



Thomas W. Birmingham
General Manager
Westlands Water District

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H.R. 1927, the "More Water and Security for Californians Act"
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Mr. Chairman and Members of the Committee, my name is Thomas W. Birmingham, and I am the General Manager of Westlands Water District ("Westlands" or "District"). Thank you for the opportunity to appear before you today to testify today on *H.R. 1927, the "More Water and Security for Californians Act."* This legislation would provide congressional direction concerning implementation of the Endangered Species Act ("ESA") as it pertains to the operations of the Central Valley Project ("CVP") and the California State Water Project ("SWP"). Enactment of H.R. 1927 would restore balance and flexibility to operations of the CVP and SWP, thereby restoring water supply and water supply reliability and creating thousands of jobs in one of the most economically depressed regions of the country.

As I have previously testified before the Subcommittee on Water and Power, Westlands is a California water district that serves irrigation water to an area of approximately 600,000 acres on the west side of the San Joaquin Valley in Fresno and Kings counties. The District averages 15 miles in width and is 70 miles long. Historically, the demand for irrigation water in Westlands was 1.4 million acre-feet per year, and 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 1.19 million acre-feet, and annual transfers of water from other water agencies.

Westlands is one of the most fertile, productive and diversified farming regions in the nation. Rich soil, a good climate, and innovative farm management have helped make the area served by Westlands one of the most productive farming areas in the San Joaquin Valley and the nation. Westlands farmers produce over 50 commercial fiber and food crops sold for the fresh, dry, and canned or frozen food markets; domestic and export. These crops have a value in excess of \$1 billion, and they are an important factor in ensuring that American families will continue to enjoy a food supply that is abundant, safe, and affordable. However, like most regions of the arid west, the production of these crops depends on the availability of water for irrigation.

Prior to the application of the ESA to operations of the CVP in approximately 1992, the principal source of irrigation water for farmers in the District was water made available from the CVP under contracts with the United States. This source of water was highly dependable, and in all but the most critically dry years, it was adequate to meet the total demand for irrigation water in the District.

The ESA dramatically changed the reliability and adequacy of the CVP as a source of water. Reductions in water supply under ESA have steadily increased, becoming progressively more and more damaging. South-of-Delta CVP irrigation water service contractors, like Westlands, have gone from an average supply of 92% of the contract quantities in 1992 to 35 – 40% today. For Westlands, this represents an average loss of approximately 675,000 acre-feet of water on an annual basis; for all south-of-Delta CVP irrigation water service contractors this

represents a loss of approximately 1.1 million acre-feet. And the price paid for those losses is measured in lost jobs, diminished productivity, and higher costs of food production.

The legislation authored by Representative Jim Costa, H.R. 1927, addresses one of the root causes of water supply shortages that affect not just farmers in the San Joaquin Valley, but people who live and work in vast regions of California, including the San Joaquin Valley, the Silicon Valley, the central coast, and southern California. H.R. 1927 provides well-thought-out direction on how the ESA will be applied to the CVP and the SWP. If H.R. 1927 were enacted, it would significantly increase water supply for the benefit workers, farmers, and consumers alike. And it would do so while providing significant protections for listed fish species that are consistent with prior actions to prevent CVP and SWP operations from causing jeopardy to those species or harming their critical habitat.

Application of the Endangered Species Act to the CVP and SWP

The CVP and the SWP, operated respectively by the Bureau of Reclamation (“Reclamation”) and the California Department of Water Resources (“DWR”), are perhaps the two largest and most important water projects in the United States. These projects supply water originating in northern California to more than 20,000,000 agricultural and domestic consumers in central and southern California. In 2008, Reclamation initiated consultations under section 7 of the ESA with the U.S. Fish and Wildlife Service (“FWS”) and NOAA Fisheries, an agency within the Department of Commerce, on whether the coordinated operations of the CVP and SWP would jeopardize the fish species listed under the ESA. In lengthy biological opinions, the FWS and NOAA Fisheries concluded that the CVP and SWP operations would jeopardize the Delta smelt, winter run Chinook salmon, San Joaquin River steelhead, and other listed species. As required by the ESA, the FWS and NOAA Fisheries issued biological opinions, respectively on December 15, 2008, and on June 4, 2009, that prescribed “reasonable and prudent alternatives” that Reclamation and DWR should implement to ameliorate the effects on the listed species and their critical habitat.

The reasonable and prudent alternatives prescribed by 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion reduce the water that may be diverted or re-diverted by CVP and SWP pumping plants situated in the southern Delta for delivery to central and southern California. *Inter alia*, the reasonable and prudent alternatives, during the period from December 1 through June 30, limit pumping rates to restrict reverse flow in Old and Middle Rivers to rates ranging from -1250 cubic feet per second to -5000 cubic feet per second, and during the period from April 1 through May 30, the 2009 NOAA Fisheries biological opinion imposes an inflow/export ratio, which limits pumping rates to a percentage of flow measured in the San Joaquin River at Vernalis. The water

supply reductions resulting from these reasonable and prudent alternatives can be enormous.

It is estimated that during the period from December 1, 2012 through February 28, 2013, restrictions on reverse flow in Old and Middle Rivers imposed by the biological opinions resulted in a combined water loss for the CVP and SWP of more than 815,000 acre-feet, compared to operations under prior biological opinions issued in 2004 and 2005. As it turned out, calendar year 2013 was the driest year in California's recorded history, and according to Reclamation's records, the CVP and SWP were able to pump only 4,190,000 acre-feet. In other words, the loss of 815,000 acre-feet reduced exports by nearly 20%, and the loss of this water provided no apparent benefit for Delta smelt. The 2013 fall abundance index for this species was the second lowest number, 18, since record keeping began in 1967. The lowest number, 17, was recorded in 2009, another year in which pumping was limited to restrict reverse flow in Old and Middle Rivers for the purported protection of Delta smelt.

Water supply losses resulting from the April – May I/E ratio can also be significant. In 2010, when the I/E ratio limited pumping to rates equivalent to one-quarter of flow measured at Vernalis, it is estimated that the loss to the CVP and SWP was 351,000 acre-feet, compared to project operations under the 2004 and 2005 biological opinions. This loss reduced exports by 7.5%. When combined with losses resulting from limits on pumping to restrict reverse flow in Old and Middle Rivers, 1,043,000, the loss of 351,000 acre-feet, means that the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion reduced exports in 2010 by 30%.

Enactment of H.R. 1927 would ameliorate the water supply losses resulting from the implementation of the reasonable and prudent alternatives prescribed by the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion. H.R. 1927 provides the requirements of the ESA relating to operations of the CVP and SWP are deemed satisfied if the projects are operated pursuant to the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion. It also provides, however, that neither biological opinion shall restrict flow in Old and Middle Rivers to a 14-day average of the mean daily flow to achieve flow less negative than -5,000 cubic feet per second. Under H.R. 1927, the 2009 NOAA Fisheries biological opinion could not be implemented to impose an April – May I/E ratio except as required to implement California State Water Resources Control Board Water Rights Decision 1641 or a superseding water rights decision. And finally, H.R. 1927 would limit application of the x2 requirements in the 2008 FWS biological opinion to only those circumstances where the action would not diminish the capability of either the CVP or SWP to make water available for other authorized project purposes.

It is important to note that H.R. 1927 would modify, not eliminate, actions prescribed by the reasonable and prudent alternatives described in by the 2008

FWS biological opinion and the 2009 NOAA Fisheries biological opinion. Moreover, there is a scientific basis for these modifications. On March 19, 2010, the National Research Council of the National Academies issued a report entitled “A Scientific Assessment of Alternatives for Reducing Water Management Effects On Threatened and Endangered Fishes in California’s Bay-Delta,” (“NRC Report”) in which the NRC evaluated the scientific basis for the reasonable and prudent alternatives prescribed by the biological opinions. With respect to restricting reverse flow in the Old and Middle Rivers to protect Delta smelt, the reported stated it was “scientifically reasonable to conclude that high negative OMR flows in winter probably adversely affect smelt,” but “the available data do not permit a confident identification of the threshold values to use in the action, and they do not permit a confident assessment of the benefits to the population of the action.” NRC Report at 51. In addition, the NRC observed, “[t]he historical distribution of smelt on which the relationship with OMR flows was established no longer exists. Delta smelt are now sparsely distributed in the central and southern delta . . . , and pump salvage also has been extremely low, less than four percent of the 50-year average index.” NRC Report at 50. H.R. 1927 would maintain some limits on pumping to restrict reverse flow in Old and Middle Rivers, but at the upper end of the range prescribed by the biological opinion, -5000 cubic feet per second. This is consistent with scientific analysis that at flows less negative than -5500 cubic feet per second, there is simply no relationship between flow and the salvage rate of Delta smelt.

With respect to the April – May I/E ratio, the NRC Report stated that “increasing San Joaquin River flows has a stronger foundation than the prescribed action of concurrently managing inflows and exports,” and there is a “weak influence of exports in all survival relationships . . .” NRC Report at 60, 59. The NRC Report concluded export pumping rates could be increased “without great risk to steelhead.” NRC Report at 60. The direction in H.R. 1927 that the 2009 NOAA Fisheries biological opinion not be implemented to impose an April – May I/E ratio except as required to implement California State Water Resources Control Board Water Rights Decision 1641 or a superseding water rights decision would be consistent with this conclusion, while still providing a 1:1 inflow/export ratio for a thirty day period from mid-April through mid-May for protection of anadromous species out-migrating from the San Joaquin River.

The fall x2 requirements in the 2008 FWS biological opinion are in essence an experiment.¹ The NRC Report also examined the basis for these requirements and stated:

¹ The 2008 FWS biological opinion states: “The Service shall conduct a comprehensive review of the outcomes of the Action and the effectiveness of the adaptive management program ten years from the signing of the biological opinion, or sooner if circumstances warrant. This review shall entail an independent peer review of the Action. The purposes of the review shall be to evaluate the overall benefits of the Action and to evaluate the effectiveness of the

The controversy about [Action 4 of the FWS RPA] arises from the poor and sometimes confounding relationship between indirect measures of delta smelt populations (indices) and X2. The weak statistical relationship between the location of X2 and the size of smelt populations makes the justification for this action difficult to understand.

NRC Report at 53. H.R. 1927 would not prevent implementation of this x2 experiment, but it would prevent the experiment from being conducted if it would diminish the capability of either the CVP or SWP to make water available for other authorized project purposes. This provision of H.R. 1927 would also eliminate the potential for the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion to impose conflicting requirements on operations of the CVP and SWP. The 2008 FWS biological opinion requires that during September and October in years when the preceding precipitation and runoff period was wet or above normal, the monthly average of x2 be no more eastward than 74 km from the Golden Gate. It is estimated that this action would require that the CVP and SWP release 800,000 acre-feet of water to comply with this requirement. However, the 2009 NOAA Fisheries biological opinion provides that the CVP maintain in storage specified quantities of water to protect cold water for the propagation of salmonid species below CVP dams. There is great potential that the fall x2 requirements of the 2008 FWS biological opinion could result in the CVP's inability to maintain water in storage to protect cold water pools, and H.R. 1927 would eliminate that potential.

Need for Congressional Action

The socio-economic impacts of water supply shortages resulting from implementation of the 2008 FWS biological opinion and the 2009 NOAA Fisheries biological opinion in the San Joaquin Valley have been profound. In 2009, a dry year, the allocation of water for south-of-Delta CVP agricultural water service contractors was only 10%. This allocation compares to allocations in other recent dry years, before implementation of the biological opinions, 2001, 2002, and 2007, when the allocations were 49%, 70%, and 50%, respectively. In 2009, nearly half of the irrigable lands in Westlands were fallowed, and large areas of other agricultural water districts were also fallowed. The most tragic consequence of the 2009 crisis was that thousands of people who live and work on the westside of the San Joaquin Valley lost their jobs; unemployment rates in the City of Mendota and the City of San Joaquin soared to more than 40%. Small, local businesses were plunged into an economic crisis. And tragically,

adaptive management program. At the end of 10 years or sooner, this action, based on the peer review and Service determination as to its efficacy shall either be continued, modified or terminated.” 2008 FWS biological opinion at 283.

many people went hungry. Indeed, long food lines in small, disadvantaged rural communities on the westside of the San Joaquin Valley were a common sight.

Oliver Wanger, a former United States District Judge to whom numerous ESA cases involving the CVP and SWP were assigned, has observed on numerous occasions that it is up to Congress to determine how the ESA should be applied to these two major water projects. Recently, in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014), the United States Court of Appeals for the Ninth Circuit upheld the lawfulness of the 2008 FWS biological opinion. In doing so, the court stated that it was “acutely aware of the consequences” and “recognize[d] the enormous practical implications of [its] decision.” *Id.* at 592, 593. But the consequences were prescribed by Congress and that resolution of “‘fundamental policy questions’ about the allocation of water resources in California ‘lies . . . with Congress . . .’” *Id.* at 593.

Enactment of H.R. 1927 would provide the congressional direction that Judge Wanger called for and would be an expression by Congress on the fundamental policy question that the Ninth Circuit stated lies with Congress. Stated succinctly, if Congress does not concur with the consequences imposed on California, indeed the nation, as a result of the application of the ESA to the CVP and SWP, it is up to Congress to change those consequences.

Conclusion

I want to express Westlands’ support for the efforts of Representative Costa, as well as Representatives Devin Nunes, Kevin McCarthy, Jeff Denham, David Valadao and other members, to provide important congressional direction concerning application of the ESA to operations of the CVP and SWP. I also want to express Westlands’ strong support for H.R. 1927. I would welcome any questions from members of the Subcommittee.