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**Written Testimony**  
**Before the Committee on Resources,**  
**Subcommittee on Water and Power**  
*United States House of Representatives*

**Hearing**

The San Joaquin River Restoration Settlement Act

**Washington, D.C.**  
*March 1, 2007*

## **Mr. Daniel M. Dooley**

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#### **CHAIR, NAPOLITANO, AND MEMBERS OF THE SUBCOMMITTEE:**

It is an honor and privilege to appear before this Committee, and to ask your support for legislation implementing a historic agreement that resolves a long-standing conflict on the San Joaquin River. I am Daniel M. Dooley, a partner in Dooley Herr & Peltzer, LLP. I serve as general counsel for many of the irrigation and water districts that compose the Friant Water Users Authority. Along with Kole Upton, Chairman of the Friant Water Users Authority, I was a principal negotiator of this historic Settlement of the 18 year old lawsuit known as *NRDC, et al. v. Rodgers, et al.* Mr. Ron Jacobsma, Consulting General Manager of the Friant Water Authority, is with me today, and will be available to respond to any questions you may have regarding implementation of the Settlement.

On September 13, 2006, the Friant Water Users Authority, Natural Resources Defense Council and U.S. Department of the Interior cooperatively reached what can only be termed a historic moment. As representatives of Friant, the NRDC and its coalition, and the federal government gathered at the federal courthouse in Sacramento, documents were being electronically filed within the U.S. District Court of Judge Lawrence K. Karlton to settle the San Joaquin River litigation that has been so contentious, and which has placed such a dark cloud over Friant's future, for the past 18 years.

My testimony today will focus on this Settlement and why it is good for society as a whole and all the parties. I will discuss how this carefully crafted Settlement provides a process to restore a river in a manner that maintains a vibrant economy and society and how it offers protection, in so many ways, for third parties who are downstream stakeholders.

Most importantly, I will assert to you that this extraordinary Settlement offers a positive and productive path forward into a future in which all of us can use our resources and talents in a cooperative effort rather than one that is wastefully devoted to continued bickering and fighting. This Settlement may not be not perfect, but it is by far the most practical option for each of the parties, and particularly for the members of the Friant Water Users Authority and the water users they serve.

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<sup>1</sup> DOOLEY HERR & PELTZER, LLP represent the Fresno Irrigation District, Lewis Creek Water District, Lower Tule River Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Stone Corral Irrigation District, Tea Pot Dome Water District, and Tulare Irrigation District, all of whom are long-term Friant Division Central Valley Project water contractors. Additionally, Dooley Herr & Peltzer, LLP represent the Hill's Valley Irrigation District, Pixley Irrigation District, and the Tri-Valley Water District, all of which are long-term Cross Valley Canal Central Valley Project water contractors.

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I commend the legislators and policy makers – Federal, State, and Local – who have done so much to reach this remarkable point in time. In particular, Mr. Chairman, the settling parties and the people and organizations we represent are grateful for the leading roles that the former Chair, Mr. Radanovich and Senator Feinstein willingly took to bring us back to the negotiating table and bridge our differences in a way that has made it possible for all of us to embrace this Settlement and its provisions.

As you may know, the Friant Water Users Authority consists of 22 member agencies that receive water from the Friant Division of the Central Valley Project. The Friant service area consists of approximately 15,000 mostly small family farms on nearly one million acres of the most productive farmland in the nation along the southern San Joaquin Valley's East Side. The Friant Division sustains underground water supplies relied upon by residents, businesses and industries in the cities within the Friant service area and delivers surface water to cities and towns that include Fresno, Friant, Orange Cove, Lindsay, Strathmore and Terra Bella.

The Friant interests were motivated to find a way to settle the NRDC's lawsuit over the San Joaquin River because of our determination to preserve the valley's way of life. Friant Dam and water delivered through the Madera and Friant-Kern canals has always provided a great deal of opportunity. For the past 18 years, the water supply of water from Friant has been under a dark cloud. We have had every reason to believe that those who farm and the communities that exist because of Friant could end up losing all or a major portion of their water through a judge's decision in the NRDC case or because of some other challenge.

Such a possibility was and is unacceptable. Farmers cannot farm without an adequate and affordable water supply. Further, farmers must have some certainty before committing to plant a crop. As this case began down a fast track toward trial to determine how much water was required to restore the River, we were provided with an opportunity to sit down and try again to reach a mutually agreeable settlement.

## **BACKGROUND**

It goes without saying that this case has been seemingly endless, frequently frustrating, incredibly challenging, internally complicated, often controversial and always expensive.

It began in 1988 just as the U.S. Bureau of Reclamation was beginning to renew Friant's long-term 40-year contracts. NRDC and its coalition of environmental and fishing interests challenged the government's decision to renew Friant water service contracts without an Environmental Impact Statement. Of course, it didn't stay that simple. NRDC's complaint was amended seven times over the next 15 years to include other claims. One of those was a claim under the Endangered Species Act, and still another that contended the operation of Friant Dam was in violation of California Fish and Game Code Section 5937, which requires dam operators to release sufficient water to keep fish in good condition below the dam. Most of the earlier claims are no longer relevant. But the river flow issue – the most crucial of all to Friant users –

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came to be the litigation's focus over the past several years, especially during an earlier four-year settlement effort that was unfortunately not successful.

The case reached a crucial turning point in August 2004 when the judge ruled Section 5937 imposes a continuing duty to release sufficient water from Friant Dam into the San Joaquin River to restore former historic salmon runs and fishery conditions. It assigned liability to the Bureau of Reclamation. The court did not determine how much water would be needed to satisfy the state law but set the case for a trial that was to have started in February 2006 to determine the "remedies" – the amount of the releases. In 2005, the parties began preparing for that trial and in the process gained valuable new scientific information from the expert reports prepared by our respective trial witnesses about possible restoration strategies.

The Judge admonished the parties that the law did not permit him to finely tune a solution in the way the parties could through a negotiated settlement. The Judge's admonition resonated with the Friant contractors. It seemed to say what many of us had long suspected – that if the judge decided this case, there was going to be a great deal of Friant water used as a "remedy" down the river. And without a settlement, there wasn't going to be any of the extensive and critically needed work done in the channel and to structures to provide any sort of on-the-ground hope that salmon could be lured back by water alone. The Judge would likely have retained jurisdiction to increase water releases in order to accomplish the Restoration Goal. There was, however, a strong likelihood that Friant's water users and the economic and social structure in the San Joaquin Valley that depends upon this water supply could very well be severely impacted.

That was the situation fall of 2005 when then Chairman Radanovich and Senator Feinstein began a non-partisan effort to try to get Friant, NRDC and the government to try again to negotiate a mutually agreeable Settlement. It should be obvious that Mr. Radanovich and Mrs. Feinstein were amazingly persuasive! They asked the parties to respect to critical principles. The first was to respect the need for water supply and financial certainty in the Friant community. The second was to respect the need for certainty that the Restoration effort would actually occur. The concept was a good old-fashioned compromise. This is essentially how it was framed:

In exchange for restoring the San Joaquin River below Friant Dam, Friant's new water dedication for the fishery's needs would be capped at certain amounts based upon hydrologic conditions. That instantly provided Friant water users with what had long been missing – a declaration of water supply and quantity certainty for decades into the future. We were well aware in taking this key compromise and filling in the details that such an agreement would result in use of a portion of the Friant Division water supply for Restoration Flows. And, yes, it represents water that our already water-short area can't afford to lose. Friant also recognized that the cap on water for Restoration Flows would remove what promised to be years of continued uncertainty over the Friant water supply that would result in socioeconomic disruption of the eastern San Joaquin Valley.

Of equal importance to that certainty and the river's restoration was development of the Settlement's unique means of using good, innovative water management to provide means to recover, re-use and recirculate water in an attempt to mitigate impacts on Friant water users. Also of great importance to Friant was another crucial compromise that capped Friant's financial contribution to river restoration at present levels – which add up to tens of millions of dollars each year paid into the CVP Improvement Act's Restoration Fund and Friant Surcharge.

By April of 2006, the parties were able to inform Judge Karlton that agreement had been achieved on numerous issues, including restoration goals, water flows, ways of managing and recovering water and a host of other issues. At the end of June, attorneys agreed to a Settlement in principle and would recommend approval to each of the constituencies.

## **THE SETTLEMENT AGREEMENT**

The Settlement Agreement itself is constructed around two important, parallel and, Friant believes, equal goals:

- **The Restoration Goal** is to restore and maintain a self-sustaining salmon population below Friant Dam to the confluence of the Merced River.
- **The Water Management Goal** is to reduce or avoid adverse water supply impacts to all of the Friant Division long-term water contractors.

**THE RESTORATION GOAL** includes three essential elements. Those include:

- **A number of improvements** providing for channel capacity, related flood protection, fish passage and fish screening. These will take place in two phases. By the end of 2013, projects to be completed include a salmon bypass channel around Mendota Pool, increasing channel capacity between the Eastside Bypass diversion and Mendota Pool to 4,500 cubic feet per second; increasing the channel capacity (in Reach 4B) below the Sand Slough control structure to 475 cfs; modifying the Sand Slough control structure to provide for fish passage and appropriate routing of water; screening the Arroyo Canal diversion; and modifying Sack Dam and the Eastside and Mariposa Bypass channels for fish passage and low flow conditions; and providing seasonal fish barriers to screen fish at Salt and Mud Sloughs. The second phase improvements are to be completed by the end of 2016. These include increasing Reach 4B channel capacity below the Sand Slough control structure to 4,500 cfs unless it is determined not to substantially enhance achievement of the Restoration Goal; modifying the Eastside Bypass diversion structure to provide appropriate fish screening and passage; and isolating gravel pits near Fresno from the river.
- **Flow releases from Friant Dam**, beginning in 2009 with experimental interim flows and with full restoration flows beginning in 2014; with quantities determined

according to hydrographs based upon water year types in order to provide fishery habitat water. These restoration flows may be supplemented by buffer flows of up to 10% and can be further augmented with water purchases from willing sellers. If construction of the river improvements is not completed, the Settlement agreement contains default provisions designed to preserve water for later use to achieve the Restoration Goal. Procedures are also specified for flexible management of Restoration Flows to account for temperature and biological factors. This adaptive management is to avoid causing harm to other downstream fishery programs. The flow schedule can't be modified until after December 31, 2026 and any change would require a court filing and a referral to the State Water Resources Control Board.

- **Reintroduction of salmon** and other varieties of fish into the upper San Joaquin River. The Fish and Wildlife Service is to apply to the National Marine Fisheries Service for a permit to reintroduce salmon and NMFS must decide on such application by April 30, 2012. Fall and spring run salmon are to be reintroduced by the end of 2012.

**THE WATER MANAGEMENT GOAL** and its implementation embrace two critical elements. They include:

- **Development and implementation of a plan** to recirculate, recapture, reuse, exchange, or transfer water released for Restoration Flows within bounds of the Settlement's terms and all applicable laws, agreements and environmental policies.
- **Creation of a Recovered Water Account** that provides an opportunity for Friant Division long-term contractors to recover water they have lost to Restoration Flows at a reduced water rate in wet water conditions. Friant Division long-term contractors providing water for Restoration Flows will be able to purchase water for \$10 an acre foot during certain wet conditions when water is available that is not necessary to meet contractual obligations or Restoration Flows. This provision is designed to increase water banking and management programs and boost incentives for districts to actively participate while reducing the Settlement's water supply impacts.

**SOME OF THE SETTLEMENT'S OTHER FEATURES** include and address:

- **State of California Participation:** This contemplates that the State will of necessity participate in implementing many provisions. A memorandum of understanding has been negotiated with various State agencies. It specifies how Friant, the NRDC coalition, federal government and the State will integrate implementation activities. The State has expressed a desire for its Resources Agencies to be actively involved. We expect the State to provide technical and

funding resources. Specific agreements will be negotiated with the State regarding specific Settlement actions. It should also be noted that Proposition 84 was approved by the California voters in November of 2006 and includes \$100 million for San Joaquin River restoration.

- **Funding:** There are very specific provisions related to Settlement funding, including provisions relating to the character of the capital investment, limitations on Friant Division long-term contractor payments, identification of existing funding resources and additional appropriations authorization. The Settlement provides that costs will not add to CVP capital obligations. It also commits Friant Division long-term water contractors to continue paying the CVPIA Restoration Charge and Friant Surcharge for the life of the Settlement but caps Friant's obligations at those amounts. The Friant Surcharge would be dedicated to implementing the settlement, as would Friant's capital repayment portion of CVP water rate payments. Up to \$2 million annually of the Friant CVPIA Restoration Charge payments will be made available for implementing the Settlement. In addition, the Settlement authorizes appropriations authority for implementation totaling \$250 million. (Some of these identified sources of funding are not subject to the appropriations ceiling or to annual appropriations and may not be subject to scoring for budget allocation purposes.) State funding from various revenue streams, including state bond measures, are anticipated. Funding identified in the Settlement is to be available to implement the Water Management Goal as well as the Restoration Goal.
- **Other Claims Resolved:** The Settlement resolves all claims pending in the existing litigation, including those challenging the validity of the Friant Division long-term renewal contracts. The exception is attorneys' fees and costs.
- **Third Party Impacts And Participation:** There has been a great deal of concern voiced about third party impacts. All of us clearly understand and the Settlement acknowledges that implementation will require a series of agreements with agencies, entities and individuals who are not parties to the litigation. The Interior Department is to coordinate with interested third parties (including third parties who own or control lands or facilities affected by Settlement implementation), and for public participation in Settlement implementation. Provisions of the MOU with the State contemplate joint efforts to provide mechanisms for non-party participation in Settlement implementation. Further, and as a result of a series of intense negotiations last September, a number of changes and additions were agreed to the legislation before you today that resolved most of the third party concerns. All participating in those discussions have signed a pledge that as a result of the changes, they will support the Settlement and the legislation and oppose changes that are not agreed to by all of the parties.

- **Management And Administration:** A *Restoration Administrator* position is to be established to help implement the agreement and advise the Interior Department on how the river restoration hydrographs are to be implemented, when buffer flows may be needed, river channel and fish passage improvements, reintroduction of salmon, interim flows for data collection purposes, targets, goals and milestones for successful implementation of the fishery program and coordination of flows with downstream tributary fishery efforts. Appointment will be for a six-year term. A *Technical Advisory Committee* will be created to advise the Restoration Administrator. It will include two representatives each from the plaintiffs' coalition and Friant defendants as well as two members mutually agreed upon, but none are to be federal employees. Terms are to be for three years.
- **Long-Term Friant Water Service Contract Amendments:** When the Friant Division's long-term renewal contracts were enacted in 2001, they included a stipulation requiring necessary contract amendments to reflect and be consistent with any Settlement agreement. Such a provision is part of the Settlement. Friant's long-term contracts will be kept in place with no further National Environmental Policy Act or Endangered Species Act compliance actions required.
- **Resolution of Disputes:** Procedures are included for attempting to resolve disputes by meeting and conferring. Should that be unsuccessful, services of a neutral third party are to be used. Finally, the parties could turn to the U.S. District Court.

## **FEDERAL LEGISLATION**

This issue is before the Subcommittee because some Interior Department actions called for in the Settlement require Congressional authority. As you have seen, an exhibit to the agreement contains legislative language proposed to implement the Settlement. It is referred to as the "San Joaquin River Settlement Act." Passage of this legislation in substantially the same form as has been introduced is critical because any party could void the Settlement if the necessary legislation were not enacted on a timely basis. Further, State of California funds will be available to implement the Settlement on July 1, 2007. Enactment of this legislation is critical to effectively utilize the State funds and to keep implementation of the Settlement on the admittedly aggressive schedule agreed to by the parties.

## **MITIGATION WATER SUPPLY IMPACTS**

The Friant Water Users have carefully evaluated the water supply delivery impacts of restoring Restoration Flows to the San Joaquin River. In addition to flood flows and surplus water supplies, Friant estimates the average annual impacts to historic water deliveries to be approximately 170,000 acre feet. Unmitigated, this annual impact would have significant adverse impacts on the Friant service area and the communities existing



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therein. These potential impacts are of concern to the Friant Contractors and many community interests along the eastern side of the southern San Joaquin Valley.

The Friant Water Users Authority and its member districts have undertaken to prepare a report that identifies a number of specific programs and projects that could be undertaken to substantially, if not completely, mitigate the water supply impacts. Some of provisions of the report identify options for recirculation, recapture and reuse of water that should be considered by the Secretary of Interior when developing the plan required by Paragraph 16 of the Settlement. Other provisions identify activities that the Friant Water Users Authority and its members are considering to further reduce the direct water supply impacts resulting from the initiation of Restoration Flows as well as the indirect impacts on the communities in the Friant service area. These programs and projects include, but are not limited to:

- Projects and programs that should be considered by the Secretary in developing the plan for recirculation, recapture and reuse of Restoration Flows that is required by the Settlement and the legislation;
- Rehabilitation and enhancement of Friant Division conveyance facilities to permit greater utilization of surplus River water to maximize the effectiveness of integrated regional and district programs and projects;
- Integrated regional management projects and programs that create improved integrated water management activities between districts and among groups of districts; and
- Improved district groundwater banking, conveyance, distribution and water management programs and facilities.

I offer a report that summarizes these programs and projects and includes a detailed exhibit for inclusion into the record of this hearing.

### **CONCLUSION**

Settlement of the 18-year-old litigation known as *NRDC v. Rodgers* has been rightly applauded in much of the nation's press as an outstanding achievement. The Friant Water Users Authority and its member agencies appreciate that sentiment and view the Settlement as historic, and the beginning of a new era in which the policies and activities of the past are blended with society's environmental priorities of the present and future. This Settlement has been constructed upon a newfound willingness among the settling parties to cooperate and compromise for the common good, and to the benefit of each of our positions.

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In addition to society's general interest in the San Joaquin River, there are three interest groups lobbying Congress on the legislation proposed for implementing this Settlement. These parties include:

- **The environmentalists** interested in restoring flows and salmon to the San Joaquin River.
- **The San Joaquin Valley folks** who are dependent on San Joaquin River water for sustaining their livelihoods and homes within the Friant Division.
- **The third party interests** who do not want the implementation of the Settlement to cause material adverse impacts to their constituents.

I submit to you that, collectively and individually, all these interests and society itself will be far better served by this Settlement than by Congress rejecting it. Of course not everyone is fully satisfied, from either the environmental coalition or the water users community:

- **Some in the environmental community** may wonder why they should settle with caps on Friant's costs and water releases when they have won so convincingly to date in Judge Karlton's Court. The answer for them is that this Settlement offers a process and constructive opportunity of cooperation for salmon restoration. With a court judgment, the attitude and approach by the valley folks would be predominantly one of perpetual resistance, and an emphasis on how to save as much water as possible. Under that scenario, water would nearly certainly be released upon orders of a federal judge, but the necessary improvements and cooperative nature essential to an effective salmon recovery would be entirely missing. And, if it were ever to be achieved, it would be accomplished only after a much longer time with far greater amounts of water.
- **Some water users interests** may feel that this Settlement makes no sense because, they reason, Congress six decades ago agreed to make the Friant project a reality and decided to make it work by drying up 60 miles of the San Joaquin River. Valley folks may also feel a federal judge should not have the power to overturn such a decision made long ago, and subsequently reaffirmed, by Congress. There is a misperception by some that an unfavorable ruling to valley water users and agencies would be a strong candidate for being reversed on appeal to the Ninth Circuit or the Supreme Court. Unfortunately, Friant has already been down that road once with this judge's decisions, including that our contracts should be voided and that California Fish and Game Code Section 5937 should apply to Friant Dam. His ruling was upheld by the Ninth Circuit and the Supreme Court would not take the case.
- **The Third Party interests** have sought protection and indemnification against unfair water and fiscal costs they assert the Settlement would be inflicted upon their constituents. We have addressed their concerns in the legislation before you.

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It is important to understand that rejection of the Settlement and proceeding to trial would not provide the third parties any of the protections contained in the Settlement and legislation.

This Settlement, and the legislation before you, is the product of literally thousands of hours or arduous negotiation and analysis. All parties to the litigation, and third parties who expressed concerns about the Settlement originally, have committed enormous good faith efforts to structure an agreement that fairly and acceptably balances all of the varied interests. Incredibly, we found such a balance. I believe this Settlement sets forth a model for resolving complex water resource disputes. The last piece is enactment of HR 24. I request that this Committee move this Bill as quickly as possible so that the parties can fully move forward to the challenging task of implementing this historic restoration program.

Thank you.