Title X of H.R. 146: San Joaquin River Restoration

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Summary

Historically, the San Joaquin River in Central California has supported large Chinook salmon populations. Since the Bureau of Reclamation's Friant Dam on the San Joaquin River became fully operational in the 1940s, much of the river's water has been diverted for off-stream agricultural uses. As a result, approximately 60 miles of the river bed is dry in most years. Thus, the river no longer supports Chinook salmon populations in its upper reaches. In 1988, a coalition of conservation and fishing groups sued Reclamation (*Natural Resources Defense Council v. Rodgers*). A U.S. District Court judge ruled in 2004 that operation of Friant Dam violates state law because of its destruction of downstream fisheries. Faced with mounting legal fees, uncertainty, and the possibility of dramatic cuts to water diversions, parties negotiated a settlement instead of proceeding to trial. The Settlement reached calls for new releases of water from Friant Dam to restore fisheries, potential river channel modifications to accommodate increased flows, and efforts to mitigate reductions in off-stream deliveries lost to restoration flows.

Congressional authorization and appropriations are required for full Settlement implementation. Legislation based on the Settlement (H.R. 4074, H.R. 24 and S. 27) was considered in the 110th Congress; a new version of the legislation has been introduced in the 111th Congress—Title X of S. 22, an omnibus public lands bill, which became Title X of H.R. 146 and passed the Senate on March 19, 2009. A key legislative issue is how to finance the Settlement, specifically how to resolve direct spending and related congressional pay-as-you-go (PAYGO) issues. Other challenges have been how to achieve the Settlement's dual goals of fisheries restoration and water management, and how to address concerns of stakeholders not party to the Settlement, without disrupting the negotiated agreement.

The region may benefit from increased recreational expenditures and investment in river restoration activities under the Settlement. For example, some communities and interests believe restoration will bring other benefits to the river and river communities, such as improved surface water quality in lower San Joaquin River reaches and enhanced recreation benefits. On the other hand, some studies suggest the Settlement would have a negative economic impact on the agriculture industry, at least in the short term. In addition, downstream interests not party to the Settlement have been concerned about increased flooding, groundwater infiltration, and competition with existing federal financial commitments. Nearby communities fear harm to groundwater quantity and quality. Some of these concerns have been addressed in the newest version of the legislation, but some may remain.

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Introduction

Historically, Central California's San Joaquin River supported large Chinook salmon populations. Since the Bureau of Reclamation's Friant Dam on the San Joaquin River became fully operational in the 1940s, much of the river's water has been diverted for agricultural uses. As a result, approximately 60 miles of the river is dry in most years, making it impossible to support Chinook salmon populations in the upper reaches of the river. In 1988, a coalition of conservation and fishing groups advocating for river restoration to support Chinook salmon recovery sued the Bureau of Reclamation (hereafter referred to as Reclamation), which owns and operates Friant Dam (*Natural Resources Defense Council v. Rodgers*).[1] Most long-term water service contractors who receive the diverted water were added to the case shortly thereafter as defendant intervenors. A U.S. District Court judge has since ruled that operation of Friant Dam violates state law because of its destruction of downstream fisheries. Faced with mounting legal fees, considerable uncertainty, and the possibility of dramatic cuts to water diversions, parties agreed to negotiate a settlement instead of proceeding to trial on a remedy regarding the court's ruling.

In September 2006, a Settlement Agreement was reached concerning operation of Friant Dam—one of the largest federal dams operated as part of Reclamation's Central Valley Project (CVP) in California. The Settlement calls for new releases of water from Friant Dam to restore fisheries in the San Joaquin River and for efforts to mitigate water supply losses due to the new releases. Full implementation of the Settlement would require congressional authorization and appropriations. Title X of H.R. 146, which passed the Senate March 19, 2009, contains a San Joaquin River Restoration Settlement implementation provision; the legislation had previously been considered and passed the Senate as Title X of S. 22.

Under the Settlement and implementing legislation, increased water flows for restoring fisheries would reduce diversions of water for off-stream purposes, such as irrigation, hydropower, and municipal and industrial uses. The quantity of water used for restoration flows and the quantity by which water deliveries would be reduced are related, but the relationship would not necessarily be one-for-one. For instance, in some of the wettest years, flood water releases could provide a significant amount of the restoration flows, thereby lowering the reduction in deliveries to agricultural and municipal users. Under the Settlement, no water would be released for restoration purposes in the driest of years; thus, no reductions in deliveries to Friant contractors would be made due to the Settlement in those years. Additionally, in some years, the restoration flows released in late winter and early spring may free up space for additional runoff in Millerton Lake, potentially minimizing reductions in deliveries later in the year—assuming Millerton Lake storage is replenished. Consequently, how deliveries to Friant water contractors might be reduced in any given year would depend on many factors.

Regardless of the specifics of how much water might be released for fisheries restoration vis-à-vis water diverted for off-stream purposes, there will be impacts to existing surface and groundwater supplies in and around the Friant Division Service Area and adjustments in local economies. Although some opposition to the Settlement and its implementing legislation remains, the largest and most directly affected stakeholders (i.e., the majority of Friant water contractor organizations, and environmental, fisheries, and community groups) support proceeding with the Settlement

[1] NRDC v. Patterson, 333 F. Supp. 2d 906, 925 (E.D. Cal. 2004).

Agreement, in lieu of going to trial. For some groups, going to trial risks considerable uncertainty and expense; others may be more willing to take such risks.

Congressional authorization and appropriations are required for full implementation of the Settlement. If Congress does not act on the legislation, some fear that the court will order a remedy, which may differ from the Settlement, and which may have more severe consequences for area water users and third parties. A key legislative issue is how to finance Settlement implementation, specifically how to resolve congressional Pay-As-You-Go (PAYGO) issues.[2] Other challenges are how to achieve the Settlement's dual goals of fisheries restoration and water management, and how to address concerns of stakeholders not party to the Settlement, without disrupting the negotiated agreement.

This report provides a brief overview of the Settlement, its legal history, and the legislative context in which implementing legislation is being considered. For more information on fisheries restoration, water management, funding, economic, and third party issues, see CRS Report RL34237, *San Joaquin River Restoration Settlement*.

San Joaquin River Settlement

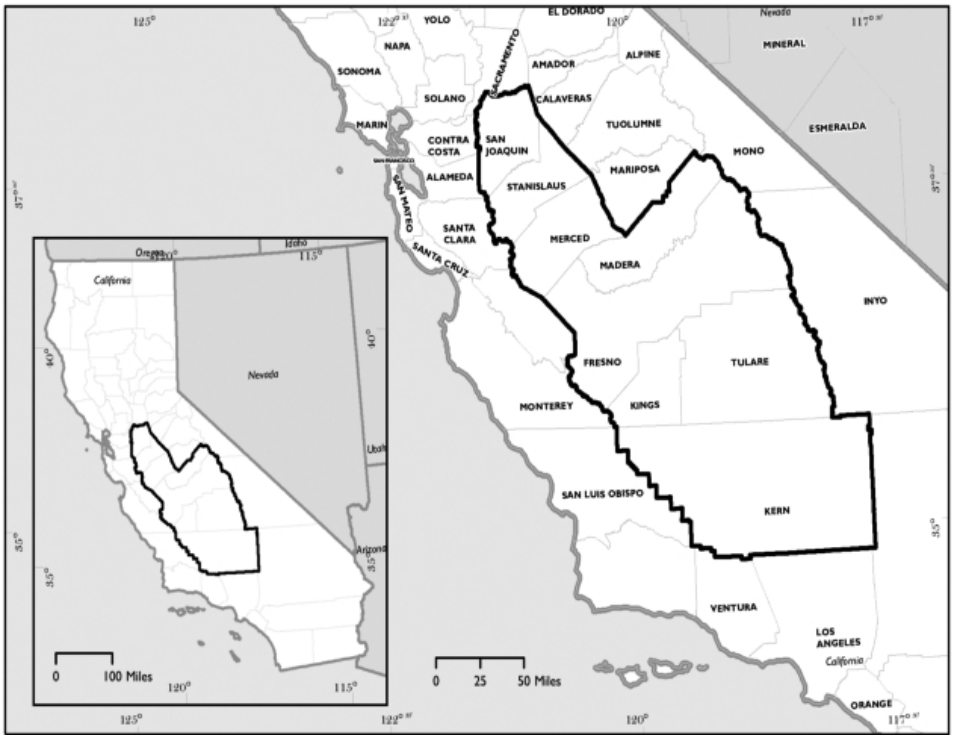
Background

The Settlement in the lawsuit *Natural Resources Defense Council v. Rodgers,* involves operation of Friant Dam on the San Joaquin River—one of the largest federal dams of the Bureau of Reclamation's Central Valley Project (CVP) in California. As shown in **Figure 1**, Friant Dam and the Friant Division of the CVP are situated in the southern portion of the San Joaquin Valley (SJV); however, the San Joaquin River flows north to the San Joaquin and Sacramento Rivers Delta confluence with San Francisco Bay (Bay-Delta). Hydrologically, the Friant Division Service Area extends into the Tulare basin. Agriculture in these areas is highly dependent on irrigation; much of the irrigation water is surface water supplied by the Friant Division. Many growers also use groundwater, conjunctively managing their surface and groundwater supplies. This conjunctive management improves seasonal and multi-year water reliability for growers.

The SJV, an eight-county region extending 250 miles from Stockton in the north to Bakersfield in the south (**Figure 1**), is both rapidly growing and economically depressed. (For more information on challenges facing the SJV, see CRS Report RL33184, *California's San Joaquin Valley: A Region in Transition,* by (name redacted) et al.) Yet, the 27,280 square mile SJV is home to five of the nation's ten most agriculturally productive counties, as measured by value of total annual sales. The Friant Division Service Area includes four of these counties: Fresno, Tulare, Kern, and Merced. The SJV faces significant environmental and natural resource challenges, including the court-ordered restoration of the San Joaquin River discussed in this report.

[2] House and Senate budget rules require offsets for certain spending measures, including those that include new mandatory (direct) spending. Finding an offset—that is, reducing spending elsewhere—to fund a new program, especially one for several hundred million dollars, is an often difficult task.

Figure 1. San Joaquin Valley



Source: Map prepared by The Congressional Cartography Program, Geography and Map Division, Library of Congress, 2007.

Friant Division

The CVP is a multi-unit, multi-purpose reclamation project administered by the Bureau of Reclamation (Reclamation) under federal law, including the Reclamation Act of 1902 and amendatory acts (known as Reclamation Law), the federal Endangered Species Act (ESA), various other federal environmental and administrative laws, and various state laws. The Friant Dam was built on the San Joaquin River by Reclamation in the early 1940s. It stores the San Joaquin River's flow in Millerton Lake, the reservoir behind the dam, from which water for irrigation and other purposes is diverted into two canals. Reclamation delivers the impounded water to 28 irrigation and water districts in the Friant Division pursuant to various types of water service contracts, many of which originated in the 1940s. The Friant Division serves irrigation and water districts in the Fresno, Kern, Madera, Merced, and Tulare counties (**Figure 2**).

Unlike most Reclamation projects, the Friant Division (dam and distribution facilities) is operated in a way that diverts nearly all the San Joaquin River's flow away from the River.[3] By the late

[3] A 1950 court ruling on the diversion of San Joaquin River flows noted that the court could find no other instance in which Reclamation was proposing to divert the entire flow of a river. The case involved rights of individuals downstream to continue to receive water from the river, as well as water for downstream fisheries and recreation. Eventually, water rights holders below the dam were granted water annually; however, no water was allocated to in-stream uses below the dam. Even though retaining water for in-stream uses (recreation, ecosystem health, fish and wildlife, and scenic values) is a relatively modern concept or value, there were local, and vocal, opponents of the proposed diversion of the river. By the court's count, there were some 1,000 farmers and ranchers below the dam who might be negatively affected. (Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950)). Some years later, Reclamation built the Trinity project, which diverted a significant portion of the Trinity River to other CVP water districts. Trinity River (continued...)

1940s, Reclamation's operation of Friant Dam had caused long stretches of the river to dry up. Portions of the San Joaquin River upstream of its confluence with the Merced River remain mostly dry today, except during flood events. Reclamation's operation of Friant Dam largely destroyed numerous species of native fish from the Upper San Joaquin River, including spring- and fall-run Chinook salmon.[4] The diverted water helped develop and continues to support a diverse agricultural economy from north of Fresno to Bakersfield—the Friant Division Service Area (see **Figure 2**).

Chinook Salmon Runs

While water diverted from rivers helped establish California's vibrant and valuable agricultural economy, some California fisheries have declined—particularly commercial and recreational salmon fisheries—due to water diversions and other factors.

Historically, Central Valley spring-run Chinook were found throughout the Central Valley—from the northern Sacramento River drainage area to the southern portions of the San Joaquin drainage. The Middle and Upper San Joaquin River historically supported two or more independent populations of spring-run Chinook salmon. Most spawning by spring-run Chinook salmon in the San Joaquin River occurred upstream of the current location of Friant Dam. Historical spawning runs may have exceeded 200,000 fish annually, ascending the river as far as Mammoth Pool (about 1,000 meters elevation), which lies about 50 miles above Friant Dam. Although the spring-run Chinook population had declined from historic levels before construction and full operation of the Friant unit of the Central Valley Project, it appears from California Department of Fish and Game records that a viable spring-run population existed well into the 1940s with returns ranging from 2,000 to 56,000 fish.[5] For several years after Friant Dam was in place, spring Chinook successfully spawned in habitat below the dam. However, by the late 1940s, operation of Friant Dam caused long stretches of the San Joaquin River to dry up, and the offspring of adults hauled by truck around the dry stretch were no longer able to out-migrate. Today Central Valley spring-run Chinook salmon are listed as threatened under the ESA;[6] however, Central Valley spring-run Chinook salmon have been entirely extirpated from the San Joaquin River drainage, and currently inhabit only the Sacramento River drainage.[7]

(...continued)

flows have also been very contentious and, per administrative actions recently upheld by a court ruling, are also to be increased to support and restore dwindling fisheries.

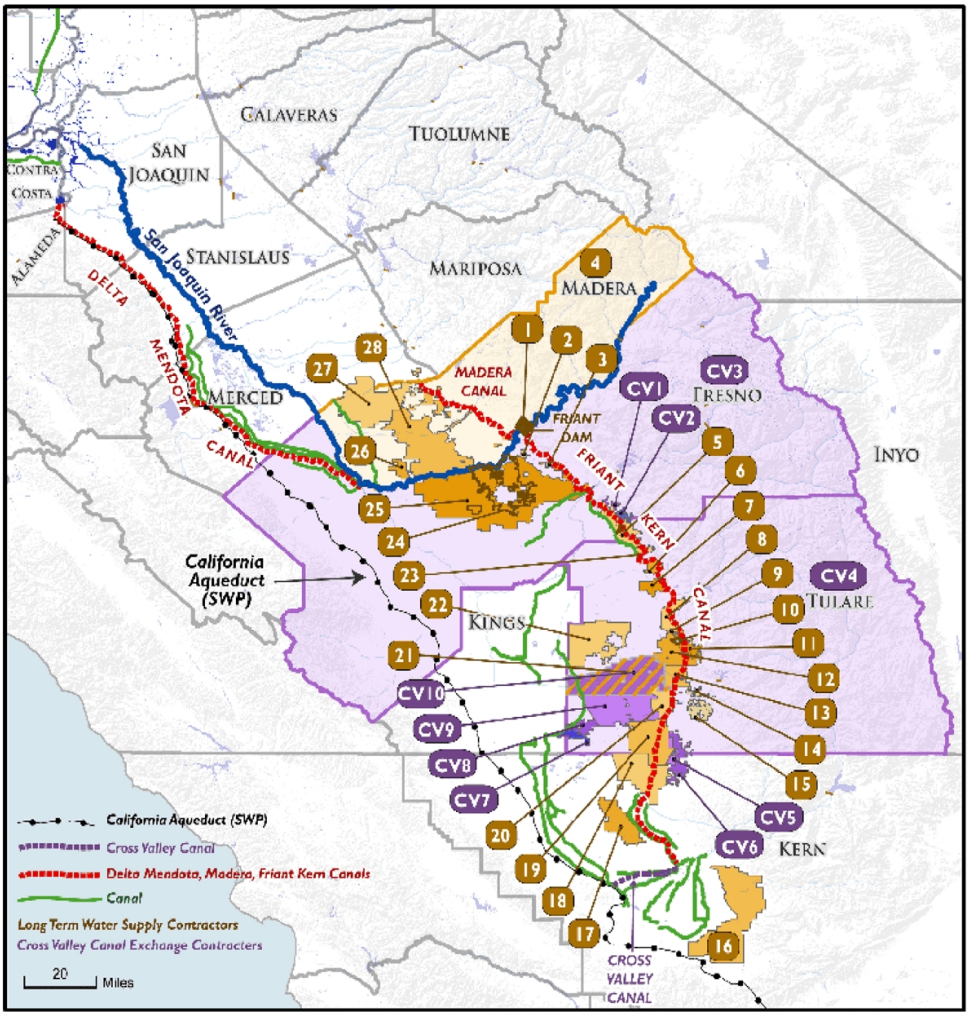
[4] San Joaquin River flows are needed to allow adult salmon to swim upstream to their spawning grounds, to provide habitat for juvenile salmon, to allow juvenile salmon to swim downstream in the spring through the lower river, and to dilute toxic and saline drainage to maintain a minimum level of water quality.

[5] Donald H. Fry Jr., "King Salmon Spawning Stocks of the California Central Valley, 1940-1959," *California Fish and Game,* vol. 47 (1961), pp. 55-71.

[6] 70 *Fed. Reg.* 37160, June 28, 2005.

[7] J. M. Myers, et al., *Status review of Chinook salmon from Washington, Idaho, Oregon, and California*, U.S. Dept. of Commerce, NOAA Tech. Memo. NMFS-NWFSC-35 (1998), pp. 119, 197-199.

Figure 2. Friant Division and Water Contractors



LONG TERM WATER SUPPLY CONTRACTORS	
1	FRESNO CO. WATERWORKS NO. 18
2	GARFIELD WATER DISTRICT
3	INTERNATIONAL WATER DISTRICT
4	MADERA COUNTY
5	ORANGE COVE IRRIGATION DISTRICT
6	STONE CORRAL IRRIGATION DISTRICT
7	IVANHOE IRRIGATION DISTRICT
8	EXETER IRRIGATION DISTRICT
9	LEWIS CREEK WATER DISTRICT
10	CITY OF LINDSAY
11	LINDSAY-STRATHMORE IRRIGATION DISTRICT
12	LINDMORE IRRIGATION DISTRICT
13	PORTERVILLE IRRIGATION DISTRICT
14	TEA POT DOME WATER DISTRICT
15	TERRA BELLA IRRIGATION DISTRICT
16	ARVIN-EDISON W.S.D.
17	SHAFTER-WASCO IRRIGATION DISTRICT
18	SOUTHERN SAN JOAQUIN M.U.D.
19	DELANO-EARLIMART IRRIGATION DISTRICT
20	SAUCELITO IRRIGATION DISTRICT
21	LOWER TULE RIVER IRRIGATION DISTRICT
22	TULARE IRRIGATION DISTRICT
23	CITY OF ORANGE COVE
24	CITY OF FRESNO SERVICE AREA
25	FRESNO IRRIGATION DISTRICT
26	GRAVELLY FORD WATER DISTRICT
27	CHOWCHILLA WATER DISTRICT
28	MADERA IRRIGATION DISTRICT
CROSS VALLEY CANAL EXCHANGE CONTRACTORS	
CV1	TRI-VALLEY WATER DISTRICT
CV2	HILLS VALLEY IRRIGATION DISTRICT
CV3	FRESNO COUNTY
CV4	TULARE COUNTY
CV5	RAG GULCH WATER DISTRICT
CV6	KERN-TULARE WATER DISTRICT
CV7	ATWELL ISLAND WATER DISTRICT
CV8	ALPAUGH IRRIGATION DISTRICT
CV9	PIXLEY IRRIGATION DISTRICT
CV10	LOWER TULE RIVER IRRIGATION DISTRICT

Source: Friant Water Authority. U.S. Bureau of Reclamation. Map: Congressional Cartography, Library of Congress, 2007

Native fall and late-fall-run Chinook salmon continue to spawn in small numbers in the San Joaquin River tributaries such as the Mokelumne, Stanislaus, Tuolumne, and Merced Rivers. These fish spawn at lower elevations in these tributaries and have been less affected by dam construction than were spring-run Chinook salmon. In addition, there is significant artificial production of fall-run Chinook salmon by California Department of Fish and Game hatcheries on the Tuolumne, Mokelumne, and Merced Rivers.[8] Fall-run Chinook salmon are not listed under the ESA, but are identified as a species of concern.[9]

Recent Legal History

Litigation involving waters of the San Joaquin River spans several decades. Litigation resulting in the most recent Settlement, however, can be traced to a 1988 lawsuit. This lawsuit and the negotiated Settlement Agreement are discussed below.

NRDC v Rodgers

During the late 1980s the Friant Division water users sought renewal of their long-term water service contracts with Reclamation. Beginning in 1988, a coalition of environmental groups and anglers led by the Natural Resources Defense Council (NRDC) challenged the contract renewals in federal court on a number of environmental grounds. In addition to claims that the process under which Reclamation had begun contract renewals violated the National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321 et seq.) and that the lack of water in the river violated the ESA (16 U.S.C. §§ 1531-1544), the plaintiffs argued that Reclamation had violated Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383). That section provides that Reclamation will act in conformity with state laws "relating to the control, appropriation, use or distribution of water used in irrigation." The state law that is at issue here is California Fish and Game Code § 5937. Section 5937 provides as follows: "The owner of any dam shall 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."

The claims have been litigated in the U.S. District Court for the Eastern District of California. The district court has reviewed the application of § 5937 to the problem at hand on several occasions since 1988 and has issued several decisions. In 2004, the District Court issued another decision regarding the application of § 5937 to the San Joaquin River, finding that Reclamation had violated the state law. It stated: "There can be no genuine dispute that many miles of the San Joaquin River are now entirely dry, except during extremely wet periods, and that the historical fish populations have been destroyed."[10] The court did not declare what amount of water was necessary to satisfy the law or declare any other type of relief; rather, it set a 2006 trial date to determine a proper remedy.

The Settlement Agreement

Faced with the prospect of a court-imposed remedy, and mounting legal fees in preparation for trial, the parties (NRDC et al., Reclamation et al., and Friant long-term water service contractors)

[8] Ibid, pp. 120, 146, 194-195, 199-201.

[9] 69 *Fed. Reg.* 19975, Apr. 15, 2004.

[10] NRDC v. Patterson, 333 F. Supp. 2d 906, 925 (E.D. Cal. 2004).

began a series of settlement negotiations in late 2005, and came to a tentative agreement in June 2006. The terms of the Settlement were then vetted with selected stakeholders, finalized, and presented to Congress in September 2006—the final Stipulation of Settlement was filed with the U.S. District Court, Eastern District of California, September 13, 2006. The Settlement Agreement was accepted by the District Court on October 23, 2006.

The stated goals of the Settlement are twofold: (1) to restore and maintain fish populations in "good condition"—the § 5937 standard—in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River; and (2) to reduce or avoid adverse water supply impacts to the Friant long-term water service contractors that may result from both interim flows and restorative flows provided in the Settlement. To accomplish these goals, the Settlement calls for numerous actions, some of which need congressional authorization and appropriations. Further, appropriations authorization is needed to finance settlement implementation as envisioned under the Settlement. The Settlement states that if legislation is not enacted by December 31, 2006, the Settlement may become void at the election of a party, at which point litigation might resume. While implementation legislation was considered in the 110th Congress (H.R. 4074, H.R. 24 and S. 27), it was not enacted. Title X of H.R. 146 (the 111th Congress) contains a revised version of this legislation. Revisions address direct spending and restoration flow provisions (§§ 10004 and 10009). To date, no party has officially elected to void the Settlement.

Legislative Context

In September 2006, the settling parties presented the Settlement, including its legislative proposal, to various Members of Congress. The parties hoped implementing legislation would be enacted prior to adjournment of the 109th Congress. However, numerous entities who were not party to the Settlement (i.e., *third parties*), objected to the legislative proposal included in the Settlement, as well as the swift time line imposed by the Settlement Agreement.[11] Shortly thereafter, many third parties met with the Settlement parties and certain Members of the California delegation. An agreement was reached to address certain third party interests; in exchange, these third parties agreed to support new legislation. Although many parties who had opposed the draft legislation in September 2006 supported the new legislation, other parties emerged that were not part of the new agreement, resulting in further opposition to Settlement legislation.[12]

San Joaquin River restoration Settlement legislation was first introduced in early December 2006 (H.R. 6377 and S. 4084); however, no action was taken on the bills before adjournment of the 109th Congress. The Settlement bills were reintroduced in the 110th Congress as H.R. 24 and S. 27. Hearings were held in both houses of Congress; however, the legislation was not enacted. One of the primary hurdles facing the legislation has been its budgetary impact and financing mechanisms.

[11] Testimony presented before the House Resources (renamed House Natural Resources in January 2007) Water and Power Subcommittee, Sept. 21, 2006, *Oversight Hearing on the San Joaquin Restoration Settlement Act.*

[12] Testimony presented before the House Resources Water and Power Subcommittee, Sept. 21, 2006, *Oversight Hearing on the San Joaquin Restoration Settlement Act,* and testimony before the House Natural Resources Water and Power Subcommittee, March 1, 2007.

Implementation of the Settlement calls for construction of numerous projects and other activities that could cost between $250 million and $1.1 billion. Federal funding for these projects and activities is sought by the parties and is contemplated under the Settlement. Direct spending funding mechanisms included in the legislation would typically require a budgetary offset under congressional PAYGO rules—according to some, a difficult task in today's budget climate. While short-term (10 year) direct spending in H.R. 146 has been reduced substantially compared with earlier versions of the legislation, the budget effects of the legislation in its entirety are still at issue for some.

An overall complication for Congress in considering San Joaquin Settlement legislation is that although the Settlement aims to end a 19-year lawsuit and comports with a court ruling, the Settlement would affect others outside the Friant Division Service Area. Changes embodied in H.R. 146 aim to resolve concern about the introduction of restoration flows. Another complication is the prospect that funding for the San Joaquin River Settlement may divert funds from salmon restoration projects in other river basins. Lastly, other recent events potentially limiting water exports from the Sacramento and San Joaquin Rivers Delta confluence could significantly affect implementation of the recirculation portion of the water management goal and has caused increased concern among some stakeholders.

If Congress does not act on the legislation, some fear that the court will order a remedy, which may differ from the Settlement and which may have more severe consequences for some area water users and third parties.

The Settlement and California Water Policy Writ Large

The Settlement Agreement and subsequent implementing legislation are the culmination of nearly two decades of discussion, argument, and study on whether and how to restore fisheries below Friant Dam, a federally owned and operated facility on the San Joaquin River. The most recent actions relate to a court decision that Reclamation is operating the dam in violation of California state fish and game code. The implications of this decision are far reaching for California water management and for both the directly affected water users and the indirectly affected communities, landowners, and water users. Several broad policy issues are raised by the Settlement. These issues partially derive from constraints imposed by the pressure to react to a settlement responding to a judicial ruling, as opposed to managing or legislating on an issue prior to, or absent, such a settlement.

Another overarching issue is how San Joaquin River management ties into other CVP management decisions, as well as state and local water systems. Both the CVP and State Water Project (SWP)—a largely parallel state water supply system south of the Bay-Delta—are operating under regulations that limit the amount (and timing) of water that can be exported south out of the Bay-Delta. Recent court decisions regarding the health of threatened Delta Smelt have constrained water exports and may constrain future exports. The degree to which some of the water management goals identified in the Settlement might rely on moving water in and out of the Bay-Delta could affect the ultimate ability to recapture, recirculate, and/or reuse San Joaquin River restoration flows. At minimum, it appears the restoration effort will necessitate multi-year water planning and investments, including having the funding on hand and infrastructure in place to buy and put to use surplus water (e.g., for groundwater recharge), and to buy water in dry years for those without sufficient access to groundwater, those with primarily Class II supplies, or in the driest of years. Therefore, the future of water resource management in the Central Valley is not just conjunctive water management, but multi-year conjunctive management with the financial

resources to make it happen, in addition to integration of federal, state, local, and private infrastructure projects. Whether Congress addresses this issue—in California and elsewhere—given current water resource authorization and appropriations practices and a restrictive budgetary climate remains to be seen.

While the issues discussed here have confronted prior Administrations and Congresses, a Settlement Agreement was not reached until the U.S. District Court acted, ultimately resulting in the difficult choices facing Congress today (e.g., budgetary, water delivery, and ecosystem health trade-offs). This is a common dilemma for resource agencies implementing projects and programs which are based on societal and political trade-offs made decades ago (e.g., agricultural industry over commercial and sport fishing industries, or timber harvest over species habitat). It is hard to say what is fair or just when such significant trade-offs were made decades ago, causing harm to some, but providing benefit to others who then made financial and livelihood decisions based on those policies. In the eyes of many, the San Joaquin river restoration is an effort to respond to fisheries economic and ecological damage begun 60 years ago; for others the potential of reduced water supplies for off-stream use is a breach of promises made 60 years ago. For the court, it is a matter of Friant Dam operations comporting with state law.

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