

**TESTIMONY OF THE MERCED IRRIGATION DISTRICT  
BY KENNETH M. ROBBINS, GENERAL COUNSEL,  
REGARDING H.R. 24,  
THE SAN JOAQUIN RIVER RESTORATION SETTLEMENT ACT  
BEFORE THE WATER AND POWER SUBCOMMITTEE OF  
THE HOUSE COMMITTEE ON NATURAL RESOURCES**

**March 1, 2007**

Good morning, Chairwoman Napolitano and members of the Subcommittee. My name is Ken Robbins. I am General Counsel for Merced Irrigation District. I am pleased to have the opportunity to testify today regarding H.R. 24, the San Joaquin River Restoration Settlement Act, introduced by Mr. Radanovich and others, that would implement the settlement agreement reached by the parties to the Friant litigation.

The Merced Irrigation District is part of the San Joaquin Tributaries Association (SJTA), a group of five associated eastside Irrigation Districts with water storage and hydroelectric facilities located on the three principal tributaries to the San Joaquin River.

The SJTA, including the Merced Irrigation District, is supportive of the goals of the settlement. The District is confident the settlement can be implemented in a manner that ensures both the restoration of the San Joaquin River and the mitigation of impacts from such an undertaking on third parties. The District believes the settling parties when they say they do not intend to impose impacts on third parties.

As you may recall, I testified before this Subcommittee last fall. Rather than repeat the background information that was contained in that testimony, I respectfully request that my earlier testimony and that of Mr. Allen Short, General Manager of the Modesto Irrigation District, be incorporated as part of the record of this hearing. Our testimony stressed that the third parties were supportive of the settlement. At that time we offered suggestions and proposed legislative language to ensure that the goal of the settlement is achieved without imposing impacts on third parties. A lot has happened since last September, and I am happy to report to you that we continue to support the efforts of the settling parties and the legislation as introduced.

The legislation before you is the product of months and months of hard work by the parties to the litigation and by the third parties and could not have been successfully

negotiated without the efforts of Senator Feinstein, Congressmen Radanovich, Cardoza, and Costa, and their excellent staffs. We are grateful to them for their support of this legislation that is so vital to the San Joaquin Valley.

The settlement package negotiated by the parties to the NRDC v. Rodgers litigation included proposed legislation to implement the settlement. While we felt that the legislation was a good start, it did not, by itself, provide the kind of third party protections needed to make good on the promise by the settling parties that the settlement not impose substantial third party impacts.

Speaking for my client, the Merced Irrigation District, and the SJTA, we feel that H.R. 24 as it now stands provides the protections we need to support the settlement. This legislation is the product of months of negotiations, culminating with a signed pledge by all the parties to support the legislation. Any changes to the legislation, therefore, could easily undo that fragile support.

I want to now focus my discussion on Section 10 of the Act. The third parties offered language to amend the legislation proposed by the settling parties. These amendments were made to protect the Eastside districts, as well as the San Joaquin River Exchange Contractors, other water users on the mainstem San Joaquin River, and the U.S. Bureau of Reclamation and the California Department of Water Resources, from the unintended consequences of introducing a federally-listed threatened species of Chinook salmon into the San Joaquin River. Section 10 was added to allow for the reintroduction of Central Valley Spring Run Chinook Salmon without impacting the third parties and to permit the restoration of the San Joaquin River to move forward in a cooperative manner.

The first thing to note is that Section 10(a) makes a finding that the settlement and the reintroduction of the Central Valley Spring Run Chinook Salmon is a unique and unprecedented circumstance requiring clear Congressional intent on the application of the Endangered Species Act (ESA) to ensure that the goals of the settlement are accomplished. Section 10(b) of the Act goes on state that the reintroduction shall be reintroduced pursuant to Section 10(j) of the ESA provided that the Secretary of Commerce makes the requisite findings.

Section 10(j) of the ESA authorizes the Secretaries of Commerce or the Interior to release “experimental populations” of threatened or endangered species outside the

current range of the species in order to further the conservation of the species. 16 U.S.C. § 1539(j). At the present time, NMFS has not adopted any regulations concerning experimental populations, although it is permitted to do so under the ESA. The U.S. Fish and Wildlife Service (USFWS) has, however, adopted regulations under Section 10(j).

“Experimental population” means a designated population, including subsequent off-spring, which can be introduced into an area where it is “wholly separate geographically from nonexperimental populations of the same species.” 16 U.S.C. § 1539(j)(1); 50 C.F.R. § 17.80(a). When a population is designated “experimental,” it is treated as if it were listed as a threatened species, rather than an endangered one. 16 U.S.C. § 1539(j)(2)(C); 50 C.F.R. § 17.82. A “*nonessential experimental population*” means an experimental population whose loss would not appreciably reduce the likelihood of the species' survival in the wild. 50 C.F.R. sec. 17.80(b). If an experimental population is deemed nonessential, no critical habitat designation is made for the population. 16 U.S.C. § 1539(j)(2)(C); 50 C.F.R. § 17.81(f). In addition, for purposes of Section 7 consultations, nonessential experimental populations are treated as species proposed to be listed under Section 4 of the ESA, rather than threatened or endangered. 16 U.S.C. § 1539(j)(2)(C)(i).

The SJTA believes that in order to protect third party interests from unintended impacts of the settlement, it is both reasonable and essential for the Secretary of Commerce to issue a final rule pursuant to section 4(d) of the ESA that will govern the incidental take of the Central Valley Spring Run Chinook Salmon *prior* to its reintroduction in the San Joaquin River. Included in the final 4(d) rule should be a provision to ensure that third parties not suffer water supply impacts as an indirect effect of the San Joaquin River restoration and that current lawful operations in the San Joaquin River watershed—including tributary water supply and hydroelectric operations on which the SJTA districts are critically dependent—would not be subject to “take” under the ESA. H.R. 24 contains a provision that provides that the reintroduction of the Central Valley Spring Run Chinook Salmon not impose more a than de minimis water supply reductions, additional storage releases, or bypass flows on third parties. We support this language as it is currently written.

With regard to the “wholly separate” criterion, the reintroduction of Central Valley Spring Run Chinook Salmon to the San Joaquin River should qualify as no other populations of Central Valley Spring Run Chinook Salmon exist on the San Joaquin River or its tributaries. Indeed, to reintroduce them individuals or eggs of Central Valley Spring Run Chinook Salmon on the Sacramento River will have to be transported to the San Joaquin River.

With respect to the required finding that the experimental population’s loss would not appreciably reduce the species’ likelihood of survival, it would be difficult to understand how the Secretary could find that the population to be reintroduced is “essential to the continued existence of the species” and still remove it from a much more friendly habitat—particularly in light of its threatened status rather than endangered. One would reasonably conclude that the fish would not be taken from their original habitat for such an experiment if they were in fact “essential.”

This protects all San Joaquin River and tributary water operations in three ways. First, if the experimental reintroduction of Central Valley Spring Run Chinook Salmon cannot be sustained based upon the actions of the settling parties, the Eastside Districts will not be required to release additional water, change operations, or commit resources to make up the shortfall. Second, if the experimental reintroduction is successful, such success will demonstrate that the current, lawful operations of the five Eastside districts have no detrimental effect on the reintroduced Central Valley Spring Run Chinook Salmon. Third, the designation of the reintroduced Central Valley Spring Run Chinook Salmon as a nonessential experimental population protects the water users while the experiment is in effect and allows an opportunity for the third parties, the State of California, the settling parties and the federal government to develop a longer term Habitat Conservation Plan.

H.R. 24 also protects the Merced, Turlock and Modesto Irrigation Districts from having to mitigate impacts to the experimental population of Central Valley Spring Run Chinook Salmon prior to 2026 when their hydroelectric projects are relicensed by Federal Energy Regulatory Commission (FERC) in 2014 and 2016. The Merced Irrigation District and the other eastside districts need the same level of protection as is afforded to the U.S. Bureau of Reclamation under the terms of the settlement. Under the settlement

there is no re-opener for twenty years, until 2026, for the release of additional water from Friant Dam. The Third Parties want this same protection given to them for their FERC relicensing. Merced Irrigation District's current FERC license expires in 2014, while Modesto Irrigation District and Turlock Irrigation District will seek to relicense their Don Pedro Project in 2016. The National Marine Fisheries Service has mandatory conditioning authority under section 18 of the Federal Power Act and section 7 of the ESA to condition these licenses with terms and conditions related to the reintroduced, experimental population of Central Valley Spring Run Chinook Salmon. The Districts are agreeable to have a reopener clause in their new FERC licenses to specifically address the population's status at that time, but not earlier.

In recognition of this unique circumstance, H.R. 24 provides that the final 4(d) rule specify that the Secretary of Commerce exercise its authority under Section 18 of the Federal Power Act by reserving its right to file prescriptions until after the settlement terminates or December 31, 2025. This protects the district from potential unreasonable mandatory conditions placed in their licenses to protect a reintroduced, experimental population. We think the time to address this issue is after termination of the settlement.

Following the agreement on the legislation which is now H.R. 24, the Stipulation of Settlement was approved by Judge Karlton on October 23, 2006. The SJTA filed an amicus curiae brief in that proceeding supporting the proposed settlement and also identifying for the judge the potential third party impacts from the settlement as proposed. I, and others, expressed these same concerns to you and the members of the Subcommittee at the previously held hearing on September 21, 2006. Those concerns have been largely alleviated by H.R. 24.

The third parties, including the SJTA, plan to be active participants in the restoration efforts on the San Joaquin River. The final major activity involving the third parties was the development of a Memorandum of Understanding (MOU) with the United States Bureau of Reclamation. The settlement and the draft legislation did not provide a direct vehicle for third party participation. To that end we have approved a MOU that will allow the third parties to provide meaningful input into the restoration activities and to coordinate our ongoing operations on the tributaries and mainstem with those of the Restoration Administrator and the other restoration participants.

The MOU is necessary because the five eastside irrigation districts of the SJTA have expended substantial amounts of water and money to restore the Fall Run Chinook Salmon fishery on the Merced, Tuolumne and Stanislaus Rivers. These efforts include active participation in, and funding for the San Joaquin River Agreement, the Vernalis Adaptive Management Plan (VAMP), Federal Energy Regulatory Commission (FERC) proceedings, on-going district funded studies and monitoring and restoration activities, and the Merced River Fish Hatchery. These efforts were covered in my September 21, 2006, testimony.

This concludes my testimony. Madam Chairwoman, thank you for the invitation to testify before this Subcommittee today. I will be happy to answer any questions members of the Subcommittee may have.