**Statement of Michael L. Connor, Commissioner**
**Bureau of Reclamation**
**U.S. Department of the Interior**
**Before the**

**Committee on Natural Resources**
**Subcommittee on Water and Power**
**U.S. House of Representatives**

**HR 1837 – San Joaquin Valley Water Reliability Act**
**June 2, 2011**

Chairman McClintock and members of the Subcommittee, I am Mike Connor, Commissioner of the Bureau of Reclamation (Reclamation). I am pleased to provide the views of the Department of the Interior (Department) on HR 1837, the San Joaquin Valley Water Reliability Act. As I stated at this Subcommittee's hearing two months ago in Fresno, the State of California has been experiencing a two-fold crisis over the past several years – one related to water supply and the other related to the collapsing Bay-Delta ecosystem. These issues are inextricably linked and a broad set of solutions is urgently needed to bring balance and sustainability back to the system in a manner that benefits all California businesses, families, and communities. H.R. 1837 does not represent a balanced approach and for the specific reasons that I will describe in detail below, the Department opposes HR 1837.

HR 1837 consists of three Titles: Title I, which significantly amends the 1992 Central Valley Project Improvement Act (CVPIA)[1] and supersedes the application of both the Endangered Species Act and California state law; Title II, which repeals the San Joaquin River Restoration Settlement Act and preempts the application of California state law[2]; and Title III, dealing with repayment contracts and accelerating the repayment of construction costs associated with Reclamation's Central Valley Project (CVP). This statement will be limited to discussion of only the most significant sections in the bill. We will continue working with the Subcommittee and its staff on the details of the legislation, as appropriate.

As a threshold matter, the Administration and Department strongly support the coequal goals of (1) providing a more reliable water supply for California; and (2) protecting, restoring, and enhancing the overall quality of the Bay-Delta environment. These goals are enshrined in California state law as a result of landmark bipartisan legislation that was enacted in 2009.[3] The goals are also the foundation for the Administration's 2009 Interim Federal Action Plan for the California Bay-Delta. As noted in the 2009 Plan, the actions, programs, and projects implemented to address and further the co-equal goals reflect a commitment to relying on science-based decisions. In our judgment, many of the provisions of HR 1837 will hinder restoration of the Bay-Delta environment, inappropriately preempt California's efforts to develop

[1] Title XXXIV of Public Law 102-575.

[2] Title X, Subtitle A of Public Law 111-11.

[3] SBX7 1, signed into law on November 12, 2009.

a comprehensive set of solutions to its water and environmental problems, and severely limit the use of science in evaluating and responding to the environmental decline of the Delta. Institutionally, HR 1837 would substantially set back, if not destroy, the fruitful cooperative relationship that has been developed between California and the Federal agencies over the course of several state and Federal administrations.

Moreover, notwithstanding the sponsors' efforts to craft HR 1837 to address concerns with water supply reliability, several aspects to the bill would be problematic to implement, conflict with existing legal obligations, law and/or policy, and create significant uncertainty for Reclamation and the water community. Also, in many places, the bill appears to reject the long-standing principle that the beneficiary should pay for the costs of developing water supplies and mitigating the impacts of such development. Shifting a large proportion of these costs to the American taxpayer, particularly in this era of limited budgets, is not an appropriate change in Federal water policy.

Finally, the provisions of HR 1837 are in direct conflict with the collaborative Bay-Delta Conservation Plan (BDCP) effort that has been under way since 2006 to develop a long-term plan to achieve the co-equal goals of restoring the ecological health of the Bay-Delta and providing reliable water supplies. The BDCP is potentially the keystone for restoring and protecting the Bay-Delta ecosystem and securing California's water supply system for the long-term. In light of the unsustainable and unacceptable status quo of the Bay-Delta and the potential impacts of sea level rise associated with climate change and for disaster to strike in the form of an earthquake or other catastrophic event that causes widespread levee failures, inaction is not a viable option. Action must be taken to achieve the dual goals of ecosystem restoration and water supply reliability, and must be tailored to assure that the interests of all affected stakeholders, including the residents and communities of the Delta, are considered and protected. HR 1837 would significantly undermine the continuing efforts of the Administration, together with the State of California, water users, community leaders, and members of the Non-Governmental Organization community, to develop a successful BDCP.

Title I – Central Valley Project Improvement Act Reforms

With respect to the specific provisions in the bill, Section 104 amends the CVPIA to add language stating that "the Secretary shall not impose mitigation or other requirements on a proposed transfer…". Current law requires that water transfer proposals comply with not just the CVPIA but also the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) in recognition of the fact that moving what can often be several thousand acre-feet of water can result in environmental impacts. Most CVP water transfers receive a Finding of No Significant Impact (FONSI) under NEPA, but in some cases mitigation actions are necessary to support a FONSI. If a FONSI cannot be reached, Reclamation would be required to undertake a much more time and resource intensive process to prepare an Environmental Impact Statement before being able to approve a transfer. In addition, because the legislation would prohibit mitigation requirements, the potential exists that significant adverse effects would not be addressed.

Section 104 of HR 1837 also removes the water pricing reform enacted in CVPIA that includes tiered water pricing which encourages water conservation by requiring incremental cost

increases for water when contractors take more than 80 percent of their contracted supplies. This would remove the incentive to conserve water and would encourage water service contractors, particularly those north of the Delta who are more likely to take a large share of their contracted supply, to take additional water under the terms of their contracts. This is contrary to the broadly supported goal of encouraging water conservation and to the intent of the State's 2009 water legislation and its water conservation mandates.

Section 106 requires that at least 50 percent of the funds collected in the CVPIA Restoration Fund, which was designed to fund mitigation for the environmental impacts of the CVP, be expended in the unit or division of the CVP where the funds were collected. This would limit Reclamation's ability to fund mitigation activities most effectively. The majority of Restoration Fund collections are generated south of the Delta, particularly on the Westside of the San Joaquin Valley, while the majority of the mitigation activities are on streams and tributaries north of the Delta and on the Eastside of the San Joaquin Valley. Many of the impacts north of the Delta are a result of delivery of water south of the Delta. The restrictions in HR 1837 would place an unfair burden on other CVP water users to fund required actions. Section 106 also would require Reclamation to use CVPRF receipts for activities that are not priorities of the CVPRF and are typically not funded through this Account.

Section 107 requires the Secretary to replace the 800,000 acre-feet of water from CVP yield dedicated for fish, wildlife, and habitat restoration purposes under Section 3406(b)(2) of CVPIA by 2016 or suspend use of this water until it is replaced. This water is used to meet Endangered Species Act (ESA) obligations for fish species, to augment in-stream flows to improve habitat for salmon and steelhead, and to assist with meeting water quality standards. The bill does not clearly address who would pay the costs of replacing 800,000 acre-feet of CVP yield by 2016, which could easily average over a hundred million dollars per year. If new infrastructure would replace the 800,000 acre-feet of yield, its construction would require at least a decade or more to complete at costs that would likely reach into the billions. These costs would either be repaid by the project beneficiaries or the public at large. Either would be a challenge in these tough economic times but as stated earlier, the beneficiaries of such large-scale development and associated mitigation, should be primarily responsible for the applicable costs. The Federal government generally follows the rule of thumb that those who share in the benefits of projects should help to pay for them.

Section 108 deems all requirements of the ESA to be considered fully met for the protection and conservation of all listed species for operation of the CVP and California's State Water Project (SWP), if the CVP and SWP are operated consistent with the 1994 "Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government" also known as the Bay Delta Accord. The Bay-Delta Accord committed that the CVP and SWP would be operated to a set of Delta habitat protective objectives that were eventually incorporated into the State Water Resources Control Board's 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. These objectives, along with the Vernalis Adaptive Management Program, were included with other changes by the State Water Resources Control Board in water rights decision D-1641, which amended the water rights of the CVP and SWP. Section 108 also preempts any California law that authorizes the imposition of conditions or restrictions on the operations of the CVP or SWP for the protection

or conservation of species that is more restrictive than the requirements of Section 108 of HR 1837. It is unclear whether this section applies only to those species listed under the ESA or to all species.

This type of broad and complete preemption of state law represents a complete paradigm shift from over 100 years of Reclamation law and purposeful direction from Congress of deference to state water law. In particular, California's Sacramento-San Joaquin Delta Reform Act of 2009 was a bipartisan product that had the support of water users, affected communities, the environmental community, and other stakeholders. Given that broad support and the balanced approach promoted by the legislation, limiting its application through congressional fiat is simply unwarranted and sets a damaging precedent. Moreover, limiting the extent to which the CVP and SWP contribute to requirements for species and other environmental needs under state law would likely result in the inequitable shifting of the burden of meeting those requirements to other water rights holders. Finally, we believe the broad state preemption provisions are likely to adversely affect programs beyond the ESA. As written, HR1837 impinges on the State Water Resources Control Board's ability to establish and enforce the aquatic resource protection provisions of the federal Clean Water Act and comprehensive California Porter-Cologne Water Quality Control Act insofar as implementation of those laws may involve requirements to protect species listed under the ESA. Most parties believe that state water quality regulations will need to be revised to accommodate potential changes in Delta conveyance. The draft legislation severely limits the State Board's ability to change those water quality regulations, and mandates the continued use of an outdated regulatory scheme that was based on a physical Delta configuration that no longer serves any of its intended functions.

From a science perspective, at the time the Bay-Delta Accord was signed, only two aquatic species affected by CVP and SWP operations had been listed under the ESA, Sacramento River winter-run Chinook salmon originally listed in 1989 under emergency provisions and delta smelt listed in 1993. Therefore, the actions in the Bay-Delta Accord reflect only the best assessment of the needs of winter-run Chinook salmon and delta smelt in 1994. The Bay-Delta Accord was intended to be in force for three years and then revisited. It was also intended to prevent the need for listing additional aquatic species under the ESA, an intent that has not been realized.

The more recent biological opinions issued by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service in 2008 and 2009, respectively, address several additional listed species and more recently designated critical habitat. Since 1994, other species affected by CVP/SWP operations have been listed, including spring-run Chinook salmon, Central Valley steelhead, the Southern distinct population segment (DPS) of North American green sturgeon, the southern resident DPS of killer whales, and Southern Oregon/Northern California Coast coho salmon. All of these species have life histories and biological needs different from winter-run Chinook salmon and delta smelt. There have also been significant strides in the knowledge regarding species needs and habitat functionality since the Bay-Delta Accord was signed. Reverting back to the Bay-Delta Accord as the sole means of protecting all listed species would result in negative impacts to the habitat for all currently listed fish species affected by CVP and SWP operations and would cause an increase in the amount of fish taken by the CVP and SWP export facilities. Conditions have changed substantially since 1994 and the scientific understanding of the Bay-Delta system continues to evolve.

**Title II – San Joaquin River Restoration**

Title II of the bill aims to repeal the 2009 San Joaquin River Restoration Settlement Act (Settlement Act). Language in Section 202 contains similar language referenced in Section 108 that "preempts and supersedes" state law that was a primary focus of the litigation that resulted in the San Joaquin River Restoration Settlement, and Section 203 formally repeals the Restoration Program as authorized in subtitle A of Title X of Public Law 111-11. Sections 205 through 207 replace the Restoration Program with an alternative series of authorities and directives.

As the members of this Subcommittee are aware, the plaintiffs in litigation that resulted in the Settlement Act had argued that the Federal government must operate Friant Dam in accordance with California Fish and Game Code § 5937, which requires the owner or operator of any dam in California to allow sufficient water to flow through or around the dam in order to keep the downstream fishery in "good condition." On September 13, 2006, the parties to the litigation, which included CVP Friant Division contractors, the Federal government, and environmental organizations, filed a Stipulation of Settlement, including proposed Federal implementing legislation, with the U.S. District Court for the Eastern District of California. The settlement was based on two goals and objectives:

1. A restored San Joaquin River with continuous flows to the confluence of the Merced River and naturally reproducing and self-sustaining populations of Chinook salmon; and

2. A water management program to minimize water supply impacts to Friant Division long-term contractors.

In the years that followed, this settlement was enacted into Federal law as the San Joaquin River Restoration Settlement Act. Hundreds of millions of dollars from a variety of sources including capital repayments and current payments from farmers and cities served by Friant Dam and state bond initiatives have since been committed to the Restoration Program. Reclamation has undertaken interim river restoration flows from Friant Dam pursuant to the Restoration Program, along with NEPA documentation for river channel modifications, conducting water management goal activities, and various other aspects of the Restoration Program.

Because of the Restoration Program's origins, the language in Section 203 of HR 1837 creates an uncertain future for more than just river restoration but also for traditional water delivery operations from Friant Dam and the San Joaquin River. The settlement and the Settlement Act effectively ended 18 years of litigation associated with water deliveries from the San Joaquin River. Through its directive to "cease any action to implement" the Restoration Program, HR 1837 would almost certainly encourage the settling parties to return to court to pursue other avenues and disrupt the underlying long-term goals of restoring the San Joaquin River according to the processes and timelines spelled out in the Settlement Act. The Restoration Program is being conducted with an unprecedented degree of opportunity for public input and involvement, including technical feedback groups, public meetings, and full consideration given to public comments regarding the implementation. This process, and the organization that has been set up to support it, represents in our view the best means of assuring the long-term reliability of water supplies both in the Friant

Division and the San Joaquin Valley as a whole and of achieving the long-sought and widely supported goal of restoring flows to the San Joaquin River.

The Restoration Program's implementation has not been without its challenges. There have been complex issues that have made the Restoration Program an ongoing challenge for the implementing entities, the settling parties, and third party interests. The reintroduction of fish species on the San Joaquin River is unique and will produce an array of technical, biological, legal, and operational hurdles. The recirculation and recapture of water back to Friant Division contractors under the Restoration Program will require considerable flexibility in the operation of CVP facilities, and require coordination with dozens of state, Federal and local agencies. But on balance, the Administration believes that the Restoration Program as authorized represents the best means of settling this issue and bringing the operation of the Friant Division into compliance with state law. We also believe that restoration of the San Joaquin River will contribute substantially to the coequal goals and State initiatives under development including the Delta Plan required by the State's 2009 water legislation and the BDCP. The San Joaquin Restoration Program supports efficient water management measures, furthers restoration of the Delta ecosystem, promotes viable populations of migratory species, assists in restoring interconnected habitats, and will improve water quality which is fundamental to a healthy ecosystem. Rather than repealing the Settlement, Congress should work with the Administration, the State of California, and all interested parties to ensure the success of the program and thereby support the overall efforts in California to improve conditions for all those reliant on the resources of the Bay-Delta system.

Section 207 would require the Department of the Interior to make no distinction between natural-spawned and hatchery-spawned species. This requirement does not provide additional benefits for recovering a species and may impede the Departments of the Interior's and Commerce's ability to implement meaningful measures that are designed to create habitat and help sustain and recover threatened and endangered species.

**Title III – Repayment Contracts**

Title III of HR 1837 would enable CVP water service contractors to convert their water service contracts, which are subject to renewal under terms of 25 to 40 years, to repayment contracts. Section 301(a)(3) requires that the outstanding capital be repaid by 2016. All CVP water service contracts that have been renewed contain language that provides for eventual conversion to repayment contracts. The existing contract language ties conversion to a declaration by Reclamation that the CVP is complete. Such a declaration at this time is premature since Reclamation continues to study the feasibility of additional water storage projects. Conversion to repayment contracts under the terms of HR 1837 would require Reclamation to enter into subsequent repayment contracts in the event a new reservoir storage project costing over $5 million were constructed as part of the CVP. In addition, once converted to repayment contracts, the amount of water under contract would in all likelihood, be fixed in perpetuity. Allowing for these repayments contracts to be converted also potentially creates a precedent for other non- Central Valley project water contractors. Moreover, this type of arrangement could limit the Bureau of Reclamation's flexibility for responding to water shortages, drought, and climate change-related issues.

Notwithstanding the Department's concerns with the language of HR 1837, we recognize that this legislation came about because a significant portion of the water user community in

California is concerned about their long-term water supplies and Reclamation's ability to deliver that water. This was readily apparent at the April 11 field hearing in Fresno, and is a frequent topic of the letters and inquiries that are sent to Members of this Subcommittee. Reclamation and the Department acknowledge the need to address these issues and answer questions of the Subcommittee. The reliability of Reclamation water deliveries goes to the heart of many of our initiatives underway in California, from planning to daily operations to ongoing construction projects.

Understanding the need of farm operators to make early planting decisions, Reclamation has developed a series of actions for the 2011 water year to help support increased water allocations early in the water year and that are intended to be used to respond to dry-year conditions as necessary. Those actions are identified in the CVP Water Plan for 2011. At the Departmental level, Reclamation's Mid-Pacific Region was apportioned more than 37 percent of Reclamation's total of $950 million, roughly $350 million, from the American Recovery and Reinvestment Act (ARRA) to be invested in northern and central California[4]. Many projects like the intertie between the Delta-Mendota Canal and the California Aqueduct underway near Tracy, and the Red Bluff Fish Passage Improvement Project near Redding will be complete or are nearing completion this year. We also have a suite of water transfer programs that facilitate the transfer of water from willing sellers to willing buyers throughout the CVP. Of course, Reclamation also continues to invest in significant water conservation efforts throughout all areas of California that receive water from the Bay-Delta.

We also continue to participate in the BDCP because, as stated earlier, we believe it offers the best chance to address present water supply constraints and the critically important concerns of water users regarding the vulnerability of Delta levees and the potential impact of their catastrophic failure upon the water supply. At the same time, it would provide for a sustainable Delta that will meet the needs of people and fish species dependent upon it. The Administration is committed to the use of the best available science and believes that a rigorous adaptive management program provides the best opportunity for meeting the wide range of public interests in the CVP.

In sum, while we acknowledge that pursuit of water reliability for the San Joaquin Valley is a goal we share with the sponsors of HR 1837, the Administration does not believe that HR 1837 will advance the spirit of cooperation and consensus that is essential to making progress on California water issues today. I would be pleased to discuss further the BDCP or the other water supply actions Reclamation is pursuing to achieve water reliability for the San Joaquin Valley with the Subcommittee today.

This concludes my written statement. I am pleased to answer any questions the Subcommittee may have.

[4] This excludes southern California investments made through the Lower Colorado Region.