

SPILLWAY

California Water, Land, and People

Winter 2004



San Joaquin River Decision:

Ecological Hope, Economic Fear

By **Tim Strohane**

The United States Bureau of Reclamation violated state fish and game law in diverting more than 90 percent of the natural flow of the San Joaquin River every year at Friant Dam 60 years ago, causing extinction of fall and spring runs of Chinook salmon there, federal district court Judge Lawrence Karlton ruled August 26 in *Natural Resources Defense Council, et al., v. Roger Patterson, etc., et al (NRDC)*.

No ifs, ands, or buts.

Karlton's decision is a first step toward righting a wrong that began as Friant Dam's penstocks closed, blocking fish passage to the upper San Joaquin River, as early as 1944. But many steps remain. The future of the San Joaquin River and its Valley is bound up with how the Karlton decision plays out, as well as with recent passage of CalFED legislation by Congress (see related story, page 5).

"This decision is an important, welcome victory for California fisheries and longstanding principles governing environmental protection and water resources," Attorney General Bill Lockyer said of the decision in August. "The court upheld a cardinal rule of California law: Water is a public resource, and its use is always subject to review and reconsideration if new information demonstrates a need to protect fisheries or other public trust values."¹

The historical water rights obtained by the U.S. Bureau of Reclamation from the cattle monopolist Miller & Lux in 1939 provided the underlying legal basis for damming the San Joaquin at Friant as well as importing Sacramento River water from the Delta via the Central Valley Project's Delta Mendota Canal.²

The NRDC decision illustrates how far California and federal courts have come in defining "the public interest." In 1959, a State Water Rights Board (SWRB) decision (D-935) enabled the Bureau to divert as much as 98 percent of San

Tim Strohane is the editor of SPILLWAY.

Inside SPILLWAY

Arresting Developments 2
CalFED "Balancing" Act 5

Joaquin River water at Friant Dam for delivery north through the Madera Canal and south through the Friant-Kern Canal. The Bureau's contractors are mostly agricultural interests on the east side of the San Joaquin Valley from Merced to Kern counties. Leaving just 2 percent of the river's flow meant that large reaches of the San Joaquin went dry each year for more than five decades.

Despite older legislative declarations that fish and wildlife conservation are legitimate purposes for dam operations, the SWRB's D-935 found that domestic and irrigation uses were preferred "over all other uses necessarily including water for fish life."³

In effect, the SWRB exalted the State's water laws over other state laws to maintain a diversion regime that dewatered nearly 100 miles of the lower San Joaquin River channel. The SWRB concluded that "a commanding consideration be given" to the fact that large taxpayer-funded

"The project [Friant Dam] diverted nearly the entire river and a long reach of the waterway had been dried up," wrote Judge Lawrence Karlton.

investment-backed expectations in Friant Dam and its Canals had been raised, and that "any action that might substantially impair the investments thus represented should be avoided if reasonably possible."⁴

Challenging Friant Operations

"The day has passed," wrote George Warner in 1987, a former chief of the California Department of Fish and Game's Anadromous Fisheries Branch, "when disasters like the operation of Friant Dam can go virtually unchallenged."⁵ A year later the Natural Resources Defense Council led a coalition of environmental groups and fish advocates in filing a suit against the Bureau of Reclamation and its Central Valley Project contractors benefiting from Friant Dam and its canals (now the Friant Water Users Authority).

California Fish and Game Code Section 5937 was the core of NRDC's lawsuit. It requires flows below dams sufficient to keep fisheries "in good condition"—whatever that is to mean as this decision gets carried out.

These flows will have to be released from Friant Dam northeast of Fresno. Such flows heretofore had been politically off-limits, even when release of fish flows from

continued on page 7

Arresting Developments
• **Anti-Shasta Dam War Dance**
• **American River Fish Kill**

**Winnemem Wintu Tribe Hold
Anti-Shasta Dam “War Dance”**

By Dan Bacher

For the first time in 117 years, the Winnemem (McCloud River) Wintu Tribe held a four-day “War Dance” at Shasta Dam that ended at dusk on September 16. The dance’s purpose was to protest the Bureau of Reclamation’s (BOR) proposal to raise the dam anywhere from 6 1/2 to 200 feet as part of the CalFed Program.

The tribe of 125 members, based in Redding, lost much of their remaining homelands and their salmon when the dam was constructed in 1937. “Any raising of the dam, even a few feet, will flood some of our last remaining sites on the McCloud River—sites we still use today,” said Caleen Sisk-Franco, Winnemem Spiritual and Tribal Leader. “Village sites, burial ground and ceremonial grounds will all be lost forever.”

On September 12, just before dusk, tribal members lit a sacred ceremonial fire, beat a drum, began singing and started their fast. Eight barefoot men danced from dusk on Sunday through dusk on Thursday. The tribe held the dance under a permit from the Bureau.

Over 125 people supported the tribe either in the press conference held before the dance or during the dance. Representatives of environmental and fishery restoration groups, including Steve Evans of Friends of the River and Dave Fink of California Trout, spoke in support of the tribe. The Hoopa Valley Tribe from the Trinity River and members of the Miwok, Redding Rancheria, Pit River and Shasta Toyon tribes also supported the dancers.

Besides flooding sacred sites, a higher dam would hurt salmon, steelhead and other fisheries on the Sacramento River, since the main purpose of the proposal is to provide more water to export to San Joaquin Valley agribusiness and other water users. It would result in a smaller cold-water pool in Lake Shasta, creating the possibility of increased pre-spawning mortality of chinook salmon.

“We received emails of support from people all over the world as we conducted our dance,” said Charlotte Berta, a member of the tribe. “The War Dance is used to ask for protection before we go into battle. We danced to tell the dam that it is our enemy and not the people. We danced for our people and all our relations. We danced to ask for protection of the waters, the salmon and ourselves. We are going into battle, though not a physical one, and we danced to give notice to the dam.”

Sisk-Franco said the last time the tribe invoked the “War Dance” was in 1887 when a fish hatchery on the McCloud River was considered the enemy and protecting the salmon and the Winnemem way of life was the focus.

“We prayed on what it was we were supposed to do about the raising of the dam and we were told to hold a war dance,” said Sisk-Franco. “Our ancestors showed the way with the dance against the fish hatchery and this is the path that was shown to us. We gave up our homeland for the sake of the California people and got nothing in return. Now you want to take our sacred places and again we get nothing in return.”

The tribe lost all of its ancestral land on the McCloud River in 1851 when the federal government signed a treaty with them. In return, the tribe was supposed to receive a 25 square mile reservation, but the treaty was never ratified, and the government illegally seized the land anyway. Eventually, individual tribal members were given allotments along the McCloud River, but their land was completely flooded by Shasta Dam in 1937.

When Shasta Dam was first proposed, Congress passed a law authorizing the federal government to take the lands and the burial grounds that the Winnemem had for a thousand years.

“Promises were made to the tribe that still have not been kept,” said Sisk-Franco “The tribe is asking the BOR to resolve these long standing debts before proceeding with these studies. The tribe, as part of the ongoing CalFed process to meet water storage and meet California’s growing thirst, wants to study alternatives to raising the dam such as better management practices for the existing reservoir and conservation options, as well as better protection of the fish populations.”

The dam expansion would flood the burial ground that includes victims of the massacre at Kaibai Creek; Puberty Rock, where the young women’s coming of age ceremonies are held; and Children’s Rock, where the young ones place their hands for blessings to make them good people and to

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Send communications to:

Editor, SPILLWAY

P.O. Box 8362

Berkeley, CA 94707-8362

Phone: 510/524-6313

E-mail: editor@spillwaynews.net

SPILLWAY

Arresting Developments

- **Anti-Shasta Dam War Dance**
- **American River Fish Kill**

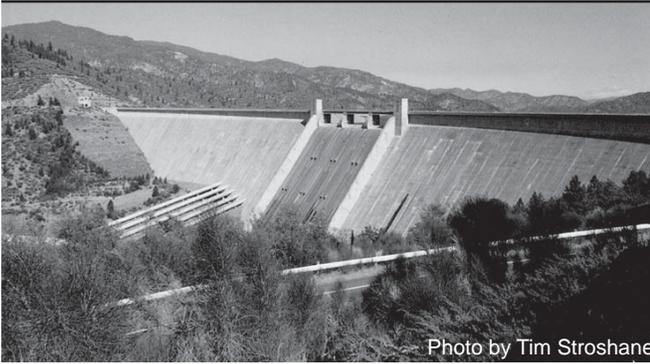


Photo by Tim Strohane

Shasta Dam north of Redding would be raised between 6 and 200 feet depending on which alternative CalFED chooses.

help them understand and magnify whatever special gifts they hold, according to Mark Franco, Headman of the tribe's Kerekmet Village.

BOR officials claim that dam expansion could help fish by providing steadier flows in the Sacramento River and maintaining colder water temperatures for migrating salmon and steelhead, but the tribe and environmental groups disagree.

"The Bureau says a higher dam is needed to benefit the salmon, but in fact they are changing the operations in a way that will eliminate the cold water pool in Shasta Lake," said Steve Evans, conservation director of Friends of the River. "They are actually proposing to reduce the amount of water in the reservoir by exporting more water south. This dam expansion is tied into supplying Bureau contracts with irrigators while increasing Delta diversions."

Whereas under current operations the Bureau has to maintain cold water 58 degrees and lower in the river down to Red Bluff, the Bureau's proposal would move the required cold water zone upstream to Balls Ferry. Operational changes could result in 26 percent mortality on Sacramento River spring chinooks in dry years and in up to 100 percent mortality in critically dry years, according to Evans.

Raising the dam would also affect houseboat owners, marina operators and fishermen on Shasta Lake, as well as potentially inundate sections of the McCloud River, a world-class wild trout fishery.

"The Bureau claims that the purpose of the dam is to help the salmon," concluded Berta. "But look at the facts: the Bureau in 1937 put in a big dam with no fish ladder that prevented salmon from getting upstream. Now they are saying that making the dam higher is supposed to help the salmon? They are not talking to native people who know all about the habitat of the salmon. We could provide them with a lot of information that would help them restore salmon populations."

The Winnemem is not a federally recognized tribe—in a bureaucratic snafu, the federal government mistakenly left the tribe out when it transcribed a list of recognized tribes -

and the tribe supported a bill authored by Colorado Senator Ben Nighthorse Campbell that would make a "technical correction" to give the tribe federal recognition.

However, the Winnemem rider to the technical correction bill, slated to be submitted to the Senate the week of September 20, was pulled. Passage of the technical correction was considered a sure thing until Senator Feinstein's office said she would not vote for it if it contained the language for the Winnemem restoration of federal recognition, according to Berta. Since it's a technical correction, it contained several other issues, and based on the 100-percent requirement for passing, the Winnemem rider was pulled in order to get the other issues passed.

For more information, visit the Winnemem Wintu website at www.winnememwintu.us.

American River's Hidden Fish Kill

By Dan Bacher

The Klamath River fish kill of September 2002, when 68,000 salmon died because of low, warm water conditions on the lower river, is considered the largest of its kind in U.S. history. However, another "hidden fish kill" that took place on the American River in the fall of 2001, 2002 and 2003 is now vying for this dubious distinction.

Only a few short miles from the State Capitol, huge numbers of adult chinook salmon returned from the ocean to spawn, but 181,709 of these fish perished before spawning. River advocates and fishery biologists blame the fish kills on bad water management by the U.S. Bureau of Reclamation and on the continuing lack of flow and water temperature standards on the American, while federal officials claim that they are forced to balance the needs of different users in managing the river.

Thirty-seven percent of the run of 2003—58,651 fish out of 158,516 fish—died before spawning in the 22 miles of the river below Nimbus Dam in the fall of 2003. The vast majority of the total run (147,103 fish) were natural spawners, according to Mile Healey, associate fishery biologist for the California Department of Fish and Game, who coordinates a crew of workers to count and record the carcasses on the river during the annual post-spawning carcass survey.

Huge die-offs of salmon before spawning also occurred in 2002 and 2001. The 2002 run lost 30 percent of the run, 35,432 fish before spawning. The 2001 run was the worst of all, with 87,626 fish (67 percent) perishing before spawning.

Healey blames the abnormally high pre-spawning mortality to lethally warm water conditions on the river. The exact causes for the fish deaths are not known because no fish pathologists examined the fish.

The salmon could have died from the outbreak of diseases
continued on page 4

Arresting Developments

• American River Fish Kill

continued from page 3

such as “Ich” and “Columnaris” that spread when the fish are crowded in low, warm water conditions. They also could have perished from low levels of dissolved oxygen or the lethally warm water itself.

The large numbers of salmon that returned were a surprise for many biologists, since the American has traditionally seen runs of around 35,000 king salmon. Then in 2000 a big run of over 100,000 fish arrived in the river. Good ocean conditions, a series of wet years, and habitat improvements resulting from the enforcement of the Endangered Species and Central Valley Project Improvement acts are among the factors that led to the large salmon returns.

Unfortunately, the situation this fall looks as bad or worse than it did in the autumn of 2001. “We anticipate another fish kill like that of 2001 unless we can figure a way to dump more cold water into the system,” said Healy.

Releases from Nimbus Dam were only 1,000 cubic feet per second during the fall run of 2001. Similar low flows occurred during the fall of 2002 and 2003.

The fact that the fish died before spawning is a tremendous loss to the potential for fish restoration on the river, according to Felix Smith, board member of the Save the American River Association (SARA) and the federal wildlife biologist who was the “whistleblower” during the Kesterson Wildlife Refuge scandal of the early 1980s. Each female salmon lays approximately 4,000 to 5,000 eggs, depending upon the size and year class of the fish.

“We’re talking about a serious egg loss and potentially millions of fish,” said Smith, a board member of the Save the American River Association. “These fish kills on the American are like a knife in the ribs of the river’s fishery.”

He blamed the yearly fish losses on the lack of adequate water flow and temperature standards on the American. SARA, the California Sportfishing Protection Alliance, Sacramento Valley Water Forum and other groups support establishing flow standards for the American to protect fisheries and continue steps to restore the river. The Water Forum came out with a draft document in January 2004 that they would like to put before the State Water Resources Control Board in 2005.

Jeff McCracken, Bureau of Reclamation spokesman, claims the federal agency is doing everything it can to balance the interests of different water users in the midst of a low precipitation year. He attributes the low state of Folsom to the driest spring in 80 years and the need to meet water quality requirements for Delta smelt.

“We never got the spring melt that we anticipated,” said McCracken. “We had projected 870,000 acre-feet of water, when all we got was 650,000 acre-feet in Folsom.”

The state and federal governments must meet water quality requirements for Delta smelt, as well as provide water for export purposes. 100,000 acre feet was taken from Folsom for Delta smelt this year, according to McCracken.

“We’re doing every thing we can to keep the cold water pool in Folsom,” contended McCracken. “We spent \$20,000,000 on a water temperature control device so that we can have cold water for the fish. It’s a tough balance trying to keep everybody happy.”

On the other hand, John Beuttler, conservation director of the California Sportfishing Protection Alliance, said the problem is that CalFed, the joint federal and state interagency group that attempts to balance water for fish and wildlife with water export demands, “stops at the State Capitol.”

“The Bureau can short the American of its water because there is no real obligation by them to protect the resources of the river without these water standards,” said Beuttler. “Nobody is being held accountable to providing flows for fish.”

The Bureau wants a permanent dedication of “b2 flows” (water dedicated to fish and wildlife under a section of the Central Valley Project Improvement Act) if they are to support the standards. Beuttler said conservation groups have trouble with BOR on this, since use of b2 water is supposed to be determined by the U.S. Fish and Wildlife Service annually, based upon changing needs and conditions.

Leo Winterwitz, executive director of the Water Forum, emphasized that flow standards are designed to protect fish, but don’t impact water supply. “The standards only rearrange the timing of releases to benefit the fish,” said Winterwitz.

Winterwitz noted that one reason why Folsom is so low is because it is used as a “work horse” by the Bureau to help meet Delta water quality standards (New Melones is another one). It takes only one day for water from the American to reach the Delta, whereas releases from Shasta Lake above Redding take 4 to 5 days to reach the Delta.

While water standards are still in limbo, another enormous fish kill is expected on the American this fall—and very little can apparently be done about it because Folsom Lake is so low, 39 percent of capacity, with little cold water pool left.

This looming loss of wild salmon comes at a time when federal and state agencies, Indian tribes, fishery conservation groups and environmental organizations are working hard to restore salmon and steelhead populations throughout the West.

“The fact that sport and commercial fishermen couldn’t catch them and utilize them before they died without spawning is a great tragedy,” said Smith. “These fish could have provided a substantial enhancement to the economy. The fish, a public trust resource, died because of insufficient temperature and flows.”

Not only are king salmon impacted by the current management of the American, but steelhead, a listed species under the federal Endangered Species Act, also suffer from low, warm water conditions. Wild steelhead spend one to two

continued on page 12

Congress approved HR 2828, the Water Supply, Reliability, and Environmental Improvement Act, on October 6, providing \$389 million in federal funding to the CalFED Bay-Delta Program to study increased Delta export pumping, construction of new dams and raising of existing ones in California's gargantuan water systems.

President George W. Bush signed the bill in late October, 12 years after his father, President George H.W. Bush, signed the Central Valley Project Improvement Act which reformed operation of the Central Valley Project, writing fisheries restoration into federal law as one of the project's purposes.

"The days of no new water storage for California are over," claimed its co-architect congressman Richard Pombo, a conservative Republican representing the Tracy area.

Reflecting anxieties of the state's water industry, Senator Dianne Feinstein, HR 2828's Senate sponsor, said on her website, "Without CALFED

there is not going to be enough water to meet California's needs. The last time California increased its water infrastructure was the 1960s when the State's population was 16 million. It's now 36 million and is expected to climb to 50 million by 2020. This legislation is needed now."

California environmentalists and fisheries advocates reject HR 2828. "From my point of view, CalFed, and this bill have become counter to everything we try to accomplish for fish in this state," mourned Byron Leydecker, Executive Director of the Friends of the Trinity River, and a fisheries consultant.

A portion of the bill's restoration funds are to come from the Restoration Fund of the Central Valley Project Improvement Act to help defray costs of the Environmental Water Account, which purchases water supplies to ensure safer habitat for fisheries near the major water project pumping plants near Tracy in the Delta.

"It's painfully ironic that a bill that's supposed to promote restoration is interfering with restoration activities," complained Barry Nelson of the Natural Resources Defense Council. Adds Carl Zichella of the Sierra Club grimly, "The ability to save ecosystems I think is in question now."¹

HR 2828 "balances the program as it was designed to be balanced," countered Jeff McCracken, spokesman for the U.S. Bureau of Reclamation, the agency that owns and operates the Central Valley Project. "The balance now is it's going to ... look at water supply and continue to look at restoration. It's always looked at restoration."²

McCracken's comment is borne out by the fact that the CalFED ROD and all its supporting documents created by CalFED staff and consultants between 1995 and 2000 contains both increased water storage elements as well as ecosystem restoration features, only the latter of which environmentalists support.³

HR 2828 authorizes groundwater storage and feasibility studies for major new off-stream and expanded reservoirs, including enlargement of Los Vaqueros reservoir, raising of Shasta Dam, and construction of upper San Joaquin surface storage and Sites Reservoir. With these four storage projects, California could acquire an additional 3.2 million acre-feet of storage.⁴

Additionally, the bill would require the Secretary of Interior to find the CALFED program out of balance if Congress does not approve storage projects by the end of the next full Congressional session after the Secretary submits feasibility studies, approximately December of 2006. Upon finding of imbalance, the Secretary would have to submit a report including preparation of revised schedules and identification of alternatives to rebalance the Program, including resubmission of the project to Congress with or

without modification, construction of other projects, and construction of other projects that provide equivalent water supply and other benefits at equal or lesser cost.⁵

"Today we finished a decade of hard work and

established a path to bring new water storage projects on line for the first time in thirty years," added Pombo.⁶ "This legislation represents a paradigm shift in our policy by making water storage the lynch-pin of the entire Cal-Fed Program. The success of Cal-Fed depends upon expanded and better-managed storage, and this bill establishes around that very fact."

Prior to passage of HR 2828, CalFED operated as an extra-legal planning process to implement the administrative agenda of the consortium, the August 2000 CalFED Record of Decision (ROD), and was usually described as a consortium of over 20 federal and state agencies committed to addressing water and environmental problems of the Sacramento-San Joaquin River Delta watershed.

Now, once President Bush signs HR 2828, the CalFED ROD will have greater legal stature in U.S. law. "By moving from an endless state of planning and paralysis by analysis into the stages of implementation, this legislation will finally deliver the resources we need for our economy and our environment," said Pombo.

In May 2004, Pombo and California's Senator Dianne Feinstein jointly vowed to "complete CalFED."⁷

"Balance is the key to this legislation," says Senator Feinstein in her news release on HR 2828. "The way that it is balanced is that each part—storage, conveyance improvements, and environmental restoration—goes ahead on a concurrent track, governed by CALFED and with the participation of the State and Federal government. This is the way to ensure a comprehensive approach to meeting California's water needs."

In passing HR 2828, Congress in essence *presumes* the

continued on page 6

CalFED's New "Balancing" Act

By Tim Strohane

CalFED Balancing

continued from page 5

CalFED program is “balanced” as long as it contains these storage projects as accomplished facts.

Section 103 of the new law, after four years’ worth of attempts, establishes the CalFED ROD “as a general framework for addressing” the issues of water storage (that is, new reservoirs), ecosystem restoration, water supply reliability (“including new firm yield”), conveyance (that is, canals), water use efficiency, water quality, water transfers, watersheds, the Environmental Water Account, levee stability, governance, and scientific research.

Adoption of the CalFED ROD as federal water policy also means that its provisions for *no net loss* to Delta exports, and a phased increase of total Delta pumping levels by the CVP and the State Water Project from about 10,000 cubic feet per second (cfs) to over 14,000 cfs have now received congressional blessing. Only legal, scientific, and engineering obstacles remain before increased export pumping begins.

The new law at Section 103(d) authorizes planning and feasibility studies for enlargement of Shasta Dam (see related story, page 2) and Los Vaqueros Reservoir (in Contra Costa County), and authorizes studies for new storage at the Sites Reservoir in Colusa County and in the upper San Joaquin River area in Fresno and Madera counties.

“If Congress fails to authorize construction of [these projects] by the end of the next full session following submission of the feasibility study, the Secretary [of the Interior], in consultation with the Governor, shall prepare a written determination making a finding of imbalance for the CalFED Bay-Delta Program.”⁸

Of course, HR 2828 mandates that whatever is out of balance, must be “rebalanced.” If the Secretary of the Interior finds imbalance, the Secretary has 180 days to submit a report to Congress describing measures necessary to “rebalance the Program.”

“The report shall include preparation of revised schedules and identification of alternatives to rebalance the Program, including resubmission of the project to Congress with or without modification, construction of other projects, and construction of other projects that provide *equivalent water supply and other benefits* at equal or lesser cost,” says HR 2828.⁹

By omitting mention of National Environmental Policy Act (NEPA) review in HR 2828, farm water interests appear to believe they have *carte blanche* to complete feasibility studies, submit them to Congress, and subsequently build new storage projects in northern California and the southern Sierra.

On the other hand, projects included in the new CalFED law were contained in the CalFED ROD of August 2000. The ROD clearly states that the CalFED programmatic environmental impact report “identified a list of twelve potential surface storage projects for consideration. Further project-specific review, however, will be required.”¹⁰

While HR 2828 does not pre-authorize the storage projects in CalFED, Pombo claims he has “won the guarantee” of New Mexico Senator Pete Domenici, who chairs the Senate Committee on Energy and Natural Resources, and of Governor Arnold Schwarzenegger, that “necessary funding will be secured to complete storage feasibility studies as soon as possible.”¹¹

Disenchantment with CalFED

HR 2828 is also expected to provide new upper San Joaquin River storage that may help increase the water supply of the San Joaquin River basin, and enable Friant Water Users Authority-based farmers to cope with a recent judicial decision requiring them to contribute flows from Friant Dam to restore fisheries in the San Joaquin River (see related story, this issue).

With or without NEPA review, passage of HR 2828 probably means eventual construction of new dams and reservoirs in California, expansion of export pumping at the state and federal pumps filling the southbound aqueducts that bring agricultural and urban wealth to the San Joaquin Valley and southern California.

Without withdrawing their “stakeholder” status within CalFED’s political framework, environmental groups now turn to fighting implementation of the Napa Agreement, renewal of CVP contracts, privatization of the State Water Project, and the merger of the major state and federal water projects through a plan called the Operating Criteria and Plan (OCAP). Many environmental and watershed groups walk a fine line between their advocacy of ecological protection and a collaborative stance that enables many of them to obtain ecosystem restoration grant funding from CalFED to recreate habitat lost from earlier water and agricultural development.

ENDNOTES

¹ Byron Leydecker, Friends of the Trinity River, personal communication (via email) on the env-trinity moderated listserv, 6 October 2004; Nelson and Zichella quoted in Brian Melley, “CalFED bill hailed by water users, criticized by environmentalists,” *Associated Press*, 7 October 2004.

² McCracken quoted in Melley, *ibid.*

³ See the CalFED Bay-Delta Program, *Programmatic Record of Decision*, August 28, 2000. Hereafter cited, *CalFED ROD*. See also Tim Stroshane, “Reframing CalFED,” *SPILLWAY* v1n1, Fall 2000; and Tim Stroshane, “Playing the Odds with Environmental Water,” *SPILLWAY* v3n1, Winter 2004.

⁴ News Release, U.S. Senator Dianne Feinstein, “Congress Approves Legislation to Enhance California’s Water Supply and Restore Water Ecosystem,” 6 October 2004.

⁵ *Ibid.*

⁶ Pombo quoted in a media release on passage of HR 2828 available on the Congressman’s web site, 8 October 2004.

⁷ Pombo’s media release, *op. cit.*

⁸ HR 2828, Section 103(d)(1)(B).

⁹ *Ibid.*, Section 103(d)(1)(B)(iii)(II).

¹⁰ *CalFED ROD*, p. 44.

¹¹ Congressman Pombo’s news release, *op. cit.*



SPILLWAY

San Joaquin River

continued from page 1

other dams, and aquatic habitat restoration, came into vogue during the 1990s under CalFED.

“Salmon were abundant prior to the closure of Friant Dam,” wrote Karlton, adding, “the river’s spring run was one of the largest Chinook runs anywhere on the Pacific Coast and has been estimated at several hundred thousand fish. The historical fall run is conservatively estimated to have numbered 50,000 to 100,000 fish.”⁶

“Extinction of these San Joaquin stocks,” Karlton wrote, quoting Department of Interior biologists, “can be directly attributed to inadequate instream flows, specifically, those which enable adult salmon to migrate upstream... The project [Friant Dam] diverted nearly the entire river and a long reach of the waterway had been dried up.”⁷

Added Karlton, “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 historic fish populations have been destroyed.”

Citing research by Peter Moyle, noted fisheries biologist from the University of California at Davis, Karlton further wrote that there is reason to hope

restoration of salmon stocks on the San Joaquin can occur. “Despite the upper San Joaquin River’s degraded habitat and long stretches of normally dry river bed, salmon and Pacific lamprey have returned to the upper San Joaquin [upstream of its confluence with the Merced River] in wet years, even after Friant Dam began full storage and diversion operations. Part of Chinook salmon’s natural behavior includes establishing or re-establishing themselves in new streams and rivers by ‘straying’ from their natal waters.

“In some years, salmon have made it to the base of Friant Dam,” he continued. “Adequate flows of water have not been released from Friant Dam for these up-migrating

salmon to spawn, however, or for their offspring to migrate back to the sea.”⁸

The Natural Resources Defense Council linked arms with 13 other plaintiffs for this litigation, including Trout Unlimited, California Striped Bass Association, National Audubon Society, Stanislaus Audubon Society, California Sportfishing Protection Alliance, CalTrout, United Anglers of California, Pacific Coast Federation of Fishermen’s Associations, Sierra Club, the Bay Institute of San Francisco, the San Joaquin Raptor Rescue Center, Friends of the River, and Nor-Cal Fishing Guides and Sportsmen’s Association.

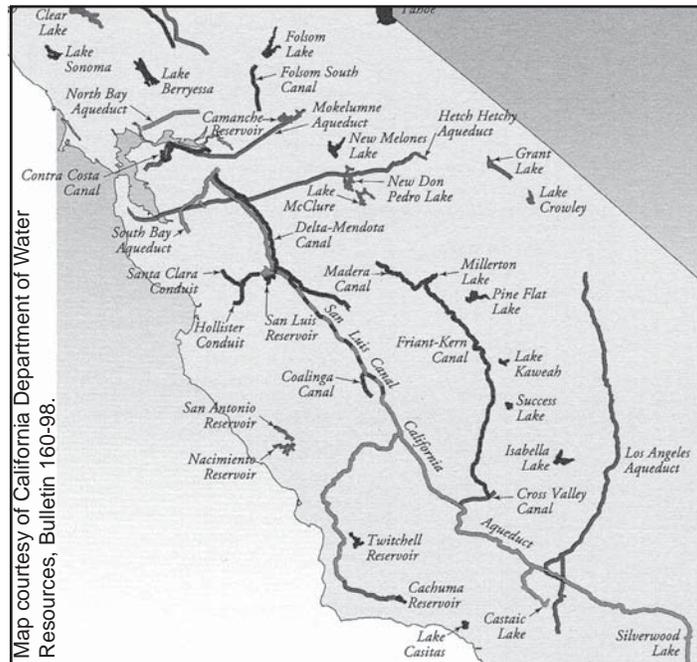
NRDC’s coalition also received welcome support from Delta farming interests, much to the Friant Water Users Authority’s (FWUA) grief. The Central Delta and South Delta water agencies filed a joint amicus brief with the court this summer, and their representatives were elated with Karlton’s decision.

“This is fantastic news,” said Dante Nomellini, counsel for the Central Delta Water Agency (CDWA) in Stockton. “The way the river has been managed up until this has been disgraceful and those of us downstream and in San Joaquin County have paid for it.”⁹

The dewatering of the river by the federal government’s operation of Friant Dam harmed south and central Delta farmers,

Nomellini told the court in early August. They need San Joaquin River flows to limit salt water intrusion from tidal forces in river channels from which farmers divert water to irrigate Delta island crops. “Compounding the salt water intrusion problem is the Bureau’s diversion of Delta water for delivery via the Delta-Mendota Canal to contractors on the Westside of the San Joaquin Valley,” wrote Nomellini and his counterpart at the South Delta Water Agency, John Herrick. “These deliveries began in the 1950s and increased over time, to the point where the Bureau now exports up to 1,000,000 tons of salt each year from the Delta to lands that

continued on page 8



Wrapping around Bakersfield in Kern County, the federal Friant-Kern Canal and the state’s California Aqueduct are linked east-to-west by a two-way water freeway called the Cross-Valley Canal, and sees dozens of water transfers each year, often involving banking water underground in Kern County aquifers as part of water transfers or from flood flows, a water strategy referred to by experts as “conjunctive use.”

San Joaquin River

continued from page 7

drain back into the San Joaquin River—lands which already contained high levels of naturally occurring salt and selenium. The result is highly concentrated discharges to the San Joaquin River, where there is no longer any assimilative capacity because the

Bureau has shut off flows from Friant Dam.”¹⁰

By pinching off flows from Friant, continued Nomellini and Herrick, “the tapping of New Melones [reservoir on the Stanislaus River, a tributary of the San Joaquin] in the spring to meet the Bureau’s fishery obligations reduces the amount of water that

could be used later in the irrigation season to ensure adequate quality and quantity of flow in the San Joaquin River [before it reaches the Delta]. For the city of Stockton and others who contract for water from New Melones, it renders their water supply uncertain,” forcing San Joaquin County water users to pump groundwater instead of receiving New Melones water the Bureau promised them in the 1970s.¹¹

Nomellini and Herrick further argued to the court that improving the quality and quantity of water in the San Joaquin, and taking pressure off the New Melones Reservoir, would have enormous benefits for all Californians. “To the extent that fish species are helped, including those which are threatened or endangered, the environmental burdens placed on the Delta and the San Joaquin River tributary areas can be reduced,” they argued to Judge Karlton.

FWUA reacted angrily to farmers siding with the NRDC coalition. Chowchilla farmer and former FWUA board member Kole Upton stated in FWUA’s newsletter in August, “We are frustrated that these farm water agencies have chosen to side with the Natural Resources Defense Council and its environmental coalition in litigation, placing the southern San Joaquin Valley’s continued economic health at risk.” By siding with the environmental plaintiffs in the case, Upton said, the two Delta agencies demonstrated they prefer “old ways of doing water business—specifically, that some find it more convenient to attempt to use the courts to ‘appropriate’ someone else’s water rather than working cooperatively and constructively in search of solutions that benefit and protect all interests.”¹²

But it was other “old ways of doing water business” that got FWUA into trouble: almost total upstream diversion of the San Joaquin. In truth, the spectre of Delta farmers breaking ranks has more to do with protecting their riparian water rights and improving Delta water quality than any hypothetical bonds of agricultural solidarity. Anyway, San

Joaquin Valley farmers broke supposed bonds of solidarity with downstream farmers 60 years ago when they diverted nearly all San Joaquin River flows for their irrigation.

The Bureau of Reclamation and its co-defendant FWUA are expected to appeal, but Karlton’s ruling appears likely to withstand further challenge, relying as it does on the Mono Lake public trust doctrine decision of 1983, and Fish and

Game Code Section 5937.

But despite the likely stature of the decision, uncertainties abound from *NRDC v. Patterson*.

San Joaquin River water is some of the state’s highest quality water, starting from its high Sierra headwaters southeast of Yosemite National Park. As part

“The trend to more and more permanent crops is very encouraging for farming in Westlands,” said Thomas Birmingham, General Manager of Westlands Water District this summer. “One of the main reasons for this trend is that our water supply has become more stable and dependable in recent years. Planting vineyards and orchards requires confidence that the water these crops require will be available well into the future.”

of the CalFED *Framework for Action* adopted in 2000, the Metropolitan Water District and FWUA began negotiating an exchange of water supplies that the parties believed would provide each with supplies whose qualities better matched their respective uses: high quality Sierra drinking water could be transferred into the State Water Project for delivery to southern California’s urban population, and saltier Delta water (now going to southern California) would be shifted over to eastside San Joaquin Valley farmers.

“Karlton’s decision may affect the MWD water quality exchange,” says NRDC attorney Jared Huffman, adding, “That water is spoken for in the river.”¹³

Technical studies have been conducted, but it is unknown what effect Judge Karlton’s decision will have on this negotiation.¹⁴

The decision also casts uncertainty on the San Joaquin Valley’s status as what California Department of Water Resources director Lester Snow referred to last June as “the switchyard for California Water.”¹⁵ Wrapping around Bakersfield in Kern County, the federal Friant-Kern Canal and the state’s California Aqueduct are linked east-to-west by a two-way water freeway called the Cross-Valley Canal (CVC). The CVC sees dozens of water transfers each year, often to bank water underground in Kern County aquifers as part of water transfers or from flood flows, what water strategists referred to by experts as “conjunctive use.” The NRDC decision could mean less water available for such transfers in the future, which could raise water prices in California’s emerging market.

Restoration of flows—combined with efforts to restore riparian vegetation, reduce water temperature, and construct good locations for spawning gravels—could be one of the great salmon restoration projects in California history, next to Sacramento River restoration efforts under CalFED and those under way in the Pacific Northwest.

Hard questions are abundant: Just how much water *will*

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need to be released into the long-dry San Joaquin River channel?

What times of year will the releases from Friant be most beneficial to restoration of riparian vegetation, habitat reconstruction, and re-establishment of salmon and other fishery stocks?

How much water can be surrendered by FWUA while minimizing economic dislocation in the San Joaquin Valley?

The answers actually may be that not much would be needed. And that's because of the hydraulic switchyard that Lester Snow refers to (see map, page 7).

Between 1999 and 2003, the parties to the San Joaquin River litigation actively pursued a settlement of this lawsuit. Friant-Kern Canal diversions were rerouted as test flow releases down the San Joaquin (which flows west, then north away from Friant farmers' territory). These flows were exchanged for transfers from other sources that provided water to southern Kern County farmers through the California Aqueduct and the Cross-Valley Canal.

"What's in it for them?" asked NRDC attorney Hamilton Candee in 1999 as experimental restoration efforts started. "The farmers get to stop losing in court, and the environmentalists have agreed to find a solution that causes no adverse impacts on the farmers."¹⁶

"We are pleased to be moving away from the courtroom and into a consensus restoration that will protect our local economy while helping the river," said Richard Moss, then-general manager of FWUA in 1999.¹⁷

Test releases, flow alternative studies, and good vibes continued for a few years as the parties took up with a federal mediator to resolve their issues. But in April 2003, NRDC announced that the mediator's final compromise

proposal was rejected by FWUA. The details of the proposal are confidential, since it was part of the lawsuit's settlement negotiations.

We may glimpse some of what the parties discussed, however, from a 2002 water supply study produced by engineering consultant URS Corporation.¹⁸ At that time, in normal years, the study suggested a tripling of Friant releases to between 341,000 to 383,000 acre-

feet for the San Joaquin River over the D-935 requirement of 116,700 acre-feet set by the state.¹⁹ These restoration releases would be about a sixth of annual average historical San Joaquin flows of 1.77 million acre-feet into Millerton Lake between 1909 and 2001.²⁰

The parties developed a short list of five "bundles" of water supply strategies. The bundles' common elements

reveal the Valley's switchyard nature and include:

- Groundwater conjunctive use practices (existing and possible);
- Recirculation of water to Mendota Pool for use by the Exchange Contractors (the corporate offspring of the Miller & Lux empire) around Firebaugh and Los Banos;
- The State Water Project and the Central Valley Project could then jointly reduce the CVP's Delta-Mendota Canal deliveries to the Exchange Contractors and instead store them for later delivery to Friant customers further south using the Cross-Valley Canal;
- Two-way (west-east) conveyance in the Cross-Valley Canal;
- Surplus flows from Eastside tributaries (floods from Kings, Kaweah, Tule, and Kern Rivers) could be diverted or pumped into the Friant-Kern Canal for delivery to storage further south in the San Joaquin Valley; and
- Water purchases, reclamation, and conservation strategies.

For comparison purposes, however, the parties augmented these "common elements" with other water strategies, including additional storage and a proposal to "recirculate" water as far north as the Delta. These flows would then be exported back to the San Joaquin Valley (near Fresno) and the Tulare Lake basin (near Bakersfield).²¹

Alternatives with additional upper San Joaquin River storage, as well as storage projects to capture Tulare Lake floods, are considerably more expensive than the alternative focused on simply recirculating existing supplies in the currently dry river.²² Passage of CalFED legislation means money would be less of an object now in resolving supply concerns stemming from the Karlton decision (see related



The San Joaquin River from Friant Dam, February 2001.

story, page 5).

With water flowing in the San Joaquin River channel and a mandate to restore fisheries to a good condition, Chinook salmon could be induced to re-enter long-lost spawning grounds on the San Joaquin upstream of the Merced River confluence, something not seen since the early 1950s.

Benefiting from San Joaquin River diversions all these years are 22 irrigation and water

districts of the eastern San Joaquin Valley from Madera County to Kern County. Collected into the Friant Water Users Authority (FWUA), these districts are likely to see reductions in supplies in their canals diverted from the San Joaquin River.

Environmentalists, led by NRDC, claim returning water

continued on page 10



Madera Canal winds past cattle grazing pastures northeast of Fresno.

San Joaquin River

continued from page 9

to the river and restoring fisheries on the San Joaquin will improve the local economy along the river, beyond the decision's more obvious ecological benefits.

Many farmers and local officials in this region reject such optimism. According to Madera County Supervisor Frank Bigelow, "The entire action of that decision... puts in jeopardy the economy of our Central Valley."²³

Interior Secretary Gale Norton tried to calm area farmers' fears a month after Karlton's ruling came down, saying that the situation could be resolved if "common sense" policies are used to accommodate both sides. "We can be sure to drive agriculture out of business if we do not do things the right way," she added.²⁴

But doom and gloom are not foregone conclusions for the regional agricultural economy stretching from the Chowchilla River in Merced County to the base of the Tehachapi Range in Kern County.

To compensate farmers' potential losses when Judge Karlton's order takes effect, they may need to pump more groundwater to maintain their irrigation schedules. Groundwater, however, is more costly to pump than the federally-subsidized Central Valley Project water FWUA farmers have gotten historically from Friant through its Madera and Friant-Kern Canals.

FWUA districts and farmers believe that groundwater pumping is neither their only nor their best option if the NRDC decision stands. The Bureau of Reclamation currently leads a planning process for additional water storage in the San Joaquin River watershed. Alternatives under study include raising the height of Friant Dam, and constructing a new dam upstream of Friant at a site called Temperance Flat. The likelihood of a fast-tracked decision and construction of a new dam and reservoir on the San Joaquin River abruptly increased this summer when President George W. Bush

signed HR 2828, the Water Supply, Reliability and Environmental Improvement Act (see related story, page 5).

For years on the west side of the San Joaquin Valley, farmers in the Westlands Water District predicted dire consequences if they retired lands from production because of selenium-contaminated drain water. They made similar claims about fish restoration flow releases for the Trinity River, Westlands' major source of Central Valley Project water for many years.

Those forebodings have not come true. Westlands farmers are switching to orchard and other permanent crops with greater profitability, lower water needs, stronger markets, no government subsidies, and they testify to a generally brighter future.

"The trend to more and more permanent crops is very encouraging for farming in Westlands," said Thomas Birmingham, General Manager of Westlands Water District this summer. "One of the main reasons for this trend is that our water supply has become more stable and dependable in recent years. Planting vineyards and orchards requires confidence that the water these crops require will be available well into the future."²⁵

Westlands farmers saw the District acquire 55,000 acres of selenium-contaminated farmland to retire permanently. The District anticipates buying another 45,000 acres by 2006.²⁶ Meanwhile, permanent crop acreage has doubled to 64,000 in the District since 1993.²⁷ Almonds, pistachios, and table grape vineyards are growth commodities right now.

Meanwhile, cotton acreage—long a principal crop in this region—fell 32 percent over the last three years. Wendy Illingworth, a consulting economist who studies Westlands' land retirement efforts, told the *Fresno Bee* that permanent crops can be more appealing because they are not tied to federal price support programs as cotton is. "These are crops that are independent of political issues," she said.²⁸

Not entirely; it's not just that Westlands cotton farmers lost their taste for federal price supports in recent years. The

SPILLWAY

democratically unaccountable World Trade Organization (WTO) handed down a ruling in April favoring Brazil in that nation's complaint that U.S. cotton subsidies violate global trading rules by distorting world prices and blocking developing nations' goods from reaching market. The WTO decision could accelerate a shift to "green" subsidies that reward farmers for restoring their cropland to native habitat, and reallocation of water from California farmers to growing cities.²⁹

Still, "the connection is unmistakable," enthused Birmingham. "When there is a reliable and adequate supply of water, the farm-based economy will thrive."³⁰

As land is retired, more water supply in Westlands is available to the farmers with land remaining in production. That supply is also more reliable now. Improving the reliability of its Central Valley Project water supply may have contributed to Westlands' willingness to settle a legal fight that erupted in 2000 when Westlands Water filed an area of origins claim to nearly half the unimpaired flow of the San Joaquin River, a transparent grab at water controlled by FWUA at Friant Dam. While tensions subsided a couple of years ago, settlement talks began in 2003 between the two water agencies and in February 2004 they settled their differences. Westlands dropped its water rights claim, and Friant officials agreed that if a new dam is built on the San Joaquin, the two agencies would share supplies from it.

Economic diversification is essential for communities to adjust to changes that loom from the Karlton decision. Prison overcrowding in the U.S. provides some impetus here: The *Fresno Bee* reports that Mendota pursues location of a new federal prison there.

Problems remain for farm workers, however. The permanent crops require fewer workers in the production process from maintenance to harvest and post-harvest processing. Illingworth feels that it is too soon to know how many new jobs have been created in a region where seasonal farm work is a fact of life.

Not in Firebaugh, where City Manager Jose Antonio Ramirez told the *Fresno Bee* in August that many workers lost jobs when some Westlands farmers took land out of production near his city. "Some of these people have gone to Hollister or Salinas to work because they can't find any here. We hear that farmers are planting more permanent crops, like almonds, and we hope that it leads to more jobs. We don't want to see them planting too much and overdoing it."

Giving in to frustration over the *NRDC* decision, Orange

Cove Mayor Victor Lopez spluttered to the *Fresno Bee* in September, "I cannot believe that fish would take the place of food," he said, apparently unphased by the fact that fish can indeed be a key part of a balanced, healthy diet. "We are going to fight together in the San Joaquin Valley to reverse this decision."³¹

ENDNOTES

¹ Lockyer quoted in press release from Natural Resources Defense Council, August 27, 2004.

² On the Miller & Lux water rights, see M. Catherine Miller, *Flooding the Courtroom: Law and Water in the Far West*, Lincoln, NE: University of Nebraska Press, 1993; David Iglar, *Industrial Cowboys: Miller & Lux and the Transformation of the Far West*, Berkeley, CA: University of California Press, 2001; and Tim Stroschane, "Conflict and Reliability in California Water, Part 1," *SPILLWAY* v2n2, Winter 2002.

³ State Water Rights Board (SWRB), *Decision on Applications of United States of America, City of Fresno and Fresno Irrigation District to appropriate Water from San Joaquin River*, D-935, adopted 2 June 1959, p. 37. The SWRB cited Water Code sections 106 and 1254 in support of this finding, then cited Water Code Section 11226 saying, "Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use and secondarily for the generation of electric and other beneficial uses." Of course, subsequent legislation and litigation established clearly that fish and wildlife conservation are appropriately acknowledged as beneficial uses of water, and therefore subject to protection in the operation of water supply facilities.

⁴ *Ibid.*, p. 62.

⁵ George Warner, "Remember the San Joaquin," in Alan Lufkin, ed., *California Salmon and Steelhead: The Struggle to Restore an Imperiled Resource*, Berkeley, CA: University of California Press, 1991, p. 69.

⁶ *Natural Resources Defense Council, et al., v. Roger Patterson, etc., et al.*, United States District Court, Eastern District of California, No. Civ. S-88-1658 LKK, released August 27, 2004, p. 3. Hereafter cited as *NRDC v. Patterson*. Available to download at <http://www.SaveTheSanJoaquin.org/>.

⁷ *NRDC v. Patterson*. p. 40.

⁸ *Ibid.*, pp. 7-8.

⁹ Nomellini quoted in Audrey Cooper, "Judge: Friant Dam broke law, ruling in long legal fight could lead to restoration of San Joaquin River," *San Joaquin Record* 28 August 2004.

¹⁰ *Amicus Curiae Brief of Central Delta Water Agency and South Delta Water Agency in Opposition to Friant Defendants' Motion for Summary Judgment on Plaintiffs' Claim Under §8/§5937*, in United States District Court for the Eastern District of California, *NRDC* (cited above), presented August 10, 2004, pp. 5-6.

¹¹ *Ibid.*, p. 7.

¹² No author, "Delta Water Agencies Frustrate Friant By Siding With Environmental Plaintiffs," *Waterline*, July 2004, newsletter of FWUA. Download from FWUA web site at <http://www.fwua.org/Waterline/index.html>.

¹³ Jared Huffman, personal communication, 5 October 2004.

continued on page 12



Fish Kill

continued from page 4

years in fresh water before migrating to salt water and need cold water to survive.

Bob Strickland, president of United Anglers of California, summed up the feeling of many anglers and conservationists when he said, "Here's another case where the fish don't count. The water for farmers and other water users always comes before fish when it's supposed to be the opposite."

The time for the adoption of water standards on the American River is long overdue. For more information, contact the Save the American River Association, (916) 387-1763, or the California Sportfishing Protection Alliance, 510-526-4049.

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San Joaquin River

continued from page 11

¹⁴ The technical studies are currently available at FWUA's web site, <http://www.fwua.org/>.

¹⁵ Snow quoted in Cal Tatum, "Focus on Valley water: State officials discuss supply, demand, storage and some environmental issues at local meeting," *Madera Tribune* 26 June 2004.

¹⁶ Candee quoted in John Howard, "Foes unite to restore tapped San Joaquin River," *San Jose Mercury News* and *Associated Press*, 19 October 1999. The *Fresno Bee* also published a lengthy and comprehensive special report,

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Rescuing the San Joaquin, in December 1999. This report is no longer on the Bee's web site, but a copy is in **SPILLWAY** files.

¹⁷ *Ibid.*

¹⁸ URS Corporation, *Final Water Supply Study: Development of Water Supply Alternatives for Use in Habitat Restoration for the San Joaquin River*, prepared for Friant Water Users Authority and the Natural Resources Defense Council Coalition, October 10, 2002. Cited hereafter as *Water Supply Study*. May be downloaded at <http://www.SaveTheSanJoaquin.org/>.

¹⁹ *Water Supply Study*, Table 6-1, p. 6.1-7.

²⁰ *Ibid.*, p. 4-15.

²¹ *Ibid.*, Table 5-1, p. 5-2.

²² *Ibid.*, Figure 1-3, reporting annual average net costs of five alternative bundles.

²³ Bigelow quoted in Tim Eberly, "Friant Dam ruling discussed: Interior secretary hears from Valley farmers," *Fresno Bee* 25 September 2004.

²⁴ Norton quoted in *ibid.*

²⁵ Birmingham quoted in "Newest Crop Report Shows Strong Trend Toward Permanent Crops," *Irrigator: Newsletter of the Westlands Water District*, Summer 2004, p. 1.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Illingworth quoted in Robert Rodriguez, "Farms look to longevity: Reliable water supply lets local growers devote more acres to permanent crops," *Fresno Bee* 8 August 2004.

²⁹ Jerry Hirsch and Debora Vrana, "Subsidy Ruling Shakes State Cotton Farmers," *Los Angeles Times* 28 April 2004.

³⁰ *Irrigator*, *op. cit.*

³¹ Lopez quoted in Mark Grossi, "Fight surfaces in salmon ruling: Orange Cove mayor, others say water shift would hurt economy," *Fresno Bee*.



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P.O. Box 8362
Berkeley, CA 94707-8362

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