**U. S. House of Representatives**
**Committee on Natural Resources**

**John Herrick, Esq.**
**Counsel and Manager**
**South Delta Water Agency**

**Testimony on H.R. 1837**
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My name is John Herrick. I am the manager and general counsel for the South Delta Water Agency whose lands are located within the Sacramento-San Joaquin Delta in California. I am her today representing both my agency and the Central Delta Water Agency.

The Central Delta Water Agency and the South Delta Water Agency strongly oppose H.R. 1837, the *San Joaquin Valley Water Reliability Act*.

When the U. S. Bureau of Reclamation was established to build water projects to provide irrigation and power to develop the West at the beginning of the 19th Century, it was required to abide by the State's water laws in which it pursued projects (Reclamation Act of 1902, Section 8). HR 1837 would turn 110 years of State/Federal cooperation on its head, especially surprising for Republican-sponsored legislation.

This bill would transfer responsibility for complying with State river flow and quality protections above the levels established for three years in the 1994 Bay-Delta Accord to those non-export project water right holders who rely upon water in the San Francisco Bay-Delta watershed. Under California water law, these water rights are generally senior to those of the exporters.

Since 1994, the provisions of the Bay-Delta Accord have proven woefully inadequate to protect the Bay-Delta environment. Six separate species of native fish are now listed under the Federal and State Endangered Species Acts which, of course, are not going away. Preventing the courts and regulatory agencies from imposing needed regulations against the Central Valley Project and State Water Project above the 1994 levels will require larger contributions from the senior water rights holders to meet flows and water quality standards which have been determined to be necessary since 1994. For example, the State Water Resources Control Board, the National Academy of Sciences and other scientific panels formed to study the problem have all concluded that freshwater flow through the estuary should increase substantially from current levels. The Nunes' bill in practical terms would shift responsibility to upstream water users in the Sacramento and San Joaquin Valleys, as well as the Delta itself, to provide these flows.

There are many objectionable features to this proposed legislation, not the least of which is the repeal of the San Joaquin River Settlement which exhibits much promise in restoring both

flows and water quality to the San Joaquin River which was decimated, along with its historic salmon fishery, by the Central Valley Project.

The cornerstone promise by the United States to the Delta and other areas of origin was that exports from the Delta would be limited to water which is truly surplus to the present and future local needs including the needs of fish and wildlife. This promise should be honored.

The conflicts of interest resulting from the United States and the State of California being the largest exporters of water from the Delta and at the same time the regulators and protectors of the public trust are difficult to overcome. The 1994 Delta Accord featured in HR 1837 which we refer to as the "Dirty Deal" is one of the results of the CALFED framework agreement which destroyed the, albeit tenuous, arms-length relationship between the State and Federal regulatory agencies and their sister agencies operating the water export projects. There is a real need to attempt to restore the credibility of our State and Federal agencies. HR 1837 is a step in the wrong direction. Breach of promises and distortion of science does not lead to lasting solutions.

The longstanding policy, promise and law limiting exports to water which is surplus to the present and future needs of the watersheds from which it is taken is sound and should be honored. The availability of surplus water from the Sacramento and San Joaquin River watershed was always recognized as being limited and subject to reduction as demands within the watershed increased. The continued availability of water for export from the Delta is greatly dependent upon supplemental water originally planned to be developed from North Coast watersheds.

A summary of the promises made on behalf of the United States to those in the areas of origin is contained in the 84th Congress, 2D Session House Document No. 416, Part One Authorizing Documents 1956 at Pages 797-799 as follows:

> "My Dear Mr. Engle: In response to your request to Mr. Carr, we have assembled excerpts from various statements by Bureau and Department officials relating to the subject of diversion of water from the Sacramento Valley to the San Joaquin Valley through the operation of the Central Valley Project.
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> A factual review of available water supplies over a period of more than 40 years of record and the estimates of future water requirements made by State and Federal agencies makes it clear that there is no reason for concern about the problem at this time.
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> For your convenience, I have summarized policy statements that have been made by Bureau of Reclamation and Department of the Interior officials. These excerpts are in the following paragraphs:

On February 20, 1942, in announcing the capacity for the Delta-Mendota Canal, Commissioner John C. Page said, as a part of his Washington D.C., press release: "The capacity of 4,600 cubic feet per second was approved, with the understanding that the quantity in excess of basic requirements mainly for replacement at Mendota Pool, will not be used to serve new lands in the San Joaquin Valley if the water is necessary for development in the Sacramento Valley below Shasta Dam and in the counties of origin of such waters."

On July 18, 1944, Regional Director Charles E. Carey wrote a letter to Mr. Harry Barnes, chairman of a committee of the Irrigation Districts Association of California. In that letter, speaking on the Bureau's recognition and respect for State laws, he said:
"They [Bureau officials] are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal reclamation laws is carried forward in conformity with State water laws."

On February 17, 1945, a more direct answer was made to the question of diversion of water in a letter by Acting Regional Director R. C. Calland, of the Bureau, to the Joint Committee on Rivers and Flood Control of the California State Legislature. The committee had asked the question, "What is your policy in connection with the amount of water that can be diverted from one watershed to another in proposed diversions?" In stating the Bureau's policy, Mr. Calland quoted section 11460 of the State water code, which is sometimes referred to as the county of origin act, and then he said:
"As viewed by the Bureau, it is the intent of the statute that no water shall be diverted from any watershed which is or will be needed for beneficial uses within that watershed. The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed. For example, no water will be diverted which will be needed for the full development of all of the irrigable lands within the watershed, nor would there be water needed for municipal and industrial purposes or future maintenance of fish and wildlife resources."

On February 12, 1948, Acting Commissioner Wesley R. Nelson sent a letter to Representative Clarence F. Lea, in which he said:
"You asked whether section 10505 of the California Water Code, also sometimes referred to as the county of origin law, would be applicable to the Department of the Interior, Bureau of Reclamation. The answer to this question is: No, except

insofar as the Bureau of Reclamation has taken or may take assignments of applications which have been filed for the appropriation of water under the California Statutes of 1927, chapter 286, in which assignments reservations have been made in favor of the county of origin."

The policy of the Department of the Interior, Bureau of Reclamation, is evidenced in its proposed report on a Comprehensive Plan for Water Resources Development–Central Valley Basin, Calif., wherein the Department of the Interior takes the position that "In addition to respecting all existing water rights, the Bureau has complied with California's 'county of origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere."

On March 1, 1948, Regional Director Richard L. Boke wrote to Mr. A. L. Burkholder, secretary of the Live Oak Subordinate Grange No. 494, Live Oak, Calif., on the same subject, and said:
"I can agree fully with the statement in your letter that it would be grossly unjust to 'take water from the watersheds of one region to supply another region until all present and all possible future needs of the first region have been fully determined and completely and adequately provided for.' That is established Bureau of Reclamation policy and, I believe, it is consistent with the water laws of the State of California under which we must operate."

On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a letter to Representative Lea on the same subject, in which he said:
"The excess water made available by Shasta Reservoir would go first to such Sacramento Valley lands as now have no rights to water."

Assistant Secretary Warne goes on to say, in the same letter:
"As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water are subject to State approval. I can assure you that the Bureau will determine the amounts of water required in the Sacramento Valley drainage basin to the best of its ability so that only surplus waters would be exported to the San Joaquin. We are proceeding toward a determination and settlement of Sacramento Valley waters which will fully protect the rights of present users; we are determining the water needs of the Sacramento Valley; and it will be the Bureau's policy to export from that valley only such waters as are in excess of its needs."

On October 12, 1948, Secretary of the Interior Krug substantiated former statements of policy in a speech given at Oroville, Calif. Secretary Krug said, with respect to diversion of water:
"Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it."
He added:
"There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later."

Promises made should be promises kept.

The bill would not only overturn existing state and federal law, it is based on a misunderstanding of the problems facing the California Delta and the reasons why export contractors of the federal Central Valley Project are not able to receive the full contractual amounts they seek.

The Committee must be aware of the long-standing principle under which the federal government operates according to state water laws here in the western United States. From the very beginning, the federal projects and operations have been specifically mandated to be under state regulation so that federal participation in programs addressing water issues does not frustrate or preclude each state from controlling its own policies. This principle has been the subject of over 100 years of negotiation, litigation and federal action. Virtually every relevant law passed by Congress in the last 100 years has contained a provision that explicitly stated that the federal action/law would not otherwise alter or supercede state water law. Since the waters that flow in the streams and rivers of California are owned by the people of California, California should decide what rules apply to the use of those waters, and under what conditions such uses will be allowed. State water laws should not exist at the whim of Congressional debate.

H.R. 1837 would abruptly end this long-standing policy for the purpose of favoring one set of water users in California over all the others. Such favoritism would not correct the shortages of supply facing the federal and state project water contractors, and would in fact excuse those contractors from mitigating the serious impacts of the water projects which supply them with water. Congress should not cavalierly make sweeping changes and try to pre-empt so many years of work and progress because one group does not accept current conditions. The members of the Committee who support this bill may be unaware of the facts surrounding water and fishery problems in California, and thus have no real basis for adopting this bill.

Adoption of the bill would turn California water rights law on its head. By limiting the Central Valley Project ("CVP") and the State Water Project ("SWP") obligations to protect certain fish species only to those actions set forth in the *1994 Principles for Agreement* (Sec. 108), the bill would shift the responsibility of mitigating the impacts of the CVP and SWP onto

other water right holders. The projects cause serious adverse impacts to fisheries as evidenced in State Water Rights Control Board Decision ("SWRCB") D-1485, which was previously provided to you. The bill would limit the projects' mitigation of these impacts to actions which are contained in the Principles for Agreement which are now clearly known to be insufficient to protect and recover species of concern. The bill cannot change the SWRCB's and the California Department of Fish and Game's obligations for protecting and recovering those fish impacted by the projects, and therefore those California agencies could only seek remedial action from water right holders other than the contractors. Since the projects are generally the junior most priority among such water right holders, the bill would result in the senior most water right holders being the only group available to provide flows for the protection of fish. With one fell swoop, the California water rights system is destroyed. It cannot be seriously asserted by the supporters of the bill that state and federal contractors should be able to shift the burden of mitigating the impacts of their actions onto other water right holders. Notwithstanding the destruction of the California water rights priority system aspect, there is no rational basis for relieving one party of its responsibilities and then shifting those responsibilities to another.

The bill would severely affect ongoing state and federal processes which seek methods by which the impacted fisheries could be protected; methods by which a reliable supply of export water could be determined. These other processes are rendered moot, ineffective, or unfair should this bill suddenly exempt one party from any further responsibility for mitigation.

The bill makes no effort to require a quantification of the projects' impacts (and thus responsibilities) to California fisheries. Is not the starting point for determining the adequate level of project responsibilities to find out the degree to which they adversely impact fish? If the bill sponsors were concerned that for some reason the SWRCB, DFG, UFWS, NOAA, EPA, and CEPA processes all were somehow unfairly attributing fishery declines to project operations, they might seek federal legislation to identify and quantify the impacts in order to compare such a new study with the ongoing processes. However, the bill makes takes no such "valid," or "fair-minded" approach. To the contrary, it quantifies/limits the obligations of the projects to a 17 year old agreement (the *1994 Principles for Agreement*). This incredible provision ignores not only the fact that the 1994 Agreement was never believed to be a solution to the fishery decline, but it also ignores the last 17 years of new data, additional fishery decline, federal and state legal actions, and numerous biological opinions. One need only read the newspapers to see that over a recent 3-day period the projects killed 1.9 million splittail fish to discern that current export operations have a significant effect on fish; an effect that is not yet mitigated.

H.R. 1837 appears to be based on the false notion that recent fishery needs are the cause of decreased supplies for export contractors. Although some decreases to exports are certainly the result of fishery needs; total supply and not fishery demands are the problem. First with regard to this, we again note as above, that export supply can only occur after export impacts to fish are mitigated. Until the projects mitigate their impacts to fish, they cannot expect to receive full contractual amounts.

Second, the system does not produce sufficient water to provide export contractors with anywhere near the amounts for which they contracted. Previously provided to you was a page from the *Weber Foundation Report* which attempted to quantify the amounts of water produced by the watersheds from which exports would be drawn. As one can clearly see, in a repetition of the 1928-34 drought, the Sacramento and San Joaquin systems produced only 17.6 MAF of water while in-basin needs (not including exports) are estimated at 25.6 MAF (these numbers are average annual amounts). This means that in each year of such a drought, the system was already 8 MAF short of water without any exports. To partially address this shortage, the SWP was to add an additional 5 MAF of water (by 2000) from other smaller rivers in the north-wester portion of the state. None of that supply was or will be developed and added to the Sacramento system as planned. I previously provided you with a chart from DWR's Bulletin 76 graphically showing how the intended export supply is now lacking which means the planned for "cushion" of flow in the river needed to support any exports is now simply not there.

What is missing from the bill sponsors' documents is any sort of analysis or calculation of what supply may be available for export in different year types. To the contrary, it simply assumes that whatever the conditions, some supply exists to fill export needs. Why does the bill not direct the USBR or some other agency to update the supply calculations so that we can all see what supply exists and when? That would of course be the starting point for determining if, when, and how much water can be exported (regardless of fishery needs). The bill does not seek this information because the export contractors know that there simply isn't any supply for them in many years, and in most years there is only a partial supply.

Interestingly, the bill purports to preserve California's Area of Origin laws, while at the same time undermining if not destroying them. California Area of Origin laws (e.g. California Water Code Sections 11460, et. seq.) give certain, non-export areas a priority over exports both now and in the future. Hence, when the population and/or economies within those areas of origin grow and need more water, and if the projects do not increase the yield of their projects, exports must necessarily decrease as those area of origin users are allowed by statute to take/recover project water for there own use. Thus, the current system anticipates that exports will continue to decline over time. Unless and until new, additional supplies are developed, there is shortage of water built into the system of exports. The bill therefore falsely seeks to protect the export supply (in violation of all California water right priority laws) when it regularly does not exist and will decrease anyway. Protecting junior exports while exposing senior area of origin users to increased obligations is the antithesis of the area of origin mandates.

A significant amount of misinformation is involved in these issues. I would like to address two areas as being illustrative. The first is the often cited allegation that the loss of export water severely impacted farm labor employment over the past several years. Exporters claim tens of thousands of farm labor jobs have been lost due to recent decreases in export levels. However, the facts are otherwise.

Research by Dr. Jeffrey Michael of the University of the Pacific's Business Forecasting Center has shown conclusively that San Joaquin Valley job losses are lower than claimed and have been driven by the housing construction collapse (see http://forecast.pacific.edu/water-jobs/Pacific-BFC-Water-Jobs.pdf). Thus the argument that decreased exports are hurting the farm labor community is vastly overstated.

Second, the exporters claim that water is being used for fish, and it is that allocation which prevents them from getting greater export supplies. The recent mini-drought in California proves this to be incorrect. In early 2009 the USBR notified its export contractors of (projected) very low deliveries as California entered what was thought to be the third year of drought. At the same time, Bureau notified one group of contractors (known as the Exchange Contractors) that they might not receive export water, but would instead get at least some of their water from the San Joaquin River instead. [For purposes of this discussion, I will not go into the details of how and why the Exchange Contractors have this alternate supply. Suffice to say that any time they might get water from the San Joaquin River instead of through the Delta export system the supplies available for export are very low.] This means that in only the third year of drought, Bureau CVP operations had resulted in there being insufficient water in storage to take care of their most senior contractors. In addition, in light of this low supply situation, DWR and USBR petitioned the SWRCB to be relieved from their obligation to maintain certain Delta outflow obligations. Those projects are required under their permits to maintain certain amounts of water flowing through the system as a protection for fishery and other beneficial uses.

The SWRCB held an expedited hearing on the petition in early 2009. As it turned out, rather than maintain the permit required outflow of 11,400 cfs, the projects were maintaining only 7,000 cfs while exporting 4,000 cfs (i.e. the projects were violating their permits). Thus the projects were stealing 1/3 of the minimum fishery flow during a drought. The testimony put on by the Bureau and DWR suggested that in order to meet requirements for temperature (cold water) control later in the year in the Sacramento River, they were suggesting that they not meet the outflow requirements; thus saving the limited amount of water for the more important (as they saw it) temperature needs. On cross-examination, the public learned that the Bureau did not have sufficient water in its dams (e.g Shasta) to meet the temperature requirements even though it was using that as the excuse for justifying the relaxation of the outflow requirements (which it wasn't meeting). [See SWRCB hearing materials at: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2009/wro2009_0013.pdf (Order) http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/emergency_drought/exhibits/dwr_3.pdf (DWR testimony); other sources available by searching the SWRCB webpage.]

The upshot of all this is that the exporters through the actions of the USBR and DWR violated water quality standards for the protection of fisheries while at the same time complaining that the fishery protections are adversely affecting them. You can't have it both ways. If you steal the fishery water you can't claim water for fisheries is hurting you. We also

see that rather than plan ahead and make sure that each year there is sufficient carryover storage in the reservoirs, USBR and DWR try to maximize exports while "balancing" (instead of obeying permit conditions) other needs/demands of the limited supplies. 2009 showed us that DWR and USBR do not plan for even small (3 year) droughts in their efforts to maximize exports; and when the drought comes, they illegally take the water that is supposed to be allocated for fisheries.

When these facts are viewed together, we can clearly see why the fisheries are in decline; there is insufficient water for all needs, the projects never developed the supply to maintain a "cushion" of flow in the channels (they are at least 5 MAF short), and when shortages for exports get too extreme the projects steal water from fishery needs. To suggest that limiting export liability for fishery flows as proposed in the bill is a reasonable response to this situation is to ignore reality.

The bill attempts to undo the San Joaquin River settlement. As many provisions of the bill, this one defies explanation. Over a period of 20 years, legal actions involving a State law ended up with the federal judge indicating that the California statute (which was the underlying for the litigation) was being violated. Hundreds of hours of negotiations later, the parties agreed to a settlement which was both signed by all parties and partially effectuated by federal statute. Now, because some of the interested parties don't like the settlement, they ask Congress to pre-empt California law, throw out the settlement, revoke the federal legislation, and substitute a "new" resolution that no other party agrees to. There could be no worse abuse of power if Congress adopts such an approach. I assume other environmental interests will and have already commented on this aspect of the bill, and our agency adopts their comments regarding this issue. I would like to make clear that our agencies support the San Joaquin River Settlement and strongly believe that the upstream interests on the River are obligated under state and federal law to contribute to downstream fishery, public trust and water right needs.

The bill seeks to limit the original CVPIA's dedication of 800,000 AF of water unless and until an additional 800,000 AF of new yield is developed. This provision completely undercuts CVPIA's (long negotiated) main focus which made protection of fisheries a co-equal goal with other CVP purposes. It should be noted that this precondition of finding an additional 800,000 AF of water is in fact a complete destruction of the CVPIA provisions to protect fish. If there were a method by which that water could be developed, or a cost-effective project(s) to produce such yield it would have been proposed and developed already. The bill ignores the Bureau's current efforts to increase yield and it statutory obligations to do so.

It is unfortunate that this bill appears to be considered a Republican/Democrat issue with members of each party lining up according to party status. The issue has nothing to do with political leanings or beliefs. One hopes that individual Congressmen and women will review the facts and arguments before deciding on how to vote. My agency represents the southern Delta which for the last 50 years has been adversely impacted by the operation of the CVP and SWP. Each year our farmers have times when they cannot divert water because the export pumps lower water levels. Each year our farmers are impacted by decreased flows in the river due to the

CVP's operation of its Friant and New Melones dams. Each year our farmers receive hundreds of thousands of tons of CVP introduced salt in the San Joaquin River. Each year our channels have null zones created and/or exacerbated by the projects. It has been a multi-decade effort to force USBR and DWR to partially mitigate these impacts, most of which remain unaddressed. It is mystifying that Congress would suddenly takes sides and force the State of California to exclude one group from the responsibilities and obligations it has to the detriment of all the others. If the Congress is interested in participating in the process to solve California's water problems, it should force the USBR to fully mitigate all its impacts; not isolate it from the destructive results of its actions.

Very truly yours,

JOHN HERRICK