OK, thank you.

[Laughter.]

Mr. RADANOVICH. I will apply the red light to Members of Congress.

[Laughter.]

Mr. UPTON. I will conclude by saying that farmers are used to adversity, OK. We are used to bad weather, to bad prices. We are used to pests, and I am not talking about Hal here.

[Laughter.]

Mr. UPTON. So we have to deal with that kind of thing. And this is where we are at on this. This is a judgment call for us that this is a better solution that continued fighting.

And I will submit to you that it is better for us, it is better for them, and it is even better for the third parties if we do it right. Because if this thing goes back to court, we are all going to be in worse shape.

So thank you very much, Congressman, for your leadership.

[The prepared statement of Mr. Upton follows:]

Statement of Kole M. Upton, Chairman, Friant Water Users Authority, and Director, Chowchilla Water District

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

It is an honor and privilege to again appear before this Committee, and to help bring you the best news regarding a major Western resource issue that has been heard in a long, long time. I am Kole Upton, Chairman of the Friant Water Users Authority, Director on the Chowchilla Water District Board, and a family farmer in Merced County, California. My family for decades has depended upon, and beneficially used, Central Valley Project water delivered from the San Joaquin River through facilities of the CVP's Friant Division.

Eight days ago, the Friant Water Users Authority, Natural Resources Defense Council and U.S. Department of the Interior cooperatively reached what can only be termed a historic moment. As representatives of Friant, the NRDC and its coalition, and the federal government gathered at the federal courthouse in Sacramento on September 13, documents were being electronically filed within the U.S. District Court of Judge Lawrence K. Karlton to settle the San Joaquin River litigation known as NRDC v. Rodgers that has been so contentious, and which has placed such a dark cloud over Friant's future, for the past 18 years.

My testimony today will focus on this Settlement and why it is good for society as a whole and all the parties. I will discuss how this carefully crafted Settlement provides a process to restore a river in a manner that maintains a vibrant economy and society and how it offers protection, in so many ways, for third parties who are downstream stakeholders.

Most importantly, I will assert to you that this extraordinary Settlement offers a positive and productive path forward into a future in which all of us can use our resources and talents in a cooperative effort rather than one that is wastefully devoted to continued bickering and fighting.

This Settlement may not be not perfect, but it is by far the most practical option for each of the parties, and particularly for the region I represent.

Please permit me to briefly digress and commend the legislators and policymakers—Federal, State, and Local—who have done so much to reach this remarkable point in time, and who continue to recognize that only through continued cooperation and consensus can we turn the Settlement that I am about to discuss into legislation we need to quickly make restoration and Settlement implementation a reality. In particular, Mr. Chairman, the settling parties and the people and organizations we represent are grateful for the leading roles that you and Senator Feinstein willingly took to bring us back to the negotiating table and bridge our differences in a way that has made it possible for all of us to embrace this Settlement and its provisions. Thank you, Chairman Radanovich, so very much.

As you may know, the Friant Water Users Authority consists of 22 member agencies that receive water from the Friant Division of the Central Valley Project. The Friant service area consists of approximately 15,000 mostly small family farms on nearly one million acres of the most productive farmland in the nation along the southern San Joaquin Valley's East Side. The Friant Division sustains underground water supplies relied upon by residents, businesses and industries in the embedded cities within the Friant service area and delivers surface water to cities and towns that include Fresno, Friant, Orange Cove, Lindsay, Strathmore and Terra Bella.

PERSONAL INVOLVEMENT

For the past year, I have been one of Friant's two negotiators in the three-party negotiations that produced this Settlement. I have been paired with Dan Dooley, an attorney in Visalia, California, who represents several Friant contractors. Mr. Dooley will be with me at today's hearing, and will be available to respond to any questions you may have regarding Settlement details.

Mr. Dooley and I were motivated to find a way to settle the NRDC's lawsuit over the San Joaquin River because of how deep our roots run back home in the San Joaquin Valley and how determined we were to preserve the valley's way of life. Friant Dam and water delivered through the Madera and Friant-Kern canals has always provided a great deal of opportunity. In my family's case, it helped us build and sustain our farm in Merced County, north of Chowchilla, which my Dad started. I was born and grew up in the valley and started farming after finishing college and serving in the Air Force. Our farming operation today includes my brother and my two sons. We grow almonds, pistachios, wheat, cotton, and corn.

I became involved in our local water boards and, eventually, with Friant because it is so clear that water means everything to farms and communities such as ours. For the past 18 years, this supply of water from Friant that means so much to us has been under a dark cloud. We have had every reason to believe that those of us who farm and communities that truly exist because of Friant could end up losing all or a major portion of their water through a judge's decision in the NRDC case or because of some other challenge.

Such a possibility was unacceptable. A farmer cannot farm without an adequate and affordable water supply. Further, a farmer must have some certainty before committing to a growing season. And so, even as this case began to head down a fast track toward trial, we were provided with an opportunity to sit down and try again. I can assure you that neither Mr. Dooley nor myself were overjoyed at the prospect but we knew it had to be attempted and, if at all possible, steered toward a resolution in a way that all of us could live with. That has now been done.

BACKGROUND

It goes without saying that this case has been seemingly endless, frequently frustrating, incredibly challenging, eternally complicated, often controversial and always expensive.

It began in 1988 just as the U.S. Bureau of Reclamation was beginning to renew Friant's long-term 40-year contracts. NRDC and its coalition of environmental and fishing interests challenged the government's decision to renew Friant water service contracts without an Environmental Impact Statement. Of course, it didn't stay that simple. NRDC's complaint was amended seven times over the next 15 years to include other claims. One of those was a claim under the Endangered Species Act, and another contended that the federal government's operation of Friant Dam was in violation of California Fish and Game Code Section 5937, which requires dam operators to release sufficient water to keep fish in good condition below the dam. Most of the earlier claims are no longer relevant. But the river flow issue—the most crucial of all to Friant users—came to be the litigation's focus over the past several years, especially during an earlier four-year settlement effort that was unfortunately not successful.

The case reached a crucial turning point in August 2004 when the judge ruled Section 5937 imposes a continuing duty to release sufficient water from Friant Dam into the San Joaquin River to restore former historic salmon runs and fishery conditions. It assigned liability to the Bureau of Reclamation. The court did not determine how much water would be needed to satisfy the state law but set the case for a trial that was to have started in February 2006 to determine the "remedies"—the amount of the releases. In 2005, the parties began preparing for that trial and in the process gained valuable new scientific information about possible restoration strategies.

I believe the seed of this Settlement was planted by Judge Karlton himself one day in January 2005 during a hearing in his court. The judge said two or three times there needed to be a settlement. Judge Karlton said, "I keep telling you folks the law is a bludgeon, not a surgeon, and what this case needs is surgery. And it can only be accomplished if you take the scalpel in your hand." And he looked us all in the eye and warned about as bluntly as a judge can put it, "But the result of that is that you're going to get the kind of fairly gross application of the law that the law will—the only thing that the law will permit me to do. There may be some fine-tuning permitted. ... But, you know, my sense—of it, but I may be wrong, is it is not going to be a very refined solution to these problems."

That resonated with me, and with all the Friant contractors and their attorneys. It seemed to say what many of us had long suspected—that if the judge decided this case, there was going to be a great deal of Friant water used as a "remedy" down the river. And without a settlement, there wasn't going to be any of the extensive and critically needed work done in the channel and to structures to provide any sort of on-the-ground hope that salmon could be lured back by water alone. There was, however, a strong likelihood that Friant's water users and the economic and social structure in the San Joaquin Valley that depends upon this water supply could very well be severely impacted.

That was the situation a little over a year ago when Chairman Radanovich and Senator Feinstein began a non-partisan effort to try to get Friant, NRDC and the government to try again to negotiate a mutually agreeable Settlement. It should be obvious that Mr. Radanovich and Mrs. Feinstein were amazingly persuasive!

We began negotiations late in the summer of 2005. That it took us a year to finalize an agreement that resolved each and every issue should make it evident to the greatest doubter that the process, the issues and the discussions were complex and difficult. One of our biggest problems was that the parties had never been able to find much in the way of common ground. It had always been an Us vs. Them mentality with positions long ago carved out in stone. So the new negotiations, although frequent, just as often were difficult. However, progress, although slow, seemed to be steady.

Then came the key breakthrough—and, again, it came at the urging of Chairman Radanovich and Senator Feinstein. The concept was a good old-fashioned compromise. This is essentially how it was framed:

In exchange for restoring the San Joaquin River below Friant Dam, Friant's new water dedication for the fishery's needs would be capped at certain amounts. That instantly provided Friant water users with what had long been missing—a declaration of water supply and quantity certainty for decades into the future. We were well aware in taking this key compromise and filling in the details that such an agreement would result in use of a portion of the Friant Division water supply. And, yes, it represents water that our already water-short area can't afford to lose. But Friant also recognized that this would be a way to remove what promised to stretch

into years of continued uncertainty over the Friant water supply and economic and social well-being of the eastern San Joaquin Valley. Of equal importance to that certainty and the river's restoration was development of the Settlement's unique means of using good, innovative water management to also provide means to recover, reuse and recirculate water in an attempt to mitigate impacts on Friant water users. Also of great importance to Friant was another crucial compromise that capped Friant's financial contribution to river restoration at present levels—which add up to tens of millions of dollars each year paid into the CVP Improvement Act's Restoration Fund and Friant Surcharge.

By this past April, the parties were able to inform Judge Karlton that agreement had been achieved on numerous issues, including restoration goals, water flows, ways of managing and recovering water and a host of other issues. At the end of June, attorneys agreed to a Settlement in principle.

You know the rest. The agreement, covering 20 years, and possibly longer, is now public as a result of filing the document with the court on September 13.

THE SETTLEMENT AGREEMENT

The Settlement Agreement itself is constructed around two important parallel and equal goals:

- The Restoration Goal is to restore and maintain a self-sustaining salmon population below Friant Dam to the confluence of the Merced River.
- The Water Management Goal is to reduce or avoid adverse water supply impacts to all of the Friant Division long-term water contractors.

THE RESTORATION GOAL includes three essential elements. Those include:

- A number of improvements providing for channel capacity, related flood protection, fish passage and fish screening. These will take place in two phases. By the end of 2013, projects to be completed include a salmon bypass channel around Mendota Pool, increasing channel capacity between the Eastside Bypass diversion and Mendota Pool to 4,500 cubic feet per second; increasing the channel capacity (in Reach 4B) below the Sand Slough control structure to 475 cfs; modifying the Sand Slough control structure to provide for fish passage and appropriate routing of water; screening the Arroyo Canal diversion; and modifying Sack Dam and the Eastside and Mariposa Bypass channels for fish passage and low flow conditions; and providing seasonal fish barriers to screen fish at Salt and Mud Sloughs. The second phase improvements are to be completed by the end of 2016. These include increasing Reach 4B channel capacity below the Sand Slough control structure to 4,500 cfs unless it is determined not to substantially enhance achievement of the Restoration Goal; modifying the Eastside Bypass diversion structure to provide appropriate fish screening and passage; and isolating gravel pits near Fresno from the river.
- Flow releases from Friant Dam, beginning in 2009 with experimental interim flows and with full restoration flows beginning in 2014; with quantities determined according to hydrographs based upon water year types in order to provide fishery habitat water. These restoration flows may be supplemented by buffer flows of up to 10% and can be further augmented with water purchases from willing sellers. If construction of the river improvements is not completed, the Settlement agreement contains default provisions designed to preserve water for later use to achieve the Restoration Goal. Procedures are also specified for flexible management of Restoration Flows to account for temperature and biological factors. This adaptive management is to avoid causing harm to other downstream fishery programs. The flow schedule can't be modified until after December 31, 2026 and any change would require a court filing and a referral to the State Water Resources Control Board.
- Reintroduction of salmon and other varieties of fish into the upper San Joaquin River. The Fish and Wildlife Service is to apply to the National Marine Fisheries Service for a permit to reintroduce salmon and NMFS must decide on such application by April 30, 2012. Fall and spring run salmon are to be reintroduced by the end of 2012.

THE WATER MANAGEMENT GOAL and its implementation embrace two critical elements. They include:

- Development and implementation of a plan to recirculate, recapture, reuse, exchange, or transfer water released for Restoration Flows within bounds of the Settlement's terms and all applicable laws, agreements and environmental policies.
- Creation of a Recovered Water Account that provides an opportunity for Friant Division long-term contractors to recover water they have lost to Restoration Flows at a reduced water rate in wet water conditions. Friant Division long-term contractors providing water for Restoration Flows will be able to purchase

water for $10 an acre foot during certain wet conditions when water is available that is not necessary to meet contractual obligations or Restoration Flows. This provision is designed to increase water banking and management programs and boost incentives for districts to actively participate while reducing the Settlement's water supply impacts.

SOME OF THE SETTLEMENT'S OTHER FEATURES include and address:

- State of California Participation: This contemplates that the State will of necessity participate in implementing many provisions. A memorandum of understanding has been negotiated with various State agencies. It specifies how Friant, the NRDC coalition, federal government and the State will integrate implementation activities. The State has expressed a desire for its Resources Agencies to be actively involved. We expect the State to provide technical and funding resources. Specific agreements will be negotiated with the State regarding specific Settlement actions.
- Funding: There are very specific provisions related to Settlement funding, including provisions relating to the character of the capital investment, limitations on Friant Division long-term contractor payments, identification of existing funding resources and additional appropriations authorization. The Settlement provides that costs will not add to CVP capital obligations. It also commits Friant Division long-term water contractors to continue paying the CVPIA Restoration Charge and Friant Surcharge for the life of the Settlement but caps Friant's obligations at those amounts. The Friant Surcharge would be dedicated to implementing the settlement, as would Friant's capital repayment portion of CVP water rate payments for nine fiscal years. Up to $2 million annually of the Friant CVPIA Restoration Charge payments will be made available for implementing the Settlement. In addition, the Settlement authorizes appropriations authority for implementation totaling $250 million. (Some of these identified sources of funding are not subject to the appropriations ceiling or to annual appropriations and may not be subject to scoring for budget allocation purposes.) State funding from various revenue streams, including state bond measures, are anticipated. Funding identified in the Settlement is to be available to implement the Water Management Goal as well as the Restoration Goal.
- Other Claims Resolved: The Settlement resolves all claims pending in the existing litigation, including those challenging the validity of the Friant Division long-term renewal contracts. The exception is attorneys' fees and costs.
- Third Party Impacts And Participation: There has been a great deal of concern voiced about third party impacts. All of us clearly understand and the Settlement acknowledges that implementation will require a series of agreements with agencies, entities and individuals who are not parties to the litigation. The Interior Department is to coordinate with interested third parties (including third parties who own or control lands or facilities affected by Settlement implementation), and for public participation in Settlement implementation. Provisions of the MOU with the State contemplate joint efforts to provide mechanisms for non-party participation in Settlement implementation.
- Management And Administration: A Restoration Administrator position is to be established to help implement the agreement and advise the Interior Department on how the river restoration hydrographs are to be implemented, when buffer flows may be needed, river channel and fish passage improvements, reintroduction of salmon, interim flows for data collection purposes, targets, goals and milestones for successful implementation of the fishery program and coordination of flows with downstream tributary fishery efforts. Appointment will be for a six-year term. A Technical Advisory Committee will be created to advise the Restoration Administrator. It will include two representatives each from the plaintiffs' coalition and Friant defendants as well as two members mutually agreed upon, but none are to be federal employees. Terms are to be for three years.
- Long-Term Friant Water Service Contract Amendments: When the Friant Division's long-term renewal contracts were enacted in 2001, they included a stipulation requiring necessary contract amendments to reflect and be consistent with any Settlement agreement. Such a provision is part of the Settlement. Friant's long-term contracts will be kept in place with no further National Environmental Policy Act or Endangered Species Act compliance actions required.
- Resolution of Disputes: Procedures are included for attempting to resolve disputes by meeting and conferring. Should that be unsuccessful, services of a neutral third party are to be used. Finally, the parties could turn to the U.S. District Court.

FEDERAL LEGISLATION

This issue is before the Subcommittee because some Interior Department actions called for in the Settlement require Congressional authority. As you have seen, an exhibit to the agreement contains legislative language proposed to implement the Settlement. It is referred to as the "San Joaquin River Settlement Act." Passage of this legislation in substantially the same form as the exhibit is critical because any party could void the Settlement if the necessary legislation were not enacted on a timely basis.

CONCLUSION

Settlement of the 18-year-old litigation known as NRDC v. Rodgers has been rightly applauded in much of the nation's press as an outstanding achievement. The Friant Water Users Authority and its member agencies appreciate that sentiment and view the Settlement as historic, and the beginning of a new era in which the policies and activities of the past are blended with society's environmental priorities of the present and future. This Settlement has been constructed upon a newfound willingness among the settling parties to cooperate and compromise for the common good, and to the benefit of each of our positions.

To that end, there are individuals and interests who have been quick to criticize this agreement, ostensibly for not being perfect, whatever that is. In fact, those of us who farm are never blessed with perfection. Every growing season presents the challenges of weather, pests, prices and thieves. You try to find the best practical approach to handling each challenge.

The Friant Division contractors reviewing the situation and prospects posed by the potential outcome of continuing to litigate over San Joaquin River flow issues with the NRDC and its coalition have taken the same approach as would any farmer in evaluating what this Settlement offers. I would urge you to do the same. Let not an unrealistic desire for perfection be the enemy of the practical.

In addition to society's general interest in the San Joaquin River, there are three interest groups lobbying Congress on the legislation proposed for implementing this Settlement. These parties include:

- The environmentalists interested in restoring flows and salmon to the San Joaquin River.
- The San Joaquin Valley folks who are dependent on San Joaquin River water for sustaining their livelihoods and homes within the Friant Division.
- The third party interests who do not want material adverse impacts to their constituents.

I submit to you that, collectively and individually, all these interests and society itself will be far better served by this Settlement than by Congress rejecting it. Of course not everyone is fully satisfied, from either the environmental coalition or the water users community:

- Some in the environmental community may wonder why they should settle with caps on Friant's costs and water releases when they have won so convincingly to date in Judge Karlton's Court? The answer for them is that this Settlement offers a process and constructive opportunity of cooperation for salmon restoration. With a court judgment, the attitude and approach by the valley folks would be predominantly one of perpetual resistance, and an emphasis on how to save as much water as possible. Under that scenario, water would nearly certainly be released upon orders of a federal judge, but the necessary improvements and cooperative nature essential to an effective salmon recovery would be entirely missing. And, if it were ever to be achieved, if would be accomplished only be after a much longer time with far greater amounts of water.
- San Joaquin Valley water users interests may feel that this Settlement makes no sense because, they reason, Congress six decades ago agreed to make the Friant project a reality and decided to make it work by drying up 60 miles of the San Joaquin River. Valley folks may also feel a federal judge should not have the power to overturn such a decision made long ago, and subsequently reaffirmed, by Congress. There is a misperception by some that an unfavorable ruling to valley water users and agencies would be a strong candidate for being reversed on appeal to the Ninth Circuit or the Supreme Court. Unfortunately, Friant has already been down that road once with this judge's decisions, and it resulted in our contracts being voided. His ruling was upheld by the Ninth Circuit and the Supreme Court would not take the case.

As a farmer, one firm slap on the head is usually enough to get my attention. That's true with most farmers I know, too. All of our Friant and district lawyers have informed us that this case, at best, would be an uphill battle with an uncertain, but possibly onerous, outcome. This Settlement is a far superior option.

The third parties seek protection and indemnification against unfair water and fiscal costs they assert the Settlement would be inflict upon their constituents. Some may demand 100% protection, and if it is not forthcoming, then they will recommend rejection of the Settlement. We have tried to address their concerns, and the Congress may need to add some legislative language to further protect them. However, it is important to understand that rejection of the Settlement does not mean the third parties would suddenly be 100% free of any impact upon them. Far from it.

It would be naive to harbor a thought that Congressional rejection of the Settlement would make the prospects of flows down the San Joaquin River, and a return of salmon, go away. If the Settlement were to ultimately fall apart, it would only be a matter of time until the Judge rules, and the water flows. Should that occur upon a court's order, rather than a carefully crafted and negotiated compromise Settlement, third parties would have none of the protections or opportunities for constructive comment and participation offered in this Settlement.

Society has determined that the rules under which Friant was built, and how it has so effectively functioned in benefiting the valley community, have changed. Environmental care and concern today are the partners of valley farming and living. Friant has embraced this notion and, in fact, has been working steadfastly for the past several years to create the scientific basis of understanding upon which good and effective restoration decisions can be founded. Friant wants restoration of the San Joaquin River to work.

As I stated at the beginning of these remarks, for society as a whole and all the parties, this is a good Settlement. It provides a process to restore a river in manner that maintains a vibrant economy and society. It offers protection for third parties. It offers new life to the river and its fishery habitat.

Most importantly, it provides a future course upon which all of us can use our resources and talents in a cooperative and constructive manner rather than wasting our energies upon continued legal and political fighting.

Friant, NRDC's coalition and the Interior Department have done what some contended was the impossible. We've reached a practical, fair and cooperative Settlement. We've made history. We ask those of you in Congress to join us by providing the tools to make this Settlement work.

[The response to questions submitted for the record by Mr. Upton follows:]

FRIANT WATER USERS ASSOCIATION

October 20, 2006

Congressman Richard Pombo, Chair
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Re: Additional Questions for Witnesses, Hearing on the San Joaquin River Settlement Before the Subcommittee on Water and Power, Thursday, September 21, 2006

Dear Congressman Pombo:

Thank you for the opportunity to appear at the Subcommittee Hearing on the San Joaquin River Settlement.

I am pleased to provide you a copy of my direct response to Congressman Nunes' questions stemming from the Subcommittee on Water and Power Hearing on the San Joaquin River Settlement on September 21, 2006. As you are aware, a large part of the Friant Service Area is in Congressman Nunes' District and thus a direct response to Congressman Nunes seemed appropriate. He continues to be a leader in promoting good public policy to ensure adequate and affordable water is available to our area for the future. Maintaining an adequate and affordable water supply was at the core of the decision of the Authority and all of its member irrigation and water districts to settle the long-standing litigation.

Please note that separate responses from the Natural Resources Defense Council and the U.S. Department of the Interior will be provided which, in certain instances, cite additional information to the questions asked as referenced in my responses.

Sincerely,

Kole M. Upton

Enclosure

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Response to questions submitted for the record by Kole Upton, Chairman, Friant Water Users Authority

October 20, 2006

The Honorable Devin Nunes
U.S. House of Representatives
Washington, D.C. 20515

Re: Additional Questions for Witnesses, Hearing on the San Joaquin River Settlement Before the Subcommittee on Water and Power, Thursday, September 21, 2006

Dear Congressman Nunes:

Thank you for participating in the Subcommittee Hearing on the San Joaquin River Settlement. This response to your questions was generated in conjunction with my position as Chairman of the Friant Water Users Authority (Friant) and that organization's role in the Settlement process. I want to directly respond to you from the perspective of Friant in deference to your essential position and role in our area's future and your representation of a significant portion of the Friant Service area.

Your leadership in promoting good public policy to ensure adequate and affordable water is available to our area for our future is greatly appreciated. Maintaining an adequate, affordable and reliable water supply was at the core of the decision of the Authority and all of its member irrigation and water districts to settle the long-standing litigation.

QUESTION - 1. Based on the terms of the Settlement, has an analysis been completed on the potential water losses on a district-by-district level and wateruser-by-wateruser level? If so, can you provide a copy of that analysis to the Committee?

Answer: Friant expects that its member districts' operations will be significantly altered after the Settlement is implemented, and it is hoped that, through operational changes, increased conjunctive use and groundwater banking programs, and the like, the Friant water users will be able to minimize the impacts of the Settlement. While an analysis of the Friant Division impacts (referred to in the Federal and NRDC responses) on water deliveries was prepared to give the Friant member districts a basis to determine the potential district level impacts of the Settlement on their individual operations, that analysis assumes historic operations of Friant Dam and does not consider any future modifications of project operations. Consequently, the Friant member districts do not believe this Friant Division analysis would further the Committee's understanding of the potential future impacts of the Settlement on the individual districts. However, the Friant districts recognize that you and the Committee have an interest in understanding the likely water supply impacts of the Settlement on the Friant districts, and, to reiterate our earlier offer to you, the Friant districts are willing to make their general managers available to brief you and other interested Members on the individual district's likely reactions to the Settlement, the programs the districts contemplate implementing, and the anticipated water supply impacts. To the best of my knowledge there has been no wateruser-by-wateruser analysis prepared.

The essential next step for the Friant contractors is to develop a cooperative agreement using the mitigation measures in the Water Management Goal of the Settlement to offset losses incurred by water users as a result of the restoration releases. Some districts cannot afford to lose any surface water in that they have no

ground water. Therefore, it is imperative that the districts with banking facilities and Class II contracts make arrangements with those districts to ensure all growers and communities have access to affordable and adequate water.

QUESTION - 2. According to the California Department of Fish and Game, Fish Bulletin Number 17, The Sacramento-San Joaquin Salmon Fishery of California (page 31), by 1928 there were "very few" salmon remaining in the San Joaquin River above the Merced River and that the historical salmon fishery that once existed had been severely depleted. Considering this is 15 years before the construction of Friant Dam, how would the Settlement change historical facts?

Answer: The Settlement will not change historical facts. Friant is aware of the information contained in Bulletin Number 17 and generally understands that fishery numbers fluctuate according to hydrology. In this case the information is somewhat irrelevant because, notwithstanding arguments to the contrary, the Judge ruled that the Bureau of Reclamation had violated California Fish and Game Code section 5937 by not releasing water to maintain an historic salmon fishery. He scheduled a trial to determine the appropriate remedy (i.e. how much water would be required to restore an historic salmon fishery).

In light of these rulings, Friant expected the Judge to require substantial releases for a salmon fishery and to retain jurisdiction to adaptively manage such releases to meet the requirements of the law as he had determined it to be. The immediate loss of water would have resulted in severe adverse impacts to Friant's water supply, and those impacts would have been compounded by uncertainty about the adequacy of future supplies because they would been under the direct management of the court. The Settlement avoids such uncertainty and removes ongoing management from the jurisdiction of the Court.

QUESTION - 3. What is a reasonable expectation of success relating to reintroduction of spring-run Chinook salmon into the San Joaquin River? How many naturally reproducing spring run Chinook salmon can we expect to inhabit the San Joaquin River as a result of the proposed restoration program?

Answer: I cannot answer the question because I do not know. Having said that, I do understand that historically the spring run was the most viable salmon run on the upper San Joaquin River. The Federal and NRDC responses to the Committee contain more detailed information regarding the expected number of salmon that the restoration effort will generate.

From a Friant perspective, it is important to recognize one clause in the Settlement (Paragraph 3) wherein the Parties acknowledge that the restoration program may not be completely successful. Nevertheless, the lawsuit is settled and the Friant Service Area can move on with our lives with reasonable certainty as to the quantity and cost of our water and with a new menu of programs to more effectively manage our water supplies. The certainty provided by the Settlement is why the Settlement is so important to Friant. A Court judgment would have exposed Friant to more Court intervention, no caps on our water releases, and no means to mitigate the losses.

QUESTION - 4. Considering that restoration of a salmon run will require consistent cold water flows, is there a plan to develop temperature controls to eliminate impacts on downstream tributary salmon runs? If so, what are the details of the plan?

Answer: Yes, the Settlement includes a number of provisions that provide flexibility for management of the spring pulse flows. Additionally, the experiments to be conducted with the Interim Flows provided for in the Settlement will develop needed information to better manage the flows to provide necessary temperature levels.

QUESTION - 5. Would the funds authorized by the proposed settlement legislation produce better results on streams other than the San Joaquin River—in terms of increasing the population of the spring-run Chinook salmon?

Answer: To my knowledge, no analysis was conducted relative to funding improvements on other streams for the benefit of spring-run Chinook salmon. The principal reason that such analysis has not been done is because the litigation relates solely to how the State Law (Section 5937) applies to Friant Dam. Throughout the current and past settlement discussions, a number of restoration options were explored. The Parties could not come to agreement on a restoration plan before the Court ruled that Section 5937 required a salmon fishery.

QUESTION - 6. Please identify how the terms of the Settlement will provide water quality improvements in the Delta?

Answer: Please refer to the Federal and NRDC responses to the Committee. In addition, I would add that this Settlement is not a water quality program, but a restoration program. There may be some incidental benefits to water quality in some areas. It is not known whether Delta water quality will benefit from the Settlement. From an intuitive perspective, it seems that if the Settlement results in more fresh water flowing into the Delta, some beneficial effect on water quality would result.

QUESTION - 7. Is there a plan to address the groundwater overdraft that will occur as a result of reduced water deliveries to the Friant Division? If so, what are the details of the plan?

Answer: The Recovered Water Account (RWA) part of the Water Management Goal called for in the Settlement is the vehicle to be used for groundwater banking and in lieu deliveries to mitigate for the groundwater overdraft. Those districts having the ability to recharge have their own plans. This will be an essential part of the program to mitigate other losses for all in the Friant Division. Districts not having recharge capability can make arrangements for their RWA entitlements to be traded with those districts with recharge capabilities to ensure constituents of both districts receive adequate and affordable water. I have great faith in the creativity of the water management professionals within the Friant Division to take advantage of these new tools to mitigate the impacts. Additionally, Friant will continue to pursue development of programs and infrastructure beyond those specified in the Settlement to augment our water supplies and water management capability.

QUESTION - 8. What are the estimated costs to implement the restoration plan proposed in the Settlement? Please provide details on how you developed the estimate?

Answer: There is a wide range (approximately $250 million to $800 million) of cost preliminary estimates for implementation of the restoration goal of the Settlement. We will provide you further information about how the preliminary estimates and the assumptions were developed.

QUESTION - 9. The proposed legislation submitted to Congress has a provision of "no private right of action." What prevents parties from filing suit for more water after 2026? What prevents a third party from filing suit in reference to NEPA compliance, or other applicable laws, as feasibility studies are conducted on various aspects of the Settlement?

Answer: I understand that this provision does not undermine any existing private right of action. I defer to the technical response to the Committee from the Federal parties.

Thank you for the opportunity to participate in this important process. I would be happy to answer any additional questions.

Sincerely

Kole Upton, Chairman,
Friant Water Users Authority
P.O. Box 575
Chowchilla, California 93610

cc: Lane Dickson, for Congressman Pombo,
Committee on Resources,
U.S. House of Representatives

Mr. RADANOVICH. Thank you, Mr. Upton. Mr. Hal Candee, welcome to the Subcommittee. You may begin.

STATEMENT OF HAL CANDEE, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL, SAN FRANCISCO, CALIFORNIA

Mr. CANDEE. Thank you very much. And I very much appreciated the opening statements of each of the Members of the Committee and Subcommittee. It was very encouraging, and I appreciated hearing that.

Mr. Chairman and Members of the Subcommittee, my name is Hamilton Candee, and I am a senior attorney with the National Resources Defense Council, and co-director of NRDC's Western Water Project.

For the past 18 years I have been a counsel of record in this case, representing a coalition of 14 environmental and fishing groups, which in turn represent over two million people nationwide, and more than 250,000 Californians. Like Kole, I have brought some helpers with me, and I want to introduce the NRDC Senior Attorney, Kate Poole, NRDC Restoration Scientist, Monty Schmitt, as well as Philip Atkins-Pattenson of the firm Sheppard Mullin Richter & Hampton, who also represents the coalition. All four of us have been involved in the settlement negotiations that produced the agreement that is the subject of today's hearing, and we are all available to help answer questions today from the panel.

Over the past years some Members of this Subcommittee have closely followed the progress of these settlement talks. And to all of you and all of the Members of the Committee and the public-at-large I want to say thank you for your patience. We know you wanted to hear details earlier than we were able to give them to you. We know you wanted to see a final agreement, and we wanted to see one sooner. And we worked as diligently as we could. As Kole mentioned, it has been 12 or 13 months.

But despite the fact that Friant and NRDC between us reached agreement on a tentative settlement almost 10 months ago, it has taken many more months of good-faith efforts, not only with the Federal government, but also with the state government, to develop a final consensus on all the key points.

And we believe that, although that process has been difficult and exhausting, it is fair to say that all of the settling parties believe we now have an improved and very historic comprehensive agreement, one which will bestow benefits on millions of Californians, while ending one of the state's longest-running water disputes and preserving a vibrant agricultural economy on the east side of the San Joaquin Valley.

Kole has already described to you some of the details of the settlement. And in the materials that we have submitted there is a summary of the settlement, and I know that others will get into that.

But first I wanted to talk briefly about the San Joaquin River itself, and how it has been managed over the past 60 years, and why its restoration is so important not only to the environmental groups and fishing organizations I represent, but also to the State of California at large.

The San Joaquin is one of California's largest rivers, and significantly is one of the two major tributaries to the San Francisco Bay Delta Estuary, an estuary of international ecological importance, and the source of drinking water for 23 million people.

The river originates in the High Sierra and flows east past Fresno, west past Fresno, and then north through the heart of the San Joaquin Valley until it joins the Sacramento River in the Delta region.

In the early 20th Century the mighty San Joaquin supported steamboat travel and commerce between San Francisco and

Fresno. And it teamed with wildlife, including one of the largest Chinook salmon populations on the entire Pacific Coast.

By the early 1940s, when Friant Dam was built, the steamboats were gone, the wildlife had diminished. But tens of thousands of Spring Run Chinook salmon, as well as a smaller fall run, still survived on the river. And in fact, they continued to survive after the completion of Friant Dam. It wasn't until the Bureau began diverting so much water from the dam that 60 miles of river downstream were dried up, that the salmon finally disappeared.

For the past half century, over 90 percent of the river's flow in most years has been diverted at or immediately below Friant Dam. But just as the operation of Friant Dam has contributed to numerous problems downstream, and those are referenced in more detail in my testimony, the operation of Friant Dam under this settlement will be part of the solution to these problems.

To illustrate some of the broad benefits of restoration and to show how broad the support for settlement is, I have attached to my testimony some materials that include a summary of some of the many benefits from the settlement, recent news clippings and editorials supporting the settlement, and also statements of support from interested officials and organizations throughout California. I would ask the Chair's permission to have all of those attachments included within the record.

Mr. RADANOVICH. Without objection, so ordered.

Mr. CANDEE. Thank you. One of the clippings I have attached to this testimony is a very recent editorial from Stockton, California, that discusses the vital importance of the settlement to that city. Communities and farmers in the Stockton area will see water quality and water supply benefits from the settlement, particularly in the critical late-winter, spring, and fall months, when elevated restoration flows will significantly reduce salinity and provide much needed assimilative capacity for long stretches of the river, which are currently impaired.

Moreover, because restoration flows will help meet regulatory requirements in the Delta, a corresponding water supply benefit is expected for communities and farmers who depend on New Melones Reservoir. This is just an example of some of the benefits that are laid out in the materials I have submitted.

On behalf of the Plaintiff Coalition, I would like to thank you, Mr. Chairman, and Senator Feinstein for your leadership in producing the settlement, and your support over the past year, and your patience, as I mentioned before. And finally, I would like to indicate that we at NRDC are extremely proud and grateful to have been a part of bringing this settlement together, and look forward to working with the Members of the Committee to, as you say, get the final issues resolved and take it to the last stretch.

Again, I have a longer statement submitted for the record. But in conclusion, let me just say with your help and support, the environmental and fishing community, the Friant water users, the Federal government, and the State of California are ready to begin the historic task of restoring the San Joaquin. The parties intend that the settlement will be implemented carefully to ensure that the broad benefits of river restoration are realized for all Californians.

All of us at NRDC are grateful to have had the opportunity to help make this day happen. Thank you for inviting us here to testify. Thank you.

[The prepared statement of Mr. Candee follows:]

Statement of Hamilton Candee, Senior Attorney; Co-Director, Western Water Project, Natural Resources Defense Council

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Hamilton Candee and I am a senior attorney with the Natural Resources Defense Council (NRDC) and the Co-Director of NRDC's Western Water Project in San Francisco. Thank you for the opportunity to testify today in support of the historic settlement in NRDC v. Rodgers. For the past 18 years, I have been a counsel of record in this case, representing a coalition of 14 environmental and fishing groups which, in turn, represent over 2 million people nationwide, and more than 250,000 Californians. With me today are NRDC senior attorney Kate Poole and NRDC restoration scientist Monty Schmitt, as well as Philip Atkins-Pattenson of the firm Sheppard Mullin Richter & Hampton, who also represents the NRDC Coalition. All of us have been directly involved in the extensive multi-party negotiation that produced the landmark settlement that is the subject of today's hearing.

Over the past year, some members of this Subcommittee have closely followed the progress of the settlement talks between the NRDC Coalition, Friant Water Users, and federal government. To those members, and to all of you here today, I want to thank you for your patience. Despite the fact that NRDC and the Friant Water Users Authority reached agreement on a tentative settlement almost 10 months ago, it has taken months of good faith efforts by all sides, and ultimately several State agencies, to develop consensus on all the key points, including the authorizing legislation we are asking you to approve.

While the process of achieving this remarkable consensus has been difficult and exhaustive, I think it is fair to say that all of the Settling Parties believe we now have an improved and very historic comprehensive agreement, one which will bestow benefits on millions of Californians while ending one of the state's longest running water disputes and preserving a vibrant agricultural economy on the East Side of the San Joaquin Valley.

We and others are submitting materials for the Record that will address the framework and the details of settlement in greater detail. However, I want to first briefly describe the San Joaquin River—how it has been managed for the past 60 years; and why its restoration is so important.

The San Joaquin is one of California's largest rivers, and significantly, is one of two major tributaries to the Bay-Delta—an estuary of international ecological importance, and the source of drinking water for 23 million people. The river originates in the high Sierra, and flows east past Fresno, and then north through the heart of the San Joaquin Valley until it joins the Sacramento River in the Delta region.

In the early 20th Century, the mighty San Joaquin supported steamboat travel and commerce between San Francisco and Fresno; and it teamed with wildlife, including one of the largest Chinook salmon populations on the entire Pacific Coast. So abundant were these salmon runs that farmers in the southern San Joaquin Valley used to pitchfork the fish and feed them to hogs; and people who lived near the present site of Friant Dam reported being kept awake at night by the thunderous noise of spawning salmon. By the early 1940's when Friant Dam was built, the steamboats were gone, the abundant wildlife had diminished, but tens of thousands of spring run Chinook salmon, as well as a smaller fall run, still survived in the river—and in fact, continued to survive after completion of Friant Dam. It wasn't until the Bureau of Reclamation began diverting so much water from the dam that 60 miles of river downstream were dried up that the salmon finally disappeared.

For the past half century, over 90% of the river's flow in most years has been diverted at or immediately below Friant Dam, mostly for irrigation purposes. Other witnesses will surely speak to you about the huge agricultural economy that has benefited from these diversions. But these economic benefits came at a tremendous cost—to the environment, to the recreational and commercial fishing industries, to groundwater levels in areas adjacent to the river downstream of the dam, and to the lower San Joaquin River and the Delta, where the de-watering of the upper San Joaquin River has contributed to chronic water quality impairments that adversely affect farmers and communities in San Joaquin county, and millions of people who rely on the Delta for drinking water. But just as the operation of Friant Dam has

contributed to these serious problems, the operation of Friant Dam under this historic settlement will be part of the solution to these problems.

To illustrate the broad benefits of restoration and to show the remarkably broad support for the Settlement and the Restoration Effort it provides for, I have attached to my testimony some materials that include a summary of the broad benefits of this settlement, recent news clippings and editorials, and statements of support from interested officials and organizations from throughout California. I would ask the Chair's permission to have all of the attachments to my written Statement included in the final record of this Hearing.

One of the clippings I have attached to this testimony is a very recent editorial from Stockton, California that discusses the vital importance of the settlement to that city. Communities and farmers in the Stockton area will see water quality and water supply benefits from the settlement, particularly in the critical late winter, spring and fall months, when elevated restoration flows will significantly reduce salinity and provide much-needed assimilative capacity for long stretches of the river—from Mendota Pool all the way to Vernalis—which are currently impaired for several pollutants. Moreover, because restoration flows will help meet regulatory requirements in the Delta, a corresponding water supply benefit is expected for the communities and farmers who depend on New Melones Reservoir for their water. These water quality and water supply benefits will extend to the many state and federal water contractors who rely on the Delta pumps.

Communities and farmers downstream of Friant Dam will be strengthened by a living river, instead of a polluted drain, flowing through the heart of the Valley and into the southern Delta. The fragile Delta ecosystem and San Francisco Bay will receive a life-giving infusion at a time when this critical estuary desperately needs it. And for salmon fishermen and North Coast fishing communities whose livelihoods once depended on the San Joaquin River's legendary spring-run salmon, this settlement heralds a return of the spring run and an important step forward in rebuilding our recreational and commercial fisheries. It is because of the broad benefits of San Joaquin River restoration for our environment, our quality of life and our economy, that an almost unprecedented array of stakeholders from one end of the state to the other is supporting this settlement. A list of those supporters is included in the attachments we have provided to the subcommittee.

On behalf of the plaintiff coalition, I would like to thank two of key players in producing this settlement whose support has been especially important, Chairman Radanovich and Senator Feinstein who not only sponsored the talks that led to the settlement, but have consistently supported the fragile consensus that began to emerge from these talks. With this remarkably broad support, we can now move ahead to tackle the next important steps in this cooperative restoration effort. Restoring the San Joaquin will be one of the largest and most important salmon restoration efforts ever undertaken. It is hard to find a river this large anywhere that has been literally dry for half a century and then brought back to life. It is equally hard to find a restoration project with such profound and far-reaching benefits.

Nevertheless, we understand that this dramatic change, while supported by the overwhelming majority of stakeholders and beneficial to millions of Californians, must be carefully implemented in light of its potential to impact some third parties. Mindful of that potential, the Settling Parties have spent much of the past several months reaching out to third-party stakeholders, briefing them on the settlement, discussing their concerns, and where appropriate, modifying the settlement to incorporate their perspectives and interests. Here are some specific examples:

1. To address concerns by downstream landowners and the local levee district that restoration not cause flows to exceed the river's flood carrying capacity, the settlement expressly requires increased channel capacity and levee work that will not only ensure safe conveyance of restoration flows, but will also improve flood protection for these downstream areas. This settlement will help fund those flood improvements for downstream landowners.
2. Landowners who farm in the area known as Reach 4B have expressed opposition to restoring flows to this reach of the river, and have urged the settling parties to consider routing flows and fish around the area by using the flood bypass system. Among the reasons they have offered is their belief that restored flows could result in crop damage to adjacent lands, and their contention that channel capacity is so degraded in this reach that massive and costly reconstruction work would be required. Although we believe the natural river channel is preferable to using a flood control bypass and will not be nearly as problematic as these parties contend, NRDC has nonetheless agreed that the Secretary of Interior has discretion to choose an alternate course if it proves to be a more viable and effective way of meeting the restoration objective. To address the concern by some stakeholders about ensuring an effective voice in

the implementation process, several provisions were included. First, the settlement was clarified to ensure full environmental compliance, including full NEPA compliance, ensuring that as projects move forward the impacts will be publicly assessed and interested parties will have a meaningful public forum in which to engage. Further, the Settling Parties have entered an MOU with state agencies which requires the engagement of stakeholders regarding the implementation activities of the state and federal agencies. The Settling Parties do not believe, nor intend, that the settlement will have any material negative impacts on third parties. We are committed to ongoing outreach and engagement with all San Joaquin River stakeholders in implementing the settlement, and continue to believe that this settlement will significantly benefit even the few third-party stakeholders who are raising concerns about it. These benefits are summarized in one of our attachments. The vast majority of third party stakeholders recognize these benefits and support this settlement. It is important to keep in mind, as many third parties have already acknowledged, that the status quo of the past 50 years is going to change regardless of this settlement, and in many ways this settlement will help third parties in managing those future changes. For example, the Central Valley Regional Water Quality Control Board is in the process of setting legally-mandated water quality objectives for salt and boron upstream of Vernalis and into the reaches of the San Joaquin River where the some west side districts farm and discharge very salty agricultural runoff. When these objectives are set, it may be challenging for some west side districts who rely on Delta water to achieve water quality compliance in these areas without spending increased amounts on elaborate treatment and disposal programs. With the settlement, these same districts could receive tens of millions of dollars in benefits from the release of clean water from the upper San Joaquin and in some cases having their facilities brought into compliance with our state's water quality laws. This is one reason many downstream interests have welcomed the possibility of an infusion of clean Sierra snowmelt to increase the assimilative capacity of the river and better enable the attainment of water quality standards.

In conclusion, with your help and support, the environmental and fishing community, the Friant Water Users, the federal government and the State of California are ready to begin this historic task of restoring the San Joaquin. The parties intend that the Settlement will be implemented carefully to ensure that the broad benefits of San Joaquin River restoration are realized for all Californians. All of us at NRDC are grateful to have had the opportunity to help make this day happen. Thank you for inviting us here to testify. As I indicated, we would be happy to answer any questions.

[NOTE: Attachments to Mr. Candee's statement have been retained in the Committee's official files.]

[The response to questions submitted for the record by Mr. Candee follows:]

Additional Questions for Witnesses
Hearing on the San Joaquin River Settlement
Before the Subcommittee on Water and Power
Thursday, September 21, 2006

Answers by Natural Resources Defense Council—October 20, 2006

1. **Based on the terms of the Settlement, has an analysis been completed on the potential water losses on a district-by-district level and water user-by-water user level? If so, can you provide a copy of that analysis to the Committee?**

The Friant Water Users recently modeled the division-wide water delivery impacts that would come from the Restoration Flows called for under the Settlement and concluded that, in the absence of mitigation measures, implementation of the Settlement would be expected to reduce Friant Division long-term water contractor deliveries, on average, by about 170,000 acre feet each year (15 % of the 1,150,000 acre feet of average deliveries to Friant Division long-term contractors). Through creative water management strategies, Friant will work to minimize the impact of these delivery reductions.

2. **According to the California Department of Fish and Game, Fish Bulletin Number 17, The Sacramento-San Joaquin Salmon Fishery of**

California (page 31), by 1928 there were "very few" salmon remaining in the San Joaquin River above the Merced River and that the historical salmon fishery that once existed had been severely depleted. Considering this is 15 years before the construction of Friant Dam, how would the Settlement change historical facts?

The Settlement would not change historical facts. While G.H. Clark's description in Fish Bulletin Number 17 indicates a very small salmon run in a single year following several consecutive dry years, it is not surprising that salmon runs were depleted during this historic drought period. Salmon populations can vary significantly from year to year based on several factors, including droughts. Within a few years after the drought ended, however, the San Joaquin River's salmon runs rebounded and by the 1940s thousands of Chinook salmon were once again migrating up the San Joaquin River, including 35,000 in 1943 and 56,000 in 1945.

3. What is a reasonable expectation of success relating to reintroduction of spring-run Chinook salmon into the San Joaquin River? How many naturally reproducing spring-run Chinook salmon can we expect to inhabit the San Joaquin River as a result of the proposed restoration program?

We expect that the precise number of adult Chinook salmon that will migrate up the San Joaquin River under the Restoration Program will vary significantly from year to year, as the salmon populations did historically, and as other salmon populations do today. The Settling Parties agree that a minimum number of spawning fish will be needed to maintain the genetic integrity of the population, and the Settlement reflects the Settling Parties' goal of not allowing the restored salmon populations to fall below such a minimum number. The Settlement also calls for a future process to set more specific targets and goals for the Restoration Program. The fact that Chinook salmon existed in the river for several years after the completion of Friant Dam with population numbers ranging from 5,000 to 56,000 suggests the potential for actual population numbers that will be significantly higher than any minimum population level that is used.

4. Considering that restoration of a salmon run will require consistent cold water flows, is there a plan to develop temperature controls to eliminate impacts on downstream tributary salmon runs? If so, what are the details of the plan?

We believe that the Settlement will complement, not adversely impact, downstream salmon restoration efforts. Toward that end, it is important to note that "consistent cold water flows" are not required at all times throughout the San Joaquin River system. When and where cold water is required depends on specific salmon life stage needs and salmon migration patterns. The Settling Parties have structured the Settlement to address these water temperature needs and migration patterns. For example, the hydrographs and restoration actions under the Settlement are designed to ensure out-migration of juvenile salmon during the period from approximately February through mid-April in most years, when ambient air temperatures are generally cool enough to preclude water temperature problems for salmon. Higher restoration flows are concentrated in this cooler out-migration period, and then quickly ramped down in most years. This strategy not only helps ensure success of reintroduced salmon on the upper San Joaquin River; it also avoids potential temperature impacts for downstream tributary salmon. The Settlement also provides for buffer flows and flexibility measures to ensure that temperature objectives are met in key fall and late spring periods. Further, the Settlement calls for coordination of restoration efforts on the San Joaquin with fishery restoration actions on the downstream tributaries.

5. Would the funds authorized by the proposed settlement legislation produce better results on streams other than the San Joaquin River—in terms of increasing the population of spring-run Chinook salmon?

Restoring the San Joaquin River will open up over 200 miles of river for threatened spring-run Chinook salmon, as well as other listed and non-listed fish species, to re-occupy. The Settling Parties are unaware of any other spring-run Chinook salmon restoration opportunity of this magnitude. Further, the San Joaquin River is uniquely important to the recovery of spring-run Chinook salmon because it once sustained the majority of the Central Valley's spring-run population. By re-opening this historically dominant portion of the fish's range, the Settlement represents an important step toward the eventual recovery and delisting of spring-run Chinook salmon.

6. Please identify how the terms of the Settlement will provide water quality improvements in the Delta?

The San Joaquin River is one of two main arteries to the Sacramento-San Joaquin Delta. The increased volume of clean water in the San Joaquin River from

Restoration Flows will provide a much needed boost in the River's assimilative capacity, especially in the late winter, spring, and fall months when Restoration Flows are highest. This has the potential to help address, among other things, the serious salt and boron impairment that exists from Mendota Dam to Vernalis in the south Delta. In some of these areas, the improvements could be dramatic because Friant water is extremely low in salt (about 50 "mhos/cm). It is anticipated that the Interim Flows called for by the Settlement will be used, in addition to other purposes, to determine water quality impacts more precisely.

7. Is there a plan to address the groundwater overdraft that will occur as a result of reduced water deliveries to the Friant Division? If so, what are the details of the plan?

Through careful and creative water management, and through the water management programs provided under the Settlement, the Settling Parties believe that additional groundwater overdraft can be mitigated or avoided. The Recovered Water Account created under the Settlement will provide access to low-cost water supplies that will enable expansion of the existing groundwater recharge efforts with the Friant service area. Moreover, the passive groundwater recharge provided by Restoration Flows will increase groundwater storage in some areas currently suffering from groundwater overdraft.

8. What are the estimated costs to implement the restoration plan proposed in the Settlement? Please provide details on how you developed the estimate?

The Settling Parties have carefully studied San Joaquin River restoration for many years and, as part of this Settlement, have identified the actions and highest priority projects necessary to achieve restoration as provided in the Settlement. Preliminary cost estimates to complete these actions and projects were developed ranging from $250 million to $800 million. The largest variables in this range are the assumptions as to the specific type and extent of levee work that may be required in connection with some of the projects. The California Department of Water Resources, which has responsibilities related to levees and flood protection, has reviewed the Settlement and provided its own preliminary cost estimate in the range of approximately $350 million to $570 million. More precise cost estimates will be completed in the course of project-specific planning activities, which will occur as part of Settlement implementation.

9. The proposed legislation submitted to Congress has a provision of "no private right of action." What prevents parties from filing suit for more water after 2026? What prevents a third party from filing suit in reference to NEPA compliance, or other applicable laws, as feasibility studies are conducted on various aspects of the Settlement?

The Settlement specifies a procedure by which the Settling Parties may move the court or bring a new action after December 31, 2025 to change the Restoration Flows established by the Settlement. Neither the Settlement nor the proposed legislation limit or preclude any rights or causes of action that a third party might have under existing law. Moreover, nothing in the Settlement or proposed legislation prevents affected third parties from exercising their legal rights under other applicable laws, such as NEPA. The referenced provision in the proposed legislation only specifies that the legislation does not create a new right of action.

Mr. RADANOVICH. Thank you, Mr. Candee, for your testimony. Next is Mr. Jason Peltier.

Mr. Peltier, welcome to the Committee.

STATEMENT OF JASON PELTIER, PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR WATER AND SCIENCE, DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. PELTIER. Thank you, Mr. Chairman, for the opportunity to represent the Department here today in support of the settlement agreement.

I would like to start by recognizing that along with me are Kirk Rodgers, the Regional Director of the Bureau of Reclamation in Sacramento; Barbara Geigle from the Solicitor's Office; and Steve MacFarlane from the Department of Justice. Those three played essential on-the-ground roles in getting this settlement achieved.

I think it is important to look at the broader conflict that is being settled here. In fact, in many ways it is a post-child kind of a conflict over a water resource and the environment. And that is why, poster child and very complex and very big, that is why it has taken us so long to find our way out of the forest into the world of settlement.

Hopefully, the settlement can also be looked at as a poster child: a poster child of collaboration among the parties, a poster child of recognizing the common interests, common needs, interests, and desires of the settling parties and the broader public.

I should make clear that this is a settlement of litigation. As we move forward and have discussions about specific legislation to implement that settlement, the legislation will be about settling the litigation. It will not be a, it will set a foundation for a restoration program.

As we go forward, there are a lot of decisions to be made. There is a lot of work to be done, years of work to be done, to sort out exactly how it will affect this restoration program. In that work I think it is essential, I know the agencies are committed and the settling parties are committed to have a broad, open, public process where the interests and concerns of all are at the table, the expertise of all is at the table, and the decisions are made in an open fashion with regard for the interests of all.

It is only through, I think, that kind of open process, where there is broad ownership of the settlement, of the restoration program, of the water management efforts, that we will go forward successfully. If we are unsuccessful in addressing the concerns of the third parties, there is some, I suppose, chance that legislation could get through Congress at some point in the future implementing the settlement. But that would be setting, we would then have set the stage for a very complex and difficult implementation process.

I think we need to look forward to implementation. Central to implementation is the successful resolution of third-party interests and concerns, and their successful engagement in the process moving forward. That broad ownership will assure that not just today, tomorrow, next Congress, but 20 years from now, all folks are still working together.

I would like to thank, in addition to the folks I have already mentioned, there are a lot of people within the Reclamation and Fish and Wildlife Service, NOAA Fisheries, OMB, Justice, CEQ, that have been focused on this effort, and have been asking tough questions, tough questions about uncertainty, tough questions about risk, the risk of what happens if we don't go forward with the settlement. That testing that we have gone through in the Administration in getting approval and support within the Administration I think has been very valuable as a demonstration of the strength of the settlement agreement.

I would like to close by saying that the Friant Division of the Central Valley Project has been a fabulously successful public work. It has brought irrigation water into the post-war era, and that area from Chowchilla south to Bakersfield saw a boom of agricultural development of small farms, community growth, and economic growth that is a fabulous picture of what the reclamation program is all about.

Today our challenge is to make sure that we maintain those benefits, maintain that vibrant economy, while achieving some broader public goals, goals about a river flowing, about a salmon fishery returning, that reflect changing public values.

Thank you very much.

[The prepared statement of Mr. Peltier follows:]

Statement of Jason Peltier, Principal Deputy Assistant Secretary for Water and Science, U.S. Department of the Interior

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the proposed settlement of Natural Resources Defense Council (NRDC), et al. v. Kirk Rodgers, et al.,. During the eighteen years since this case was filed, relations between stakeholders in the San Joaquin River basin, including the State of California, Reclamation water users, environmentalists, and Federal agencies, have often been contentious. However, through the good faith efforts of the "Settling Parties," namely NRDC, Friant Water Users Authority (FWUA), and representatives of the Bureau of Reclamation, Fish and Wildlife Service, National Marine Fisheries Service, and the Department of Justice for the United States, an opportunity has been seized to resolve this litigation in a way that will both restore the San Joaquin River and increase certainty to farmers that they will continue to be able to access the water supplies upon which they rely. A Stipulation of Settlement (Settlement) and draft Federal implementing legislation have been filed with U.S. District Court. My testimony today will provide an overview of this proposed settlement.

Brief Background

The Bureau of Reclamation has water service contracts with 28 entities made up of cities and water districts of various sorts that rely on the water supply from the Friant Division, one of the key features of the Central Valley Project. Friant Dam is located on the upper San Joaquin River, where it forms Millerton Lake, and became fully operational in the late 1940s. Our understanding is that about 15,000 farms rely on Friant water supplies.

Except for flood-control operations, Friant Dam/Millerton Lake is operated to maximize water deliveries which result in approximately 60 miles of the river being dried up in most years, except during seasonal flood control releases.

In 1988, a coalition of environmental groups led by NRDC filed suit challenging the federal defendants' compliance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) in connection with their renewal of the long-term water service contracts between the United States and the Central Valley Project, Friant Division contractors. Most of the Friant Division long-term contractors intervened as additional defendants.

Through amended complaints the plaintiffs subsequently included a claim asserting that the federal defendants must operate Friant Dam in accordance with California Fish and Game Code § 5937, which requires the owner or operator of any dam in California to allow sufficient water to flow through or around the dam in order to keep the downstream fishery in "good condition." During the initial phase of the litigation, the District Court ruled that the contracts were not entered into in violation of NEPA requirements, but held that approval of the renewal contracts violated procedural requirements of the ESA. On June 24, 1998, the Ninth Circuit Court of Appeals affirmed most of the District Court's rulings but remanded to the District Court the issue of the applicability of § 5937 to the operation of Friant Dam.

From 1998 to 2003, without direct involvement by Federal defendants, FWUA and NRDC attempted to settle the remanded issue. In 2003, those discussions were terminated, and on July 19, 2003, the plaintiffs amended their complaint by adding the Secretary of Commerce and the National Marine Fisheries Service as additional defendants and adding claims asserting that the long-term renewal contracts do not conform to the requirements of the Central Valley Project Improvement Act (CVPIA). In an Order issued on August 27, 2004, Judge Karlton concluded that Reclamation violated § 5937, and scheduled a trial on the issue of remedy for that violation.

During the summer of 2005, at the request of Subcommittee Chairman George Radanovich and Senator Diane Feinstein, FWUA and NRDC reinitiated settlement discussions. In November 2005, the Federal government was invited into those discussions, and in spring 2006, the State of California was also approached about the negotiations since the negotiators foresaw that the State would have a significant role in the implementation of any settlement. On September 13, 2006, the Settling

Parties filed the Settlement, including proposed Federal implementing legislation, with the Court. The Settlement Agreement is based on two goals and objectives:

1. A restored river with continuous flows to the confluence of the Merced River and naturally reproducing and self-sustaining populations of Chinook salmon.
2. A water management program to minimize water supply impacts to Friant Division long-term contractors.

Restoration Goal

The Settling Parties have carefully studied San Joaquin River restoration for many years and as part of the Settlement have identified the actions and highest priority projects necessary to achieve the restoration goal. These include among others: expanding channel capacity, improving levees, and making modifications necessary to provide fish passage through or around certain structures in the river channel. Also called for are year-round flows in the San Joaquin River, including those areas that have been without continuous flows for decades, to sustain naturally reproducing Chinook salmon and other fish populations in the 153-mile stretch of the river between Friant Dam and the confluence of the Merced River.

Water Management Goal

Recognizing that the Settlement's Restoration Flows will reduce the amount of water available for diversion at Friant Dam, the Settlement also includes provisions to protect water availability for the 15,000 small farms that currently rely on these supplies. One million acres of the most productive farmland in the country as well as many towns and cities along the southern San Joaquin Valley's East Side receive all or a major portion of their water supplies from the Friant Division. The Settlement recognizes the importance of this water to those farms and calls for development of water management solutions to provide these users water supply certainty for the long term. Such a program would include a Recovered Water Account to make surplus water available at a reduced rate to farmers who have contributed water to the Restoration Flows and a flexible combination of recirculation, recapture, reuse, exchange and/or transfer programs. Additional storage such as groundwater banking may also be explored.

Phased Approach

Restoring continuous flows to the approximately 60 miles of dry river will take place in a phased manner. Planning, design work, and environmental reviews will begin immediately, and interim flows for experimental purposes will start in 2009. The flows will be increased gradually over the next several years, with the goal of reintroducing salmon by December 31, 2012.

The flow regime called for in the Settlement continues unchanged until 2026, with the U.S. District Court retaining jurisdiction to resolve disputes arising under the Settlement. After 2026, the court, in conjunction with the California State Water Resources Control Board, could consider any requests by the parties for changes to the Restoration Flows.

Restoration Funding

The Settlement identifies a number of funding sources to support implementation of these projects, including current payments from farmers and cities served by Friant Dam, state bond initiatives, and authorization for federal appropriations—although without a commitment to appropriate federal funds. These funds are to be used to meet both the Water Management and Restoration goals.

More specifically, the Settlement envisions the continuation of and the dedication of the "Friant Surcharge," a CVPIA environmental fee of $7 per acre foot of water delivered to Friant Contractors that is expected to average about $8 million per year ($160 million over the 20-year period), and up to $2 million annually of other CVPIA Restoration Fund payments made by Friant water users under the CVPIA for use by the program ($40 million over the 20-year period).

It also calls for the dedication of the capital component of water rates paid by Friant Division water users to the program for 9 years ($90 million over the 10-year period). These are funds that at present go to the U.S. Treasury to repay the capital costs of construction in the Friant Division; these funds, instead of going to the Treasury, would directly pay for implementing the Settlement. The Settlement provides that the monies contributed to the Settlement from the Friant Surcharge, Restoration Fund payments, and capital repayment obligation may be used to fund bonds, guaranteed loans or other finance instruments issued by agencies or subdivisions of the State of California. The Settlement anticipates fiscal participation by the State of California as well.

The Settling Parties have agreed on a suite of actions to be taken to restore flows and salmon runs, but those actions still contain significant uncertainty. The

proposed actions are nowhere near as detailed, for instance, as would be found in a Feasibility-level study for a Reclamation project. However, some parties have provided an extremely rough estimate for total costs of $600 million. It is possible or even likely that these costs will go up as the project details become firm.

This uncertainty in project costs has been a source of concern to both the Administration and the State of California. As project partners, we realize that federal appropriations may be integral to implementing the settlement. However, the Administration is not willing to commit to seeking any particular level of funding. All the parties to the settlement must realize that implementation of this settlement, including any authorizing legislation, does not imply a limitless federal commitment to fund whatever it costs.

Third Parties

Prior to the execution of the settlement documents, copies of the draft documents were made available in Sacramento, Fresno, and San Francisco for review by interested third parties, subject to confidentiality agreements. Representatives of water users on the west side of the Central Valley; water users from tributaries to the San Joaquin River downstream of Friant Dam; the Exchange Contractors, who receive water from the Delta in lieu of water they would otherwise divert from the San Joaquin River below Friant Dam; and other parties concerned about river management issues (collectively, "Third Parties") have taken the opportunity to review the Settlement documents. In addition, the Settling Parties have conducted numerous briefings throughout the Central Valley, which have been attended by approximately 70 Third Party representatives. At those briefings, the Settling Parties walked through the proposed Settlement in detail, responded to questions, and listened to comments. Following those briefings, a number of the Third Parties submitted written comments on the Settlement documents. Their primary areas of concern were related to the ESA take provisions, operation & maintenance, funding, meaningful participation in implementation of the program, and water rights. After consideration of comments from Third Parties, the Settling Parties made modifications deemed appropriate to some of the settlement documents and further provided the Third Parties with a comprehensive written response to their written comments.

Conclusion

This monumental agreement ends an 18-year legal dispute over the operation of Friant Dam and provides increased certainty to Friant Division farmers who rely on CVP water deliveries while returning flows and salmon runs back to the San Joaquin River. We look forward to working with the Committee on implementing legislation that reflects the settlement, protects taxpayer interests, and effectively achieves the settlement's goals. We believe that this historic agreement is the start of a truly collaborative process that will result in a restored river for all.

Mr. Chairman, this concludes my testimony.

I would like to reiterate my appreciation to the subcommittee for your interest in this settlement. I would be happy to answer any questions at this time.

[The response to questions submitted for the record by Mr. Peltier follows:]

Additional Questions for Witnesses
Hearing on the San Joaquin River Settlement
Before the Subcommittee on Water and Power
Thursday, September 21, 2006

These follow-up questions were submitted by Rep. Devin Nunes on October 5, 2006, to all witnesses who testified before the Subcommittee on Water and Power:

1. **Based on the terms of the Settlement, has an analysis been completed on the potential water losses on a district-by-district level and wateruser-by-wateruser level? If so, can you provide a copy of that analysis to the Committee.**

Reclamation has not performed a district-by-district level or wateruser-by-wateruser level analysis on the potential water losses. The Friant Parties completed modeling of the water delivery impacts that would result from the Settlement to the Friant Division as a whole and concluded that in the absence of measures to reduce or avoid impacts, implementation of the Settlement would be expected to reduce Friant Division long-term water contractor deliveries, on average, by about 170,000 acre feet each year (15% of the 1,150,000 acre feet of average deliveries to Friant Division long-term contractors). The extent of the impact on any particular district

will be influenced by the development of measures to reduce or avoid impacts as part of the Water Management Goal, such as the groundwater banking and recharge opportunities in wet years, referenced below in the answer to question 7. The impact on individual districts will also be influenced by cooperative arrangements that we understand will be pursued among Friant districts to minimize impacts.

2. According to the California Department of Fish and Game, Fish Bulletin Number 17, The Sacramento-San Joaquin Salmon Fishery of California (page 31), by 1928 there were "very few" salmon remaining in the San Joaquin River above the Merced River and that the historical salmon fishery that once existed had been severely depleted. Considering this is 15 years before the construction of Friant Dam, how would the Settlement change historical facts?

In the Fish Bulletin Number 17 article, G.H. Clark described a trend in the San Joaquin River spring-run Chinook salmon population that still occurs with the fall-run Chinook salmon populations in the San Joaquin Basin. Since the escapement surveys began in 1940, fall-run salmon abundance has been high for a period of 2.5 years following high spring flows during wet years and their abundance has been low for a period of 2.5 years following low spring flows during critical and dry years. The decline in the spring-run population that Clark reported during the late 1920s occurred during several consecutive dry years, whereas the population rebounded to 56,000 fish in 1945 following three consecutive wet years.

3. What is a reasonable expectation of success relating to reintroduction of spring-run Chinook salmon into the San Joaquin River? How many naturally reproducing spring-run Chinook salmon can we expect to inhabit the San Joaquin River as a result of the proposed restoration program?

We expect that the spring-run population will fluctuate between several hundred fish following critical water year types and several thousand fish following wet water year types. Our basis for these estimates is that in dry and wetter years, the San Joaquin River Restoration flows are similar to or greater than the flows that occurred in Butte Creek from 2000 to 2005, when Butte Creek spring-run escapement averaged about 7,500 spring-run fish. However, following critical-low and critical-high water year types when Restoration Flows will be low, we expect that several hundred fish will return to the San Joaquin River.

4. Considering that restoration of a salmon run will require consistent cold water flows, is there a plan to develop temperature controls to eliminate impacts on downstream tributary salmon runs? If so, what are the details of the plan?

The Settling Parties do not believe that implementation of the Restoration Flows will adversely impact downstream tributary fall run Chinook salmon. However, we will work with those managing downstream tributary salmon runs to determine if there are effects of the Restoration Flows on those runs, and how to eliminate impacts to the extent they exist. Further, the Stipulation of Settlement under Paragraph 15 "Interim Research Program And Releases" calls for implementation of a program of Interim Flows in order to collect relevant data concerning flows, temperatures, fish needs, seepage losses, recirculation, recapture, and reuse.

5. Would the funds authorized by the proposed settlement legislation produce better results on streams other than the San Joaquin River—in terms of increasing the population of spring-run Chinook salmon?

There are few opportunities in the Central Valley to restore populations of spring-run Chinook salmon. All of these opportunities are being pursued in the Sacramento River Basin and several are well underway (like Butte Creek) or planned with funding identified (like Battle Creek). The existing populations of spring run and all other opportunities to restore spring run are in close geographic proximity to one another. Because the San Joaquin River is geographically distant from existing populations of spring-run Chinook salmon as well as within their historic range, restoring a self-sustaining population to the San Joaquin River will alleviate dependence upon habitat conditions at other locations. This provides a unique opportunity in terms of increasing the resiliency of the overall spring-run population in the Central Valley.

6. Please identify how the terms of the Settlement will provide water quality improvements in the Delta.

The terms of the Settlement among other things call for certain restoration flow hydrographs which are expected to create a continuous and perennial hydrologic connection to the main stem San Joaquin River and therefore the Delta. Although we have not yet fully analyzed the extent of expected water quality improvements in the Delta, the source water associated with the restoration flows is typically superior in quality to water diverted directly from the southern Delta.

7. Is there a plan to address the groundwater overdraft that will occur as a result of reduced water deliveries to the Friant Division? If so, what are the details of the plan?

The Stipulation of Settlement under Paragraph 16 calls for the creation of a Recovered Water Account. Friant contractors who have reduced deliveries as a result of the Restoration Flows will be eligible to purchase unstorable water for $10 an acre foot, which is significantly less than current prices. The intent of making this water available at a lower price is to encourage ground water recharge programs which in the past may not have been financially feasible. In addition, the Settlement provides for the development of a plan to reduce or avoid impacts of water deliveries to all of the Friant Division long term contractors caused by the Interim Flows and Restoration Flows.

8. What are the estimated costs to implement the restoration plan proposed in the Settlement? Please provide details on how you developed the estimate?

Preliminary cost estimates to complete restoration actions and projects were developed ranging from $250 million to $800 million. Representatives of the Settling Parties met with staff from the California Department of Water Resources (DWR), which has responsibilities related to levees and flood protection in much of the restoration area, to discuss the actions necessary to implement the Restoration Goal. DWR's preliminary cost estimates for implementation of the Restoration Goal is approximately $350 million to $570 million. The largest variables in these estimates are the assumptions as to the specific type and extent of levee work that may be required in connection with some of the projects. More precise cost estimates will be completed in the course of project-specific planning activities, which will happen as part of Settlement implementation.

9. The proposed legislation submitted to Congress has a provision of "no private right of action." What prevents parties from filing suit for more water after 2026? What prevents a third party from filing suit in reference to NEPA compliance, or other applicable laws, as feasibility studies are conducted on various aspects of the Settlement?

Paragraph 20 of the Stipulation of Settlement governs the procedure by which the Settling Parties may move the court (after December 31, 2025, and before July 1, 2026), or bring a new action (after July 1, 2026) to alter the flow regime established by the settlement, if such an alteration is not mutually agreed upon. It does not limit any rights or causes of action, if any, that a third party might have under existing law.

The proposed legislation does not eliminate any rights or causes of action under existing law; nor does it create new rights or causes of actions. It is anticipated that affected third parties would be able to seek review of settlement implementation actions under NEPA and other applicable law, to the extent allowed by such law and the Administrative Procedure Act.

Mr. RADANOVICH. Thank you, Mr. Peltier, for your testimony. Next is the Hon. Mike Chrisman, Secretary of the Resources Agency, State of California.

Mr. Chrisman, welcome to the Subcommittee. You may begin.

STATEMENT OF THE HON. MIKE CHRISMAN, SECRETARY, RESOURCES AGENCY, STATE OF CALIFORNIA, SACRAMENTO, CALIFORNIA

Mr. CHRISMAN. Thank you, Mr. Chairman. Thank you for the opportunity to testify today.

Joining me in the room are Nancy Saraceno, the Chief Deputy Director of the Department of Water Resources, and someone not unfamiliar to you, John McKalein, who is the Chief Deputy Director in the Department of Fish and Game. They are joining me today, and will be part of the question-and-answer period if so needed.

So again, nice to be here today, and I appreciate the opportunity to appear before you to discuss this truly historical restoration.

This, I think as all have said, this is truly a significant achievement with lasting positive impacts on the fisheries and the natural environment, while at the same time protecting farmers and the Central Valley economy. The two have to go hand in hand in this historic settlement.

It creates a clear obligation to the settling parties, but more importantly an incredible opportunity to achieve a historic restoration of a magnificent Western river.

The State of California has joined with Federal agencies and other settling parties to sign the memorandum of understanding to help implement the stipulation agreement. The plan enhancements on the state's second-largest river will have exceedingly far-reaching impacts.

State agencies, including the California Resources Agency, the California Environmental Protection Agency, Department of Water Resources, and Department of Fish and Game, and the settling parties have pledged to work collaboratively to plan, design, and fund and implement actions to support this important restoration project.

A key goal of the settlement is to minimize the impacts to water users who depend on the San Joaquin River. Under this plan, farmers will achieve assurances of water supply and cost. The state will help identify special projects and actions to meet these important objectives.

Additionally, improvements on the San Joaquin River will focus on ecosystem restoration, to return the river to more natural conditions. The state will help design and to construct facilities to provide fish passage, minimum fish entrainment, establish riparian habitat, implement the best available science and monitoring procedures so the system can be adaptively and effectively managed.

Terms of the settlement mandate the water releases from Friant Dam will more than double, allowing native salmon to once again spawn and complete their life cycle in the great San Joaquin River.

To address flooding and better protect residents living along the San Joaquin River and adjoining areas, the state will work on new and existing projects related to flood protection, including levy repair and improvements, maintenance, levy relocation, and work on channel facilities.

While the state did not participate in negotiating the terms of the stipulation agreement, we recognize the importance of defining the state's role in the implementation of this very important agreement. The stipulation of settlement and its restoration and water management goals provide the initial elements of a plan for the restoration. The settling parties must now turn to working with the state, the many public and private interests along the San Joaquin River, and the interested public to establish an effective implementation plan for this historic settlement.

Well, this is not obviously going to be a simple task. We indeed are committed to working with the effective parties to ensure that there will be success, and the costs of the other impacts are not passed on to other parties.

The MOU that we have signed is intended to set out the initial framework for state collaboration with the settling parties on this

implementation. That MOU requires two things we may achieve as we work together.

First, the Secretaries of the Interior and Commerce, along with the Secretaries of the Environmental Protection Agency and the Secretary for Resources for the State of California, must establish a process by December 13 of 2006 for the state and Federal agencies to implement this agreement. This is important because the stipulation of settlement assigns to the Secretary of Interior many restoration tasks that will require California's participation and approval for them to be achieved.

Second, the state and the settling parties will establish a mechanism to ensure public participation input into the implementation of the settlement. Clearly, there are many, many vested interests along the river, and many who have already spent years working on these restoration efforts. To successfully restore the river, we must indeed work collaboratively with all of these interests.

Again, the San Joaquin River, as we all know, is a critical waterway that serves crucial links in the state's vast water delivery system. It is a river that is often called the Jewel of California Central Valley, and it feeds into the Delta, a delta that feeds and supplies two thirds of Californians, more than 22 million people in our state, with drinking water.

The Governor has expressed strong support for the terms of the settlement agreement, and the State of California is committed to doing its part to achieve the restoration of this river.

Mr. Chairman, thank you again for holding the hearing.

[The prepared statement of Mr. Chrisman follows:]

Statement of Mike Chrisman, Secretary for Resources, California Resources Agency

Subcommittee Chairman Radanovich and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the historic San Joaquin River Restoration Settlement which was signed last week.

This is a significant achievement that will have lasting positive impacts on fisheries and the natural environment while protecting farmers and the Central Valley economy. It creates a clear obligation to the settling parties, but more importantly, an incredible opportunity to achieve an historic restoration of a western river.

All Californians will be the beneficiaries of the environmental, economic, recreational, water management and flood protection success our collective efforts will help to create. As a fourth generation Californian, I personally look forward to the restoration of California's second largest river as a significant milestone in responsible environmental stewardship.

The State of California has joined with federal agencies and other settling parties to sign a Memorandum of Understanding to help implement the Stipulation of Settlement. The planned enhancements on the state's second largest river will have far-reaching benefits.

State agencies, including the Resources Agency, the California Environmental Protection Agency, the Department of Water Resources and Department of Fish and Game and the settling parties have pledged to work collaboratively to plan, design, fund, and implement actions to support the restoration project.

The restoration of the San Joaquin River has long been elusive. Many thought that it could never be done. I urge you to seize this opportunity and to work toward making this dream a reality.

History of the San Joaquin River

Originating at 10,000 feet in the form of crystalline snow pack in the southern Sierras, the San Joaquin's original river bed stretches for 350 miles, making it California's second longest river.

Tragically, however, the San Joaquin has long been recognized as one of California's most damaged rivers. Dammed 60 years ago, it was engineered to save Central Valley farmers from economic ruin. Responsible for the irrigation of more than one

million acres of farmland, the San Joaquin River has played a central role in the development and success of some of California's most important and productive agricultural areas.

Along with the economic prosperity and agricultural bounty brought by altering the path and flow of the San Joaquin, came environmental consequences. Construction of dams, channels and levees, during the last 100 years, has modified the river, changing its natural streambed.

These diversions and modifications of the San Joaquin have resulted in diminished and, in some cases, near elimination of, Chinook salmon runs. Prior to the construction of the Friant Dam in 1942, the San Joaquin River was the southernmost habitat for salmon in North America. However, the diversion of water from the upper reaches of the river and subsequent reduced flows has significantly reduced the number of Chinook salmon native to the river.

Additionally, the habitat of the endangered kit fox has been largely degraded, and seasonal wetlands and the migratory birds they host have both been severely compromised as a result of human impact on the river.

Even more troubling, lack of adequate flows in the San Joaquin threatens the quality of local drinking water supplies.

But modern irrigation technology and other advances in water conservation and agriculture afford us an opportunity to make restoration possible, while still maintaining the health and prosperity of neighboring farmland.

Facts about the settlement and California's role

A key goal of the settlement is to minimize impacts to water users who depend upon the San Joaquin River. Under the plan, farmers will receive assurances of water supply and costs. The state will help to identify special projects and actions to meet these objectives.

Improvements on the San Joaquin River will focus on ecosystem restoration to return the river to more natural conditions. The State will design and construct facilities to provide for fish passage and minimize fish entrainment, establish riparian habitat, and implement the best available science and monitoring procedures so the system can be adaptively and effectively managed.

Terms of the settlement mandate that water releases from Friant Dam will more than double, allowing native salmon to once again spawn and complete their lifecycle in the great San Joaquin.

To address flooding and better protect residents living along the San Joaquin River and adjoining areas, the state will work on new and existing projects related to flood protection including levee repairs and improvements, maintenance, levee relocation, and work on channel facilities.

While the state did not participate in negotiating terms of the Stipulation of Settlement, we recognized the importance of defining California's role in the implementation of this agreement. The Stipulation of Settlement and its Restoration and Water Management Goals provide the initial elements of a plan for restoration. The settling parties must now turn to working with the state, the many public and private interests along the San Joaquin River and the interested public, to establish an effective implementation plan for this historic settlement.

While this will not be a simple task, we are committed to working with all affected parties to ensure that it will be a success and that cost and other impacts are not passed on to other parties. The MOU is intended to set out the initial framework for state collaboration with the settling parties on implementation.

It requires two things so that we may achieve this goal together;

First, the Secretaries of Interior and Commerce, along with the California Secretaries of Environmental Protection and Resources, must establish a process by December 13, 2006 for the state and federal agencies to implement the settlement. This is important because the Stipulation of Settlement assigns to the Secretary of Interior many restoration tasks that will require California's participation and approval for them to be achieved.

Second, the state and the settling parties will establish a mechanism to ensure public participation and input into the implementation of the settlement. Clearly, there are many vested interests along the river and many that have already spent years working on restoration efforts. To successfully restore this river, we must work collaboratively with all of these interests.

Conclusion

The San Joaquin River is a critical waterway that serves as a crucial link in the state's vast water-delivery network. This jewel of California's Central Valley, as it's been called, is part of the Sacramento-San Joaquin River Delta. The Delta supplies two-thirds of Californians, more than 22 million people, with their drinking water.

Years of negotiations have culminated in what can truly be called a landmark settlement. The San Joaquin River will once again become a living river, flowing as nature intended, from its headwaters in the High Sierra all the way to San Francisco Bay.

Governor Schwarzenegger has expressed his strong support for the terms of the settlement agreement. The State of California is committed to doing its part to achieve San Joaquin River restoration.

Chairperson Radanovich and committee members: I urge you to consider the paramount significance of this settlement, and I respectfully ask for your help in the long overdue restoration of the San Joaquin River.

Thank you.

Mr. RADANOVICH. Thank you, Mr. Chrisman, I appreciate your testimony. Next is the Hon. Lois Wolk, Chair of the Committee on Water, Parks, and Wildlife with the California State Assembly.

Ms. Wolk, welcome to the Subcommittee. And you may begin.

STATEMENT OF THE HON. LOIS WOLK, CHAIR, COMMITTEE ON WATER, PARKS, AND WILDLIFE, CALIFORNIA STATE ASSEMBLY, SACRAMENTO, CALIFORNIA

Ms. WOLK. Good morning, Mr. Chair and Members of the Committee. I am very pleased to be here, and thank you very much for inviting me to appear today.

I do chair the California Assembly Committee on Water, Parks, and Wildlife. I also represent the northern and western part of the Delta.

Your committee is the counterpart to ours here in Congress, and both committees strive to balance the protection of our natural resources heritage with often conflicting, and sometimes contradictory, demands.

I appear today before you as an ardent advocate for this settlement. This has been a longstanding dispute, as you know. I support the proposed San Joaquin River Settlement because it does reflect a reasonable balance between water supply and restoration.

We fight a lot about water in California. Water conflicts, particularly court litigation, simply cost too much. Litigation costs money to pay advocates, to pay expert witnesses. It costs time, and most of all missed opportunities. And we fight, the ecosystem continues its collapse.

There are three points that I would like to share. You have my testimony, but there are three basic points.

The first is that I believe the settlement provides benefits for the San Joaquin, that you have heard. Certainty for water users. Certainly the restoration have been extraordinary, fishery and river. And something that hasn't been mentioned: a mechanism for future collaboration between the parties. And that is important.

Breathing life-giving water back into this river is an extraordinary goal, worthy of the 21st Century. The agreement may also provide flood protection benefits. While flood protection may not have been one of the original purposes, some of the actions required by the settlement will improve flood protection, particularly the expansion of the river's capacity to 4500 cfs at various points.

The second message I would like to leave with you is that there will be, in my view, secondary or indirect benefits that this settlement will provide for the Sacramento San Joaquin River Delta, which has been mentioned is the heart, and you know that, of the

California water system. It provides drinking water to well over two thirds of the residents of this state.

The Delta is currently in crisis. In the last year the state has put its best minds and best scientists from the University of California to investigate the causes of what has been a substantial decline of pelagic fish and much of the ecosystem that supports them. We still do not have final answers, but we have seen indications that there may be three categories of causes that have contributed to this decline: the explosion of invasive species, water-quality contaminants, and water-project pumping operations.

These problems share a connection clearly to the flow of water into and within the Delta. Introducing additional flows into the Delta may well assist California in addressing the causes of the Delta ecosystem crisis.

The third, and perhaps the most important, message for your committee is how important it is to take the next step in implementing the agreement. This is a vast undertaking, no doubt about it.

California needs Congress to enact the legislation necessary for the implementation of the settlement. On our part in the Legislature, the Legislature can enact other support of legislation and budget proposals to advance the settlement's implementation. I am proud that I was, along with my colleague, Senator Machado, one of the legislators who fought for state funding in this year's budget to support a settlement. There is $2 million that is tied to the settlement and could be used for this purpose.

Further state legislation, for example, could create a San Joaquin River Program, including a special San Joaquin River Fund to authorize both water supply and river restoration projects, proceeding together and consistent with the settlement. I have supported such legislation along with my colleague, Senator Machado, in the past; but before the settlement it did not enjoy the necessary broad support that today's settlement may well provide.

I also don't need to mention, but I shall, that on the November ballot there is a proposition that has earmarked $100 million—Proposition 84, $100 million—that would go toward the San Joaquin support of the settlement, and there may be other categories which projects would be eligible for, as well.

We don't read tea leaves here, I know, but we certainly hope that the people of the State of California will step up and support many positive things in November.

I hope, in conclusion, that our two governments, the state and Federal government, can find a way to collaborate on promoting the most effective and balanced use of San Joaquin's water for agriculture, for urban use, and for the fishery. I hope you will support the settlement strongly, and I know you have been working hard to resolve some of these third-party concerns.

The alternative is that the judge will decide and will impose a settlement. And I have always believed, and I am sure you agree with me, that water managers on the ground and the landowners and the environmentalists who work on the ground can figure out the best deal, if they choose to.

This is a well-crafted settlement. It is a settlement for the 21st Century. It should be a model for settling other California water conflicts, and I certainly urge your support.

And thank you once again for allowing me the brief testimony. Thank you.

[The prepared statement of Ms. Wolk follows:]

Statement of The Honorable Lois G. Wolk, Chair, Assembly Committee on Water, Parks & Wildlife

Good morning, Mr. Chairman and members. My name is Lois Wolk and I chair the California Assembly Committee on Water, Parks and Wildlife. I also represent the northern part of the Delta. I am honored by your invitation to appear today before the subcommittee, which is our counterpart in Congress. Both committees strive to balance the protection of our natural resources heritage with conflicting and often contradictory demands.

I. Support for San Joaquin River Settlement

I appear before you today as an ardent advocate for settlement of the long-standing dispute on the San Joaquin River. While the Friant division of the Central Valley Project has produced vast abundance of agricultural products, it has produced substantial conflict as well. The most recent litigation—and the one we all are here today to resolve—has lasted 18 years, often sapping the financial resources and political energy of the litigants as well as much of the California water community.

I support the proposed San Joaquin River settlement because it reflects a reasonable balance between water supply reliability and River restoration. This settlement will confer benefits on many Californians, not just the ones who have spent the last two decades in court.

A. Value of Resolving Long-Standing Conflict

This settlement offers all of us an opportunity to move beyond conflict. Water conflicts—particularly court litigation—simply cost too much. It costs money to pay our advocates—the lawyers and expert witnesses. It costs time and missed opportunities. As we fight, we too often ignore the continuing and changing needs to operate, maintain and rebuild the water infrastructure that may have served us well in another time. But with improved technology and increased value for each drop of water, we need to invest in creating the most efficient water system possible—one that balances the many competing water needs—agricultural, urban and environmental. Moreover, the inherent risks of litigation put the use of our water resources and water supply reliability in jeopardy.

Finally, as we fight, the ecosystem collapses. The public trust resources that we have a duty to protect deteriorate. California cannot afford the costs of conflict. That's why I'm here today to urge you to support the federal legislation that will let California move beyond this long-standing conflict.

I hope that our two governments—state and federal—can find a way to collaborate on promoting the most effective and balanced use of the San Joaquin's water—for agriculture, cities and the fishery. Only recently did the Schwarzenegger Administration begin investing time, attention and resources on improving the situation on the San Joaquin. I am proud to be one of the legislators who fought for State funding in this year's budget to support this settlement. I was also encouraged to see that the draft legislation includes a "savings clause" for existing federal law requiring Central Valley Project compliance with State law. This provision will protect the State's sovereignty and ensure the State's proper role in overseeing the San Joaquin River's water resources.

B. Settlement Helps Resolve Multiple San Joaquin River Issues

I would like to share a broader perspective about how this helps California as a whole.

Certainty for Water Users. First, there is the added certainty for water users throughout the San Joaquin River basin. For more than a decade, we have crafted water agreements that would allow for some uncertainty due to this litigation. The Federal Government and water users on San Joaquin tributaries crafted the 1998 San Joaquin River Agreement, often called the VAMP (or the Vernalis Adaptive Management Program), leaving some flexibility for an outcome of this litigation. The State's Delta water quality standards were imposed on all the Central Valley Project permits, to allow for the possibility that water might some day come down the mainstem from Friant to the Delta. This time of bracing for uncertainty can now

end, and we can begin the conversation about how to promote greater water certainty throughout the San Joaquin system.

Assistance for Fishery Resources. And, of course, this settlement will help the San Joaquin system's fishery resources. I understand there may be some who question how much the water released under this agreement will help the spring run and, perhaps, may not help fall run salmon at all. But let us keep in mind our starting point—a dead river—and a basic fact—fish need water for life. Breathing life-giving water back into this river—even if not as much as some suggested would be required—is better for the fishery than dry sand. This water will contribute to the fishery needs in the San Joaquin River and downstream in the Sacramento-San Joaquin Delta.

Diluted Salinity. This infusion of water also contributes to diluting the salinity flowing downstream from the westside of the San Joaquin Valley to the Delta. Some of you may remember the Kesterson wildlife debacle when the last drain operated in the 1980's. This settlement will contribute a new water resource to this chronic salinity problem on the San Joaquin and in the Delta. Even a small contribution will nevertheless be a contribution.

Flood Protection. While flood protection was not one of the original purposes, some of the actions required by the settlement will improve flood protection, particularly the expansion of the River's capacity to 4,500 cfs at various points. This last year, the small town of Firebaugh suffered a huge risk that its levees would fail and deluge the town. This settlement provides a small indirect flood protection benefit that, in these years after Hurricane Katrina, may be appreciated.

II. Benefits for the Sacramento-San Joaquin Delta

This settlement's benefits reach beyond the confines of the San Joaquin River, particularly to the broader Sacramento-San Joaquin River Delta—California's Critical Crossroads for water. I note that the Delta's name includes the San Joaquin River. The Delta is formed by two of California's great rivers—the Sacramento AND the San Joaquin. Admittedly, the settlement was not necessarily intended, nor are there any commitments, for the benefit of the Delta. But, when you begin moving toward a healthier river, the Delta cannot help gaining some sort of benefit, albeit unquantified.

A. Delta

The Delta currently suffers from two inter-related problems—water quality and an ecosystem crisis. The Delta's water quality issues are multi-faceted, involving salinity (both drainage and saltwater intrusion), contaminants (including pesticides, mercury and urban runoff), and water circulation or flow standards. Increasing the availability of San Joaquin River flows will, in any case, contribute to improving water quality in the South Delta, where the San Joaquin River flows into the Delta.

Also, in the last year, the State has been investigating the causes of the substantial decline of pelagic fish (e.g. delta smelt) and much of the ecosystem that supports them. We still do not have final answers, but we have seen indications that three categories of causes have contributed to this decline—invasive species, contaminants and water project pumping operations—and we have recognized that there are connections among all three of those categories. Those categories also share a connection to the flow of water into and within the Delta. The cause of the decline is likely related to all of these causes. So, the best news is that introducing additional flows into the Delta may assist California in addressing the root causes of the Delta ecosystem crisis.

B. Export Water Supplies

Because California's export water communities—in the San Joaquin Valley and Southern California—rely on water exported from the Delta, any assistance the Delta receives can help the water supply reliability for export water supplies. It may help the two large water projects comply with the interior Delta salinity standards. Or the additional San Joaquin River inflows may improve the export-inflow ratios that regulate export-pumping operations. In either case, export water supply may improve because there is more water flowing into the Delta.

III. Next Steps

The next steps to implement the San Joaquin River settlement involve both of our legislative bodies. First, California needs the Congress to enact the legislation necessary for implementation of the settlement, including elimination of the CVPIA prohibition on Friant releases for these purposes. Then, I can assist the effort in the California Legislature to enact other supportive legislation and budget proposals to advance the settlement's implementation. For example, we may create a San Joaquin River program, including a special San Joaquin River fund, to authorize

both water supply and River restoration projects proceeding together, and consistent with the settlement. I have supported such legislation in this past session, but before the settlement, it did not enjoy the necessary broad support that today's settlement may provide. With our two legislative bodies working together, I have no doubt that we will succeed in making this settlement a great success!

[The response to questions submitted for the record by Ms. Wolk follows:]

OCTOBER 19, 2006

Honorable Richard Pombo, Chairman
Committee on Resources
United States House of Representatives
Washington, D.C. 20515

Subject: San Joaquin River Litigation Settlement

Dear Congressman Pombo:

Thank you for the assistance that you and the chair of your Subcommittee on Water and Power, Representative George Radanovich, have provided in supporting the San Joaquin River settlement. I have heard positive reports about the final resolution of the issues surrounding the supporting federal legislation. I look forward to Congress acting at its earliest opportunity to complete the settlement process.

Having reviewed the questions submitted by Representative Nunes, I see that he has identified all the issues where the settling parties have the least certainty and specific information. Such uncertainty is not unusual when settlements arise. Settlements of such disputes are nevertheless preferable to continued litigation and the uncertainty of placing the decision only in the hands of one judge, regardless who that judge is.

The questions are properly directed to the settling parties, who have what information is available on the specific issues Mr. Nunes has raised. Many of the issues, however, will require future resolution—with participation by the State of California in that resolution. For fishery improvements, water quality and groundwater overdraft, for example, the State will need to continue to play an active role in addressing how to improve San Joaquin River conditions. The State already has committed to support this settlement, with an appropriation in this year's budget to support implementation of the settlement. This settlement is just the first step toward restoring the San Joaquin River and supporting the water needs of Friant Division water users.

I look forward to working with you and other members of the California Congressional delegation, as the settling parties and our two governments continue working on the best use for California's limited water resources.

SINCERELY,

LOIS WOLK, CHAIR
ASSEMBLY COMMITTEE ON WATER, PARKS & WILDLIFE

Mr. RADANOVICH. Thank you, Mrs. Wolk, for your testimony. It was very valuable; I do appreciate that.

We are going to have a series of three votes coming up somewhere between 11 and 11:30. It is our hope to be done with the first panel, but again we will go as long as we need to to get every question answered.

So I am going to start, and then begin to defer to the others. Again, thank you for being here. And I do want to stress that a lot of this hearing is going to be about addressing potential third-party impacts to this agreement, because third parties were not party to the settlement agreements, but we need to get them resolved.

But I want to be really clear about what is at stake here if this settlement does fall apart. And my question is for just about anybody on the panel, if you wish to answer it, what happens if this settlement fails? I mean, what are the choices if we don't success I guess is the question? And I would invite comment on that.

Mr. UPTON. At least for the farmers, I mean, the judge has already indicated that the feds are in violation of 5937. So he is going to release water, he has that authority.

And then if it becomes a question of whether it is enough water to revive to self-sustain the salmon fishery, he has said that his view is the historic fishery, some semblance of that is what has to be restored.

So we would look, from our perspective, at an uncertain situation. If the initial release wasn't enough, then he would come back and keep releasing until he did it. And we would obviously have none of the mitigation measures that we have in this settlement.

So we would basically be looking at fallowing land. And how do we let our users know that there is just water available and nothing we can do about it?

Mr. CANDEE. I guess I would like to emphasize that one of the benefits of settlement is that we not only accomplish the restoration of the river and the protection and stability for the Friant farmers, but we actually set up a 20-year program of cooperation between farmers, environmental and fishing groups, and the Federal government and the state government. And I think by itself is a critical piece of this agreement.

And so it would be a shame to, if Congress didn't want to support it and bless it and create an impediment to accomplishing that cooperation in this very historic undertaking. So we are optimistic that now that somehow the three parties were able to reach agreement, that we can finish the job and reach final approval from Congress.

Thank you.

Mr. PELTIER. It is up to the Federal Courts to approve the settlement itself. We are scheduled for a hearing in late October to present and hopefully receive court approval. The court will also hear from people who have concerns, the third parties. So that process is ahead of us.

The Federal government does have considerable authorities, flowing largely out of the Central Valley Project Improvement Act, to begin implementation of the settlement agreement in the sense of doing planning and the initial work. I can imagine if Congress does not enact the legislation to provide full authorization for the Federal government to implement the settlement, that we will simply limp along; the conflict will continue. The parties, we will be in kind of a limbo where nobody is happy, and anger continues to be the word of the day instead of progress.

Mr. CHRISMAN. From our perspective, following on what the other three speakers have said, failure of this is unacceptable. I mean, we essentially have to be moving forward. We have to work hand in glove to try to make this work. Too much good work has gone into this. Having the parties coming to this stage I think is truly historic. We need to be working jointly to make it happen.

Because what you heard here is just kind of the beginnings of what the impacts may be if this settlement is not consummated. So we are here to support everything we can do to get it done.

Ms. WOLK. Mr. Chair, I think I spoke to that in my statement. I believe a settlement, there would be a court decision. I don't believe that it would meet the test of balance; it might make some people very happy, and others very unhappy. I think balance is the key, and I think that is what you get here in the settlement.

More money would be wasted, more energy and time would be absorbed by all of this for the next umpteen years. And we have propositions that are on the ballot. We have money that may be ready to support positive collaborative projects. It is time to get those projects ready to go, and look forward rather than backward, and the uncertainty would be tremendous.

Mr. RADANOVICH. Thank you very much for your answer to those questions.

Before I defer to other Members, I will say that we will stick to the five-minute rule on questions, but we will continue to go back until all the questions are asked.

I now recognize the Ranking Member, Ms. Napolitano.

Ms. NAPOLITANO. Thank you, Mr. Chair. Mr. Candee, outside of the Central Valley and the Delta, exactly who will benefit from the settlement?

Mr. CANDEE. Well, as I mentioned in my testimony, we think the benefits flow very widely. It is not just about the parties to the case, and it is not just about the San Joaquin Valley.

We represent, for example, commercial fishermen. And there are North Coast communities that have suffered as a result of the decline of the salmon population, and they are looking for a revitalization, a rebuilding of the salmon in California. There are people who are working very hard right now in the Sacramento Valley to recover the Spring Run Salmon. I think they are very—both the Federal and state agencies and all of us in the environmental community are very enthusiastic about beginning a recovery program or restoration of Spring Run Salmon in the San Joaquin, its historic habitat on the San Joaquin River.

There are people in Southern California who obviously have been hoping for improvements in the Delta, both in terms of water supply stability and water quality improvement. So I think the benefits are really very far and wide.

And I know there is a big focus here at the hearing on some specific potential third-party impacts that have been identified. And all of us on the panel have spent an enormous amount of time trying to understand those impacts and try to address them. But we also need to recognize that there are an enormous amount of benefits, as well, and that is another good reason to quickly move to implement the settlement.

Ms. NAPOLITANO. You did touch upon the water quality. And it does make sense that we would see some water quality improvements if we release more freshwater to flow into the Delta.

Have any studies or modeling been done to document the water quality effects of implementing the settlement? And will the salinity be reduced in the San Joaquin River or in the Delta? And what

are the pollutants that are already present? And then the last question. Will water exported to Southern California be improved?

Mr. CANDEE. Our belief and understanding based on a lot of state studies is that yes, there will be improvements in all of those respects.

I mean, it is interesting. Although we have had this case going for 18 years, there have been a number of other proceedings trying to look at the challenges and the problems on the San Joaquin River, including the Lower San Joaquin River. And one of those, of course, has been the water quality impacts.

And there are a number of studies from the Regional Water Quality Board indicating that there is a recurring and persistent problem of pollution, and also salinity in the Lower River and in the Delta. We believe this just can't possibly be anything but beneficial to have hundreds of thousands of acre-feet of freshwater coming down from the Upper San Joaquin.

Remember, historically the San Joaquin is the second-largest tributary to the Delta. It has been disconnected from the Delta for 50 years. And it is critical, I think, to the future water quality improvement. So we see a number of benefits. It may also help people not all the way down to the Delta, but part of the way downstream, meet their own water quality obligations, either under current law or under future standards.

So we think there is, again as I mentioned before, a number of benefits. And some of this is laid out in some of the materials we have submitted to the record.

Ms. NAPOLITANO. And also to Southern California, I would hope.

Mr. CANDEE. Absolutely. And you know, in terms of the studies, I mean, one of the studies that needs to be further done, and will be done as part of the environmental reviews, will be, of course, all of the benefits and impacts of the restoration program.

But for a number of years people in the export area have looked at how do we improve the water quality situation in the Delta, and addition of freshwater flows. I know at the state regulatory agencies, that has always been a critical piece. And that is how we get to improved water quality for all of the experts.

Ms. NAPOLITANO. Ms. Wolk, could you describe in more detail how you think this settlement will benefit the State of California? And why should my constituents in the Southern California area be concerned or care about this?

Ms. WOLK. When they turn on their tap, much of their water—two thirds of the water—comes from the Delta. So this has been an ongoing issue in our committee.

We have a committee that is made up mostly of people from Southern California, members from Southern California. And when we talk about the Delta and its importance to the entire state, and the importance of levees, for example, the importance of water quality, they understand that their water essentially comes from that part of the state.

So it seems to me that any introduction of freshwater will assist, we hope, in some of the water quality issues that right now are a major, major concern in the Delta.

We don't know, as I said in my testimony, we don't know the exact cause for the failure of the Delta, the crisis that the Delta

is in. But we do know that introduction, that water is a major feature of all of that, and more freshwater, the better.

Ms. NAPOLITANO. I just need to make a correction, because about a third of Southern California comes from the Delta. Thank you.

Mr. RADANOVICH. Thank you, Ms. Napolitano. Now I recognize the Chairman of the Committee, Mr. Pombo.

Mr. POMBO. Thank you. I guess just a couple of questions for the whole panel. The first one is in regards to third-party impacts.

It is my understanding from meetings that we have had in the past, that everyone is in agreement on not having a third-party impact. And I would like the witnesses to comment on that.

Mr. UPTON. We agree.

[Laughter.]

Mr. CANDEE. But the settlement actually has a provision, speaking specifically to that point, in which all of the settling parties make clear that it is neither our intent nor our expectation that there will be any material adverse impact.

So as you indicated, we have all spent a lot of time, not just in the last two days, but actually in the last six months, trying to reach out to third parties, understand their concerns.

For example, I know one of the opening statements mentioned the issue of flexibility and timing of releases of water because of the potential for temperature impacts, because there are Fall Run programs on the tributaries. And obviously one of the goals of this settlement is to rebuild and strengthen the Fall Run population. So we all have a shared interest in that.

As a result of those discussions—and many of these were way before the June 30 conclusion of the settlement, these were in the springtime—we went back and we collectively—the Friant parties, the environmental parties, and the government—redid our hydrograph exhibit, the Exhibit B, and created new flexibility in the settlement, so that we could adjust the release of water out of Friant to accomplish both the restoration goal of the settlement, and also meet the concerns, the temperature issues for example, downstream.

I am sorry for the long example, but that was one where we really spent a lot of time trying to understand the concern of the third parties.

Mr. PELTIER. If I could, for just a second, address the water quality issue and make sure the record is clear. I think from the perspective of reclamation, we are uncertain as to the water quality benefits that would be associated. Certainly intuitively we know more freshwater in a river is good.

However, there are many factors that affect water quality in San Joaquin River. There are many players, there are many diversions, there are many, many things that affect us.

One thing I can guarantee and assure the Committee of is that we will continue to meet the standards, the water quality standards established by the State Water Resource Control Board. We are going to have a fight over those standards because we believe that the State Board has looked too narrowly at the state and Federal projects to meet those standards. But we will go forward, and that will be a continued area of tug-of-war.

On the question of third-party impacts, I think we made great progress yesterday in addressing some of the real estate, the landowner, property owner adjacent to the river concerns. And I think the direction we are heading is before we get—we have a lot more planning to do, and a lot more determinations to make, about how exactly kind of the lower stretch of the river is going to be managed and look. And that will possibly entail, depending on where we go, us coming back to Congress and having a more complete hearing and further public involvement at the Congressional level on that matter.

There are other issues related to endangered species downstream that continue to be sensitive. Certainly the reality of bringing the Spring Run Salmon into a system where it has been eliminated for many years has, you can imagine the collateral concerns that that raises.

But we don't want to lose sight of the reality that this is, but for the settlement, these fish would not be there at all. They would not exist. So it is the settlement that creates an opportunity, and it also creates a challenge for us as to how we make sure that opportunity remains a positive for the people on the San Joaquin River and in the Delta. Thank you.

Mr. POMBO. So was that a yes? Sounded like it.

[Laughter.]

Mr. PELTIER. Indeed.

Mr. POMBO. Just making sure.

Mr. CHRISMAN. From a state perspective, quite frankly, and Mr. Candee and others have indicated the fact that third-party impacts, the fact that we didn't want third-party impacts out of the settlement, it was recognized in the stipulation agreement.

From a state perspective, I mean, we strongly support the restoration, obviously this river and the reintroduction of the salmon. We also need to make sure that we take measures that don't adversely impact water used from the Delta and other impacts on the Delta.

So, quite frankly, this is going to be a big challenge. And we hear, quite frankly, our folks were involved, Lester Snow, our Director of Water Resource, Nancy Saraceno and John McKalein were involved in the conversations here yesterday with Senator Feinstein. It sounds like we are making good progress, but it is something we are going to have to spend a lot of time on.

We at the state level are committed to working with everybody to make sure that we live up to the commitments in that stipulation agreement.

Mr. POMBO. Thank you. You are going to have to do it anyway, so it is all right. Assemblywoman?

Ms. NAPOLITANO. I don't have much to add to what has been said. I think the point is that the intent of the agreement is not to harm others, but to look at the positive. And there are probably positive third-party impacts that will result from this. It takes a leap of faith at this point, but I do believe that what you have heard is indication of how this will move forward.

Mr. POMBO. I believe that you are correct, that there are positive aspects on third parties, and that will be taken into consideration. But I think all of us, as well as you, have had concerns raised by

people who were not party to the settlement not part of the negotiations, that have very serious concerns about the impact on them.

I think the easiest thing to do when you are negotiating in reaching a settlement is to have somebody else pay for it, or have somebody else hurt by it who is not in the room. And we just want to make sure that doesn't happen in this case.

Yes, ma'am.

Ms. WOLK. May I just respond to that? I agree with you, Congressman.

I think one of the important things in that case and for the future is to ensure that there is some kind of process whereby these impacts can be addressed. And my understanding is that the proposal, that the settlement also encourages a restoration administrator, and all parties, the major parties are at the table.

And I think that if you provide that kind of mechanism for resolution of issues that come up in the future, that goes a long way toward solving these problems.

Mr. POMBO. Thank you. Thank you, Mr. Chairman.

Mr. RADANOVICH. Thank you, Mr. Chairman. Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman. I am heartened and relieved to hear that everyone agrees that third parties should not be impacted. Yet the agreement does not provide ESA protections to the tributary agencies or the Delta exporters currently, as it is currently written in the agreement. We have had negotiations, we are making progress on that.

My question to Secretary Chrisman is, do you support language to protect the tributary agencies and the Delta exporters on the question of ESA protections?

Mr. CHRISMAN. We are going to have to get to that. I mean, at the end of the day, part of the stipulation agreement, no adverse impact to third parties, obviously an integral part of that is the work that we are doing in the Delta. An integral part of that is the ESA protection. We understand that conversations and negotiations are ongoing right now. We want to be a party to that, because we have, again, there is a Federal law, there is a state law in ESA that we have to match. And so at the end of the day, we are going to want to be a party to those conversations, and ultimately a part of the solutions.

Mr. CARDOZA. Mr. Upton?

Mr. UPTON. Yes, sir.

Mr. CARDOZA. Same question.

Mr. UPTON. Yes, well, we have had this discussion with the tribs for quite a while. They brought this up early and often, and I think they have a legitimate point, that they did not want to put their constituents at risk for huge water losses or huge financial considerations because of the inadvertent introduction into their system of a spring run.

So we support the language to make sure that they are taken care of. And I think we are pretty close on getting that language.

Mr. CARDOZA. Mr. Candee, would you like to answer the same question?

Mr. CANDEE. Yes. As I think you know, Congressman Cardoza, as a result of the meetings and the comments we have received from third parties on this issue, the settlings parties went back and

actually modified the settlement after it had been negotiated to add two sentences with an explicit acknowledgment that all of the parties, including the National Marine Fisheries Service+, which of course has regulatory authority over the Spring Run Salmon, anticipate that take protection would be provided for the population that is reintroduced.

So the National Marine Fisheries Service also prepared a briefing memo for the third parties which laid out that there are actually multiple ways to provide those protections. They have a lot of discretionary authority.

So as you know, we all talked a lot about this recently, and there has been, I think, a lot of effort, collective effort to try to understand what the problems are and how to deal with them.

Mr. CARDOZA. You know, I concur with you, Mr. Candee, that we have had those discussions. I commend all the parties, including yourselves, for trying to get together.

This is one of those cases where, because the law can get you into so much trouble and it can be litigated in the future, we have to be very careful on how we craft this legislation, both from your perspective and from ours, to make sure that we all understand what we are doing, and we understand the impacts on the third parties. Including the Delta, where all of the different species comes together, and protecting one may impact another. And that is why we are having these detailed conversations.

Mr. CANDEE. Absolutely. And I think, you know, if my colleague and member of our coalition, Zeke Grader, was here on behalf of the commercial fishermen, he would point out that there was a very, very big third-party impact a few decades ago that was caused by the beginning of the Friant Division and the operation of the Friant Division. And one of the goals, of course, of the settlement is to try to undo some of that damage.

And obviously we are not going to turn back the clock and bring back the historic run at the same levels, but we have, I think, laid out a program here to bring back spring run, reintroduce spring run. I think we need to be very careful about how we manage this issue, because we want to make sure that if we are going to work upstream to rebuild spring run, we don't want to then do something inadvertently in the Delta that hurts that population.

Mr. CARDOZA. Let me stop you there, because I have two more questions, and I think we understand.

Mr. CANDEE. Yes, OK.

Mr. CARDOZA. The point is, however, that there are also potential third-party impacts to the exporters, to others who have pumps in the Delta. And so when we talk about no third-party impacts, we still have work to do in this area to get to the goal that we all have of protecting the third parties, and protecting the other species.

If I could go to Jason. Mr. Peltier, I understand that significant progress has been made regarding Reach 4B. What assurances can you give me and the Committee that the impact of the flows will be mitigated before a substantial quantity of water is released? And what assurances can you give that sufficient funding is available for these impacts if, as the Committee knows, in Reach 4B the channel in some places exists only on maps, and doesn't exist any

longer in reality, and it cannot handle the expected flows. So I would put that question to you, sir.

Mr. PELTIER. I can give you little firm assurance that that mitigation would be put in place today, simply because I don't think the settlement that we have negotiated in the draft legislation that we have put together goes as far as the discussions that have been going on subsequent to our coming to closure.

If those subsequent discussions and progress in the legislation we are focusing on this topic, that, you know, at some subsequent point we testify, if that language is what is before us, then that is when we will be able to comment on it. But today we are limited.

But I can assure you that the desire and, you know, the motivation and the staying at the table on the part of the Administration will last on and on into the future.

Mr. CARDOZA. Thank you. Mr. Chair, I know I have the red light, but I do have two additional questions. I would like a second round.

Mr. RADANOVICH. Oh, you will definitely get a second round. You can go as long as you want.

Mr. CARDOZA. Yes, that is what I am—

Mr. RADANOVICH. Yes, we won't finish before we go to vote. We do have a vote call on, but I think we can get Mr. Nunes's questions in. Then we will break and vote. It will be about a half hour, it is about three votes. So we will be back as soon as we can.

Thank you, Mr. Cardoza. Mr. Nunes.

Mr. NUNES. Thank you, Mr. Radanovich. Mr. Candee, typically the way that Congress has worked on, when we enact legislation we typically will do a feasibility study, followed by an authorization, followed by an appropriation.

This, what you are asking us to do is all of that at once, do you agree?

Mr. CANDEE. Well, let me get—

Mr. NUNES. And not just you, you and Friant.

Mr. CANDEE. I was going to say when Kole Upton and I were finished last October or November, there was no proposed legislation. The Federal government is the implementing agency, and it is the Federal government that needs, in the first instance, needs the permission and the authority from Congress to do the complete array of actions under the settlement. And of course, in terms of funding, you need to provide the authorization.

So I think we understand, and I think Mr. Peltier discussed this in his testimony, that unlike a project that just is developed on its own, this is an attempt to settle litigation. It is much more like an Indian water rights settlement in that sense.

Mr. NUNES. But, I mean, Congress did decide to dry up the river. And you are essentially asking us to pass legislation that does a feasibility study, authorizes and appropriates all at one time. That is what the settlement does.

And so my question to you is, you know, how is this any different than water storage projects, just for example, or water banking projects for example? Should we do those projects the same way we are doing this?

Mr. CANDEE. There are many parts to your question. First of all, I don't agree with the premise that Congress had no interest in

downstream releases when they authorized Friant Dam. After all, one of the authorizing purposes of Friant Dam was to help with salinity intrusion in the Delta. That assumes a connection between releases from Friant and the Delta.

Second, I think in terms of the—

Mr. NUNES. I mean, this question specifically is to the fact that you have come to us, you and Friant—and I will give Mr. Upton his chance to speak, also—have come to us and asked us to enact legislation that does all this at one time. And I mean, we haven't done any feasibility studies. We don't know what could happen, for example, if we put water down this section of 4B, just as an example, or water right by Fresno. We don't know what is going to happen on a whole host of areas, what could happen. And that is typically why the Congress asks for feasibility studies before we enact any type of authorization or appropriation.

Mr. CANDEE. There are two very important differences, I think, between the model you are talking about and what you have before you here.

First of all, as Exhibit C to the settlement and a number of provisions to the settlement indicate, the very first thing that is done is a number of studies answering exactly those questions. And to develop those answers, in some cases we haven't even made the choice yet as to do we go this way or go that way.

And second, there is no request for immediate new appropriations. This is an authorizing bill, it is not an appropriations bill.

Mr. NUNES. Well, I mean, you are authorizing the use of restoration fund money.

Mr. CANDEE. Absolutely, yes.

Mr. NUNES. And you are changing the payment structure. I think the appropriators would have a differing opinion of you, the Members of Congress here in Washington.

Mr. CANDEE. I understand that point, and I think that is in some ways one of the advantages of this settlement. Not only do we have the State of California that has already put a bond, a ballot initiative on to provide $100 million up front, but we also have I think a fairly creative proposal from OMB and Interior and the Friant water users to try to make some of the payments from the farmers in California available for this program, without going to the appropriators for new funding.

But I guess the point I am trying to make is if we are able to give Interior the approval it needs to fully implement the settlement, and I agree with—

Mr. NUNES. Well, yes, I mean, you are asking us to authorize and appropriate money to enact the settlement. I understand, that is what you are asking. And so my question is, why in the past when we have talked about other projects, storage projects, offstream storage water projects, typically your organization has opposed those efforts.

And I do want to follow up, you know, just with one part of your testimony. You talked about the restoration flows improving water quality in the Delta. However, it is my understanding that most of the time, during that time when the water will be released to the Delta, we don't have a water quality problem during that time period.

Mr. CANDEE. Well, there are flows year around, and there are different amounts. And obviously there is a higher flow than—

Mr. NUNES. But during that time period we don't have a water quality problem. So I mean, therefore your statement in your testimony is not really correct.

Mr. CANDEE. No, actually, as I think Assemblywoman Wolk pointed out, one of the big problems that we have in the Delta is the uncertainty. A lot of people assume that hey, if you move—

Mr. NUNES. Right, but when you are going to release the water under this agreement, it is going to go down the river into the Delta at a time where there is not a water quality problem.

Mr. CANDEE. There will be water released year around. It is true that there are larger pulse flows in certain periods, and we believe there will be a water quality benefit both part of the way downstream and in the Delta.

But you know, I want to get back to—

Mr. NUNES. I think, Mr. Candee, I know that we have a vote. And I know, Mr. Chairman, I think we are going to have to go before the rest of it. I look forward to hearing that response when I get back.

Mr. CANDEE. Thank you.

Mr. RADANOVICH. All right. Thank you, Mr. Nunes. And again, we will go into recess to vote. It will be about 30 minutes. If all Members can come back quickly so that you can get your questions in to the first panel, it would be much appreciated. And we will now recess.

[Recess.]

Mr. RADANOVICH. We are back in session, and we will start a new round of questions.

I do want to get into some of the issues of the third party, on the 4B Reach funding. And this is a question for the whole panel.

It is important that this settlement be funded from the beginning, but we have to be realistic about how we fund this and what we fund. One of the funding issues is restoring the Reach 4B for basin pulse flows. It appears that no one knows how much this will cost. So doesn't it make sense to do the study, so that we know what we are getting into before we authorize a big-ticket item that, frankly, may never work?

I guess my question is, does it make sense that before we get into the issue of 4B, that we do the studies before we do the funding of it? And that is for anybody on the panel.

Mr. UPTON. Well, from Friant's perspective, yes, that makes a lot of sense to us.

Mr. RADANOVICH. OK.

Mr. CANDEE. Mr. Chairman, the folks in that region have raised that question. And as the Chairman knows, the settlement contemplates two different stages, two phases of the work on Reach 4B.

The big jump is from 475 cfs of a base flow amount to 4500 cfs for the full pulse flows. And the settling parties decided to put that second phase off. It is one of the last physical improvements to be completed under the schedule, and it assumes a lot of study to be done before that choice is made.

So the settlement explicitly contemplates the Interior Department making a subsequent decision after the studies are completed.

Mr. RADANOVICH. All right, thank you. Next question is for either Secretary Chrisman or both, and Jason Peltier. Could the settlement affect the state and Federal pumping operations in the Delta without ESA protections?

Mr. CHRISMAN. That is a hard one right now. I mean, it is again something we are going to have to work through. It could very well. But at the end of the day we are going to have to, in the context of the settlement we are going to have to figure out how to make it work.

So it is something that we are going to have to really drill down on and look at. And we are not there yet.

Mr. RADANOVICH. OK.

Mr. PELTIER. When you say could it, I would say yes, it could. The specter is there. We will have new fish, new listed fish showing more of the—you know, spring run are doing good in the Sacramento Valley. If we are successful we will see them entering the Delta from the San Joaquin River. And the answer is yes, it could.

I think the next question is, so how do we deal with that. We were working on language yesterday, and this is really the domain of National Marine Fisheries Service, who has the regulatory tiller here. And they were working yesterday with us trying to craft language which would describe how they might use some of their regulatory tools in the context of Delta operations. I would say that is an open, you know, we have not reached closure on that; there is uncertainty there. But I think it could well be one of the critical issues to whether we reach closure or not, is just how does Congress describe those tools and their use going into the future.

Mr. RADANOVICH. Thank you. I now recognize Mr. Costa for his first round of questions.

Mr. COSTA. Thank you very much, Mr. Chairman. As we have discussed this morning and now into the afternoon, the concerns that we have all raised with regards to third parties, a lot of that focus has been with folks that are on the parts of the river that, as you see the map, that affect the tributaries that go to the Delta.

But there are other third parties that are impacted that were not mentioned here today, and I represent part of them. And they go further south of Fresno, and the map doesn't go that far, unfortunately. But I am talking about those in Kern County that also are part of this direct and indirect impacts.

Mr. Peltier, do you believe that the flows that are going to be required, the pulse flows, will impact the availability of what is referred to as 215 water that is contracted by the Kern County Water Agency and others?

Mr. PELTIER. Yes.

Mr. COSTA. You do. Who are the other parties that could be impacted? Can you name beyond the Kern County Water Agency?

Mr. PELTIER. Well, to the extent that—and I couldn't begin to quantify or—

Mr. COSTA. No, I understand.

Mr. PELTIER.—put it in a magnitude sense. But I would say in the larger sense, the entire operation of the unit is going to be

altered in some fashion to accomplish the settlement. And I think the tools that the Friant Division contractors have sought in the settlement agreement are tools to allow a positive kind of, I don't want to use the term reoperation, but modification of the way that the system operates.

There will be more water going down the river. There will be less water going down canals at times. And yet we have some tools to make sure that—

Mr. COSTA. Yes, I understand. Let us quantify that. I have some other questions I want to ask.

The amount that I have heard as far as the Kern County Water Agency is 90,000 acre-feet that they have been able to purchase under 215, and that they believe it could be cut back down to 40,000 acre-feet, which would be a loss of 50,000 acre-feet for them on a regular basis. Do you believe those numbers are correct?

Mr. PELTIER. I don't have the analysis to—

Mr. COSTA. Well, for the record let us submit at this point, unless someone testifies with other information, that it is a loss of 50,000 acre-feet of water.

Mr. CANDEE. Congressman Costa, this is Hal Candee. Can I take a stab at that question? Because I know that the issue has come up. The question is, as compared to what?

My understanding is that all of the Friant contracts give them a first right to 215 water. And so if there is a court order to release water from Friant Dam, my understanding is that they would most likely exercise that right to take that 215 water. So I guess the question is, are you comparing what Kern County might have gotten in a windfall in—

Mr. COSTA. No, I am not talking about a windfall. They believe that they contract, they have been able to purchase up to 90,000 acre-feet of water on an average basis.

Mr. CANDEE. When there is no flow release requirement.

Mr. COSTA. Right. And they believe that that is going to be cut back to allow them maybe 50,000 acre-feet or less.

I have other questions, and I am going to get to you, Mr. Candee, so hold on a second, OK?

Mr. Chrisman, does the state plan, under the settlement agreement, to do any analysis to try to ensure that there are no impacts?

Mr. CHRISMAN. Absolutely. I mean, we have committed to that up front, and again with our—

Mr. COSTA. And you have set aside money for that purpose?

Mr. CHRISMAN. If we haven't, we will, let me say that. I can't tell you whether we have set aside money for that purpose yet or not.

Mr. COSTA. Will you include in that analysis whether or not there will be any impact on the state water project?

Mr. CHRISMAN. Absolutely.

Mr. COSTA. OK. Mr. Candee, it was spoken of earlier about the benefits of the agreement, and I agree there are numerous benefits. And that is why we are hopeful that this restoration effort will be implemented, and that we will be able to pass enabling legislation.

But I also want to ask you whether you believe, in the event—and it has been part of the discussion as of yesterday on third-party impacts—as to whether or not the Delta is included when we

are talking about fisheries, and if, in fact, the fishery count is included in the Delta area in terms of the spring run.

Do you believe that this could impact the pumps, the state pumps, in terms of the exporters of water not just to the Central Valley, but result in a loss of water to possibly Southern California, which would be obviously the metropolitan district that gets up to 700,000 acre-feet of water depending upon the year from their supply as a state water contractor.

Mr. CANDEE. Several points. First of all, I think all of the parties made clear we do not intend or anticipate material adverse impacts. Second, there will be benefits in the Delta when—

Mr. COSTA. No, we have established the benefits.

Mr. CANDEE. Right.

Mr. COSTA. I am asking you the question, if spring run were included to the area of the Delta as it relates to the pumping regime, do you believe, in fact, that that could negatively impact the ability of exporting water south of the Delta for those who have established contracts as state water contractors?

Mr. CANDEE. And I think the answer is the National Marine Fisheries Service and others do not know the answer to that, because they have already—

Mr. COSTA. But it could.

Mr. CANDEE. Well, they have the regulatory tools to avoid that. So for example, the consultation on that question, salmon impacts in the Delta, is currently reopened, and they are reconsidering what the protections are. So they have the flexibility. So I think—

Mr. COSTA. They have the flexibility, but they also—we know the contentious nature of water debate in California. And we know the pressures that are placed on it. And the fact is that the pumping regime has been hotly debated. The notion of increasing the pumping capacity is opposed by you and many other folks under the Harvey Banks approach.

So the answer to the question—I mean, you may artfully choose to answer any way you want. But the fact of the matter is yes, this could, if the salmon spring run are included in the Delta, could potentially impact the pumping regime on the state project.

Mr. CANDEE. Now, it is interesting. We had so many meetings with all the third parties, including the people within the San Luis Authority who receive exports. There was a specific ask for the take protection, for example on the tributaries and upstream. There was a recognition—this was made very clear to us by some representatives of those third parties—that when you get into the Delta things get more complicated.

Mr. COSTA. Correct.

Mr. CANDEE. Because the whole theory about the experimental population.

But in terms of understanding how the existing take limits work and what the timing will be, I don't think the studies have been done yet to demonstrate that there is a risk there. We have, nevertheless, been working, as you know, yesterday we—

Mr. COSTA. But if the studies did conclude that there is a risk, then it could impact them.

Mr. CANDEE. Yes, the theoretical possibility that over 20 years—

Mr. RADANOVICH. The gentleman's time is up. If you want to finish, quickly finish.

Mr. CANDEE. Anyway, I am not sure where we are going to go, because there is theoretically, there is a potential—

Mr. COSTA. No, but this is a risk we are all taking, and it is the reason that we have to provide these predictions. And why, in my opinion, we cannot be having any degree of ambiguity that would create doubt in people's minds as to these third-party impact.

Mr. RADANOVICH. The gentleman's time is up. Mr. Nunes, you go ahead. You are recognized.

Mr. NUNES. Oh, well, thank you. Mr. Candee, I want to follow up on, I didn't understand your answer to Mr. Costa's question involving the 215 water with Kern County Water Agency. And I also have some information about the other dialogue we were having before.

OK, but can we clarify that first? You said that they will lose their 215 water under this agreement?

Mr. CANDEE. No, I am not saying—again, I don't think people know. Part of it depends on, as you know, 215 water is sporadic, and it is sometimes available in very large amounts. I assume Mr. Upton would know better than any of us about how to adjust this question.

But my understanding, we have talked about this during the settlement process, is right now the Bureau of Reclamation, nobody has an entitlement to 215 in terms of a guarantee of when the water is available, except that the Friant water users do have in their contract—

Mr. NUNES. But the question that Mr. Costa asked specifically on the 50,000 acre-feet of water annually that they would lose, is that true?

Mr. CANDEE. What I was trying to get at is it is hard to say that they are losing 215 water under the settlement. It depends on what you are comparing it to.

First of all, I don't think people know. But the second thing is that if the alternative is a court order requiring more flows to be released from the dam, and Friant has the option of taking all of the 215 water itself, it could be that they would lose more by not settling. That is the point I was trying—

Mr. NUNES. So we are back to the point of if Congress doesn't act, the judge will.

Mr. CANDEE. No, no. The settlement goes into effect when the settlement is approved by the Court.

Mr. NUNES. You just said, though, if we don't—

Mr. CANDEE. If we don't settle. I said if we don't settle.

Mr. NUNES. Then the judge will rule.

Mr. CANDEE. Well, I mean, nobody can predict what a court is going to do. But I think the theory that—

Mr. NUNES. You are basically saying Kern County would lose more if the judge ruled, so you better do the settlement. That is what you said.

Mr. CANDEE. Mr. Nunes, your constituents have spent the last year working with NRDC and the Federal government trying to come up with a fair package settlement to avoid litigating the issue. Nobody knows exactly what the Court is going to do. But I

think when Chairman Radanovich and Senator Feinstein approached us, they said try to come up with a program that works for both sides. And we did.

In terms of the 215 water—and I have talked to the Bureau of Reclamation about this for many, many years—they have always told me if it ever turns out that we have to release water from Friant Dam, the first thing we would do is try to avoid impacts to the long-term contractors. So if there were a way we could use surplus flows, flood flows, or 215 flows, we, the Bureau—

Mr. NUNES. I understand. But, I mean, you did make that point, though, that if we don't do this, that the judge would rule, and Kern County would lose more water.

Mr. CANDEE. No, no. I mean, I know that Kole Upton said that in his opening statement.

Mr. NUNES. Can I go to another question?

Mr. CANDEE. Please.

Mr. NUNES. In regards to the salmon, to date, has anyone submitted documentation concerning the probability that the effort to reintroduce Spring Run Salmon will succeed?

Mr. CANDEE. Yes. That was the subject of enormous amount of expert testimony in preparation for the trial. There were depositions, there were reports on both sides. And you know, I think that material is available; we can make it available if you don't already have it.

By the way, I wanted to mention I do have the site for that, you were asking about whether there was any precedent for the Federal government asking for legislation—

Mr. NUNES. Yes, but let us finish this question on the fish first. So have you estimated the number of salmon that would be returned? Would the documentation that you said has been submitted?

Mr. CANDEE. Yes, I think there is some discussion there. But in the settlement, I think all of the parties felt that they didn't want to get into a lot of the numbers at this point, and instead we have created a process where the state fish agencies—

Mr. NUNES. But do you have a specific number of how many fish? I mean, will it be three fish? Five million fish?

Mr. CANDEE. The settlement is explicitly silent on that subject.

Mr. NUNES. But I mean, it is the job of the Congress to understand. I mean, you are asking us to spend $800 million, which probably means $2 billion, to restore salmon on the river. That is what you are basically asking us to do.

So I mean, I think it is our job and our duty to understand how many fish are going to be returned. Do we have any sense of what would happen if you put the water down the river, you reintroduced the salmon? How many salmon are we going to get? What is a reasonable expectation?

You know, it has been reported you—numerous newspapers have come out now, and they have editorialized about how wonderful it is going to be to be poaching salmon on the San Joaquin River again. But is that a reasonable expectation?

Mr. CANDEE. The goal of the effort in the San Joaquin, like the goal of the efforts that many water users are working on actively with the Bureau of Reclamation and the State of California and

Sacramento Valley, is to rebuild the Spring Run population as much as we can. And they are having, as Jason stated earlier, they are having some success. The numbers are up.

Mr. NUNES. Well, maybe Jason can tell us. Jason, or Mr. Peltier, do you know how many fish are going to be restored to this river? Is there any documentation?

Mr. PELTIER. I guess I am with Hal; I can't answer that question at this point. There are studies and hopes and expectations. But do we have—

Mr. NUNES. But you are asking us to pre-authorize and appropriate $800 million to bring back fish that we don't know will be back, for sure.

Mr. UPTON. Yes. And I would go further and say that between the Federal and state governments and local interests, over the last decade we have spent $1 billion on fishery improvements in the Sacramento Valley. We have seen response in the populations.

But when you ask a biologist what is the population-level effect of this $80 million fish screen, they will say I can't tell you. Even though the fish are right there, and it is real time as opposed to us looking ahead 20 years on the San Joaquin.

So it is a very, very difficult world in terms of tracing cause and effect between investment and result on fish populations.

Mr. RADANOVICH. The gentleman's time has expired.

Mr. NUNES. Thank you, Mr. Peltier. Thank you, Mr. Chairman.

Mr. RADANOVICH. You bet. Mr. Cardoza.

Mr. CARDOZA. Thank you, Mr. Chairman. I want to reiterate that I am in support of trying to do this, as we have set out to do. Because I think there are some tremendous benefits.

I think it is important, though, that the public go in, as I said in our meeting yesterday in Senator Feinstein's office, with our eyes wide open. And we know all the impacts and ramifications, the positives and the negatives. And I think it is really important that the public not get oversold on the impacts.

You know, much has been said about the potential water quality benefits of this settlement. But we really don't know, because the pulse flows will happen at times that don't really benefit, from my understanding, the Delta. I mean, all water, all freshwater, you would think, would be beneficial. But the reality is that if you send it down certain parts of Reach 4B, we could actually end up leaching salt into the river that is currently buried a little deeper, because the water table in certain parts of Reach 4B is so shallow that it may actually provide the wick to wick up salt, and send additional salt down the river, if the flows are not sufficient to dilute it. And you could actually see a degradation of water quality at certain times of the year.

That is my question. Jason, Mr. Peltier, and Secretary Chrisman, is that not your understanding as well? That we need to study this and find out exactly what will happen before we send water down certain stretches of the river.

Mr. CHRISMAN. From a state perspective, yes. We really haven't done any studies at all yet on what additional flows down the San Joaquin will do to water quality, so we are just going to have to study it to determine it.

Mr. PELTIER. I would concur. And I think you are correct that there are many issues. We could talk about temperature benefits and temperature downsides. We can talk about accretion/depletion. There are a bunch of factors.

And that is exactly why, certainly in the discussions yesterday and the discussions for months now, we have recognized, and the settling parties recognize the magnitude of uncertainty with that reach, and have kind of pushed off and said until we know more, we can't make decisions.

Mr. CANDEE. Congressman Cardoza, actually in August of 2004 the Bureau of Reclamation did a study, sort of a pilot recirculation study, where they released Delta water down into the river, and found that there actually was a significant improvement in salinity.

Also, everybody needs to remember there is a provision for buffer flows. And so the flow regime that is in the hydrographs can be augmented at different times of the year.

There are also different kinds of water quality issues. There is a Stockton DO problem, there are obviously fishery issues that are covered by some of the water quality hearings and orders out of the State Water Board.

So I think it is more complex than just taking one point in the Delta and looking at the hydrographs, and trying to match up.

Mr. CARDOZA. You are absolutely right, and I concur with that. By the way, the dissolved oxygen questions were significantly benefitted this summer by the aerators. Don't know if that will always happen. But the point is that we can do good things in the Delta.

Mr. PELTIER. I am not sure, I don't know the details of the recirculation study that was done by Reclamation. But I am 99 percent sure none of that recirculation occurred in Reach 4B.

Mr. CARDOZA. Well, that was my next question, so I am glad you point that out.

Mr. PELTIER. So what the geology is and what the salt load is, you are exactly right, we have unknowns to discover, to find answers to.

Mr. CARDOZA. The point that I want to make is we all want to do this. But the skepticism you are hearing from some of us is that we want to make sure that the agreement that we, in fact, pass from this Congress does not do what we have all stated here that we don't want to have happen. We don't want those third-party impacts. Everyone on the panel said that.

It is our job to make sure that the legislation we craft adds another layer of protection, beyond what the settling parties have done, to make sure that, in effect, we don't harm the environment, because there is that potential. And let us all understand that when we don't know everything that is going to happen, we don't know everything that is going to happen.

And we just have to make sure that none of us are voting for something that ends up like a Kesterson, where we intended a drain that was going to solve a lot of problems in the Valley and a lot of problems for the State of California; and in fact, we almost had an ecological disaster there. So that is what I am trying to avoid.

Mr. RADANOVICH. Thank you, Mr. Cardoza. Mr. Costa.

Mr. COSTA. Thank you very much. Mr. Chrisman, one question I am not sure I got a clear answer on. Is it the intent, for the record, that any of the costs to this settlement agreement be shared by the State Water Contractors?

Mr. CHRISMAN. You know, I can't answer that right now. Just for the record also, I mean, we have significant dollars, as has been pointed out by—

Mr. COSTA. No, I understand the bond measure. I am supportive of Prop 84. I am trying to do all the right things.

Mr. CHRISMAN. But I don't know the answer to that question yet.

Mr. COSTA. OK. Well, I think it is important that we get a clarification.

Mr. CHRISMAN. Sure, you will.

Mr. COSTA. Because thus far the money that I know that has been identified for the settlement agreement from the state has been out of the bond measure.

Mr. CHRISMAN. Yes, sir.

Mr. COSTA. And if, in fact, it is being contemplated that state contractors have to share some of these costs, then they need to know it.

Mr. CHRISMAN. Yes.

Mr. PELTIER. If I could answer that. I have not heard any discussion or any contemplation that the state contractors would incur any costs.

However, there may be scenarios in the future where they derive benefits from this restoration program and reoperation of the system, to some extent. I would say, you know, if benefits are derived, then they should, you know, I mean they would have a call. Do they want the benefits? And if they want benefits, then there is a cost that goes with them at times.

Mr. COSTA. Well, that relates to me another question, because I think there are potentially, as we have all stated, benefits, Mr. Peltier. But will the recirculation efforts that are being contemplated under the agreement that have benefits also potentially take water away from state contractors? I mean, how well have you figured that part out?

Mr. PELTIER. That is not, I would say, well defined. However, I can't imagine a—

Mr. COSTA. It is not the intent.

Mr. PELTIER. Yes. I can't imagine going into the development of a recirculation plan where one of the first principles is we are not going to jump ahead of anybody's existing need or use. And the principle would be we are looking for where there is surplus capacity to use.

Mr. COSTA. Let me, final question to you, Mr. Peltier, since you probably have a larger breadth of knowledge of western states' efforts and various agreements, whether they be Indian settlements or other efforts that have taken place on the Columbia. Certainly you and I have worked together over the years; I know you are very well versed in terms of California water challenges that we have worked on.

The parties to the agreement have a high and a low number in terms of the costs of the settlement: $250 million on the low end and $800 million at the high end. And obviously the studies will

make it clear. And of course, whether or not we are spending these monies today or whether we are talking about spending these monies, vis-a-vis inflation, for 2015 or 2020 makes a big difference, I think.

Having said that, if I gave you $800 million today and said I want to restore fisheries in western states, Mr. Peltier, tell me where you could take that $800 million and get the best bang for your buck in restoration of salmon fisheries? Off the top of your head. Whether it be in California or on the Columbia. Is this the best place that we have a chance to restore Chinook salmon?

Mr. PELTIER. I don't have a snappy answer to that question.

Mr. COSTA. It didn't have to be a snappy answer.

[Laughter.]

Mr. PELTIER. It could be a thoughtful answer?

Mr. COSTA. It could be a thoughtful answer.

[Laughter.]

Mr. PELTIER. Oh. You know, there is a lot of money being spent in a lot of places, and the Columbia is a great example. There is a lot of money being spent.

Mr. COSTA. Over billions of dollars.

Mr. PELTIER. Yes. And we have spent a lot in California. And my earlier comment about—

Mr. COSTA. Let us keep it local. The Red Bluff diversion effort that has been successful. What could $800 million do there?

Mr. PELTIER. Eliminate any fraction of a barrier that remains in undercurrent operations.

Mr. COSTA. And how much more fish would be produced as a result of that?

Mr. PELTIER. I can't answer that. I don't know the—

Mr. COSTA. A lot more?

Mr. PELTIER. No, I can't answer that. Because I don't know the increment of—

Mr. COSTA. I think it is an interesting question to ask. Because what we are talking about here I think, and the point I am trying to make, is the restoration effort and the agreement is more than just about restoring salmon, which is, everyone acknowledging the goal, but no one knows with certainty that we will be able to do that.

Mr. PELTIER. Right.

Mr. COSTA. And if simply we are talking about restoring native salmon to California or elsewhere, we know we could put money in other areas with more certainty in terms of results.

Mr. PELTIER. And I think it is really important to keep in mind that this is about a lot more than salmon. It is about repairing a corridor, it is about recreation, it is about communities looking out their back door and seeing a flowing river. It is about migratory songbirds, it is about a lot of things.

Mr. COSTA. Thank you.

Mr. RADANOVICH. Thank you, Mr. Costa. I am going to ask one question, which I hope will be the last question of this panel, because it is two and a half hours into this hearing and we do have a second panel to hear from.

But I did want to ask this question of Mr. Upton, Mr. Peltier, and Mr. Candee. Over the past 24 hours or so you have been

working with third parties and others to address concerns relating to Reach 4B and also some remaining ESA issues.

My understanding is that you have reached agreement regarding Reach 4B, and that you are still working on some ESA-related issues.

What I want to hear from each of the three of you is that you are committed to resolving these matters very shortly, hopefully within the next couple days.

Mr. UPTON. Yes, Friant has definitely committed to that, Congressman. And let me say that our view in Friant is we are not coming to you and demanding that you approve this settlement or anything like that. What we are doing is we are looking for leadership. We are saying this is our settlement; you have the broader perspective from society in general, so you have to look at it from that perspective. And help us to make this settlement so that it addresses all of society's concerns so that we can move forward.

Mr. RADANOVICH. Thank you.

Mr. CANDEE. Yes, Mr. Chairman. We have invested a lot of time already, and as you indicated, I think we have made great progress on 4B. The ESA issues are obviously more complicated and more difficult, and there is a broader array of interest in the U.S. Senate, for example in California.

We are committed to continue that process. I am not sure Senator Feinstein has given us an option not to.

Mr. RADANOVICH. Good.

Mr. CANDEE. But you know, obviously all sides are going to need to realize we are not going to all get everything we want. So it is a complicated one.

Mr. RADANOVICH. Very good. Mr. Peltier.

Mr. PELTIER. Yes, we are committed to work, and are optimistic that the tools exist to accomplish the assurances that folks are looking for. And we are confident that, you know, your part is not so much those tools, but creating the framework for how those tools will be deployed.

And I think the National Marine Fisheries Service is fully engaged there. They have the regulatory lead, and we are very appreciative of their engagement.

Mr. RADANOVICH. All right, thank you. Is there any other questions of this panel?

Mr. CARDOZA. Mr. Chairman, I have one follow-up question.

Mr. RADANOVICH. We need to wrap up, guys. So I will recognize you, Mr. Nunes, and then Mr. Cardoza.

Mr. NUNES. Thank you, Mr. Chairman. Mr. Candee, I know that you can't wait to speak, because you have found a precedent. And now I have done my homework, too, and I have found three precedents. So I am not going to tell you which ones I found, but I want to know if your precedent is one of the three that I have.

Mr. CANDEE. The question is whether we asked the same people. No, I was enjoying the irony that NRDC did not ask for legislation as part of the settlement, and it was really the Federal government who felt they needed to come to you for legislation.

So I did ask and check in with some folks in the Federal government. And one of the most recent examples is the Torres-Martinez settlement agreement where—

Mr. NUNES. I knew you were going to say that one.

Mr. CANDEE. I figured you had already done your homework. I figured you could give me the cite.

Mr. NUNES. And let me tell you that there is a difference between that one, because, you know, it is on Native American lands, dealing with a sovereign nation, so to speak, which is much different than the San Joaquin River and its importance to the State of California and the country as a whole. I mean, I respect—

Mr. CANDEE. I understand the difference, but I am not sure it is so material, so relevant to the question you have asked, which is does the U.S. Government ever enter into settlements where they feel they need Congressional action to provide the authority, and include that as part of the settlement agreement. My understanding is that is exactly what happened in this Coachella Valley-Imperial negotiation, where they felt they needed that authority, and they actually drafted the legislation, and then it was passed. It is part of Public Law 106-568.

So Congress not only has been presented with that situation before, but has approved that situation before. So I know—

Mr. NUNES. It is pretty rare. It is pretty rare, Mr. Candee. And that was a very, very different from this. And that is not to say I am opposed to enacting legislation; I am very supportive of enacting legislation as long as it, you know, keeps water in my district whole, as long as it restores salmon to the river, as long as it repairs parts of the river channel that need to be repaired, and to make sure that there are no third-party impacts anywhere. I am very supportive of, and I hope that we can come to a resolution on this. And I think this committee has a responsibility to do that.

And the Congress, since the Congress was the one that made a decision to dry the river, they should be the ones to rewet the river under the terms of the people by elected representatives.

Which, I have one more question on that.

Mr. RADANOVICH. Quickly.

Mr. NUNES. And the Technical Advisory Board. Why was NRDC provided a spot on this Technical Advisory Board? Because didn't you bring a lawsuit on behalf of the people?

Mr. CANDEE. There are a lot of different seats. The State of California has two seats, the Friant and NRDC parties will jointly select independent people to have some of the seats.

But really, in addition to all of the other public participation and all of the other committees that I am sure the Federal and state government will be setting up, but I guess here is my problem with this. We have the Department of Fish and Game, we have Fish and Game, we have the Bureau of Reclamation, we have the entire, you know, huge government entities that are out there within the government, numerous entities. Why are we creating a new entity, Technical Advisory Board? And why would you have a seat at that table?

Mr. CANDEE. I think it is very straightforward, actually. One of the things that we were presented with in people asking us to sit down at the negotiating table to try to come up with a settlement was go in more slowly. Let us phase this in. Let us not just start turning on the tap. Let us do all this construction work, all this improvement work, and then phase in over time.

And we said look, we have a very strong interest in how that happens. And Friant said the same thing. Friant said we have a very strong interest. And even though we both love the Interior Department very much, we would like to have a role and be able to participate. We have to safeguard our own investment of time and effort in crafting the settlement to make sure it is implemented in a way that we find, you know, successful.

So that is really a way, and it is unique to a settlement, a grievance situation, I think.

Mr. NUNES. So unique that it is borderline unconstitutional. I mean, this is really an area where, you know, that I have a real problem with, in terms of Friant—and I am not just saying this to NRDC. But NRDC and Friant playing government and playing how they are going to create legislation and come up with legislation—

Mr. PELTIER. Could I comment?

Mr. NUNES. Yes, Mr. Peltier.

Mr. PELTIER. We do not anticipate any of the Federal agencies, and I am sure the state would echo this, ceding any of our authority or responsibility.

Mr. NUNES. But don't you already have that responsibility to do all the things that are in this settlement? Within your department and California?

Mr. PELTIER. No, we don't have all the authority to carry out—

Mr. NUNES. I mean, if we enacted legislation to do this, why would you need this Technical Advisory Board?

Mr. PELTIER. Well, it will be a part of the bigger public involvement process. We would imagine the establishment of a Federal advisory committee, a FAC committee, patterned somewhat after the Trinity River Restoration, where we would have the broad suite of agencies and publics involved.

The TAC, as far as the NRDC and Friant, would be in some ways their means of engaging in the broader public process. So there will be no, the restoration administrator or the FAC would not have any authority vested in them from any of the existing agencies.

Mr. NUNES. Thank you, Mr. Peltier. Thank you, Mr. Chairman. My point on this is not that I am against this Technical Advisory Board. I just wanted to know why it is part of the settlement. That is the part, I think the important part of this hearing is making sure that we flush out all these issues, so that we have a good understanding as we move forward on legislation of what we are doing, and why.

Mr. RADANOVICH. Thank you, Mr. Nunes. Mr. Cardoza, you have one last question?

Mr. CARDOZA. Actually I have two now that we have just engaged in this other topic.

I want to say that I support the Technical Advisory Committee. I think it is an important part of this process.

But, Mr. Peltier, don't you think it is also important that the third parties have a seat at that Technical Advisory Committee, since they are so potentially impacted by this process? Mr. Costa and I are asking this question jointly, by the way.

Mr. PELTIER. That is not what is envisioned in the settlement agreement. What is envisioned in the settlement agreement,

however, above and beyond the TAC, the TAC being kind of NRDC and Friant's means of organizing and inputting into this bigger Federal/state combine which would have—that is where the bigger scope of public involvement would occur. And it in no way diminishes that, in no way substitutes for that.

We have a long history of having Federal advisory committees be the locus of activity, whether it is on the Colorado River or the Trinity River or elsewhere.

Mr. CARDOZA. I understand that, Mr. Peltier. And that is my point, that if you are going to have this, and it is going to have impacts, that is going to be the locus of communication, then we should have all the locusts in the room. And that is why I am so committed to having our third-party folks as part of that committee, too. And so that is something that I will pursue with the two Chairs as we move forward with the legislation.

My question. When I asked my first question today with regard to ESA, I got a lot of different nuances to that question. And it was clear to me that everyone committed to ESA protection for the tributaries. But I am also concerned about the ESA protection for the Delta, because we have the Tracy Pumps in the Delta, we have a chondrocostal water district in the Delta. We have a Santa Clara water district in the Delta. We have a number of folks. And I understand the challenge, frankly. Because you have another endangered species to the north that you are trying to protect; they are going to intermingle.

But we have to come to some kind of resolution. And I want everyone to state that they are committed to trying to figure out a resolution, because the problem doesn't stop at the last tributary. And that is a real challenge for us.

So, Mr. Upton, I will let you start with that.

Mr. UPTON. Well, we are committed to that, Congressman. And as I pointed out—

Mr. CARDOZA. The Delta, as well.

Mr. UPTON. I am just a simple farmer, so I can't tell you how you write the language to address that. But hopefully there are some people smart enough to do that, because we are committed to doing it.

Mr. CARDOZA. Thank you.

Mr. CANDEE. Again, as I indicated before, I think the Delta is kind of a unique situation. There already is take protection for listed species in the Delta, so the situation on the tribs is unique because there is no Spring Run situation there. So that is why I think we have all been tackling that first.

But you know, there already are protections, there already are biological opinions in place, whereas on the reintroduction of spring run in the tribs, we are looking at a future biological opinion and a future incidental take statement. In the case of the Delta, we already have existing take protections that are in biological opinions, and they respond to the numbers, et cetera.

So I think it is complicated. But in terms of committing to working with you to see if we can find a way to meet everybody's interests, obviously we would like to do that, and that is what, as you know, we have already been working on.

Mr. CARDOZA. We have, but I just, I needed to get that in the record. Jason, Secretary.

Mr. PELTIER. Yes. And I would say in addition we want to find something, a way to address the concerns, via process and use of existing tools on the river and in the Delta, that has this legislation not coming into the arena of being a National Environmental Species Act lightning rod, where there is some clear Federal exemption or something that would cause people to go overboard, or to go—

Mr. CARDOZA. We know about lightning rods in this committee. We have experienced that. Richard?

[Laughter.]

Mr. PELTIER. My concern is even if we find something that we, in the confidence of a meeting room and with the experts, feel does not prejudice the process, and yet provides the comfort, there are a bunch of religious issues associated with the Delta that go beyond rational discussion. And I, frankly, fear very much that our ability, we might be able to find comfort in a room, but outside the room the answer is going to be no, no matter what. And the response is going to be no, that is unacceptable, we can't go there.

Mr. CARDOZA. That is our challenge. That is our challenge.

Mr. PELTIER. Yes, that is my concern, too.

Mr. RADANOVICH. Thank you, Mr. Cardoza. With that, I want to thank the panel for being here. Your testimony has been very valuable. And you may be dismissed now. We will call up our second panel.

I would like to mention that Ranking Member Napolitano did have four questions that we are going to submit for the record, and leave time available for written responses to, as well.

[Recess.]

Mr. RADANOVICH. If our next panel would be seated. The second panel consists of Mr. Tom Birmingham, the General Manager/General Counsel of the Westlands Water District in Fresno, California; Mr. Allen Short, the General Manager of Modesto Irrigation District and representing the San Joaquin Tributaries Association in Modesto, California; Mr. Ken Robbins, General Counsel of the Merced Irrigation District in Merced, California; Mr. Steve Chedester, the Executive Director of the San Joaquin River Exchange Contractors Water Authority in Los Banos, California; and Ms. Lynn Skinner, the owner of Wolfsen Farms in Los Banos, California.

Ladies and gentlemen, welcome to the Subcommittee. We will hear from each of you, with five minutes worth of testimony, and then open up the dais for questions if you wish. And again, thank you for being here.

I will start with Mr. Birmingham. Tom, if you want to start, we will just work right on down the line and then open it up for questions. Welcome.

STATEMENT OF TOM BIRMINGHAM, GENERAL MANAGER/GENERAL COUNSEL, WESTLANDS WATER DISTRICT, FRESNO, CALIFORNIA

Mr. BIRMINGHAM. First I want to thank you for the opportunity to appear today to testify about what is critically important, an issue critically important to the State of California.

Before I begin, I need to ask leave of the Committee. Apparently there was some problem with the physical delivery of copies of my testimony yesterday. An electronic copy was received within the time prescribed by the Committee's rules, but copies were not delivered. And so I would ask that my testimony be received into the record of the hearing.

Mr. RADANOVICH. With no objection, so ordered.

Mr. BIRMINGHAM. Thank you very much, Mr. Chairman.

I would like to begin my testimony by expressing, in unambiguous terms, as Members of the Committee have, Westlands Water District support for the implementation of this settlement agreement.

Westlands, more than any other agency in the Western United States, understands the chaos and economic disruption that occurs when hundreds of thousands of acre-feet of water are involuntarily taken away from farmers who have historically relied on that water.

The Friant water users and the Bureau of Reclamation have done a risk assessment. And they have concluded that this settlement is the best, the best that they can make of what potentially could be a very bad situation. And so we absolutely support their decision to pursue this settlement.

Having said that, as the Members of the Committee have outlined here today, in their present form, the settlement agreement and the San Joaquin River Restoration Settlement Act create risks that burdens associated with the implementation of the settlement agreement may be shifted to other parties. And I would just like to briefly highlight four.

One is the use of CVP water. The settlement agreement and the Restoration Act essentially establish a cap on the amount of water that can be taken from the Friant Division of the Central Valley Project for purposes of restoring this fishery. But there isn't a cap on the total amount of CVP water that can be taken. And this can be easily fixed by an amendment that says the only Central Valley Project water that will be used, absent acquisition from a voluntary seller, to implement the settlement will be the water released from Friant under the terms of the settlement itself.

A second is the recirculation, the recapture of water released from Friant to minimize water supply impacts on the Friant Division. As each of you know, the capacity to pump water in the Delta is limited. And it is currently dedicated, in virtually all circumstances, to existing uses. And so we think that the legislation needs to express unambiguously that the use of the pumping capacity to recirculate water will be subordinate to the existing demands and uses the pumping plants.

Third is ESA protection. And the Committee has talked an awful lot about that with the first panel. But I just have to express my complete disbelief of comments made by Mr. Candee with respect to that issue.

Mr. Cardoza and Mr. Costa and Mr. Nunes each asked him specifically, do you support ESA protection in the Delta. And the answer that he gave you to that question is the most disingenuous answer I have ever heard.

He said to Mr. Cardoza, well, there are already take limits, take protection under biological opinions that exist for these salmon in the Delta. Well, what he failed to mention is that his organization has filed a lawsuit to challenge those very protections in the biological opinions.

What the Members of this committee have said is critically important. If we are going to be able to implement the settlement without endless litigation, this legislation has to be unambiguous that there will be no third-party impacts, including ESA protections for the Delta.

And then finally, I would like to comment on the potential risks associated for Central Valley Project contractors in connection with payment of capital. We want to make sure that the fact that the Friant capital payments are being devoted to this project, which we support—which we support—doesn't result in other CVP contractors having to pick up those same capital payments under laws pertaining to the repayment of capital.

With that, I will conclude. And I would be happy to respond to any questions that you may have. But again, I want to express Westlands Water District support for the efforts of the Friant Division and the Bureau of Reclamation to minimize the amount of water that they otherwise would lose potentially under an adverse judicial decision.

[The prepared statement of Mr. Birmingham follows:]

Statement of Thomas Birmingham, General Manager/General Counsel, Westlands Water District

Mr. Chairman and members of the Subcommittee, my name is Thomas Birmingham, and I am General Manager/General Counsel of the Westlands Water District. I appreciate the opportunity to testify today on "The San Joaquin River Restoration Settlement Act."

At the outset, I would like to express our appreciation for your decision to conduct this oversight hearing and take testimony from agencies that are not party to Natural Resources Defense Council v. Rodgers, the litigation that would be settled through enactment of 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. However, to avoid creating uncertainty and risk for other portions of the Valley, 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. I am confident that your decision to hear from "third parties" will facilitate the development of amendments to the San Joaquin River Restoration Act that will avoid third party impacts while not frustrating the agreement of the settling parties.

1. Westlands Water District Experience with Water Shortages

Westlands Water District (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 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.

Westlands 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 the area served by Westlands on of the most productive farming areas in the San Joaquin Valley and the nation. Farmers in Westlands 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 Westlands farmers to produce these

crops and generate the associated economic activity depends on the availability of an adequate, reliable source of water.

Westlands' 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 Central Valley Project when significant quantities of water are involuntarily reallocated from irrigation use to fish and wildlife use. Water deliveries to Westlands from the Project began in 1967, and up until 1991, those deliveries were highly reliable and adequate to meet the demand in Westlands for irrigation water. Indeed, from 1967 to 1991, Project water was the principal source of water for irrigation within Westlands, 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 Westlands' 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 Central Valley 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, Westlands farmers have had to rely more on the use of groundwater as a source of irrigation water. In 2004, farmers in Westlands pumped more than 210,000 acre-feet of groundwater, which is significantly more than the USGS estimate of the safe yield of the groundwater basin (135,000 acre-feet). To the extent which farmers have 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 Westlands has 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, and Westlands supports the Friant water users' efforts to minimize through the a settlement 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 present form the Settlement Agreement and the San Joaquin River Restoration Settlement Act could be interpreted or implemented in ways that could have significant adverse effects on agencies that were not parties to the litigation or 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 the 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 agencies that were neither party to the litigation nor involved the development of restoration program. To avoid these unintended consequences Westlands suggests that the San Joaquin River Restoration Settlement

Act be amended to express an unambiguous congressional intent that third parties not suffer adverse effects.

I am confident that other witnesses will focus their testimony on potential effects that could be suffered by the agencies they represent. Therefore, my testimony will focus on potential impacts on south-of-Delta long-term contractors that currently receive water from the Delta Division of the Central Valley 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 there is no comparable limitation on the use of other Central Valley 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 Central Valley Project, the Settlement Agreement limits the quantity of water that can be involuntarily taken from Friant Division long-term contractors to implement the Act for the protection of salmon, or other fish, below Friant Dam. There is no comparable protection for other Central Valley Project long-term contractors.

Stated succinctly, the Settlement Agreement and the San Joaquin River Restoration Settlement Act limit the obligation of the Secretary to operate the Friant Division for the protection of fish under the Endangered Species Act, but the Secretary's underlying obligation to operate the Central Valley Project to avoid take and promote recovery of listed species that will be reintroduced to the main stem of the San Joaquin River between Friant Dam and the confluence with the Merced River is unaffected. For this reason it is conceivable that the Secretary could be required to use water from other Central Valley Project facilities to accomplish the "Restoration Goal" established by the Settlement Agreement. As an example, if it is determined that the flow provided by releases from Friant Dam is insufficient to support outmigrating 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 Central Valley Project water to provide additional flow. It is conceivable that in order to provide such additional flow, the Secretary of Commerce though a biological opinion issued for the operation of the Central Valley Project could impose as a reasonable and prudent alternative the release of water from San Luis Reservoir into the Delta-Mendota Canal for subsequent release into the San Joaquin River.

In recent discussions with the settling parties, they have stated unequivocally that such a scenario was never envisioned and it not their intent to impose on the Secretary of the Interior an obligation to take water from other Central Valley Project long-term contractors in order to achieve the Settlement Agreement's Restoration Goal. Therefore, to avoid this potential, unintended effect Westlands suggests that the San Joaquin River Restoration Settlement Act be amended to provide that the only Central Valley Project water that the Secretary is authorized to use to achieve the Restoration Goal is water released pursuant to the Settlement Agreement from Friant Dam. Such an amendment would do no violence to the settling parties' expectations and would protect south-of-Delta Central Valley Project water service contractors, who have already lost more than 650,000 acre-feet to fish and wildlife uses, from suffering additional water supply shortages.

Another potential reduction in water supplies of agencies that receive water from the Delta export facilities of the Central Valley Project or the State Water Project could result from pumping limitations imposed to prevent take of the reintroduced spring run salmon. There are already in place numerous restrictions on pumping at the Tracy Pumping Plant and the Harvey O. Banks Pumping Plant imposed to protect or enhance other anadromous and pelagic fish species. However, if out-migrating spring run salmon reintroduced pursuant to the Settlement Agreement are in the vicinity of these pumps at times their operations are not restricted, it is likely that additional pumping restrictions will be imposed. As a consequence, the water supplies for agencies that receive water from the Delta export facilities would be reduced. To avoid this unintended effect, the San Joaquin River Restoration Settlement Act should be amended to direct the Secretary of Commerce to exercise his existing authority to designate as an experimental population pursuant to Article 10(j) of the Endangered Species Act the reintroduced spring run Chinook salmon.

Such a designation would protect the Central Valley Project and the State Water Project from water supply losses that otherwise would occur to prevent the incidental take of the species.

Recirculation or Recapture of Water

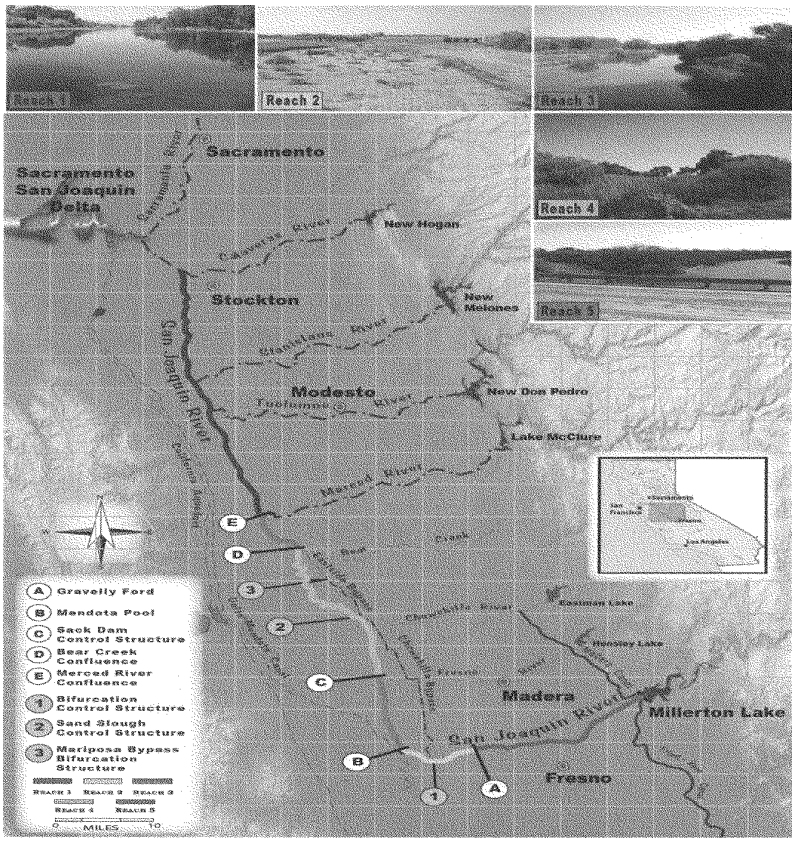
Provisions of both the Settlement Agreement and the San Joaquin River Restoration Settlement Act direct the Secretary to develop and implement a plan or program of recirculation, recapture, reuse, exchange or transfer of water released for restoration flows, for the purpose of reducing or avoiding impacts 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 Tracy Pumping Plant and the permitted capacity of the 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 or recirculate restoration flows released from Friant Dam were to displace existing uses of the Tracy Pumping Plant or the Banks Pumping Plant, the water supplies of other agencies would undoubtedly be reduced and significant conflict would ensue.

I am informed by representatives of the Friant water users that it is not their intent to displace existing uses of either the Tracy Pumping Plant or the Banks Pumping Plant. Instead, it is their expectation to use excess capacity at these facilities when it is available. To avoid any future conflict concerning this issue Westlands proposes that the San Joaquin River Restoration Settlement Act be amended to provide that the Secretary's duty to implement a recapture or recirculation program shall be subordinate to the Secretary's use of the Tracy Pumping Plant to make Project water, other than restoration flows released from Friant Dam, and water acquired through transfers available to existing south-of-Delta Central Valley Project contractors. 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 Tracy the Banks Pumping Plant, the Secretary's duty to implement a recapture or recirculation program should 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' 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. If the settling parties are sincere in their belief that implementation of the Settlement Agreement will not have a material adverse effect on any third parties, I am confident that we will be able to reach agreement on amendments to the San Joaquin River Restoration Settlement Act to ensure avoidance of such effects on south-of-Delta Central Project long-term contractors and other potentially affected agencies. I would welcome any questions from members of the Subcommittee.



Mr. RADANOVICH. Thank you, Mr. Birmingham. Next is Mr. Allen Short, General Manager of the Modesto Irrigation District, and also representing the San Joaquin Tributaries.

Mr. Short, welcome to the Subcommittee.

STATEMENT OF ALLEN SHORT, GENERAL MANAGER, MODESTO IRRIGATION DISTRICT AND REPRESENTING SAN JOAQUIN TRIBUTARIES ASSOCIATION, MODESTO, CALIFORNIA

Mr. SHORT. Thank you, Mr. Chairman, and thank the Committee for holding this hearing. And I appreciate the opportunity to come before you.

I would also like to thank the Committee for their recognition of third-party impacts to those that are on this panel and those who are not on this panel. That is a critical component of this agreement.

As the Chairman said, I am Allen Short, the General Manager of the Modesto Irrigation District. I am also the Coordinator of the San Joaquin Tributaries Association. That is a group of irrigation districts on the east side of the Valley, that consists of Modesto, Turlock, Oakdale, South San Joaquin, and Merced Irrigation

Districts. We each own or operate huge reservoirs on the east side, containing in storage well over three million acre-feet. We also irrigate more than 3,000 acres through, collectively, our area. We also, some of us are moving into the domestic water supply as a result of the conversion of ag land to urbanization.

Our focus today is ESA and that third-party impact. I want you to recognize that that is a concern to all of those that are on the tributary. Mr. Robbins will speak specifically to what we are proposing in terms of language to assist in the legislation.

But I also want to take another issue, which is an issue that is very important to all of us who have hydro facilities on those tributaries, of which we all do. In taking the settling parties at their word that there would be no third-party impacts, most of us, if not all of us, will be having our FERC licenses renewed over the next several years.

Two of the agencies have had their license renewed and have reopened. Modesto and Turlock are slated to have their license renewed in 2016, 2017, and Merced, 2014. So from that standpoint, we want to ensure that we get protection measures contained within ESA and the Federal Power Act to allow this species to move forward and to be reintroduced into the San Joaquin.

Let me say as strongly as my friend, Mr. Birmingham, has said, the San Joaquin Tributaries Association does support the settlement agreement, provided that the third-party impacts, ESA-specific and the FERC-issue-specific, are resolved in a mutual agreeable manner. That there will be no impacts to our entities.

With that, Mr. Chairman, you like to conduct a tight ship. I would again like to thank you for the opportunity to come before you. And I delegate any time I have left, I will market it to my friend, Mr. Robbins, to take the lead.

Thank you.

[The prepared statement of Mr. Short follows:]

Statement of Allen Short, Coordinator,
San Joaquin Tributaries Association

Good morning Chairman Radanovich and fellow members of the Subcommittee. My name is Allen Short. I am the General Manager of the Modesto Irrigation District. I appear today in front of you as the Coordinator of the San Joaquin Tributaries Association.

The San Joaquin Tributaries Association is comprised of five irrigation districts located on the eastside of the San Joaquin Valley which divert and use water from the Merced, Tuolumne and Stanislaus Rivers. The SJTA's members include the South San Joaquin Irrigation District and Oakdale Irrigation District, which are senior water right holders and producers of power on the Stanislaus River; the Modesto Irrigation District and Turlock Irrigation District, which are senior water right holders and producers of power on the Tuolumne River; and the Merced Irrigation District, which is a senior water right holder and producer of power on the Merced River. Collectively, the SJTA's members comprise over 300,000 acres of agriculture, annually produce over one-thousand megawatts of electricity, annually divert over a million acre feet of water and have large storage facilities that store millions of acre feet of water.

The SJTA is a supporter of the settlement. We believe it is better to look for solutions, rather than relying on courts to issue decisions.

Our support for the settlement is premised, however, on the provisions of Paragraph 7 of the settlement agreement, which provides in part:

> "The parties neither intend nor believe that the implementation of this settlement will have a material adverse effect on any third parties or other streams or rivers tributary to the San Joaquin River."

In order to make that intention come to fruition in a clear and unambiguous fashion we have offered language for legislation. Mr. Ken Robbins will address the issues related to the reintroduction of Spring Run Chinook Salmon. My testimony will focus on ensuring that adverse impacts will not occur to the SJTA's members as a result of the settlement.

In the near future, Merced Irrigation District will begin a Federal Energy Regulatory Commission re-licensing process for its Merced River Project, whose current license expires in 2014. Shortly thereafter, Modesto Irrigation District and Turlock Irrigation District will begin their FERC re-licensing process for the Don Pedro Project, the present license for which expires in 2016. Oakdale Irrigation District and South San Joaquin Irrigation District have finished their re-licensing process, but their licenses have a re-opener provision for threatened or endangered species.

In the Federal Energy Regulatory Commission's re-licensing process, the National Marine Fisheries Service has mandatory conditioning authority. If Spring Run Chinook Salmon are re-introduced into the upper San Joaquin River in 2012 then the National Marine Fisheries Service will have the authority to condition the licenses of the Merced, Modesto and Turlock Irrigation Districts with conditions for the protection of Spring Run Salmon as part of the re-licensing process. Moreover, the licenses already issued to the Oakdale and South San Joaquin Irrigation Districts could be re-opened to consider additional conditions for the purpose of protecting or enhancing the re-introduced Spring Run Chinook Salmon.

It is imperative to the SJTA that the ESA protections afforded the Districts at the beginning of this settlement process, namely those under Sections 10(j) and 4(d), are not changed in the middle of the implementation process. We do not want to have one set of conditions applied now, only to be ratcheted up with additional conditions in the FERC re-licensing process.

We need a clear Congressional directive to the National Marine Fisheries Service, the Federal Energy Regulatory Commission and non-governmental organizations that Spring Run Chinook Salmon will not be an issue in the FERC re-licensing process. We only request that this condition be in place for the term of the settlement agreement. We accept the likelihood that our licenses will have a re-opener condition for Spring Run Chinook Salmon in 2026. We believe our proposed legislative language is fair and reasonable. We believe it provides the SJTA's members with the same level and duration of assurances as given to the settling parties. We believe the language we have offered accurately, concisely, and succinctly sets forth what the parties intended in their settlement agreement and is necessary for our continued support of the agreement.

Congressman Radanovich, the SJTA appreciates your leadership and guidance on this historic settlement and legislation. Your continued insistence and unwavering support of the key concept of no redirected impacts has made it possible for us to support this settlement and yet protect the valuable resources and service we provide to our landowners and customers in the San Joaquin River Basin.

This concludes my testimony. Mr. Chairman, thank you for the invitation to testify before this Subcommittee today. I will be happy to answer any questions members of the subcommittee may have.

[The response to questions submitted for the record by Mr. Short and Mr. Robbins follows:]

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October 20, 2006

Honorable Richard Pombo, Chairman
Committee on Resources
U.S. House of Representatives
Washington, DC 20515

RE: Response to follow up questions from The Honorable Devin Nunes Subcommittee on Water and Power hearing October 5, 2006—San Joaquin River Settlement

Dear Mr. Pombo:

You forwarded a set of follow up questions propounded by Mr. Nunes as set forth above. We understand these questions to have been submitted to all witnesses before the subcommittee. Some of the questions can only be answered by other witnesses.

The following answers respond on behalf of Mr. Allen Short, General Manager of the Modesto Irrigation District and Coordinator of the San Joaquin Tributary Association (SJTA). SJTA is an association of California Irrigation Districts (ID) with water rights, storage, power, and irrigation facilities on the Stanislaus, Tuolumne and Merced Rivers, tributary to the lower San Joaquin River. Its members are: South San Joaquin ID, Oakdale ID, Modesto JD, Turlock ID, and Merced ID. Reference to Mr. Short's original testimony is made for further details.

These answers are jointly provided by Kenneth Robbins, General Counsel to Merced ID and Special Counsel to the SJTA, to whose original testimony reference is also made.

RESPONSE

1. **Based on the terms of the Settlement, has an analysis been completed on the potential water losses on a district-by-district level and wateruser-by-wateruser level? If so, can you provide a copy of that analysis to the Committee?**

Answer: We understand that this question is directed towards the Friant Water Users Authority. Regarding the SJTA agencies, the hydrographs that might be developed by regulatory agencies for the support of Spring Run Salmon on the tributary rivers are unknown and an analysis of potential water losses to the SJTA members has not been performed. However, because of the need for "cold water" habitat below the main dams of the districts and the water requests of the Anadromous Fish Restoration Plan (AFRP), the SJTA members expect a demand for large scale additional water requirements potentially doubling current requirements.

In addition, significant concerns were raised about potential monetary costs to screen diversions as needed to prevent the loss of a threatened species and operational changes to storage which would have impacted electric generation at peak demand.

It should be noted that if the current agreement regarding implementing legislation actually results in the adoption of the legislation these impacts will not occur. The Spring Run Salmon will be reintroduced as an experimental population under section 10(j) and 4(d) of the Endangered Species Act.

2. **According to the California Department of Fish and Game, Fish Bulletin Number 17, The Sacramento-San Joaquin Salmon Fishery of California (page 31), by 1928 there were "very few" salmon remaining in the San Joaquin River above the Merced River and that the historical salmon fishery that once existed had been severely depleted. Considering this is 15 years before the construction of Friant Dam, how would the Settlement change historical facts?**

Answer: This question should be answered by the California Department of Fish and Game and the National Marine Fisheries Service.

3. **What is reasonable expectation of success relating to reintroduction of spring-run Chinook salmon into the San Joaquin River? How many naturally reproducing spring-run Chinook salmon can we expect to inhabit the San Joaquin River as a result of the proposed restoration program?**

Answer: This question should be answered by the California Department of Fish and Game and the National Marine Fisheries Service.

4. **Considering that restoration of a salmon run will require consistent cold water flows, is there a plan to develop temperature controls to eliminate impacts on downstream tributary salmon runs? If so, what are the details of the plan?**

Answer: This question should be answered by the Settling Parties. Mr. Short and Mr. Robbins have received assurance that in years when flow levels create temperature issues of concern to out-migrating Fall Run Salmon on the tributary rivers, the Upper San Joaquin hydrograph will be adapted by moving the spring flows to an earlier date. The process and parameters of that adaptation are the subject of negotiations between the Bureau of Reclamation, the Settling Parties and the third parties which are intended to be memorialized by a memorandum of understanding (MOU). That is why the MOU is so important to the Third Parties.

5. **Would the funds authorized by the proposed settlement legislation produce better results on streams other than the San Joaquin River—in terms of increasing the population of spring-run Chinook salmon?**

Answer: This question should be answered by the California Department of Fish and Game and the National Marine Fisheries Service.

6. Please identify how the terms of the Settlement will provide water quality improvements in the Delta?

Answer: This question should be answered by Settling Parties. From the analysis by the third parties it appears that there will only be marginal improvement in water quality at Vernalis and in the South Delta. The additional water contribution would only very rarely provide significant improvements, usually in March. No water quality standards adopted by the State Water Resources Control Board (SWRCB) will be met with flows from the restoration, though small amounts of water currently used to meet standards from New Melones may be conserved.

7. Is there a plan to address the groundwater overdraft that will occur as a result of reduced water deliveries to the Friant Division? If so, what are the details of the plan?

Answer: This should be answered by the Friant Water Users Authority.

8. What are the estimated costs to implement the restoration plan proposed in the Settlement? Please provide details on how you developed the estimate?

Answer: Because of the referral of Reach 4B to a study and implementation at a later date in the legislative settlement, answering witnesses are not aware of the total current known cost, though savings from original estimates may be achieved from such referral if the Mariposa by-pass is ultimately used.

9. The proposed legislation submitted to Congress has a provision of "no private right of action." What prevents parties from filing suit for more water after 2026? What prevents a third party from filing suit in reference to NEPA compliance, or other applicable laws, as feasibility studies are conducted on various aspects of the Settlement?

Answer: Answering witnesses are unaware of constraints after 2026 to actions which might be brought under the issues resolved in the Settlement Agreement. Of course, all waters of California may be subject to actions before the SWRCB on a number of issues, including water quality. Answering parties are unaware of any bar to third party suits on matters which are not the subject of the settlement, nor is there any bar to claims arising from the regulatory requirements such as NEPA or CEQA.

Respectfully submitted,

Allen Short
General Manager, Modesto Irrigation District
Coordinator, San Joaquin Tributary Association

Kenneth M. Robbins
General Counsel, Merced Irrigation District
Special Counsel, San Joaquin Tributary Association

Mr. RADANOVICH. Good man. Thank you, Mr. Short.

The Committee would like to welcome Mr. Ken Robbins, who is the General Counsel of the Merced Irrigation District. Ken, welcome to the Subcommittee.

STATEMENT OF KEN ROBBINS, GENERAL COUNSEL, MERCED IRRIGATION DISTRICT, MERCED, CALIFORNIA

Mr. ROBBINS. Thank you, Mr. Chairman. Again, I am the General Counsel for Merced Irrigation District that operates the Exchequer Project on the Merced River, which is the first river on the San Joaquin system that the water coming down the San Joaquin will arrive at. And that is important, because one of the concerns we have, one of the many concerns we have about this project, notwithstanding the fact that we are in support of the agreement because we believe what the parties have said in their settlement and what they have said before you today, that they intend no third-party impacts.

Nevertheless, we managed our systems on the Merced, the Tuolumne, and the Stanislaus for the protection and propagation

of Fall Run Salmon. One of the things we do besides provide irrigation water and power and domestic water, et cetera, is that we do maintain water in the river, and we do ensure that that water occurs whether or not the rainfall is going to contribute to that. We will often use storage water to make sure those rivers stay in tact.

But those systems are managed for Fall Run. Now, the problem with the water arriving from the San Joaquin under the settlement is that without some sort of adaptation, there might be years in which the water arriving at the confluence of the Merced will simply be too hot for the survival of Fall Run Salmon, who will be outmigrating from the system in the springtime.

Now, the parties have been talking to us, and we have gotten assurances from them that adaptations will be made. But obviously, it makes us very nervous, and we would want to be able to ensure that we had input to the decisions that are being made about how the adaptations for the settlement water would be made in order to make sure that the Fall Run Salmon that currently exist on the San Joaquin system is not harmed.

The second major concern we have, of course, is that Spring Run Salmon is, in fact, a listed species. It is a threatened species. It will have to actually be seized, or part of the population will have to be captured or taken from a hatchery in the northern part of California, most likely, to be deposited in the San Joaquin. And when that happens, of course, every single project, every water project, every diversion, every landowner, every system that interfaces with the San Joaquin faces the potential impacts of the Endangered Species regulatory activities on us.

And so what we have suggested are a couple of tools be used that already exist in the Endangered Species Act. We are not asking for any modification of the Act. We are simply asking for the tools that are already in the Act be implemented.

One of those tools is referred to as Section 10[j]. It is for an experiment. And you have heard it classified this morning by all of the parties as an experiment. We will be putting water into the river, we are going to be putting fish into the river; we are going to be testing, we are going to be trying to find out exactly what those fish returns are going to look like, and whether or not they can be sustained.

During that time, this fish can be classified by the National Marine Fisheries Service under 10[j] as an experimental population. We expect, during that process, that they will find this population in the part of the Sacramento where they take these fish to be essentially non-essential to the survival of the species, or they wouldn't be moving it to the San Joaquin, quite frankly, where the risks to survival are going to be much higher for that fish.

So once they have found this to be an experimental population, and that this is a non-essential part of the population, we gain a whole lot of things.

First, under Section 4[d] of the Endangered Species Act, we are eligible for take limitations. And those take limitations or exceptions can be made all through the San Joaquin system; and indeed, with proper crafting, might be made neutral in the Delta, such that additional concerns arising in the Delta might not be impacted. As

long as that species remains threatened, we are entitled to the 4[d] protection.

What 10[j] does is to say something else. It says that in so long as that species is an experimental species, even if it descends to an endangered status, you may still be eligible for the take exceptions under 4[d], one. Two, no critical habitat gets designated. What that means for landowners and for all of us should be obvious. The interferences with individual property rights and the accommodations that we must make for critical habitat would be off the table.

And finally, our Section 7 consultations for the FERC relicensing would be considering Spring Run as simply a species of concern, rather than as an endangered, threatened species.

So we are hopeful that language we are working out now can be put into play, so that the Secretary will exercise those discretions prior to the reintroduction of Spring Run and resolve this issue. Thank you very much.

[The prepared statement of Mr. Robbins follows:]

Statement of Kenneth M. Robbins, General Counsel, Merced Irrigation District

Good morning Chairman Radanovich and members of the Subcommittee. My name is Ken Robbins and I am General Counsel for Merced Irrigation District. I am pleased to have this opportunity to testify regarding the proposed legislation that would implement the settlement agreement reached by the parties to the Friant litigation.

Merced Irrigation District is part of the San Joaquin Tributaries Association (SJTA), a group of five associated Irrigation Districts with water storage and hydroelectric facilities located on the three principal tributaries to the San Joaquin River (SJR). Mr. Short has already testified on behalf of the SJTA, so I shall not revisit those points.

I am here today to testify about the impacts the proposed settlement will have on Fall Run Chinook Salmon and the operations of the District's hydroelectric and water supply facilities.

Let me preface my remarks by reiterating what Mr. Short said earlier. The SJTA, including the Merced Irrigation District, is supportive of the goals of the proposed settlement. The District is confident the proposed settlement can be implemented in a manner that ensures both the restoration of the SJR and the mitigation of impacts from such an undertaking on third parties. The District believes the settling parties when they say they do not intend to impose impacts on third parties. My testimony will offer suggestions and a proposed legislative approach to ensure the settlement goal of no third-party impacts is achieved.

The five eastside irrigation districts of the SJTA have expended substantial water and money to restore the Fall Run Chinook Salmon fishery on the Merced, Tuolumne and Stanislaus Rivers. These efforts include active participation in, and funding for the San Joaquin River Agreement, the Vernalis Adaptive Management Plan (VAMP), Federal Energy Regulatory Commission (FERC) proceedings, on-going district funded studies and monitoring and restoration activities, and the Merced River Fish Hatchery.

The SJRA/VAMP

In May of 1995, the State Water Resources Control Board, as part of the river flow objectives in the 1995 Bay-Delta Plan, set minimum monthly average flow rates on the San Joaquin River at Vernalis. The Sacramento and San Joaquin River flow objectives were included to provide attraction and transport flows and suitable habitat for various life stages of aquatic organisms, including Delta smelt and Chinook salmon.

The five Eastside irrigation districts, the City and County of San Francisco, the San Joaquin River Exchange Contractors and the Friant Water Users Authority settled with the United States Bureau of Reclamation and the California Department of Water Resources resolving a dispute on how the responsibility for implementing the flow objective was to be met. This consensus resulted in the San Joaquin River Agreement, and the ongoing experiment commonly known as VAMP.

Under the VAMP, the five Eastside irrigation districts and the San Joaquin River Exchange Contractors agree to provide a supply of up to110,000 acre-feet for an April—May pulse flow. In addition, the parties expend $750,000 a year to conduct the VAMP experiment which is designed to gather better scientific information regarding fisheries on the lower San Joaquin River.

Federal Energy Regulatory Commission

Flows for facilities operated by the Modesto Irrigation District and Turlock Irrigation District on the Tuolumne River are governed by Article 37 of the Federal Power License for the Don Pedro Project (FERC Project No. 2299). The minimum flows are designated by 10 different water-year types ranging from "Critical & Below" to "Median Wet/Maximum." Each year is broken into three time periods plus two pulse periods. The minimum annual flows ranged from 94,000 acre-feet to 300,923 acre-feet, mainly for the benefit of Fall Run Chinook Salmon.

Merced Irrigation District operates the Merced River Hydroelectric Project (FERC No. 2179), a 103.5-megawatt project consisting of the Exchequer and McSwain developments. Under its FERC license, Merced Irrigation District provides flow based on two year types, as defined by its license. These flows, when combined with the flows required pursuant its Davis-Grunsky Agreement with the State of California, provide annual flows totaling about 100,000 acre feet per year. That amount of water is doubled across the salmon spawning grounds as Merced releases even more water to downstream water right holders. In addition, Merced Irrigation District provides 12,500 acre-feet of water in October, the equivalent of approximately 200 cubic feet per second, pursuant to a memorandum of understanding with the California Department of Fish and Game. These flows are maintained predominantly for the benefit of Fall Run Chinook Salmon.

District Operations

Currently South San Joaquin Irrigation District and Oakdale Irrigation District on the Stanislaus River spend approximately $500,000 annually to operate rotary screw traps and the Vika weir, and to participate in gravel restoration, habitat restoration and river mapping.

Modesto Irrigation District and Turlock Irrigation District on the Tuolumne River collectively have spent about $500,000 a year for the last 10 years on their Tuolumne fishery program. Another $1,000,000 has been spent on restoration work over that same time period. The $500,000 annual expenditure is expected to increase in the years ahead.

Merced Irrigation District invests over $475,000 annually to operate its Fall Run Salmon enhancement program in conjunction with the California Department of Fish and Game. The Merced Irrigation District and the California Department of Fish & Game have entered into a ten-year agreement for studies and projects to address habitat and salmon restoration programs on the Merced River. This program is known as Merced River Adaptive Management Program or "MRAMP." The district has committed matching funds of $5 million over a ten-year period for this program.

Merced River Fish Hatchery

Merced Irrigation District and the California Department of Fish and Game, in collaboration with the State Water Contractors, have agreed to cooperatively fund the future operation and management of the Merced River Fish Hatchery. Annual operating costs for the Merced River Fish Hatchery are over $400,000. These costs are scheduled to be borne by the Merced Irrigation District, the Four Pumps Agreement Group, and the San Joaquin Tributaries Association. Fall Run Chinook Salmon production from this facility is targeted at about 960,000 smolts per year. The hatchery production is devoted to maintenance of the Merced River Fall Run salmon, the VAMP program delta studies, and other experimental programs conducted on other California Rivers in the San Joaquin Valley by the California Department of Fish and Game and their partner agencies.

The status of Fall Run Chinook Salmon on the San Joaquin River and its tributaries is one of improvement, but still of concern. At the end of an unprecedented six year drought, from 1987-1992, salmon returning to the San Joaquin River basin numbered about 1,373, including hatchery fish. Over the last ten years Fall Run Chinook Salmon production in the San Joaquin River basin has ranged from a low of 14,023 to a high of 79,679. Recent trends have once again been troubling.

In 1998, Fall Run Chinook Salmon became a candidate species for listing as threatened under the Endangered Species Act. In recent testimony to the State Water Resources Control Board, the California Department of Fish and Game expressed concern regarding the recovery of Fall Run Chinook Salmon in the San Joaquin River basin. It stated:

"Fall-run salmon populations in the SJR Basin are not making progress toward meeting the narrative doubling goal."

So we are not out of the woods yet in terms of assuring the recovery of Fall Run Chinook Salmon in the San Joaquin River basin. It is still a species of concern.

Third-Party Impacts of Settlement

The problem we identified early to the settling parties was the impact of the released water from Friant on water temperatures at the confluence of the Merced and Tuolumne Rivers. If the temperature of water flowing down from Friant is too hot it will literally cook the little Fall Run Chinook Salmon smolts out-migrating from the Merced and Tuolumne Rivers. In response to our concerns the settling parties have agreed to advance the pulse flows to an earlier date depending upon air and water temperatures. We do not know if this will be sufficient nor do we yet have a voice in how this will be done.

Plaintiffs' expert focused his temperature criteria solely on Spring Run Chinook Salmon. Dr. Peter Moyle testified that temperatures as high as 74 degrees Fahrenheit would protect Spring Run Chinook Salmon during the Spring migration period. The California Department of Fish and Game has recommended optimal temperatures for Fall Run Chinook Salmon of 55 degrees Fahrenheit and set lethal temperatures at 62 degrees Fahrenheit during this time period. If Plaintiff's expert is incorrect, or the California Department of Fish and Game is correct, then Fall Run Chinook Salmon smolts leaving the Merced and Tuolumne Rivers may perish.

Of course, another potential consequence of such a scheme would be to have Merced Irrigation District, or others, release massive amounts of water over what is currently required to maintain, if possible, cold water temperatures. This could have a major impact on the Merced Irrigation District and its farms and cities in terms of power production, storage and water supply reliability. It would have a lesser impact on the Tuolumne River system, but there would be a similar demand for additional water.

Merced Irrigation District's position is that an experimental fish population should not be reintroduced to the detriment of an existing species of concern, Fall Run Chinook Salmon. These impacts must therefore be mitigated.

This brings me to the second major point of my presentation, the reintroduction of Spring Run Salmon and its impact on Merced Irrigation District's hydroelectric and water supply facilities. The Merced River Project and other SJTA projects are focused on Fall Run recovery, which involves concentrated water requirements from the fall through spring. Fall Run generally return from the ocean from late October thru December. They spawn and their progeny migrate out of the system in the spring. Because of winter rain runoff and colder winter temperatures, satisfactory salmon habitat is much easier to maintain in the foothills. Spring Run, on the other hand, require summer fresh water habitat as most of the population spend an entire year in the system before migrating to the ocean. This means cold water temperatures must be maintained in the foothills throughout weeks of 100+ degree days. The Spring Run no longer has access to the high mountain regions of the San Joaquin Sierra Mountains as they do in some areas of Sacramento Sierras.

Merced Irrigation District does not agree with the settling parties that conditions are conducive now or will be in the future on the upper San Joaquin River for the reintroduction of Spring Run Salmon. We have only to look to the mainstem Sacramento River from Redding to Red Bluff. The overall population trend for Spring Run Chinook Salmon on the Sacramento River has been negative. Average abundance on the mainstem Sacramento River has gone from a high of 12,107 for the period 1980-1990 to a low of 609 for the period 1991-2001. Spawning populations are so low the California Department of Fish and Game biologists believe Spring Run have nearly disappeared entirely from the mainstem Sacramento River. This is not to suggest their condition on the Sacramento tributaries. However, it is important to recall that the settlement calls for Spring Run restoration on the mainstem of the SJR, not its high mountain tributaries.

The Sacramento River has 4.5 million acre-feet of storage at Lake Shasta compared to Friant's 500,000 acre-feet of storage on the SJR. The flows on the Sacramento River can be 10 times the flows on the upper SJR. The Sacramento River has 100 ± miles of deep pools, cold water and shaded riverine aquatic habitat. The San Joaquin River has neither—and will have nothing even remotely comparable to the Sacramento for decades, if ever.

In fact, as Plaintiff's expert, Dr. Moyle, pointed out, in many years when it is dry it will be necessary to trap and truck the fish because flows will not be sufficient to sustain them. In critically dry years there may be no water at all.

I do not say this as a pessimist. There are reputable biologists who suggest the experiment may work. But make no mistake, this is an experiment. The third

parties, particularly the SJTA districts operating water storage projects on the SJR tributaries below the proposed Spring Run restoration area, do not want to get left holding the bag for a potentially failed experiment, if the experiment fails in the target area and the National Marine Fisheries Service (NMFS) determines the Spring Run cannot be restored as set out in the settlement.

The Need to Legislate Third-Party Protections

To avoid these potential impacts, the third parties have offered language to amend the proposed legislation accompanying the settlement agreement to protect the Eastside districts, as well as the San Joaquin River Exchange Contractors, other diverters on the mainstem San Joaquin River and the USBR and DWR at the Delta pumping facilities. This language leads to the making of certain findings under section 10(j) of the Endangered Species Act (ESA) prior to the re-introduction of the threatened Spring Run salmon. It also protects the Merced, Turlock and Modesto Irrigation Districts from having to mitigate impacts to the experimental population of Spring Run prior to 2026 when their hydroelectric projects are relicensed by FERC in 2014 and 2016.

ESA Section 10(j)

Section 10(j) of the ESA authorizes the Secretaries of Commerce or the Interior to release "experimental populations" of threatened or endangered species outside the current range of the species in order to further the conservation of the species. 16 U.S.C. § 1539(j). At the present time, NMFS has not adopted any regulations concerning experimental populations, although it is permitted to do so under the ESA. The U.S. Fish and Wildlife Service (USFWS) has, however, adopted regulations under Section 10(j).

"Experimental population" means a designated population, including subsequent off-spring, which can be introduced into an area where it is "wholly separate geographically from nonexperimental populations of the same species." 16 U.S.C. § 1539(j)(1); 50 C.F.R. § 17.80(a). When a population is designated "experimental," it is treated as if it were listed as a threatened species, rather than an endangered one. 16 U.S.C. § 1539(j)(2); 50 C.F.R. § 17.82. A "nonessential experimental population" means an experimental population whose loss would not appreciably reduce the likelihood of the species' survival in the wild. 50 C.F.R. sec. 17.80(b). If an experimental population is deemed nonessential, no critical habitat designation is made for the population. 16 U.S.C. § 1539(j)(2); 50 C.F.R. § 17.81(f). In addition, for purposes of Section 7 consultations, nonessential experimental populations are treated as species proposed to be listed under Section 4 of the ESA, rather than threatened or endangered. 16 U.S.C. § 1539(j)(2)(C)(I).

The SJTA believes that in order to protect third-party interests from unintended impacts of the settlement, it is both reasonable and essential for Congress either to make the required findings under Section 10(j), or at a minimum to predicate the reintroduction of Spring Run in the SJR on the Secretary of Commerce's making the necessary findings. The required findings include:

1. that the San Joaquin River spring-run Chinook salmon is wholly separate from any other population of the species, and is thus an "experimental" population;
2. that the loss of the experimental population would not appreciably reduce the likelihood of the species' survival in the wild, and the population is therefore "nonessential";
3. that the reintroduction of spring-run Chinook salmon in the San Joaquin River will further the conservation of the species;
4. that "take" of San Joaquin River spring-run Chinook salmon that is accidental or incidental to an otherwise legal activity, such as recreation (e.g., fishing, boating, wading, trapping, or swimming), forestry, agriculture, operation of dams and reservoirs for irrigation, hydroelectric power, municipal and industrial water supply, and other uses, and other activities that is in accordance with federal, state and local laws and regulations, is permitted; and
5. that the reintroduction San Joaquin spring-run Chinook salmon nonessential experimental population is within the historic range of the species and shall include the San Joaquin River watershed, including its tributaries, and that all spring-run Chinook salmon found within these boundaries will be considered nonessential experimental animals.

With regard to the "wholly separate" criterion, the reintroduction of Spring Run to the SJR should qualify as no other populations of Spring Run exist on the SJR or its tributaries. Indeed, to reintroduce them individuals or eggs of Spring Run on the Sacramento River will have to be transported to the SJR.

With respect to the required finding that the experimental population's loss would not appreciably reduce the species' likelihood of survival, it would be difficult to

understand how the Secretary could find that the population to be reintroduced is "essential to the continued existence of the species" and still remove it from a much more friendly habitat—particularly in light of its threatened status rather than endangered. One would reasonably conclude that the fish would not be taken from their original habitat for such an experiment if they were in fact "essential."

In making the findings, Congress would also determine that current lawful operations in the SJR watershed—including tributary water supply and hydroelectric operations on which the SJTA districts are critically dependent—would not be subject to "take" under the ESA for the re-introduction of this non-essential fish population pursuant to section 4(d).

This protects all SJR and tributary water operations in three ways. First, if the experimental reintroduction of Spring Run Chinook Salmon cannot be sustained based upon the actions of the settling parties, the Eastside Districts will not be required to release additional water, change operations or commit resources to make up the shortfall. Second, if the experimental reintroduction is successful, such success will demonstrate that the current, lawful operations of the five Eastside districts have no detrimental affect on the reintroduced Spring Run Chinook Salmon therefore do not need to be changed. Third, the designation of the reintroduced Spring Run Chinook Salmon as a nonessential experimental population protects the water users while the experiment is in effect and allows an opportunity for the third parties, the State of California, the settling parties and the federal government to develop a longer term Habitat Conservation Plan.

FERC License Protections

Finally, the Merced Irrigation District and the other Eastside districts need the same level of protection as is afforded to the U.S. Bureau of Reclamation under the terms of the settlement. Under the settlement there is no re-opener for twenty years, until 2026, for the release of additional water from Friant Dam. The Third Parties want this same protection given to them for their FERC re-licensing. Merced Irrigation District's current FERC license expires in 2014, while Modesto Irrigation District and Turlock Irrigation District will seek to re-license their Don Pedro Project in 2016. These Districts do not want the National Marine Fisheries Service, which otherwise has mandatory conditioning authority under section 18 of the Federal Power Act and section 7 of the ESA, to condition their licenses with terms and conditions related to the reintroduced, experimental, non-essential fish population. The Districts want this protection until 2026. The Districts are agreeable to have a re-opener clause in their new FERC licenses to specifically address the population's status at that time, but not earlier.

This concludes my testimony. Mr. Chairman, thank you for the invitation to testify before this Sub-committee today. I will be happy to answer any questions members of the sub-committee may have.

[NOTE: The response to questions submitted for the record by Mr. Robbins and Mr. Short can be found on page 77.]

Mr. RADANOVICH. Thank you, Mr. Robbins. Next is Mr. Steve Chedester from the San Joaquin River Exchange Contractors Authority.

Steve, welcome to the Subcommittee. You may begin.

STATEMENT OF STEVE CHEDESTER, EXECUTIVE DIRECTOR, SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY, LOS BANOS, CALIFORNIA

Mr. CHEDESTER. Thank you, Chairman and Members of the Subcommittee. As mentioned earlier, my name is Steve Chedester. I am the Executive Director of the San Joaquin River Exchange Contractors Water Authority. And we are, of course, one of the third parties, and I do want to thank you, especially Chairman, for allowing us to have this hearing so we can vet these third-party issues straight out.

We have four main issues I just want to start talking about on this. One of them is water rights protection, ESA protection,

adequate funding for the implementation of this, and adequate representation on an implementation committee.

You have heard about this earlier today almost on all of these. But one of them that wasn't talked about much is water rights protection. The exchange contractors, the Water Authority represents four districts, four districts that comprise 240,000 acres. They hold senior water rights on the San Joaquin River mainstem, and by nature of the contracts that we signed with the Federal government and a purchase contract that actually allowed the building of Friant Dam.

Our rights are still there. We still have them. We want to make sure that anything that happens in this legislation, it has to be clear and ambiguous language that our water rights and our contracts are protected and respected. That is not a movable subject.

As all of the panelists earlier have said, ESA protection, we fully support having ESA protection. Number one, mainly because we are right along the San Joaquin River. We are in Reach 2, 3, 4, and 5. So 80 percent of the implementation that is going to occur through this settlement is going to occur in our service area.

We support the 10[j] designation that was discussed earlier, and think that it is critical to have that to be able to go forward with this settlement.

Our biggest point is, is there going to be adequate funding for the implementation of this project? And more importantly, is there going to be adequate funding for the mitigation that is going to be required? We just want to be very direct with the Committee. Our growers are going to be impacted. It is not if or maybe; we are. So now it is a matter of how are you going to mitigate it.

We want to make sure that the mitigations are captured, the process to address those through a feasibility study, a phasing through feasibility, NEPA, SJRECWA, and making sure that all of that is taken care of ahead of time, before flows or fish are introduced.

We don't want to be sitting here in 20 more years and have half of a project built, and have it fall upon our growers, who have been impacted because you haven't completed the project. We want to make sure there is a proper phasing to make sure that it can be done, funding is identified, and it is completed. With that, that alleviates a lot of our concerns, and that is critical for our support.

And then the adequate representation on the implementation committee. There was talk about this Technical Advisory Committee. Whether it is that or another one, it needs to be a committee that we have equal say on how this gets implemented. Again, our area is going to be the most impacted by this. We have to have a vehicle by which our concerns are more than just heard; we have to have reasonable consideration that they are going to be acted upon so that it gets done properly.

One of the biggest issues that is going to happen as far as implemented is this 4B. It has been mentioned a couple times. Let us just back up.

In my testimony you have attached are some maps that show what the river looks like today, and what it looks like down through Reach 4B. 4B hasn't had any water in it, and I mean zero flows, from the mainstem of the San Joaquin since 1969. Not in the

1997 flood did it have any flows, not last year or this year. There is an existing flood bypass system that is there. It passes flows.

We need to make sure that if you are going to try to consider even using the old stem, Reach 4B, that it needs to be done in phases. Take a look at what is going to happen if you want to run the prescribed, up to 475 cfs. That needs to be looked at, studied, NEPA/SJRECWA, and then mitigate the impacts that are going to occur from just the 475. Then go back and look at what you are going to do in making your decisions on the broader higher flows of up to 4,000 cfs.

If we can get assurances that those kinds of processes are in place, funding is available, we would be very supportive of this legislation and back it. We do support, though, I want to say, the settlement that has been proposed, and we think it is a good way to go, as long as and it is contingent upon these issues adequately being addressed.

I would be happy to answer any questions.

[The prepared statement of Mr. Chedester follows:]

Statement of Steve Chedester, Executive Director, San Joaquin River Exchange Contractors Water Authority

Good morning, Chairman Radanovich and members of the Subcommittee. My name is Steve Chedester and I am the Executive Director of the San Joaquin River Exchange Contractors Water Authority. We are commonly referred to as the "Exchange Contractors." It is my honor today to address you on a matter of crucial importance to the Exchange Contractors.

You have before you legislation that will implement a Settlement Agreement that has been entered into among parties to the litigation instigated by the Natural Resources Defense Council seeking to restore flows for fisheries to the upper San Joaquin River. The Exchange Contractors are not a party to this Settlement Agreement. The Exchange Contractors were nominally represented in the litigation by virtue of our member agencies' membership in the San Luis & Delta-Mendota Water Authority ("Authority"), a water user group that receives water from the Bureau of Reclamation and which intervened in the subject litigation. The Authority did not play an active role in the litigation or the settlement, as there was never an opportunity for its interests to be fully aired. However, the Exchange Contractors intend to submit an amicus brief to the District Court raising its concerns with the proposed Settlement. I will provide copies of that brief to the Sub-committee once it is filed.

As you know, the proposed Settlement will obligate the Bureau of Reclamation to release water from Friant Dam in order to protect downstream fisheries. The bulk of this water will come from a reduction of water supplies to the members of the Friant Water Users Authority. These irrigation districts receive water from the Bureau of Reclamation through their contracts entitling them to water from the Central Valley Project. According to the terms of the Settlement Agreement, any additional water will only be provided from willing sellers. The Settlement Agreement also states that there will be no "material adverse effects" on other water users. It is to this issue that we have serious concerns.

The Exchange Contractors is a joint powers authority comprised of four water entities that irrigate 240,000 acres of prime agricultural land in the San Joaquin Valley. Our water rights date back to the 1880's, when these water rights were first established by Henry Miller and Charles Lux. The members of the Exchange Contractors are the Central California Irrigation District, Columbia Canal Company, Firebaugh Canal Water District and San Luis Canal Company.

Farmers in our area grow 38 different varieties of permanent and annual crops. There are over 1500 farmers within the combined districts and we support $400 million of economic output at the farm gate which translates into over a three fold effect to the regional economy. This figure does not include the significant economic output from the dairy industry in our area. Our lands play host to several endangered species and of necessity we are good stewards of the environment. We support solutions for the Bay-Delta ecosystem by providing water for the Vernalis Adaptive Management Plan and providing water to the local wildlife refuges.

While we are not contractors to the Central Valley Project, by virtue of our "exchange contract" and our "purchase contract," we have exchanged our source of water from the San Joaquin River for a supply from the Central Valley Project via the Delta-Mendota Canal. The development of the exchange contract enabled the development of the Central Valley Project by the Bureau of Reclamation, including the construction and operation of Friant Dam. In the event that the Bureau of Reclamation is unable to meet its contractual obligations to the Exchange Contractors, we are entitled to resort to our senior water rights and receive a flow of water down the San Joaquin River. This is an important fact, as any increase in capacity to the San Joaquin River for restoration flows must be of a sufficient size to enable the Exchange Contractors to receive their water right entitlement to a flow of 2,316 cfs as is provided for under the exchange and purchase contracts. In other words, as the size of the channel capacity needed for the restoration effort is being considered, capacity must be provided so that the Bureau of Reclamation can meet its obligation to deliver the water the Exchange Contractors are entitled to under their pre-1914 water rights.

The Exchange Contractors have four major concerns with the Settlement Agreement. These concerns are:

I. WATER RIGHT PROTECTION

It is essential that our contract rights with the Bureau of Reclamation and our historical water rights be honored and protected. The settling parties state in their Settlement Agreement that they do not believe that there will be impacts to third parties, the legislation then, must un-ambiguously affirm that the water rights and contract rights of the Exchange Contractors will not ever be adversely affected by this fish restoration program. We do not want to find ourselves in a situation akin to the farmers on the Klamath River.

II. ADEQUATE ENDANGERED SPECIES ACT PROTECTION

In order to protect our water rights and water supply, it is essential that any fishery to be introduced into the upper San Joaquin River not expose the Exchange Contractors to liability under the Endangered Species Act. We believe that it is essential for Congress to direct the Secretary of Commerce to exercise his discretion to designate any fishery reintroduced to the San Joaquin River as a Section 10(j) experimental population. While some have suggested a take exemption under Section 4(d), that option is insufficient as Section 4(d) only protects threatened species, not endangered species.

III. ADEQUATE FUNDING FOR IMPLEMENTING THE MITIGATION MEASURES

We understand that the goal of this program is to restore the salmon fishery to the entire stretch of the San Joaquin River from Friant Dam to the confluence with the Merced River. This 153 mile stretch of river has been without fish flows for over 60 years and many miles of river have been without any flows since 1969. The introduction of fish flows to many sections of the river will cause substantial damage to downstream structures and downstream property unless mitigation measures are in place prior to releasing the flows. As the legislation is currently crafted, it is possible for those entities that will implement the Settlement to construct facilities along this entire stretch of river, release water from Friant Dam and introduce endangered species into that water without ensuring that necessary mitigation measures have been completed.

We do not want half of a project constructed. We also do not want to be in a position of supporting this legislation based on the hope that the terms of a permit to be issued several years from now will protect us.

We believe the costs of this restoration effort could approach $1 billion dollars in capital costs alone. Inflation will raise the costs over the years and operations and maintenance costs are on top of these capital costs. In as much as Congress will not appropriate the entire cost of this restoration effort at this time, we believe that it is prudent to proceed with the restoration effort on a phased basis.

It is critical to understand that approximately 80% of the channel modifications and mitigation for seepage will occur in our service area and almost all of the fish screening and fish passage costs will occur in the reaches of river that we represent. There will be impacts and risks shifted to our landowners by this settlement and we are simply requesting that the mitigation required for implementation of the settlement be in place prior to reintroduction of fish flows and salmon.

We do not believe that the two phases identified in the proposed legislation and Settlement Agreement are sufficient. Rather, the restoration effort should be undertaken by river reach starting with the upper most section of the river below Friant Dam. That is an area that will be best suited to the initial planting of fish and will

provide the most suitable habitat of the entire stretch of the upper San Joaquin River. In-stream restoration actions must occur before fisheries can be introduced into that reach of the river. After instream measures and any levees, slurry walls and other mitigation measures are constructed, only then should water be released to a given reach of the river. Any flows that would reach the lower stretches of the river should be bypassed around those reaches until a final route is chosen and mitigation measures are in place.

While analogies are usually dangerous to make, I liken this to the construction of a house. If you have enough money to build a 2 bedroom house you should not frame out for 4 bedrooms only to run out of money without even completing 2 bedrooms. It is better that the 2 bedroom house be constructed up to code and that plans be made for future improvements. This is a prudent course to take for the restoration of the upper San Joaquin River.

To give you an idea of the problems and challenges the restoration effort will face and the risks to adjacent properties that have to be mitigated, I have some photographs and diagrams that show the areas along the San Joaquin River that will be affected. Attached as Exhibit A are a few photos of the San Joaquin River as it exists today throughout our service area. Additionally, we are including as Exhibit B maps of the San Joaquin River from Friant Dam (reach 1) through its confluence with the Merced River (reach 5).

In order to assist the Subcommittee in understanding what work needs to be undertaken along the San Joaquin River, in addition to the photos and maps, I also have attached as Exhibit C a write-up by the engineering firm of CH2MHill analyzing the river reach by reach. Below is a chart summarizing their report. It shows, reach by reach, the work that needs to be done to provide habitat for the salmon and to protect the existing flood control facilities and the adjacent lands and water facilities. The chart and attached analysis also contain cost estimates.

We know you are receiving a number of different cost estimates. We believe those prepared by CH2MHill are reasonably accurate, but perhaps could be defined after in-depth discussions with the Bureau of Reclamation and the California Department of Water Resources. It may interest the Subcommittee to know that CH2MHill's work is supported by a $1 million study funded by the EPA and the company is a contractor to the Bureau of Reclamation for purposes of analyzing aspects of the Central Valley Project. In light of this substantial involvement with the CVP, we believe CH2MHill's analysis should be taken quite seriously.

Summary of Costs for San Joaquin River Restoration Actions
Assuming a Conveyance Flow of 4,500 cfs and Costs Escalated to 2014

	Channel and Levee Improvements (Slurry walls, levee setback, etc)	Fish Passage and Screens	Total
Reach 1	$19,164,000	$12,474,000	$31,638,000
Reach 2A	$173,690,000	$48,989,000	$222,679,000
Reach 2B	$214,394,000	$52,041,000	$266,435,000
Reach 3	$0	$20,000,000	$20,000,000
Reach 4A	$119,568,000	$46,353,000	$165,921,000
Reach 4B	$371,847,000	$3,706,000	$375,553,000
Reach 5	$0	$2,051,000	$2,051,000
Total	**$898,663,000**	**$185,614,000**	**$1,084,277,000**

Costs are escalated to Year 2014 dollars using an escalation rate of 6% per year.
Fish passage and screen costs from Donahue Expert Report.
Fish screen costs added for Mud and Salt sloughs.

IV. ADEQUATE REPRESENTATION ON AN IMPLEMENTATION COMMITTEE

The proposed restoration program as ultimately conceptualized by the Settlement Agreement will represent a comprehensive restoration program for the upper San Joaquin River. However, since this is only a conceptual settlement and many specifics are left to implementation, it is essential that all affected parties be entitled to participate in the implementation program. We believe that Congress should direct the settling parties and the federal and state fishery agencies as well as the Bureau of Reclamation to participate in an implementation committee that will include in its membership as co-equal members the affected downstream water interests including the Exchange Contractors, San Joaquin River Tributary Association, the San Luis & Delta-Mendota Water Authority and the San Joaquin River Resources Management Coalition. The purpose of this committee should be to advise the implementing agencies on the impacts of the fishery and river restoration

efforts. This committee should be distinct from the settlement implementation committee known as the Technical Advisory Committee comprised of the Natural Resources Defense Council and the Friant Water Users Authority. Their task is to implement the Settlement Agreement. The task of this other committee should be to restore the upper San Joaquin River in a manner consistent with the Settlement, in a manner that does not adversely impact third parties, and in a manner that sizes the restoration program to the funds that are secure.

In our view, inclusion of the above protections in the subject legislation is essential for our support of the legislation. We do not think this settlement should be put on the backs of other farmers and water users. To that end, we support the water agency draft of proposed amendments to the legislation that we will provide to the committee. We have already provided this legislation to your respective staff.

Thank you very much for allowing me to testify before you today on behalf of the Exchange Contractors. We sincerely hope that we will be able to support this legislation. If our interests are protected, we will be in a position to do so. I am pleased to respond to any questions.

[NOTE: Attachments to Mr. Chedester's statement have been retained in the Committee's official files.]

[The response to questions submitted for the record by Mr. Chedester and Ms. Skinner follows:]

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OCTOBER 20, 2006

The Honorable Richard Pombo
Chairman
Committee on Resources
U.S. House of Representatives
Washington D.C. 20515

RE: San Joaquin River-Response to the Chairman's Letter of October 5, 2006

Dear Mr. Pombo:

Thank you very much for your letter of October 5,2006 in which you requested that we respond to a series of questions submitted by Representative Devin Nunes to all witnesses that testified before the Subcommittee on Water and Power on September 21,2006. As the Executive Director of the San Joaquin River Exchange Contractors Water Authority ("Exchange Contractors") and as a landowner who will be directly effected by the restoration we are pleased to be able to provide you with these responses. For convenience each question is in italics followed by our response.

Question no. 1: Based on the terms of the Settlement, has an analysis been completed on the potential water losses on a district-by-district level and water user-by-water user level? If so, can you provide a copy of that analysis to the Committee?

Response no. 1: The Exchange Contractors have not compiled such an analysis and we are not aware of any such analysis that has been conducted. Presumably, this type of analysis will be required pursuant to the National Environmental Policy Act ("NEPA") for any actions undertaken by any federal agency and pursuant to California Environmental Quality Act ("CEQA") for any action undertaken by a state or local agency.

Notwithstanding the fact that we have not conducted such a study, the Exchange Contractors are concerned about the potential impact on their water supply as a result of the Settlement. Without going into great detail on the water rights of the Exchange Contractors, please be advised that the Exchange Contractors hold water rights on the San Joaquin River that are senior to those of the Bureau of Reclamation ("Reclamation") as well as most other water users. Our pre-1914 water rights total some 840,000 acre feet. Pursuant to the contract between the Exchange Contractors and Reclamation (as revised December 6,1967, the "Exchange Contract"), the Exchange Contractors are entitled to receive a substitute supply of 840,000 acre-

feet of water (650,000 acre-feet during critical years). Typically, this water is provided via the Delta-Mendota canal, but under §§4(a) and §8 of the Exchange Contract, should Reclamation not be able to provide the substitute supply, the Exchange Contractors are entitled to receive this supply of water from the Friant Dam down the San Joaquin River. We are concerned that in the event that supplies from the Delta Mendota Canal are interrupted as a result of either physical or regulatory actions, planned or unplanned, that the release of water for fisheries from Millerton Lake will potentially reduce the amount of water otherwise available to the Exchange Contractors. In order to better understand the Exchange Contractor's rights, I am enclosing with this response a copy of our amicus brief that was filed with the United States District Court in the matter of Natural Resources Defense Council v. Rodgers, et al, which case has lead to the current Settlement.

Question no. 2: According to the California Department of Fish & Game, Fish Bulletin No. 17, The Sacramento-San Joaquin Salmon Fishery of California (Page 31), by 1928 there were "very few" salmon remaining in the San Joaquin River above the Merced River and that this historical salmon fishery that once existed had been severely depleted. Considering this is 15 years before the construction of Friant Dam, how would the Settlement change historical facts?

Response no. 2: In as much as the Exchange Contractors are not proponents of the Settlement, they do not have any greater insight as to the physical or biological chances for success of this experimental program than any other party. However, according to our consulting biologist, Dr. Kathy Freas of CH2M Hill, review of the experiment is going to be very challenging and the chances for successful reestablishment of a self-sustaining population of spring run Chinook salmon is marginal. In fact, we note that Settling Parties' measurement of success, seven years or more following the reintroduction of spring-run Chinook salmon to the San Joaquin River, is an annual escapement of 500 fish (Settlement, §20(d)(l)(B)).

Question no. 3: What is a reasonable expectation of success relating to reintroduction of spring-run chinook salmon into the San Joaquin River? How many naturally reproducing spring-run chinook salmon can we expect to inhabit the San Joaquin River as a result of the proposed restoration?

Response no. 3: In addition to our response to Question No. 2, the National Marine Fisheries Service ("NMFS") has characterized this program as an "experiment." We have heard their biologists explain that they believe that the salmon to be reintroduced should be treated as an "experimental population" pursuant to Section 10(j) of the Endangered Species Act. We agree. There are serious problems associated with the proposed restoration effort. Without going into great deal, and we trust that the settling parties will provide you with this detail, there are many physical and biological challenges to the reintroduction and restoration of the spring run chinook salmon fishery. Among those challenges are the following:

- Additional spawning habitat is needed in Reach 1 as the current spawning habitat is inadequate.
- A defined low-flow channel is needed in Reaches 2A and 4B to provide appropriate water depths and temperatures for passage for adult salmonids during upstream migration and juvenile salmon during outmigration.
- An appropriate hydrologic flow regime is needed to promote the establishment of riparian vegetation where it does not exist and prevent encroachment of vegetation into flood control channels.
- Need to maintain suitable water temperatures in all reaches of the San Joaquin River to prevent salmon mortality along with increased susceptibility to disease and predators.
- Preventative measures are needed to control predation by largemouth bass and other predatory fish (e.g., smallmouth bass and pikeminnow) known to inhabit the gravel pits, Mendota Pool, and other portions of the San Joaquin River.
- Modifications are needed to existing barriers to fish migration along the San Joaquin River including the Chowchilla Bifurcation Structure, Mendota Dam, Sack Dam, the Sand Slough Control Structure, and the Mariposa Bypass Bifurcation Structure.
- Screening of numerous diversion structures and sloughs will be needed to prevent fish entrainment and mortality. This would include screening the diversion structures in the Mendota Pool or constructing a bypass around the pool similar to the Mendota Pool Bypass proposed by the Settlement parties.
- An appropriate spring-run stock that could adjust to the wanner water conditions of the San Joaquin River will be needed for reintroduction. In addition, NMFS will need to allow for the use of this stock, which may be listed as threatened or endangered and may affect restoration efforts in other river systems, for reintroduction efforts on the San Joaquin River.

From the foregoing, it should be evident that this restoration program faces some very real and difficult challenges. It may be necessary at some point to conclude that this experiment is a failure. If so, that will be a decision made by NMFS presumably in consultation with the Secretaries of Commerce and Interior. The Exchange Contractors will be watching this program carefully, both in terms of its ability to actually restore a salmon population as well as for potential impacts on our operations and those of our downstream farming constituencies.

Question no. 4: Considering that the restoration of a salmon run will require consistent cold water flows, is there apian to develop temperature controls to eliminate impacts on downstream tributary salmon runs? If so, what are the details of the plan?

Response no. 4: The Responding witnesses are not aware of any current plan to provide sufficient coldwater to the downstream fishery. It will be very important to maintain an adequate coldwater pool behind Friant Dam for this purpose. Even so, should NMFS attempt to use the channel of the San Joaquin River such as it may exist or be improved, this will exacerbate an already difficult temperature control situation. Assuming that the channel is recreated and widened to a flow of 475 cubic feet per second (cfs), there will still be tremendous temperature gain in the 80 miles of the San Joaquin River that run through the service area of the Exchange Contractors. This stretch of river was historically a braided river that spread out widely across this portion of the San Joaquin Valley. Again, in conjunction with any effort to restore the salmon fishery, we believe that these are the types of studies that must be conducted prior to the reintroduction of any fish into the river.

Question no. 5: Would the funds authorized by the proposed settlement legislation produce better results on streams other than the San Joaquin River-in terms of increasing the population of spring-run chinook salmon?

Response no. 5: The responding witnesses believe that NMFS is in the best position to respond to this question. Nevertheless, we find it hard to believe that $1 billion could not be better spent elsewhere to produce spring run salmon. NMFS is currently working with parties in other areas of California to improve spring run salmon populations. For example, recently the California Department of Water Resources submitted a license application for the Oroville Facilities hydroelectric relicensing (P-2100) to the Federal Energy Regulatory Commission. According to the draft environmental impact statement, the Department of Water Resources proposes to spend several hundred million dollars restoring habitat for a salmon fishery. This will include spring run chinook salmon, fall run chinook salmon and steelhead on the Feather River. It is our understanding that there are hopes of creating several thousand additional fish on the river at a cost substantially less than the nearly $1 billion being proposed for expenditure on the San Joaquin River.

Question no. 6: Please identify how the terms of the Settlement will provide water quality improvements in the Delta.

Response no. 6: This question should be answered by settling parties. However, from the analysis of the third parties it appears that very marginal improvement will be provided as any additional water contribution would only rarely provide improvements in Delta water quality and when it did it usually occurred in March when there is minimal irrigation demand. No current water quality standards adopted by the State Water Resources Control Board (SWRCB) will be met with flows from the restoration, though small amounts of water currently used to meet standards from New Melones may be conserved.

Question no. 7: Is there a plan to address the groundwater overdraft that will occur as a result of reduced water deliveries to the Friant Division? If so, what are the details of the plan?

Response no. 7: This should be answered by the defendants since we do not have sufficient knowledge to adequately respond to this question.

Question no. 8: What are the estimated costs to implement the restoration plan proposed in the Settlement? Please provide details on how you develop the estimate.

Response no. 8: Please see the attached analysis prepared by CH2MHill. In summary, CH2MHill's estimate is based upon costs projected forward to mid-term construction schedule of 2014 based upon 6% inflation factor. Their estimate totals $1,071,537,000, which includes use of the river channel in Reach 4B, rather than the by-pass. If the by-pass is used, the costs will be reduced by $260,000,000.

The San Joaquin River between Friant Dam and the confluence of the Merced Dam—which is the part of the river subject to the Settlement—is broken down into the following Reaches: Reach 1 runs approximately 38.5 miles from Friant Dam to Gravelly Ford; Reach 2A runs approximately 13 miles from Gravelly Ford to the Chowchilla Bifurcation Structure; Reach 2B runs approximately 11 miles from the Chowchilla Bifurcation Structure through Mendota Pool to Mendota Dam; Reach 3 runs approximately 23 miles from Mendota Dam to Sack Dam; Reach 4A runs 13.5

miles from Sack Dam to the Sand Slough Control Structure; Reach 4B runs approximately 33 miles from the Sand Slough Control Structure to Bear Creek; and, finally, Reach 5 runs 17.8 miles from Bear Creek to the confluence of the Merced and San Joaquin Rivers.

A Reach-by-Reach summary of required improvements to meet the Restoration Goal, along with an estimate of costs, prepared by CH2MHill is attached as Exhibit 4 to the Amicus Brief and included hereto.

Question no. 9: The proposed legislation submitted to Congress has a provision of "no private right of action." What prevents parties from filing suit for more water after 2026? What prevents a third party from filing suit in reference to NEPA compliance, or other applicable laws, as feasibility studies are conducted on various aspects of the Settlement?

Response no. 9: (i) The first question seeks information on what will prevent parties from filing suit for more water after 2026. Although if a suit were to be filed for more water after June 30,2026 it would be filed as a separate action (Settlement, § 20(a)), nothing will prevent third parties from filing suit for more water prior to 2026. However, we believe there are various defenses to such an action based on the comprehensive nature of the plan to be put in place by virtue of the Settlement and related legislation. Given the breadth of the restoration plan, assuming it is implemented in a manner contemplated by the parties, we expect that a strong defense would be available for the Exchange Contractors as well as the settling parties regarding any further action that might be undertaken on the San Joaquin River above the confluence with the Merced River.

As for additional water after 2026, the Settlement provides the Restoration Flows shall not be changed "except by a written agreement signed on behalf of all the Parties, acquisition of water from willing sellers, or a final recommendation by the SWRCB and a final Order of this Court." (Settlement, § 20). If a Party seeks additional flows, the Settlement obligates them to move the Court to have the SWRCB make certain findings relevant to the request for a change in the Restoration Flows. The Court shall evaluate the request for a change in Restoration Flows in light of the extent of the implementation and success of the Restoration Flows and other restoration measures taken, the extent of success in meeting the Water Management Goal, the effectiveness of restoration measures provided for in the Settlement, progress of the Settlement, and environmental and economic effects of the Restoration Flows. (Settlement, § 20(d)).

(ii) Section 108 of the proposed legislation provides as follows:

"Nothing in this Title shall confer upon any person or entity not a party to the Settlement a private right of action or claim for relief to interpret or enforce the provisions of this Title or the Settlement. This provision shall not alter or curtail any right of action or claim for relief under any other applicable law."

In discussions with the settling parties, which included the United States Department of Justice, the parties agreed that the private right of action would not foreclose litigation based on NEPA, the Endangered Species Act, the Administrative Procedures Act, (put citations after each statute), or other applicable federal laws. The legislation will only prohibit litigation based on the San Joaquin River Restoration Settlement Act as well as on the Settlement Agreement itself. In fact, the water users have not waived their right to challenge any action taken under the Settlement Agreement in the event that they believe that there is a violation of any of the foregoing legal provisions. Further, pursuant to the Administrative Procedures Act ("APA"), should the implementation of the Settlement or the Act be undertaken in a manner that is arbitrary or capricious, and to the detriment of downstream water users, it is more likely than not that the downstream water users will file litigation that challenges the arbitrary and/or capricious actions of the Secretary.

We are pleased to have this opportunity to respond to your questions and to have had the opportunity to testify before the subcommittee on water and power. In the event that you or Mr. Nunes have any more questions, whether about our response or the Settlement and related legislation, please do not hesitate to contact us.

Respectfully yours,

Steve Chedester
Executive Director
San Joaquin River Exchange Contractors Water Authority

Lynn W. Skinner
Landowner, Wolfsen, Inc.

Enclosures

cc: The Honorable Dianne Feinstein

The Honorable Barbara Boxer
The Honorable Dennis Cardoza
The Honorable Jim Costa
The Honorable Devin Nunes
The Honorable George Radanovich
Exchange Contractors Board of Directors
Tom Birmingham, Westlands Water District
Dan Nelson, San Luis and Delta Mendota Water Authority
Allen Short, San Joaquin Tributaries Agencies

Mr. RADANOVICH. Thank you, Mr. Chedester, I appreciate your testimony.

And now hearing from somebody who actually lives in the subject area that we are discussing, I want to introduce Ms. Lynn Skinner, who is the owner, long-time farmer, of Wolfsen Farms in Los Banos, California.

Ms. Skinner, welcome to the Subcommittee.

STATEMENT OF LYNN SKINNER, OWNER, WOLFSEN FARMS, LOS BANOS, CALIFORNIA

Ms. SKINNER. Thank you. Thank you, Mr. Chairman and honorable Members of the Subcommittee. It is a real thrill to be here to be part of this process. I am enjoying it all.

My name is Lynn Skinner, and I am a California farmer. For four generations my family has farmed on the San Joaquin Valley, and I expect that my grandchildren will participate in the family farm, as well.

Our farm is located in Reach 4B of the San Joaquin River, which is the area, of course, that is being looked at for reintroduction of the Spring Chinook Salmon.

I am testifying today as a farmer who will be directly affected by the legislation you are considering. I am here as a surrogate to hundreds of other farmers along that river who will also be affected, especially those in Reach 4B. I am not here expressing opposition to, or favor for, the proposed settlement. I am, however, here to go on record against making those farmers downstream of the dam victims of the settlement.

How the legislation is crafted to a great extent affects how other farmers and I will be impacted. I am here this afternoon to put a face on, and a voice to, Reach 4B, to let you see and hear that we are more, much more, than the number four and the letter B.

All of us in Reach 4B understand the significance of the effort to restore fish to the river. However, when decisions are made I hope you will keep me and the hundreds of other affected farmers in mind, and the economic and moral contributions that we make to this great nation.

On our farm we grow predominantly canning tomatoes and cotton, some alfalfa, with a few what we call flex crops. Our farm is located adjacent to the San Joaquin River, in an area that may be flooded by this fishery restoration effort.

Here is the problem. We farm in an area where there is high groundwater. If water is allowed to go down that stretch of the river, where it hasn't flowed for like 60 years, it is going to flood adjacent lands, both from over-the-top flooding or from seepage.

This last really wet season, we lost about 400 acres due to seepage. And that was through the bypass.

Now, let me explain why this is the case. Historically, the San Joaquin River never, ever flowed through just one channel at this particular reach. It was what is known as a braided river, and that is that many different channels flow through this very, very flat ground.

When Friant Dam was built for flooding, and it was controlled, farming operations commenced along those once-historic-flooded areas. Over the past several decades the river channels have disappeared, leaving only a creek-size segment of the old channel that can literally be waded across in wet times.

When it is wet, the water would otherwise have, when it is wet now, the water flows through what is called the Chowchilla Bypass. It is a manmade channel, authorized by the government, and built for flood control.

Now, you have heard a lot about cfs. That is cubic feet per second, the standard water-flow measurement. For the purpose of this new restoration flow down the old channel, remember that old channel is about knee-deep, that is like filling 83,000 average-size swimming pools, and dumping them into the river every day.

Now, one day's flow would irrigate 3,000 acres of tomatoes, and nearly 4,000 acres of melons. I am sure I don't need to remind you that the estimates for the Spring Run Salmon is 500 fish annually. That is compared to about 120,000 tons of tomatoes, and 2,400,000 boxes of melons. The economic variances are staggering.

Now, I am not opposed to fish. But we need to look at protecting the farm ground. I urge you to use some logic in this equation and give preference to an improved Chowchilla Bypass. It could be modified to function as a fish corridor, rather than trying to construct a new, unnatural main channel. Because remember, there was no main channel through here.

So basically what we are talking about is another manmade channel on the San Joaquin. So in essence we have two manmade channels going through that area.

While you certainly can restore part of the river upstream from Reach 4B, attempting to restore this particular segment of the river is unrealistic, illogical, and threatens the site of a huge food-producing area, an economic-generating area, and it is expensive.

The estimates to restore the Reach 4B are about $400 million, or 40 percent of the entire project. Now, my dad and uncle paid well under $200 an acre for our ranch. And now, however, this land is being scheduled for permanent crops, and recent sales around have been up to $10,000 for tree- or permanent-crop area, more if the crop is already on the land, and less if it is row crop.

If we use the mid-price range of 10,000 acres and we apply it to approximately 5,000 acres that would be needed for mitigation, we are looking at a purchase price of like $50 million or more if more land is ruined, on top of the $400 million for restoration costs. So now we are at like $450 million for Reach 4B.

This, of course, does not include any cost of litigation should we feel that the amount offered by the government to condemn property is adequate, and in turn we should choose to litigate the value of our land.

Now, Don and I just lived through a litigation due to insufficient funding of a government project. And I can tell you nobody wants that. It is imperative that an exact accounting of cost be determined before the project is started.

My second concern was about the Endangered Species Act, and you have heard from my colleagues on that. However, I do have one point, and that we feel is being overlooked, and that is the displacement of a huge habitat sanctuary that has developed naturally, and will be totally decimated, if it is turned back to nature.

All of us in Reach 4B have taken great care to see that the old main channel is left entirely alone as a wildlife sanctuary. Numerous species would disappear if the river were to be mucked out. I don't know if that is a technical term or not.

We are pleased with the progress that we have lived through this week. I believe in compromise. I mean, I am a mom; I have to. It is our hope that we will get the assurances that we need to move forward with this. If not, I don't think it is fair that you should ask us to give up all that we have worked for for generations, and simply accept any legislation that comes along and walk away from our heritage.

Those of us in Reach 4B are living the American Dream. My father was a grandson of a German immigrant, and he wanted to be a doctor, but he was too poor for all that schooling. So he became a farmer, set the groundwork for the farm that we have today.

My husband put himself through school, alternating semesters by working and going to school one. His first job was at 11 years old, picking cotton in a sack, and he has worked every day since.

Our sons and daughters are actively working on our family farm. The biggest problem we have with our grandchildren is keeping them in school, because they want to be working on the farm.

The Bowles and the Nickel and the McNamara families and others all have similar rich pioneering histories in the area, only older by a generation.

My daughter, Laurel, and I came and made this trip out here because it was important. It is important to Don and I, and it is important to her, and it is important to her brothers and her sisters and her nieces and nephews: the fifth generation. It is their heritage. It is important enough to get me on an airplane.

I urge you to do whatever is in your power to help us help you. Do what is logical, do what is economically sensible, and do what is morally right.

Thank you. I would be happy to answer questions.

[The prepared statement of Ms. Skinner follows:]

Statement of Lynn W. Skinner, A California Farmer

Good Morning, Honorable Chairman Radanovich and honorable members of the Sub-committee.

My name is Lynn Skinner and I am a California Farmer. For 4 generations my family has been farming in the San Joaquin Valley and I expect that my grandchildren will also participate in family farming. Our farm is located in reach 4-B of the San Joaquin River which is an area that is within that stretch of the river that you are considering for reintroduction of Spring Run Chinook salmon.

I am testifying today as a farmer who will be directly affected by the legislation you are considering. I am here as a surrogate for the hundreds of other farmers along the San Joaquin River who will also be affected, especially those in reach 4-B. I am not here expressing favor for nor opposition to the proposed settlement.

However, I am here to go on record against making the farmers downstream of Friant Dam into the victims of the Settlement. How the legislation is ultimately crafted will determine the extent to which my fellow farmers and I are impacted by the settlement. I am here today to put a face on, and voice to reach 4-B; to let you see and hear that we are more, much more than the number (4) and the letter (B)!

My testimony today addresses three issues, they are:

1. THE POTENTIAL FOR FLOODING IN REACH 4-B OF THE SAN JOAQUIN RIVER AND THE USE OF THE REACH 4-B BY-PASS KNOWN AS THE CHOWCHILLA BY-PASS.
2. THE NEED TO PROTECT FARMERS FROM THE POTENTIAL ADVERSE IMPACTS OF INTRODUCING AN ENDANGERED SPECIES INTO THE SAN JOAQUIN RIVER.
3. THE DISPOSITION OF SURPLUS LANDS THAT MAY BE ACQUIRED BY THE SECRETARY OF THE INTERIOR FOR MITIGATION PURPOSES.

The farmers are the original environmentalists! Most of us in the farming community work on a daily basis with the environment and the environment sustains our livelihood, simply put, if we don't take care of the environment (including land, air and water) it doesn't take care of us!

I understand the significance of the effort to restore fisheries to the San Joaquin River. Candidly, I do question whether it is worth $1 billion or thereabouts to restore somewhere between 50 and 500 fish to the river when we have so many other environmental needs that could greatly benefit from this money or basic domestic infrastructure projects. However, that is a decision that you and others will have to make. But, when you make that decision, I hope you will keep me and the hundreds of other affected farmers in mind, and the economic and moral contribution we make to this great nation.

1. THE POTENTIAL FOR FLOODING IN REACH 4-B OF THE SAN JOAQUIN RIVER AND THE USE OF THE REACH 4-B BY-PASS KNOWN AS THE CHOWCHILLA BYPASS.

On our farm we grow predominately canning tomatoes and cotton and alfalfa with a few "flex" crops (crops that are good for the soil). Our farm is located adjacent to the San Joaquin River in an area that may be flooded out by this fishery restoration effort. Here is the problem: We farm in an area where there is high groundwater. If water is allowed to flow along this stretch of the river where it hasn't flowed for at least 50 years, it will flood out the adjacent lands.

Let me explain why this is the case. Historically, the San Joaquin NEVER flowed in a single channel in that area of the valley. It was a "braided river" that is, it formed many different channels as it spread over the flat valley floor. When Friant Dam was built and the flooding of the area controlled, farming operations commenced along those once historically flooded areas. Over the past several decades the river channels have disappeared, leaving only a creek-sized segment of river that can literally be waded across by an adult. In wet times, the water that would otherwise have flowed through that area now flows through the Chowchilla bypass, a man-made channel authorized by the government and built for flood control because that area and others along the river were so prone to flooding.

I know from my discussions with others related to this restoration proposal, that a type of "beefed up" levee is supposed to be constructed along Reach 4-B in order to prevent flooding adjacent to the river. Just to give you an idea of the magnitude of potential flooding, engineers tell me that as much as a quarter mile on each side of the river could be flooded which would put 5,440 acres of agriculture out of business. You've heard a lot about CFS (cubic feet per second, the standard water flow measurement) For the purpose of this "new restoration flow" down the old channel, (that's knee deep) that's like filling almost 83,000 average sized swimming pools per day or 458 million cases of bottled water EACH day!! One day's flow would irrigate nearly 3,000 acres of tomatoes or nearly 4,000 acres of melons. I'm sure I don't need to remind you that the goal for Spring Run Salmon is 500 fish...annually! That is 1.3 fish a day compared to 120,000 tons of tomatoes or 2,400,000 boxes of melons. The economic variances are staggering!

I urge you to put some LOGIC into the equation and give preference to the use of an improved Chowchilla by-pass channel that could be modified to function as a corridor for fish migration rather than trying to construct a new, un-natural, main channel (remember the river never did flow through just one main channel in this area, so basically what we are talking about here is another man-made by-pass) of the San Joaquin, so we would have TWO man made bypasses running through the same area!

While you certainly could restore certain sections of the river above Reach 4-B, attempting to restore this particular segment of the river is unrealistic, illogical and threatens the site of a huge food producing area.

Secondly, in order to restore the 4-B reach and to protect the adjacent farmers, estimates are that about $400 million or nearly 40% of the entire project would have to be spent on this reach.

My Dad and Uncle paid well under $200. per acre for our ranch. Now, however, this land could be scheduled for permanent crops and recent sales have been around $10 thousand per acre, more if a permanent crop is already on it, less if it is row crop farming. If the mid- price of $10,000 per acre were to be applied uniformly to all 5,440 acres, that may need to be acquired, you are looking at a purchase price of 54 million dollars; ON TOP of the 400 million for restoration costs; now we're totaling 450 million for restoration of reach 4-B, only!

This of course does not include any operation and maintenance cost nor litigation costs that may arise if the farmers feel that the amount offered by the government to condemn our property is inadequate and in-turn they choose to litigate the value of their land. Don and I just lived through a litigation due to insufficient funding of a government project and I can tell you, nobody wants that! It is imperative that an exact accounting of costs is determined before any project is started.

2. THE NEED TO PROTECT FARMERS FROM THE POTENTIAL ADVERSE IMPACTS OF INTRODUCING AN ENDANGERED SPECIES INTO THE SAN JOAQUIN RIVER.

My second concern is that you are proposing to introduce an endangered species into the river. I understand that there is some controversy over how to designate these fish so that water and farming operations may continue in tandem. I don't have a legal background in the Endangered Species Act; however, I understand there may be ways to protect farming and water operations under the Act. I urge you to include in this legislation some mechanism that will give us assurance that our operations will not be shut down by having an endangered species in our backyard! We are already hosts to several endangered species and have learned to cohabitat with them. However, none of them are fish and Spring Run Salmon would impose a whole new set of problems and operating concerns that we presently don't have.

One other point that we feel is being over looked is the displacement of the huge habitat sanctuary that has developed naturally and that will be totally decimated if it is "turned back to natural state". All of us in reach 4-B have taken great care to see that the "old, main channel" is left entirely alone as a wildlife sanctuary. Numerous species would simply disappear if dredging were to occur.

3. THE DISPOSITION OF SURPLUS LANDS THAT MAY BE ACQUIRED BY THE SECRETARY OF THE INTERIOR FOR MITIGATION PURPOSES.

My last item of concern is this: It is my understanding that the federal government and perhaps the state government may be acquiring some land upon which to construct levees and some other facilities for this program. I also understand that in the event too much land is acquired, that the surplus land may be disposed of. I believe that it would only be fair if you would direct the Secretary to offer the land back to the farmers from whom it was originally taken. On the other hand, if the land is to be converted into parkland or other public use land, then the secretary should be required to include a condition on the sale of the land that protects adjacent landowners from intrusion by the public.

We are being asked/told to accept this legislation. In order for us to do so, you must give us some assurances that we won't be harmed. Don't ask us for unconditional, mindless support. If you want us to not oppose this legislation please work with us and give us the reasonable protections we are asking for. If we are adequately protected, we will work with you, the fishery agencies and our local water districts to help ensure the success of this program. If you won't agree to provide us with some assurances, then I don't think it's fair that you should expect us to give up all we have spent generations working for and simply accept the impact of this legislation, and walk away from our heritage!

Those of us in reach 4-B are representational of all Farmers and as such, we are the epitome of all that is good and right about this Country. We are the history that helped build our country into what it is today. We ARE the American Dream. My father, grandson of a German Immigrant, wanted to be a doctor, but was too poor to go to that much school so became a farmer and set the foundation for the organization we have today. My husband put himself through college by alternating semesters of school and work. His first job was at 11, picking cotton in a sack, and has worked ever since. Our sons and daughters are actively working in our family farm. The biggest problem we have with our grandchildren is keeping them in school; they all want to be home, working on the farm.

The Bowles and Nickel and McNamara families all have similar, rich pioneering histories in the area, only older, by a generation!

We, the family farmers in reach 4-B, along with others along the river, represent the history, the hope and the future of America through our economic and moral contribution and I urge you to do whatever is in your power to help us help you. Do what is logical, do what is economically sensible and do what is morally right. Thank you for your attention. I would be happy to answer any questions.

[NOTE: The response to questions submitted for the record by Ms. Skinner and Mr. Chedester can be found on page 90.]

Mr. RADANOVICH. Ms. Skinner, thank you very much for your testimony. It is very appreciated.

I am going to start off with questions. And I want to start off by telling the panel—and most of the panel is involved in negotiations on third-party issues, with the settling parties as well, to try to reach an agreement—you have done a great job.

And from what I understand, and this is my sense of it, and you can correct me if I am wrong, the two controversies kind of swirl around two issues, or the controversy is around two issues. And that is, one is that the Reach 4B area can barely handled 50 cubic feet per second. And then the second is the Endangered Species Act issues, especially as it relates to Spring Run Salmon, but also some relicensing issues.

And you, as well as others, have been, the last 24/36 hours, have been trapped in Senator Feinstein's office, and then told to get an agreement, and made a lot of progress yesterday. My understanding is that most of the issues on Reach 4B have been addressed to people's satisfaction. And there has been even progress on the ESA issue, especially as it relates to tributaries.

But there is the issue of endangered species and how it affects Delta, pumping out of the Delta, that is, in my view, it may not be the only issue, but probably the most contentious one that remains. And I think the key in getting an agreement that we can get the third parties on board, and so therefore could move, is making sure that we get a resolution of that Delta ESA issue, while not making this whole package a lightning rod for the Endangered Species Act, which will not enable us to be able to get it done in the way that we would like to. I think it is in everybody's interest to get this issue done and off the table as fast as we can.

Having that in mind, or keeping that in mind, I would like to get panel members to suggest how they think that something like that can be done. Do you have concepts? Do you have suggestions on how to word part of this Act to address that issue, while still enabling us to get this thing moved through the House and Senate as soon as we can?

We will start with you, Mr. Birmingham, and just go down the line.

Mr. BIRMINGHAM. Well, Mr. Chairman, first I want to observe that it is thanks to the efforts of every Member of this Subcommittee present today, and the Chairman of the full Committee, as well as Senator Feinstein, that we have made the progress.

I have heard a variety or a number of you say this morning and yesterday when we met that it is critical that to avoid the conflict and the uncertainty that we have had with prior agreements, this

language, this Act needs to be unambiguous. And I could not agree with you more.

My understanding is consistent with yours: that we have made progress on the 4B issue, that that issue has been resolved. I have to say that that is not an issue for Westlands Water District, but I certainly understand; and after the compelling testimony of Ms. Skinner, have a much better understanding of that issue.

On the issue related to the Endangered Species Act, there was significant progress with respect to developing language that would provide protection for the tributary agencies. But as is always the case when we get into the Delta, it becomes much more difficult.

Now, there are existing regulatory mechanisms that can be used to provide the types of assurances that the CVP export contractors would like to see, that the Department of Water Resources would like to see for its State Water Project to contractors, that would not exempt us from the Endangered Species Act. That is not what we are seeking. But what we want to avoid is a circumstance where we support the reintroduction of a species, but then we are punished for it, as well.

And yesterday a representative from NOAA Fisheries offered some language concerning how some of that, those regulatory processes could be implemented, and we were satisfied with that. And I am confident that if we sit down and talk further in good faith, that we will be able to persuade all of the parties to accept it. It is going to require your help, however, and the help of Senator Feinstein.

Mr. SHORT. Thank you, Mr. Chairman. I don't have much more to add to Mr. Birmingham, being in the same meetings and following him around for the last couple weeks. He has said it pretty eloquently.

But I will say this. From that perspective that language has been developed, at least on the FERC-related issue, along with the ESAPs, which is 10[j] and 4[d], and we think that we can bring closure to those pieces. And we think we can do it in a fairly compressed time frame.

So I find it encouraging from that standpoint. To get it through your process, with all due respect, Mr. Chairman, I have a hard time getting stuff through my own process, so I can't offer you any suggestion from that standpoint. But we are encouraged at least from a language perspective, and its development.

Mr. ROBBINS. Thank you, Mr. Chairman. And I want to also second Tom's indication to all of you. We very much appreciate all of your leadership in getting this done, and apparently we are going to continue it after this hearing is over in an effort to try to resolve these matters.

I want to also echo we believe that we have at least core language now that may satisfy our Endangered Species concerns, at least with respect to the San Joaquin River. And as Mr. Birmingham has indicated, there are tools we think we can bring to bear for resolution of Delta issues, as well.

In addition, we have some language that we have proffered to the National Marine Fisheries Service, and have a tentative approval, though everybody is still waiting for our final negotiating sessions that would essentially make sure that the relicensing

process at the Federal Energy Regulatory Commission doesn't trump what we are trying to do here today.

Again, it wouldn't exempt us. It would just simply say that these experimental conditions would stay neutral with respect to these projects, and when the experiment was over or at the end of the settlement period, the licenses could be reopened for Spring Run, and if it were necessary at that point. So again, that FERC language is very narrow, getting us right down to just the protections that the other parties are getting under the settlement agreement.

So assuming that language can move forward, I think you will have our full support in trying to implement this as soon as possible.

Mr. CHEDESTER. With respect to Reach 4B, I do believe we have come to at least conceptual closure. The language looks right. We have all got to go back and sell it back to our home folks, but it looks like it is worked out.

I do want to thank all of the delegation that was there yesterday. They made some very clear points, and actually applied the sufficient pressure to make it happen.

I just don't want to forget that while the exchange contractors and ESA aren't big, we definitely support all of our colleagues here. We have to have Endangered Species Act. We are on the mainstem of the river. Lynn's lands are along the river. We are going to need Endangered Species Act protection all the way up the river, for all of us.

And I will leave it to the experts on the language. That is why we have good counsel.

Mr. RADANOVICH. Thank you. Thank you very much. Ms. Skinner, if you would like to?

Ms. SKINNER. Just a short comment. I would like to thank everyone that was there today—or yesterday, actually. It was a productive meeting. The pressure was applied when it needed to be. And I do think we are feeling relatively comfortable.

I am not a technical person. I am a mom, so I am logical. So once it is written, then I would like to read it.

Mr. RADANOVICH. Very good. All right. Well, thank you. I will defer for other questions, but I would prefer to lock you all back in the room as soon as possible so that you can finish this thing out.

So I will defer to Mr. Pombo for questions.

Mr. POMBO. Thank you. And I know that there are a lot of concerns about the impacts on all of you of going forward with this. And I think all of us understand that. And we all represent either you or people very much like you in our own districts, and we understand.

I would say that at this point, it is a matter of drafting. It is a matter of coming up with the right language. You heard, all of you heard the previous panel and their testimony. They all pledge that there would be no third-party impacts; that they all agreed that the final document that would be produced, the final legislation that would be produced, would not have the third-party documents. And at this point it is up to us to come up with the right language in order to do that. Hopefully nobody goes back on that, hopefully nobody changes their mind after they testified before a

Congressional hearing. But you did hear them all pledge that there would be no third-party impacts. And I think this committee is committed to doing that in order to carry out the settlement.

I think we also know at this point that this is something that we want to do. It is something that I believe is the right thing to do, in terms of restoring the river and doing everything that we possibly can to restore the fishery on that particular river.

But you have my commitment and the commitment of this committee that, as we move forward with legislation, that we will do everything we possibly can to make sure that there are no third-party impacts, because of what we heard yesterday, the meetings we had, and the testimony that you heard earlier today where we had a pledge from all of the signatories on that agreement that they would do that, and that they agreed to do that.

I know that some people like to try to dance around their answers a little bit. But I think after they were asked the same question five different times, finally they all answered that they were committed to that.

So I am very much in favor of doing this and moving forward. And I look forward to working out the final language that all of you can agree to.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. BIRMINGHAM. Thank you, Mr. Chairman.

Mr. SHORT. Thank you, Mr. Chairman.

Mr. POMBO. Well, thank you.

Mr. RADANOVICH. I am going to recognize Mr. Cardoza very quickly.

Mr. CARDOZA. Thank you, Mr. Chairman. This is a question for the entire panel. And before I say this, I want to thank in particular Lynn Skinner for coming out and giving such eloquent testimony. I was out of the room, but I didn't miss it. And I appreciate very much your passion and your honest conviction on this issue.

The first panel was asked the question what would happen if the settlement does not go forward. I would like to ask each of you to briefly, because we have limited time, tell us what would happen if a settlement goes forward without the third-party protections that we are trying to implement in the legislation.

Mr. BIRMINGHAM. The very brief and simple answer to that, Mr. Cardoza, is that if the settlement goes forward without unambiguous protection in the authorizing Act to prevent third-party impacts, there will be endless litigation over its implementation. I can guarantee that if the Secretary of Commerce makes a decision to reintroduce Spring Run without the protections we need, Westlands Water District will do everything that it can judicially to prevent that from happening, because it will only take more water away from us.

And again, I want to make the point that we support, as does the Chairman of the full Committee, this program. We think it is a great idea. But we should not be punished by reduced water supplies as a result of a decision made to reintroduce a species, a species that we had absolutely nothing to do with its extirpation.

Thank you.

Mr. CARDOZA. Mr. Short?

Mr. SHORT. Well, I will echo that, from that standpoint. We will fire up our attorneys just as much as Mr. Birmingham and Mr. Robbins will fire up himself. There is an issue there.

In terms of that, and if there is potentially more water taken from our organization or our Tributaries Association, that is a problem. And as I have indicated to you before, that there is a second bite at the apple for us when all of us go and get relicensed. We will get another opportunity——

Mr. CARDOZA. I am going to ask a question about that in the second round.

Mr. SHORT. I figured you would. But there is another bite at the apple from that perspective, as well. So we will get hit twice if, in fact, we don't have the protections in play.

Now, there are other issues if the thing goes forward and there is no—well, I will leave it at that, because it is the judge's, you are not asking that question. So I will just simply say we will fire up the attorneys, and we will see what happens.

Mr. CARDOZA. Mr. Robbins?

Mr. ROBBINS. That is an interesting question, because we don't know. There has been some speculation about what would occur in the absence of these mitigation measures, because we don't know what regulatory actions would or would not be taken.

But let me just answer it by saying if no other actions are taken, Section 4[d] of the Endangered Species Act currently does not have an exemption or an exception for salmon on the San Joaquin River. So we would potentially be subject to take limitations if those fish began to——

Mr. UPTON. Mr. Robbins, I do hate to interrupt you, but we are down to five minutes on a vote. So unless you can finish in like 30 seconds, we might want to hold the answer to that until we get back.

Mr. CARDOZA. We can just reengage when we come back?

Mr. RADANOVICH. Yes.

Mr. CARDOZA. Thank you.

Mr. RADANOVICH. But I will say that I beat every other Member back here after the last series of votes. And if you want to ask questions, you have to get back here soon.

And with that, we will recess. I am sorry, there are three votes, but we have to go do our duty. Thank you.

[Recess.]

Mr. CARDOZA. I think we were at Mr. Robbins. And the question for the entire panel was, the first panel was asked the question what would happen if the settlement does not go forward. I would like to ask each of you to tell us what would happen if the settlement goes forward without having the qualifying language that we need in the Congressional Bill that would protect the third parties, as everyone has stated they want to do.

Mr. ROBBINS. And once again, let me just reiterate. You know, we don't know all the answers to that because there are some regulatory uncertainties that agencies will have to consider.

But nevertheless, under the current regime, without change what will happen, of course, is that the Spring Run Salmon would be introduced into the system. It would, our biologists tell us, undoubtedly, to the extent that the experiment is succeeding, lead to the

propagation of Spring Run on the tributaries, as well, which would put our projects under the Endangered Species Act relative to that fish. And in the event that we were unable to obtain take exemptions, significant water costs. Remember, we operate our systems for Fall Run, which means that we have water from the Fall through the Spring to support Fall Run Salmon.

The Spring Run Salmon actually are all throughout the year, but particularly difficult to sustain in the summertime down in the lower end of the Valley, where temperatures soar. So the potential for significant water costs, huge water costs, power losses, and economic difficulties for the districts, for all of the parties all along the river are enormous without environmental protection.

Mr. CHEDESTER. Wow, I don't know if I can add any more to that. But I think the clear answer is that if this begins to move forward to settlement without the appropriate mitigations for the third-party impacts, we are going to have to come back with the exchange contractors and I hope the rest of the panel I am hearing, and say don't support this legislation, and don't let it go forward without it.

There will be impacts to us. We will have severe economic impacts. As mentioned earlier, there will be impacts with respect to endangered species. And we just, you know, it is almost unfathomable. Besides, I think you would be violating the settlement agreement, because that is third-party impacts. So I just don't know how it can go forward without that being addressed.

Ms. SKINNER. On a personal note, we would probably be under water, flooded, either by top or by seepage. Again, it is just absolutely flat out there, like a table. And if you pour a bucket of water on a table, it is going to run everywhere. Which would mean we couldn't plant, which would mean we couldn't harvest, which would mean we couldn't pay our operating loan off, which would mean the bank would foreclose, which would mean—I mean, it would be economic chaos.

Mr. CARDOZA. And just as a follow-up to your answer, Lynn, because I think it is very appropriate. How many acres would you say might be affected? Do you have any guesstimate? Because I have met with folks. I know that there is a myriad, and not all of them today would even know that they are being impacted today. But just your guess.

Ms. SKINNER. Right. In Reach 4B only?

Mr. CARDOZA. Well, that is where you have your most experience.

Ms. SKINNER. Oh, how many acres are we—I don't know.

Mr. CHEDESTER. Probably 10,000 acres.

Mr. CARDOZA. Up to 10,000 acres?

Ms. SKINNER. Yes, in that area.

Mr. CARDOZA. So close to what we set aside in the Headlands Forest Project, which was 10,000 acres of forest, we could be potentially taking that out of production in the Central Valley if we don't do the right——

Ms. SKINNER. Absolutely.

Mr. CARDOZA. Go ahead, go ahead.

Mr. CHEDESTER. That is just in the Reach 4B. There are other lands upstream that is going to be impacted, also. So it is broader, it is larger than that.

Mr. CARDOZA. OK.

Ms. SKINNER. Yes, you know what, 4B is larger than that, too.

Mr. CARDOZA. Mr. Robbins, and we may not have enough time to answer this entirely, I want to ask the question of you and Mr. Short to further explain the FERC language and what—because I don't want the Committee to go through this process without fully understanding the necessity on the FERC point.

Mr. ROBBINS. I think it is critical to understand how the Endangered Species Act and the Federal Power Act, and the agencies that are responsible for those, intermingle.

As an example. Section 18 of the Federal Power Act provides, in the case of anadromous fish, of which, of course, the Spring Run is one, power to the National Marine Fisheries Service to provide absolute conditions on our relicensing. And those conditions can be fairly draconian.

So if we have an experimental fish in the system, under these kind of conditions, and our licenses are being tagged with fish passage issues that could cost millions of dollars or tens of thousands or 100,000 acres of water to support cold water in the summertime while we look at this experience, then the Federal Power Act would end up trumping whatever protection we got under ESA.

So in order for the ESA protection to mean anything then in the hydro projects, it has also got to have that protection. We are not asking for a complete pass; we are just saying reserve it. And at the end of the experiment, to the extent we need to make adjustments for Spring Run, we will do that.

Ironically, and I do need to clarify this, it is not just Section 18, but believe it or not, the Section 10[j] of the Federal Power Act, as well. Now, that is different than 10[j] of the ESA, so as we go forward we will talk about those more.

Mr. RADANOVICH. Thank you. Mr. Cardoza, you are out of time. You can come back if you want.

Mr. Nunes.

Mr. NUNES. Thank you, Mr. Chairman. I would like to ask maybe the—I know that Mr. Birmingham is a lawyer, and I think Mr. Robbins is a lawyer, I am not sure. Are there any other lawyers up there?

I would like to discuss, would this settlement, in your opinion, what really happens in terms of future litigation on the Friant water users? And I would have liked to ask this question of Mr. Upton, but we didn't have time. But, you know, what still hangs out there under this current agreement?

I guess we will start with Mr. Birmingham.

Mr. BIRMINGHAM. Well, the reality, Mr. Nunes, is that this settlement agreement and the legislation authorizing implementation of the settlement agreement would resolve the claims brought in the United States District Court for the Eastern District of California by the Natural Resources Defense Council and other entities against the Secretary of the Interior in connection with his operation of Friant Dam. And an alleged violation of Section 5937 of the Fish and Game Code.

The implementation of this legislation in the settlement would not prevent anyone else from walking down to the San Joaquin River, wetting a fishing line, establishing standing, and then

bringing another action next week, or the week after this legislation is signed, another action under Section 5937 of the Fish and Game Code.

Now, there is a simple amendment that could be offered to address that. Congress has the ability, the authority to prescribe the jurisdiction of United States District Courts. And in order to sue the United States, it has to be in District Court.

To provide greater certainty concerning the commitment to the settlement—and all of the settling parties have said we are committed to this settlement. Well, to provide greater certainty, one thing that could be done would be to amend the Restoration Settlement Act to provide that except as to enforce the terms of this settlement, the United States District Court is deprived of jurisdiction to entertain any claim brought against the United States related to Section 5937 of the California Fish and Game Code, as it relates to the Bureau of Reclamations' operation of Friant Dam. That would make sure that, at least during the pendency of this settlement, no one else would be able to come into District Court and upset it by filing another 5937 loss.

Mr. NUNES. That would protect Friant in the future.

Mr. BIRMINGHAM. Yes, it would.

Mr. NUNES. Mr. Robbins, do you agree with that?

Mr. ROBBINS. I do. But I also think there is another outstanding issue.

Without the environmental protections we have been talking about from ESA, it is my opinion that Friant has some, the area has some exposure to these same issues. For instance, notwithstanding the fact that the flow caps are in place, this is a settlement of a fish and game proceeding. It is not a settlement of ESA proceedings particularly.

Now, I do know that the parties consider and have the opinion that the biological opinions that they have been able to put together suggest that they can have a successful experiment. But what happens if this fishery is reintroduced into the Upper San Joaquin, and that doesn't happen; and now new parties are filling these seats that don't have this kind of recollection, and under the Endangered Species Act simply take a look at what that Federal project is doing, and suggest more waters taken?

There is not a guarantee that the Endangered Species Act won't trump these caps at some point in the future. And that, in the absence of the 10[j] protection and of the 4[d] protection we have been talking about, I think that they are potentially exposed, as well.

Mr. NUNES. In relation to, there were some questions on the first panel about third-party impacts in terms of Delta pumping. And maybe this is a good question for both of you again.

Ms. Napolitano, I wish she was here, but there was a question about, you know, how does it impact Southern California. And Tom, or Mr. Birmingham and Mr. Robbins, could you answer that real quickly, in our one minute that we have here?

Mr. BIRMINGHAM. Yes, Mr. Nunes. There are two potential impacts. One is a detriment, one is a benefit.

Now, theoretically there are some water quality improvements that will result from the implementation of this settlement. However, in terms of complying with the water quality objectives

established by the State of California for the protection of beneficial uses of that water, the benefits derived from the settlement in terms of water quality improvement in the Delta are marginal, very marginal. And I could explain the reasons for that.

In terms of water supply, unless there is some Endangered Species Act protection in the Delta, if the Spring Run that are expected to be reintroduced show up at the Harvey O. Banks pumping plant, there will be limitations imposed on the pumping rates, and there would be a water supply reduction for all state contractors.

And I note that in this proceeding, there is no representative of any state contractor, but there are potential effects on the State Water Project.

Mr. NUNES. Thank you. And thank you, Mr. Chairman. I know my time is up.

Mr. RADANOVICH. Thank you, Mr. Nunes. And we are wrapping up this hearing. So if there are no other questions.

Mr. NUNES. Well, I do have one more.

Mr. RADANOVICH. If you can be brief, sure.

Mr. NUNES. OK. And I thought Mr. Cardoza was going to—let me just, let me throw this out there, in terms of the settlement requires legislation to provide the Secretary the authority to proceed. If the parties were to return to court, what are the boundaries of the judge's authority without Congressional authorization?

This is just an example. If the judge mandated the release of 500,000 acre-feet of water, then how is this accomplished if the downstream improvements require Congressional authorization? Mr. Birmingham.

Mr. BIRMINGHAM. Well, I have not done extensive legal research on the question, but I think Mr. Upton himself alluded to the answer to this.

The judge has said to the parties the tools that I have are very blunt. And as an example, I can't imagine a circumstance under which a court is going to order the release of water if it is going to result in flooding. The District Court does not have the power, the judicial power, to order the Secretary of the Interior to undertake an action that the Secretary doesn't have statutory authority to implement.

And so it is really unclear what the court could do. The court could not order the Secretary of Commerce to reintroduce Spring Run into this river. That would be an exercise of discretion, and the case law is very clear that a District Court does not have the authority to describe to a member of the Executive Branch how to exercise discretion.

So there are lots of things that aren't being undertaken in connection with the settlement that the District Court simply has no power to impose as part of a judgment.

Mr. NUNES. Mr. Robbins.

Mr. ROBBINS. Yes. It is hard for me to imagine that the judge would be ordering flows into a system that wouldn't in fact accomplish the goal. This settlement has to do with a Fish and Game settlement intending to put water below the Friant Dam in sufficient quantities to have a healthy fishery, which would include Spring Run.

Without the intentional reintroduction of Spring Run—and again, I would echo Mr. Birmingham's indication that we don't believe the judge has the authority to order the Secretary to do the reintroduction—what you would get is a lot of water going down the wasteway during the summertime and during the fall and spring post-flows. Some fish probably. We don't have a clue as to how. You would have a whole lot of damage to the landowners, to the levee systems. Nothing the judge would do would take out their potential Court of Claims proceedings.

However, I have, during my 30-year career, been wrong on more than one occasion of what I think a Federal judge's power is. And so I would suggest to you that this particular Federal judge might do just exactly what we have been talking about.

Mr. NUNES. Thank you. Just to clarify—and I want to ask the lawyers this question, also—this is really a precedent-setting action that the parties have come and asked the Congress to do this. And there was a comparison earlier to the agreement down in Southern California dealing with Indian Tribes.

This is much different than that. And I would like both of your takes on the precedent that this sets, that this sets bringing it to Congress asking Congress how to act, and how it compares to the example that was given earlier.

Mr. BIRMINGHAM. In responding to these questions, I don't want to create the impression among any of the people listening that the Westlands Water District is opposed to this settlement. I think, as Mr. Cardoza indicated, it is critical that we examine these issues, so we can make sure we know how it is going to be implemented.

The reference was made by Mr. Candee to the Torres-Martinez Settlement Act. And he said that was comparable to what is being done here. That involved an authorization to settle pending litigation, and the total amount of the settlement was $14 million, $10 million of which was going to come from the government.

I am informed by one of our lawyers who was actually involved in those negotiations and the settlement that that was, a Member of Congress was involved in the negotiation, and actually was involved in the drafting of the legislation. Here, the legislation has come to Congress as an exhibit to the settlement.

In that case, it took a number of Congresses to approve the settlement because of concerns that had been raised by a particular senator from the State of Nevada. And so Mr. Candee is right in a technical sense; there Congress authorized the implementation of a settlement. But that settlement was fundamentally different than this settlement, where, number one, you are being asked to authorize a program the costs of which are uncertain, the effects of which are uncertain. And so there are, I think, some fundamental differences.

Mr. NUNES. Thank you, Mr. Birmingham. Thank you, Mr. Chairman.

Mr. RADANOVICH. The Chair is reducing the time to two minutes per round. Mr. Cardoza.

Mr. CARDOZA. Yes. I would like to follow up and allow Mr. Short to answer the question I asked previously with regard to the FERC reauthorization challenge.

Mr. SHORT. Thank you, Congressman. I don't have much more to say. Ken, I think Ken outlined the procedural process fairly clearly. And that is on point. I think his answer was just fine.

My only concern about the FERC issue, as I have indicated before, is that we don't get hit twice: once during this process, and then again during our relicensing process, for an experimental amount of fish population. It just doesn't make sense.

Mr. NUNES. Thank you.

Mr. RADANOVICH. Mr. Costa.

Mr. COSTA. Thank you, Mr. Chairman. Mr. Birmingham, as it relates to the Federal contractors, do you have any belief that the recirculation effort under the settlement will impact your ability to continue to allocate your water for the Westlands Water District?

Mr. BIRMINGHAM. The simple answer is that it could. Because the settlement agreement and the legislation authorizing implementation direct the implementation of a recapture and recirculation program.

And by itself, that could be interpreted as meaning that the Secretary of the Interior should displace existing uses of Tracy Pumping Plant in order to fulfill or to accomplish the water supply goals of the settlement agreement.

Now, I have been told repeatedly by the settling parties that that is not their——

Mr. COSTA. It is not the intent, right.

Mr. BIRMINGHAM. And they have been very, very gracious in saying let us put language in the settlement, or excuse me, authorizing legislation that says that this recirculation will not displace existing uses. And we proposed that as an amendment.

Mr. COSTA. And that should be included in some fashion, it seems to me, because of the potential impact. And I would believe that, as point of fact, that it also potentially could impact state contractors, as well. And I am very concerned about that point as well, and I think there ought to be consideration taken into account for state water contractors that share the same plumbing system in the Delta.

Mr. BIRMINGHAM. My understanding from the Department of Water Resources in the State of California is they have raised this issue in connection with the ongoing discussions concerning potential amendments, because that is a potential impact on the state contractors as well.

Mr. COSTA. I want to make one final point, but first I want to commend Ms. Skinner, who I have had the pleasure to work with over the years and know of her family's active involvement in California agriculture for generations. And you are a great spokesperson always, and I think the passion and the detail that you shared with the Committee today is very important for the purpose of dealing with the issues for those farmers who are impacted in Mr. Cardoza's district.

The point I want to make is the following. The Chairman has admonished us that he wants to get the Committee concluded so that you can go back to the table and work on the efforts as it relates to the third-party agreements and the language you are trying to work out.

I want you to do that, too. And I think we all are very much interested in implementing this agreement for all the right reasons. We have all stated that. I, too, share that, and I want you to do your very best in your efforts, including Mr. Hal Candee and the environmental groups that he represents.

But let me tell you, Mr. Chairman, and I have suggested this to the Chairman of the Policy Committee as well, that my view is, in terms of where I am coming from—and I can't speak obviously for any other Member—is that if you don't reach an agreement as it relates to the third-party impacts, whether it is this afternoon or tomorrow or whatever remaining time that you are allowed to reach an agreement, I believe it will then be incumbent to do everything I can do, and hopefully with my colleagues, to write third-party protections into the law.

So I think the challenge is this, in my view. You guys work it out, Mr. Candee and company and with the others. We are going to, I am going to try to do everything I can to make sure that it is worked out for the satisfaction of those impacts that I have outlined in my letter, and that has been submitted to the record.

Thank you very much, Mr. Chairman.

Mr. RADANOVICH. Thank you, Mr. Costa. Any other questions?

Mr. CARDOZA. I would just like to associate myself with Mr. Costa's remarks.

Mr. RADANOVICH. When do you go back to the table? This afternoon, like right now?

Mr. CHEDESTER. Half an hour.

Mr. RADANOVICH. All right. Ladies and gentlemen, thank you for your testimony. It was very valuable to the issue. And let us get back to work and get this job done.

Thank you.

[Whereupon, at 2:37 p.m., the Subcommittee was adjourned.]

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