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# The San Joaquin River Settlement

**T**he San Joaquin River litigation Settlement has now completed its long legal and political journey. Final Congressional approval of the legislation needed to fully authorize and implement the Settlement was adopted March 25, 2009, as part of House of Representatives passage of a much-broader omnibus public works bill. President Obama signed the measure into law on March 30. This historic Settlement was reached in 2006 by the U.S. Bureau of Reclamation, Friant Water Users Authority (FWUA) and its member agencies, and the case's plaintiffs, the Natural Resources Defense Council (NRDC) and its environmental and commercial fishing coalition. The planning for parallel processes of San Joaquin River restoration activities and water management objectives to reduce or avoid water supply impacts on Friant Division users of Central Valley Project water is already under way and, given the legislation's enactment, will now accelerate.

On the pages that follow, the FWUA is pleased to answer many questions regarding the Settlement. The first section provides factual background on the Settlement, the equal San Joaquin River restoration and water management goals, and the legislation. In the second section, we clarify and/or correct many of issues raised in dialogue and debate over the legislation. A third section answers questions about the case's background and evolution.

## **THE SETTLEMENT**

### **What are the Settlement objectives?**

- The Settlement includes two objectives. The first is a commitment to restore flows and salmon to the San Joaquin River between Friant Dam and the Merced River confluence. The Settlement's co-equal Water Management Goal provides numerous and varied opportunities for Friant Division contractors to mitigate water supply impacts resulting from Restoration water releases. Friant's goal is to develop means to recover all or most of these water releases. This historic effort covers 153 river miles. It involves not only restoring flows to approximately 60 miles of dry river bed, but also significant channel and fish passage improvements. We are unaware of any other river restoration project involving changes of this magnitude.

### **Why did Friant pursue Settlement?**

- Directors of the Friant Water Users Authority and its member districts pursued and reached Settlement because of how the litigation was unfolding in the Courts. In short, the plaintiffs were winning. Most significant decisions by the court in the case's 18-year history had already gone against the U.S. Bureau of Reclamation and Friant water users, and in favor of the environmental plaintiffs. There was great concern that when the court finally decided a "remedy" for the liability it had already pinned on the United States for water flows and a historic fishery downstream from Friant Dam, Friant was at risk of losing significant quantities of water. Friant water contractors and users had been clouded by uncertainty for years. There was nothing to stop the court from utilizing adaptive management to increase fishery water releases in the future if the first attempts at luring salmon didn't work. There was no indication the court would provide opportunities for Friant to recover water released for fishery flows. There were funding concerns. It was doubtful as to whether the court would provide any protections for affected third parties. Seeking a Settlement was a business decision aimed at preventing a bad legal situation from turning into a catastrophic impact to Friant Contractors.

### **What factor was most responsible for Settlement?**

- For Friant, the motivating factor to settle was always certainty. Friant needed assurances of water supply and cost certainty, and got them both. They were among the key breakthroughs early in the Settlement negotiations with the NRDC and United States, suggested by Congressman Radanovich and Senator Feinstein. Most significant were the caps proposed on the amount of water from Millerton Lake that Friant water users would have to give up for river restoration and agreement that the Friant water users' costs would not increase. NRDC's experts insisted river restoration could succeed by releasing 15-20% of Friant's water (on a long-term average), far less than Friant's analysis indicated. So Friant accepted NRDC's numbers, which vary based on the river's natural water supply. Friant's analysis, based upon 18 years of litigation and related court rulings, led Friant directors – all of whom are farmers who stand to be among the first to feel the on-the-ground effects of any supply reduction for restoration – to unanimously conclude a court-ordered restoration could have severe water supply and economic impacts and had to be avoided in favor of water supply certainty.

### **What about getting some of that water back?**

- Had the court decided the case, there was no assurance that Friant would ever be able to recover any water. That's why the Settlement's Water Management Goal was so crucial. It parallels the Restoration Goal as an equal program purpose and is aimed at ultimately minimizing or even eliminating Friant's water supply losses to restoration through a wide array of possible projects. The most recent set of amendments to the federal implementing legislation provided opportunities and funding to better develop and manage water supplies, particularly flood flows.

### **Shouldn't Friant have tried to maintain its supply?**

- That's exactly what the FWUA has done in seeking and achieving agreement for water supply certainty. The FWUA's directors are all farmers. Every one of them appreciates the importance of San Joaquin River water. Friant has worked diligently to protect water rights and supplies. Friant successfully struggled to ensure that the Settlement would end litigation over the validity of Friant contracts once and for all. Friant has and will work hard to minimize impacts and maximize opportunities to fully reduce or avoid water supply curtailments while protecting Friant's contractual right to continue beneficial use of that water. This Settlement is the region's best chance to do that.

### **Why were there not negotiations for a better deal or proposals to restore something less than salmon, like a 'tailwater' fishery?**

- The FWUA and its member agencies are well aware that the Settlement became a controversial issue among some valley residents and elected officials as the implementing legislation moved through Congress. Those opposed believed the deal was not a good one for water users. Plaintiffs in the case, led by the NRDC, publicly rejected any change to another type of fishery, in large part because of the court's ruling in their favor that water was required to be released for fish, including the historic salmon fishery. If other changes were forced upon the plaintiffs by Congress, they would likely have withdrawn from the Settlement. The agreement would then have collapsed with Friant farmers and their water supply again be placed at the mercy of the federal court. That is why the FWUA continues to believe the Settlement is a sound decision and best option for protecting long-term Friant Division interests.

### **When are flows and salmon to be returned to the river?**

- Interim flows are scheduled to begin in the fall of 2009 and full restoration flows are scheduled to begin in January 2014. Salmon would be reintroduced no later than December 31, 2012 in the upper reaches, after channel improvements have been constructed.

### **What needs to be done before flows and salmon are restored?**

- Releasing water without fixing the channel cannot be a successful means of restoring salmon. The Settling Parties identified actions and highest priority projects. These include expanding channel capacity, improving levees and making modifications necessary to provide fish passage through or around certain structures in the river channel. These river fixes will allow for salmon restoration using less water.

### **What role will the State of California play in implementing the Settlement?**

- The State of California has expressed strong support for this Settlement and has pledged cooperation and financial resources of the State to help it succeed. Through the Department of Water Resources, Department of Fish and Game, the Resources Agency, and Cal-EPA, the state has entered into a memorandum of understanding with the Settling Parties that outlines an important, collaborative role for the state in the Settlement's planning, design, funding and implementation.

### **How much will implementing the Settlement's restoration goal cost?**

- Preliminary cost estimates to complete these actions and projects range from \$250 million to \$800 million. The largest variables are the assumptions as to the specific type and extent of levee work that may be required. The California Department of Water Resources, which has responsibilities related to levees and flood protection, has reviewed the Settlement. Its preliminary cost estimate ranges from \$350 million to \$570 million. More precise cost estimates will be completed in the course of project-specific planning activities.

### **Where is the money coming from to support the Settlement?**

- Funding will be drawn from a combination of federal authorizations and appropriations, state bond initiatives and current environmental contributions from farmers and cities served with Friant water under the CVP Improvement Act's "Friant Surcharge." Legislative amendments accepted in May 2008 by the Senate Energy and Natural Resources Committee permit Friant Contractors to accelerate payment of their construction obligation to the federal government at a discounted amount and convert existing water service contracts to repayment contracts with specified conditions. That will make more Settlement funding available during the construction phase. The legislation also permits Settlement funds to be used for the Water Management and Restoration goals. In summary, Friant contractors' financial contributions are limited to payments that would otherwise be made. California's Prop. 84 in 2006 included \$100 million to implement the settlement. The state has also indicated that another \$100 million of funding is available from other bond provisions. These and other funding sources and financing strategies are anticipated to provide sufficient funding to fully implement the settlement.

### **What happened with the Settlement implementation legislation?**

- Legislation needed to implement the Settlement, authorize the Bureau of Reclamation to do the work and provide some of the necessary funding did not progress in Congress as quickly as the Settling Parties would have preferred. However, great progress was made in strengthening the legislation in ways that will be a benefit to Friant. When the legislation cleared the House Natural Resources Committee, Congressman Jim Costa stated the legislation needed to better delineate the Water Management Goal. It was also suggested that Friant assist Congress in finding creative and beneficial ways to resolve what turned out to be a couple of the Settlement bill's thorniest challenges – resolving new Congressional Pay-Go rules requirements, a pay-as-you-go approach to new programs adopted in 2007 by Congress. The other legislative test was in finding means of establishing a cash flow on the two San Joaquin River program goals.

That has been done. In May 2008, the U.S. Senate Energy and Natural Resources Committee approved S. 27, sponsored by Senators Feinstein and Boxer, accepting amendments that added important new provisions to the bill and expand on changes made to the House companion legislation (H.R. 4074) by the House Resources Committee in November 2007.

As Congress adjourned in 2008, the bill maintained its original elements but had been amended to include important revised financial responsibility details. Friant districts that hold contracts for use of CVP water will accelerate payment of their construction obligation to the federal government in a discounted amount and by converting existing water service contracts to repayment contracts with specified conditions. This

would make much more Settlement funding available during the Restoration Program's construction phase and partially address Pay-Go rules. The new contracts will be permanent and remove Friant contractors from certain restrictive provisions of Reclamation Law.

Also added was a great deal more specificity and detail around the Settlement's Water Management Goal, reflecting Friant's objective of achieving the maximum possible water supply and cost certainty for its users. Since the bill has become law, Friant Division officials believe up to half of Friant's long-term water contract supplies contributed to Restoration can be recovered in the near term. Limited recirculation of water released for restoration picked up downstream and brought back into the Friant system could provide part of the recovery. Improvements to the Friant-Kern and Madera canals to restore their original design flow capacities (decreased over the years by ground subsidence and other factors) figure to be a significant contributor. There will also be partial funding, contingent upon future appropriations, for new and expanded local groundwater storage programs around the Friant Division. Additional water recovery from an expanded recirculation program is currently under evaluation and will most likely be dependent upon environmental issues in the Delta.

## **RECENT ISSUES THAT WERE RAISED**

### **Haven't NRDC's actions and testimony in the Delta smelt case eliminated or reduced Friant's ability to get water back through recirculation?**

- The Settlement states that the Water Management Goal "is to reduce or avoid adverse water supply impacts" to Friant Division long-term contractors as a result of restoration flows. The Delta smelt litigation that resulted in court-ordered reductions in Delta water export pumping was filed in early 2005, more than a year before the Settlement was reached. It is correct that Friant did not anticipate constraints on Delta pumping that are now in place but recirculation through the Delta was never intended to be the only means of mitigating Friant water supply impacts. Although it is hoped the Delta situation will eventually be resolved, Friant officials last spring worked with members of Congress on legislative amendments that will improve the ability to recover lost water through federally-funded improvements to the Friant-Kern and Madera canals. A grant program for local groundwater recharge and banking projects will also be created.

### **Won't NRDC's Delta pumping lawsuits put all Friant water at risk?**

- Friant's water supply is indeed linked to the Delta through the Bureau of Reclamation's ability to supply the Exchange Contractors on the valley's West Side with a substitute supply for their historic San Joaquin River water rights. Delta pumping restrictions increase the chance that Reclamation might be called upon to supply the Exchange Contractors through releases of Friant water. That risk is the same with or without the Settlement.

### **Isn't it true that the NRDC and other environmentalists aren't precluded from suing regarding other species under the ESA?**

- The Settlement is comprehensive, resolving all of the plaintiffs claims (except for attorney fees), including their contention under the Endangered Species Act that biological opinions supporting Friant's long-term contract renewal were inadequate. The plaintiffs cannot reinitiate those claims. The proposed implementation legislation provides for an "experimental population" for salmon reintroduction under the ESA. New species affecting the CVP are not covered, a risk that would be same with or without the Settlement. Under this global settlement the plaintiffs also dismissed all their other claims challenging the validity of the Friant contracts under Reclamation law and other theories.

**Aren't some Friant districts to be impacted differently by the Settlement?**

- The CVP's Friant Division is the only Reclamation project unit with a two-class water supply system. Unless there are further agreements among Friant contractors, Settlement impacts will not be evenly distributed because no two Friant contractors have the same combination of Class 1 and/or Class 2 supplies under contract. This situation was known to all contractors during Settlement negotiations. Efforts are underway to "equitably" distribute water supply impacts and recovery opportunities.

**Couldn't other Delta court cases affect the San Joaquin River situation?**

- Ongoing fishery and water quality challenges in the Delta and the San Joaquin River continue. Friant believes that the Settlement evidences Friant's contribution in addressing many of the issues being raised, but what the courts might decide on such assertions cannot be predicted. Friant has stepped up its involvement in Delta issues.

**The CVPIA required an act of Congress to take water from the Friant system's supply for fish and wildlife; why are we giving up that protection?**

- Friant didn't give up any such protection. Federal court rulings had already taken it away. Friant stated in 1994 that the Central Valley Project Improvement Act provided a federal preemption against restoration of the river unless Congress approved a plan that was "reasonable, prudent and feasible". Subsequent federal court rulings, focusing on a section of state law (Fish and Game Code Section 5937), found that the CVPIA did not necessarily prevent the court from ordering water releases necessary to maintain a "historic fishery" under that state law. That decision was upheld by the Ninth Circuit Court of Appeal. The U.S. Supreme Court declined to hear Friant's appeal on that issue.

**Don't some Friant managers, lawyers and consultants advise that *any* settlement is better than going back to court?**

- No. The advice has all been focused on this Settlement: The Settlement provides water supply certainty by capping the amount of Friant water supplies that can be reduced for use in river restoration at an average of 15-20% of historic deliveries; provides means – principally financed by the federal government – to recapture restoration flows; and ensures Friant's costs will not increase. The only other advice has been on what would have happened if the Settlement had failed and the case had gone back to the federal court. If that had happened, Friant directors were advised:
  - Friant could probably lose more water with an adverse court ruling than under the Settlement.
  - There could well have been more uncertainty over supply losses if the court had ever imposed adaptive management.
  - The court might have attempted to order the Bureau of Reclamation to construct river improvements for restoration flows at the expense of water users.
  - A host of other issues litigated as part of the lawsuit, including Reclamation law, tiered pricing and ESA compliance, would have been back on the table and the environmentalists' challenge to the validity of the Friant contracts would have been resumed.

## **CASE BACKGROUND AND EVOLUTION**

**How did this all begin?**

- Beginnings of the San Joaquin River litigation were rooted in the pending expiration of the Friant contractors' original 40-year CVP contracts in the late 1980s. Friant districts believed the United States had pledged when it executed the original contracts that there would be a continuous supply of water for Friant as long as it was put to beneficial use. In 1988, as the U.S. Department of the Interior was in the process of renewing the first Friant contract, that of the Orange Cove Irrigation District, objections were

raised by the environmental community. NRDC and a coalition of other environmental and fishing plaintiffs initiated litigation that challenged the contract renewals.

**‘Contract renewals’ doesn’t sound much like restoring salmon to a river. What happened?**

- The environmental plaintiffs later amended their complaint seven times, raising complicated, and different, legal issues. A decision in 1994 invalidated the long-term renewal contracts (replaced with interim contracts and, in January 2001, with 25-year long-term renewal contracts that were to, and now have been, updated to reflect Settlement terms).

Since the mid-1990s, the litigation centered on a state fishery protection law, Section 5937 of the California Fish and Game Code. This state law requires dam owners and operators to release “sufficient” water to operate a fish passageway or “maintain in good condition” the fish in a river below the dam. The dispute centered on, among other things, whether this state law applied to the federal project and, if so, whether releasing the amount of water needed to satisfy the state law would conflict with the laws authorizing the dam.

**Earlier, you stated that the plaintiffs had been prevailing in the court rulings. What was left for the court to decide?**

- In August 2004, the U.S. District Court ruled that Section 5937 imposed a continuing duty to release sufficient water from Friant Dam into the San Joaquin River to restore former historic salmon runs and fishery conditions (“liability phase”). The court did not determine how much water would be needed to satisfy the state law. Rather, the court set the case for a trial in February 2006 to determine the amount of the releases (“remedy phase”).

**What happened next?**

- In the summer of 2005, Senator Dianne Feinstein and Rep. George Radanovich, then House Water and Power Subcommittee Chairman, began a non-partisan effort to bring the parties together. An earlier set of settlement negotiations took place in 1999 - 2002, during which time the parties conducted many fishery and water supply-related studies. Even though this original four-year round of negotiations proved unsuccessful, a foundation for future discussions was laid. Talks were frequent and difficult but progress, although slow, proved to be steady. A key breakthrough occurred when the parties agreed on a significant compromise: In exchange for restoring the river below Friant Dam, Friant’s water loss for the fishery’s needs would be capped at designated amounts. Even though the Settlement will use 15-20% of the average annual Friant water supply that the farmers really can’t afford to lose, the compromise removed what promised to stretch into years of continued uncertainty over the Friant water supply and economic and social well-being of the eastern San Joaquin Valley. Settlement discussions also included a water management goal to recover water used to restore the fishery.

**And the Settlement?**

- It was achieved during 2006. By April of that year, the parties were able to inform the court that agreement had been reached on numerous issues, including restoration goals, water flows, ways of managing and recovering water and a host of other issues. At the end of June, attorneys for the parties reported that they had agreed to a settlement in principle. The agreement, covering 20 years (until 2026), and possibly longer, was filed in September 2006 and formally adopted by the court several weeks later. Implementation legislation was proposed in Congress in the fall of 2006 and reintroduced the following January. The Settlement legislation was amended in 2008 to include expanded water recovery provisions and additional third party protections that were negotiated by nearly all of the down-river stakeholder interests. The Senate on March 19, 2009, approved the omnibus bill containing the San Joaquin River legislation. On March 25, it was approved by the House. Five days later, the bill was signed into law by President Obama. Settlement implementation, primarily focusing on environmental documentation, has been ongoing since the Settlement was agreed to by the parties.