

Briefing Paper
Subcommittee on Water and Power
Committee on Resources
Oversight Hearing on
“The San Joaquin River Restoration Settlement Act”
September 21, 2006, 10:00 a.m.
1324 LHOB

Summary:

On December 20, 1988 the Natural Resources Defense Council (NRDC), along with a coalition of conservation and fishing groups, filed a lawsuit challenging Bureau of Reclamation water contracts with the Friant Division (Friant) of the Central Valley Project. **After** a series of revised suits and court rulings **spanning 17 years**, Friant and NRDC entered into settlement negotiations in **2005**. **The negotiations eventually included the Departments of the Interior and Justice, and** settlement agreement was filed **with the federal courts** and made public on September 13, 2006. **The settlement includes draft legislation** to codify the agreement, authorize the Interior Department to carry-out **its** provisions, **authorize funding for implementation, and protect third parties** from adverse impacts stemming from the settlement.

Background:

Lawsuit and Settlement Negotiations:

The Friant Dam was completed in 1942 on the Upper San Joaquin River creating Millerton Lake. The dam and reservoir diverts nearly all San Joaquin River flows to provide much of the water for the Friant Division (Friant) of the Central Valley Project (CVP). Friant provides irrigation and municipal water to farms and communities along the southern San Joaquin Valley's east side. Nearly one million acres **on 15,000 farms** are irrigated with Friant water and several cities and towns receive all or a major part of their water supply from the Friant Division. As a result of water diversion at Friant Dam, a 153-mile stretch of the San Joaquin River below the Dam to the confluence of the Merced River **is dry during much of the year**.

In 1987, Friant water users began **negotiating renewal of their** water contracts, which determine the allocation and price of water. The originally 40-year contracts were signed with Reclamation in 1955. On December 20, 1988, NRDC and a coalition of conservation and fishing groups filed *Natural Resources Defense Council, et al, v. Rodgers, et al*, suing Reclamation over the renewal of these contracts. After subsequent amendments, the lawsuit alleged Friant contracts violated California Fish and Game Code § 5937 (§ 5937), the National Environmental Protection Act, and the Endangered Species Act. Section 5937 requires dam owners to "allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."

On May 31, 1995, federal Judge Lawrence K. Karlton, a President Carter appointee, ruled that the renewed contracts were not in violation of NEPA, but were in technical violation of the required impact studies on listed species under the ESA. This led to Judge Karlton invalidating 14 long-term contracts because Reclamation did not formally consult with the National Marine Fisheries Service (NMFS). On appeal to the Ninth Circuit Court of Appeals, the court affirmed much of the District Court's opinion. They found that Reclamation had violated the ESA and upheld the Friant contract revocation, but sent the § 5937 issue back to the District Court for further consideration.

After the Supreme Court declined to hear the case in 1999, Friant contractors **and NRDC attempted to** reach a settlement. Talks focused on river restoration between Friant Dam and Merced River and eventually evolved into two studies sponsored by a Friant/NRDC partnership with the backing of Reclamation and the California Department of Water Resources. These studies examined water supply needs and strategies for restoring the river. Despite some progress, the parties were unable to reach an agreement by the settlement deadline in April 2003.

Without a settlement, the Plaintiffs filed a seventh Amended Complaint in August 2003, alleging violation of § 5937 because salmon runs were not restored, as well as NEPA, ESA, and Reclamation Law violations. These motions all sought to force the release of water from Friant Dam and to invalidate the long-term renewal contracts. In August 2004 and then in July 2005 Judge Karlton found in favor of the Plaintiffs, holding that Reclamation was in violation of § 5937 and the Endangered Species Act. Judge Karlton **scheduled a 2006 trial** to decide on a "remedy" for the violations.

Before the remedy trial began, a new series of settlement negotiations began **in the fall of 2005** at the urging of Representative George Radanovich and Senator **Dianne Feinstein**. All negotiating parties agreed on a final settlement on June 30, 2006. The settlement was reviewed by third party stakeholders, **which resulted in some modifications to the agreement. The final settlement agreement, including draft implementation legislation, was** approved by the U.S. Justice Department, and filed in the U.S. District Court in Sacramento on September 13, 2006.

Settlement Agreement:

The 41-page settlement agreement **sets out two fundamental and equal goals: River Restoration and Water Management. The Restoration Goal includes water flow schedules (hydrographs) and river channel remediation projects intended to provide for the** reestablish a naturally reproducing spring and fall run Chinook salmon fishery in the San Joaquin River. **By tying restoration flows to an agreed-upon schedule, the settlement caps the amount of water that Friant users must give up. Under the Water Management Goal, the settlement authorizes actions and programs to allow Friant users to recover some of the water lost to fishery restoration. The settlement also includes provisions to fund both the Restoration and Water Management goals through the dedication of certain existing CVP revenues and by authorizing additional appropriations.**

Pending Congressional passage of authorizing language, the settlement will take effect on December 31, 2006. According to the agreement, the environmental documentation (NEPA/CEQA, ESA, etc.) would be complete and interim flows would begin in 2009. Interim flows would continue until full restoration flows begin no later than January 1, 2014. Fall and spring run Chinook salmon are scheduled to be reintroduced by December 31, 2012. Water management goals are expected to be met by December 2025, and the settlement would be terminated on December 31, 2026 unless all parties agree to extend it.

Interim flows, beginning in 2009, will be used for experimental purposes and will be limited by capacity of the channel and construction activity. Once full restoration flows begin in 2014, the quantity of water released is based on six classifications based on natural runoff in the river. ~~An average of 117,000 acre feet (AF) are currently released to the San Joaquin River. In addition, Friant dam must release 555,568 AF during “wet years”, 356,281 AF during “normal wet years”; 247,876 AF in “normal dry” years; 184,021 AF in dry years; and 70,795 AF in “critical dry” years. No water beyond the 117,000 AF must be released if San Joaquin runoff is less than 400,000 AF (termed “critical low” years).~~ On average, water deliveries to Friant’s **long-term water contract holders will decrease 19% below current average deliveries, or by about 160,000 to 170,000 acre-feet per year.**

In addition to the added flows, the restoration goals of the settlement involve improvement to the historical river channel. The improvements would be done in two phases, with phase one to be completed by 2011-2013 and phase two done by the end of 2016. Ten projects are specified for phase one and four projects in phase two. The projects would consist of modifying existing structures, channel capacity modifications, fish passages and screens, bypass canals, and habitat restoration.

The settlement also addresses water management in an attempt to minimize impacts on Friant water users. The Water Management Goal of the settlement has two main features. First, it calls for plans to be developed to recapture and recirculate some of the water that is used for restoration flows. No concrete plans or feasibility studies have been done, but several concepts have been proposed. The second part of the water management goal is creation of the “Recovered Water Account.” These accounts would attempt to encourage water banking by allowing Friant contractors to buy back any water they give up for fishery recovery during wet years at a discounted rate (\$10/AF).

Funding for the implementation of the agreement are also outlined in settlement document. Funds will come from the dedication of fees already being paid by Friant contractors, State Bonds (if passed), and federal appropriations. First, the settlement continues the existing \$7 per acre foot Friant Surcharge and dedicates the revenues, plus up to \$2 million a year from the CVPIA Restoration Fund, to implementation. **These fee revenues will total about \$130 million over 20 years.** In addition, nine years of the capital repayments from the Friant Division will be committed, **which will total about \$90 millions, will be dedicated to achieving the restoration and water management goals of the settlement.** On average, about \$20 million annually (depending on the water year) of locally generated funds will be used for the project. Proposition 84, on the California ballot in November, would provide \$100 million specifically for San Joaquin River restoration. In addition, it is expected that, if passed in November, some

funds from a California Flood Control Bond (Proposition 1E) could be used for the effort. The remaining amount would be sought through federal appropriations.

Third Party Impacts:

In addition to the settling parties, some third parties will be affected by implementation of the settlement agreement. Among the third parties are the San Joaquin River Exchange Contractors, Sacramento/San Joaquin Delta Water Districts, The San Joaquin Tributaries Association, and private land owners near the San Joaquin River. The settling parties have indicated that it is not their intention to affect third parties. Despite such statements, third parties expressed concerns and are expected to seek some safeguards against injury.

Funding of the settlement has been one major concern of third parties. **Although the settlement identifies specific channel restoration projects, firm cost estimates for those projects won't be available until detailed engineering and environmental work is completed. The same is true for the settlement's water management projects. In addition, the need for some of the potentially most expensive work, construction of levees, will be determined later by the Interior Department. As a result, settling parties are unable to put a firm price on the cost of implementing the agreement.** Cost estimates range from the NRDC's estimate of around \$250 million, to Friant's at just under \$800 million.

Third parties are concerned that if the cost of implementation exceeds the funding available, the burden of paying the excess costs will fall on them. However, the settling parties believe that the dedicated revenues in the settlement, plus funding from the State, will minimize the need for appropriated federal dollars and eliminate any need for funding from other parties.

The San Joaquin Tributaries Association and other water users **also** have expressed concern that once endangered salmon are reintroduced in to the San Joaquin River they could eventually migrate up the smaller tributaries. Without proper protections, water users worry that they **will face ESA regulatory burdens that would not otherwise exist without the settlement. The settlement contains administrative protections for the third parties, but he affected agencies believe that these are insufficient.** In addition, **the third parties** want to ensure that water temperature requirements, already required for other fish species, are not **affected by the settlement's restoration flows. Third party** witnesses will testify about their concerns

Another concern of third parties is the issue of land acquisition needed to restore the historic river channel. After completion of Friant dam, the river channel between Friant Dam and the confluence of the Merced River, was allowed to go dry. In one section, known as "Reach 4B", much of the historic channel is gone and homes and farms have developed in the area. Restoration of "Reach 4B" would require acquisition of private property. Some have suggested allowing restoration flows to bypass "Reach 4B." Proponents suggest that bypassing the reach would eliminate many worries of land acquisition and dramatically cut the cost of the project **by eliminating the need for expensive levees.** Witnesses will testify about concerns regarding land acquisition.

Draft Legislation:

As stated above, authorization legislation was included as an attachment to the settlement. If substantively similar language is not passed by Congress as of December 31, 2006 the settlement is voidable. However, settling parties have indicated that failure to pass the bill before December 31st does not necessitate voiding, and implementation of some aspects of the settlement could begin without passage of legislation.

The attached draft bill, titled the “San Joaquin River Restoration Settlement Act”, provides several major authorizations and stipulations. First, in section 104, it authorizes the Secretary of the Interior (Secretary) to implement condition of the settlement in coordination with the State of California. A memorandum of Understanding has been signed with California regarding implementation.

In addition, the draft legislation authorizes acquisition of land necessary to implement the settlement, and disposal of land if it determined that it is no longer needed for the projects (section 105). Section 106 requires compliance with current law including the National Environmental Policy Act, Endangered Species Act, and Reclamation Law. The bill also authorizes \$250 million to carry out the settlement. **The nine years of Friant capital repayment revenues (about \$90 million), and the CVPIA Restoration Fund revenues of \$2 million per year (about \$40 million over the life of the settlement) that would be dedicated to funding the settlement, count against the \$250 million authorization. As a result, the draft legislation actually authorizes about \$120 million in new appropriations.**

Witnesses:

Mr. Tom Birmingham, General Manager, Westlands Irrigation District, Fresno, California

Mr. Hal Candee, Senior Attorney, Natural Resources Defense Council

Mr. Steve Chedester, Executive Director, San Joaquin River Exchange Contractors Water Authority, Los Banos, California

The Honorable Mike Chrisman, Secretary, Resources Agency, State of California, Sacramento, California

Mr. Jason Peltier, Principal Deputy Assistant Secretary for Water and Science, Department of Interior, Washington, DC

Mr. Ken Robbins, General Manager, Merced Irrigation District, Merced, California

Mr. Allen Short, General Manager, Modesto Irrigation District, Modesto, California

Ms. Lynn Skinner, Owner, Wolfsen Farms, Los Banos, California

Mr. Kole Upton, Chairman, Friant Water Users Authority

Contact Information:

Majority Staff: Kiel Weaver, Michael Correia, or Lane Dickson @ X5-8331.