

**Prepared Statement of John Laird, Secretary
Natural Resources Agency
State of California**

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

**Legislative Hearing on H.R. 1837 (Nunes)
June 2, 2011**

Good morning Mr. Chairman and Members of the Subcommittee. The state of California appreciates the invitation to appear before your subcommittee today to offer testimony on H.R. 1837. Five minutes is a brief amount of time to address such a complex subject – so I will use my time to make major points, and have submitted longer written testimony for the benefit of the committee.

The centerpiece of H.R.1837, about which you are having this hearing today, would be to enshrine into law the 1994 water agreement that created the CalFed process. Many things have changed since 1994 on California water issues. The fishery populations in the Sacramento-San Joaquin Delta crashed about ten years ago, the full impact of seismic activity on possible water service interruption has been better understood, and the impacts of climate change in water delivery and habitat restoration have more clearly come into view. The bottom line is that virtually all parties agree that the current Delta is unsustainable over time – a view that was not universally shared in 1994 – and has set the table for a series of new agreements over California’s water future.

For the state of California, the biggest difference was the carefully wrought bipartisan compromise passed by the California State Legislature in 2009. Strongly supported by both parties, this compromise provided statutory authority to proceed with the Bay Delta Conservation Plan, which will achieve the dual co-equal goals of water supply reliability and ecosystem restoration through the use of sound science. These goals were added to California law as part of this agreement. The Bay Delta Conservation Plan is the best hope water users have of constructing a facility in the Sacramento-San Joaquin River Delta to transport water to the state and federal water pumps.

The bipartisan package also contained water conservation goals, established various Delta governance agencies, authorized a bond act which will provide additional storage capacity – set for the November 2012 ballot – among other things. By destroying part of this package, H.R. 1837 could threaten different parts of this delicately balanced package. A letter from the leadership of the California State Legislature has been submitted to the Subcommittee that echoes this concern.

As a state, we want to resolve long-term water issues in a manner consistent with the bipartisan compromise. We want to determine water reliability, restore Delta habitat, and guarantee that the agricultural and fishing economies of California both thrive. We stand

ready to work with any party that wishes to further those goals. That is why the new state administration has kick-started the water decision making process in a participatory, transparent manner than is designed to keep this matter out of court and work to meet the needs of as many of the involved parties as possible.

H.R. 1837 would also overturn a century old precedent in water law: Congress ought not pre-empt the right of states to manage their own water under state water rights law. If this bill passes, no state will be safe from congressional interference in their water rights laws. Another consequence would be the immediate opposition of states to continued federal involvement in water development, since it would come with the danger of overturning state water rights law.

H.R. 1837 would also overturn the San Joaquin River Restoration Act, an act that resolved an extremely divisive controversy in a way that was supported by all sides. By overturning the Act, H.R. 1837 would almost certainly send that controversy back to court, where the consequences of litigation would be unknown – and the ability to resolve long-standing issues, including meeting the co-equal goals could be substantially delayed.

Pre-emption of state water rights authority

Like other western states, California has long emphasized the importance of preserving the states' authority over their own water resources.

Congress has respected this principle. As Justice Rehnquist observed in the Supreme Court's 1978 opinion in *California v. United States*: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." (438 U.S. 645, 653.) Observing the Reclamation Act of 1902 is a prime example of "cooperative federalism," (*id.* at p. 650), the Supreme Court interpreted Section 8 of the Reclamation Act of 1902 to require the federal Central Valley Project to comply with requirements imposed by the State Water Resources Control Board. The Central Valley Project Improvement Act (CVPIA) repeatedly refers to the requirement for compliance with state law, and the legislative history of the CVPIA specifically reaffirms the applicability of state law as provided for in the Supreme Court's opinion in *California v. United States*.

Because of its strong interest in preserving state water law, the state of California participated as a friend of the court in the litigation leading to the San Joaquin River Restoration Settlement Act. The Court of Appeals' 1998 opinion in *Natural Resources Defense Council v. Houston* adopts the position advocated by the state of California, upholding the applicability of California water resources law to Friant Dam. It bears emphasis that California became involved in the litigation in response to threats of federal preemption, and based on the state's longstanding position that state law authority must be preserved. The state entered the litigation under Republican Governor George Deukmejian, and stood by its position through subsequent administrations, both

republican and democratic. An important consideration to the state in the drafting of the San Joaquin River Restoration Settlement Act was the protection of state law authority.

In a radical departure from the principles of cooperative federalism that have guided federal reclamation law for over a century, H.R. 1837 includes two provisions expressly preempting state law. Setting aside Section 8 of the Reclamation Act of 1902 and effectively overruling *Natural Resources Defense Council v. Houston*, section 202 of the bill preempts California state law setting requirements for protection of the San Joaquin River. Section 108(b) would preempt state law as applied to water project operations affecting endangered species. Section 108(b) would preempt state water law, not just to operations of the federal Central Valley Project, but also as applied to the state owned and operated State Water Project. The preemptive effect of sections 108(b) and 202 would apply notwithstanding the absence of any conflict between state and federal requirements.

The state of California strongly opposes this federal preemption of state authority and state rights. Congress simply should not be considering preemption as proposed in this bill. It amounts to unwarranted federal intrusion with a State's authority to determine how to allocate its scarce water resources, and an unacceptable interference with the state water right administration.

San Joaquin River Restoration Act

The state of California is a strong partner in the effort to restore the salmon fishery of the San Joaquin River. We are working closely with the Bureau of Reclamation in implementing the restoration projects, and look forward to continuing to do so. This legislation would completely undermine the effort to restore this historic fishery.

I have attached additional material regarding the act in my written testimony.

Central Valley Project Improvement Act (CVPIA)

The Central Valley Project Improvement Act has provided funding to resolve some of California's most critical water supply and environmental problems. The one-sided changes made in the CVPIA by H.R. 1837 would make additional gains impossible, and would further degrade the spirit of political compromise that is allowing water development to proceed in California.

With respect to the provisions of the legislation amending the CVPIA, the state has supports the orderly administration of this act in a way which meets the dual goals recently adopted by the California Legislature: providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The legislation further calls for the use of sound science to achieve these goals.

Bay Delta Conservation Plan

The Bay Delta Conservation Plan (BDCP) is an attempt to achieve the dual goals through the use of science, and comply with the provisions of the Endangered Species Act, California Endangered Species Act, the National Environmental Policy Act, the California Environmental Quality Act, the Clean Water Act, the Porter-Cologne Act (state water quality law), and many other state and federal environmental and water statutes.

BDCP was established and supported by a wide variety of water, environmental, business, labor, and other California organizations. Its successful conclusion would be the most important breakthrough in water development and environmental protection in decades.

H.R. 1837 would dramatically change the assumptions being used by BDCP, and would cause great delay to the program, which is scheduled to allow for construction of any necessary water facilities in the next few years.

The broad coalition supporting BDCP would be seriously disrupted by passage of H.R. 1837, since it does not appear to respect the dual goals established by the California Legislature. This would mean that the state's chances to provide water conveyance facilities to transport water to water agencies in the San Joaquin Valley, Southern California, and the Bay Area would be seriously undermined.

Conclusion

I have appended written material to my testimony dealing with the San Joaquin Valley Water Reliability Act; preemption of state law, including possible constitutional problems with federal pre-emption of state law; and problems with federal control of game species in California.

Thank you for the opportunity to provide testimony on H.R. 1837.

Attachments to Prepared Testimony of Secretary John Laird

Comments on Section 108(b)(1) Preemption of State Law:

- The federal Endangered Species Act established a balance between federal and state regulation of endangered species that has served as the basis for a successful cooperative relationship between the United States and California for decades. While the Endangered Species Act provides that state endangered species laws and regulations that conflict with federal law are preempted, the Act also provides that: *“Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter, or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined. (16 U.S.C. § 1535(f) (emphasis added).)* As a result of this balancing of authority, endangered species protection in California has developed as a successful and effective blend of federal regulation and more-restrictive state regulation. Section 108(b)(1), which preempts state laws and regulations that restrict federal and state water project operations for the purpose of protecting endangered species, undermines decades of federal-state cooperation on endangered species protections and will likely lead to inadequate and inconsistent protection for valuable fish and wildlife resources.
- The provision of Section 108(b)(1) prohibiting the State of California from imposing restrictions on the operations of the state-run California State Water Project is inconsistent with the 10th Amendment to the United States Constitution. By commandeering a state-operated facility and dictating to the State of California how it may operate this facility, Section 108(b)(1) violates the 10th Amendment, which reserves to the states all powers not delegated to the United States.

Comments on Section 108(b)(2) Native Species Protection:

- Section 108(b)(2), which preempts any state restrictions on the take of non-native or introduced species that prey on native fish in the Sacramento and San Joaquin Rivers, their tributaries, and the Delta, will have a significant detrimental impact on popular and economically productive sport fisheries. In particular, highly popular fisheries for striped bass, black bass, brown trout, brook trout, and catfish could be drastically reduced or even eliminated if current regulations are preempted. California sells nearly two million

fishing licenses a year, and more than 300,000 anglers fish in the Delta alone each year. Studies have estimated the value of the Delta fisheries at more than \$300,000,000 annually. Section 108(b)(2) will radically restrict recreational opportunities, devastate local businesses throughout the region that serve recreational anglers, and cost the State of California significant revenue.

- The sudden elimination of all state restrictions on harvest of nonnative or introduced species could also have significant unintended consequences for the Delta and Sacramento and San Joaquin River ecosystems. A significant reduction in the populations of non-native fish, many of which have existed in the Delta and rivers for more than one hundred years, could inadvertently lead to significant increases in the population of native species that prey upon or compete with endangered and threatened fish species. In some cases the native predators and competitors could have more significant impacts on the endangered and threatened fish species than non-native predators do now.

Comments on section 201 through 204: San Joaquin River Restoration Settlement Act

- The proposed legislation would prohibit the federal government from implementing the San Joaquin River Restoration Act and any obligations required by the related Stipulation of Settlement. (*Natural Resources Defense Council, et al. v. Kirk Rodgers et al.*, Eastern District of California, No. Civ-S-88-1658 LKK/GGH.) The practical effect of the legislation is the withdrawal of federal funds from any actions related to implementation of the San Joaquin River Restoration Program (SJRRP), thereby shifting the funding burden to the State. The potential modification of roles and responsibilities related to the SJRRP will require revisiting the Memorandum of Understanding entered into by all parties to the SJRRP on November 9, 2006. It is likely that the SJRRP, and the Stipulation of Settlement, will not be able to continue without the financial support of the federal government. Currently reintroduction of spring-run Chinook salmon is scheduled to commence in 2012. Without implementation of the Settlement, the San Joaquin River will not be able to support a viable population of spring-run Chinook salmon and so the reintroduction will likely not occur. In that scenario, the parties to the underlying litigation would be expected to take the matter back to federal court for a trial on the remedies.

The proposed legislation attempts to avoid this judicial remedial process by declaring that the federal government and all parties have satisfied any and all obligations to keep fish in good condition below Friant Dam in compliance with Fish & Game Code section 5937. In summary, the proposed legislation purports to permanently stall progress on the implementation of the SJRRP by removing federal funding and by subverting the judicial process.

Comments on section 108(a): Compliance with Endangered Species Act of 1973

- The proposed legislation exempts the state and federal water projects from the Endangered Species Act (ESA) if they operate in a manner consistent with the “Principles of Agreement on the Bay-Delta Standards Between the State of California and the Federal Government” dated December 15, 1994. Additionally, the proposed legislation exempts the projects from the California Endangered Species Act (CESA) if they are in compliance with ESA. Therefore, the projects will be deemed to be in compliance with ESA and CESA if they follow standards from the Principles of Agreement. The measures identified in the Principles of Agreement are not intended to satisfy the requirements of ESA and CESA. The Agreement does not contain any project specific impact analysis or minimization/mitigation measures for any particular species. Instead, the measures are intended to reflect the general agreement among various parties as to what they believe should be included in the Bay-Delta Water Quality Control Plan, a regulatory document issued by the State Water Resources Control Board. Even if the parties to the Agreement intended the measures to provide some level of benefit to ESA and CESA listed species, they certainly did not consider species not listed as of the date of the Agreement. As most threatened or endangered aquatic species that reside in the Delta were found to be threatened or endangered after 1994 the projects’ impacts on those species were not adequately addressed in the Principles Agreement. For reference, the spring-run Chinook salmon was listed as threatened under the state and federal endangered species acts in 1998. The winter-run Chinook salmon was listed as endangered by the federal government in 1994, but the protective take regulations for the species were not issued until 1995. The Central Valley fall and late-fall run Chinook salmon were designated as candidates for listing under ESA in 1999. The longfin smelt was listed as a threatened species under CESA in 2009.