

Statement of Jason Peltier
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U.S. Department of the Interior
Before the
Subcommittee on Water and Power
House Committee on Resources
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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.