

**Statement of Richard M. Frank
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before the
Energy and Natural Resources Committee
United States Senate
Hearing on H.R. 2898 & S. 1894
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Chairman Murkowski, Ranking Member Cantwell and members of the Committee, thank you for the opportunity to testify on the two “California drought relief” bills currently pending before this Committee: H.R. 2898 and S. 1894.

I am Richard Frank, Professor of Environmental Practice and the Director of the California Environmental Law & Policy Center at the University of California, Davis School of Law. Before I joined the U.C. Davis Law School faculty in 2011, I served as the Executive Director of the U.C. Berkeley School of Law’s Center for Law, Energy and the Environment. At these law schools, I have taught courses on Water Law, California Environmental Law & Policy, Environmental Enforcement, Climate Change Law & Policy, Ocean & Coastal Law, the California Delta, Natural Resources Law and related topics. Much of my research and writing has focused on water law and policy in California and the American West, climate change mitigation and adaptation law and strategies, environmental regulatory policy and private property rights.

Before my academic appointments at U.C. Davis and U.C. Berkeley Schools of Law, I worked for 30 years as a practicing attorney at the California Department of Justice, where I represented the People of the State of California and various state agencies, departments, boards and commissions focused on environmental regulation and natural resources management. At the time of my retirement from the Department of Justice in 2006, I served as the California Attorney General’s Chief Deputy Attorney General for Legal Affairs.

Since leaving state government in 2006, I have been appointed to and have served on various California state advisory boards and commissions. Most relevant to this testimony, in 2007 former California Governor Arnold Schwarzenegger appointed me to the Delta Vision Blue Ribbon Task Force. I served on that body from 2007 until it concluded its work and reported its findings to the Governor and California Legislature in late 2008.

General Comments & Overview

With the beginning of a new “water year” on October 1st, California has now officially entered its fifth consecutive year of drought. The length and intensity of that drought are unmatched in California’s 165-year state history.

The current drought has severely tested California’s people, economy, environment and political system. The good news is that California’s political leaders, water managers and general citizenry have responded remarkably well, under exceptional circumstances, to the unprecedented challenges presented by the drought. With a few exceptions noted below, and through their own, unprecedented conservation efforts, the state’s 39 million residents have been able to obtain the water necessary to meet their basic human needs. Perhaps counter-intuitively, the current drought has not impeded California’s remarkable and steady recovery from a protracted economic recession. Indeed, the state’s robust economic recovery began roughly at the same time the current drought began in 2011.¹ In contrast, however, California’s environmental resources have not fared nearly as well in the face of the present drought.

A key factor in ameliorating some of the potential adverse effects of the current, protracted drought is the work of federal, state, regional and local water managers in California. Most relevant to this hearing, federal and state water managers have collaborated closely and well in managing the Central Valley Project and the State Water Project under daunting circumstances and chronic, multiyear shortages. This, in turn, is due in no small measure to their ability to manage and coordinate the operation of those systems in real-time, on a day-by-day basis. (California Secretary of Natural Resources John Laird has made the same point in recent written communications with Congress.) That’s an important, overarching principle—one that any new federal drought response legislation should promote, rather than impede.

At the same time, the rather impressive record of California drought response to date should not lead to a false sense of complacency. Nor should reports of an El Nino winter that could conceivably end—or at least put a significant dent in—California’s current drought. That’s because most climate scientists, meteorologists and climate modelers warn that a pattern of future droughts is likely to occur. Further, they caution that the *severity* of the state’s current and protracted drought may actually be replicated in future years. I.e., California’s present drought may well not be an aberration but, instead, a harbinger of a more water-challenged future--not only for California, but also for other portions of the American West.

Accordingly, it seems appropriate for Congress to consider any proposed federal drought legislation not simply as a one-time response to California’s current drought but, rather, with an

¹ Several of my U.C. Davis faculty and research colleagues recently published an academic study concluding that California agriculture has shared in this recent economic prosperity. That August 2015 report, prepared for the California Department of Food and Agriculture, indicates that the state’s \$46 billion-a-year agricultural output remained robust through a fourth year of drought, even in the face of significant surface water delivery cutbacks from the CVP and SWP. See, <http://californiawaterblog.com/2015/08/18/drought-bites-harder-but-agriculture-remains-robust/>

eye toward the “new normal” of *recurrent* droughts exacerbated by projected climate change.

H.R. 2898

Several features contained in H.R. 2898 appear to have merit. For example, the bill’s requirement that the feasibility of various new surface storage facilities be studied, and that those feasibility studies be concluded and published in the near future, makes considerable sense. Several of these proposals have been hotly debated in the abstract, without focusing on their cost, engineering feasibility, etc. It’s high time for an objective review of those projects’ relative merits, so that federal and state policymakers can determine whether they “pencil out” and make environmental sense.

Similarly, the bill’s proposed sections 203 and 204, which would undertake studies of invasive species and predator control, represent worthwhile initiatives. Invasive species present a clear and present ecological danger to the California Delta’s native species and ecosystem. They have also resulted in economic hardship to many people and businesses in the Delta. Federal research, pilot projects and monetary support to combat that problem would be most welcome.

Finally, environmental review of proposed emergency response efforts to address the drought can and should be expedited when it is reasonably possible to do so. The National Environmental Policy Act (NEPA) and implementing regulations promulgated by the President’s Council on Environmental Quality provide the flexibility to shorten the time periods to complete NEPA review in emergency circumstances. Many of H.R. 2898’s proposed “fast-tracking” and disclosure provisions in this regard—when invoked in connection with the federal government’s emergency drought response efforts—seem appropriate. One particularly welcome feature of proposed section 805 requires the Secretary of the Interior to adopt “Transparency Reporting” via creation of an electronic database to make publicly available documents associated with the government’s NEPA compliance efforts. Such a reform is overdue.

On the other hand, H.R. 2898’s proposal to reduce the public comment period under NEPA for drought response projects to 60 days—or, in some cases, as little as 30 days—is unwise. One of the overarching purposes of NEPA is to allow the interested public a meaningful opportunity to participate in the environmental decision-making process. Given the cost, complexity and magnitude of many potential federal drought response projects, these abbreviated comment periods seem unreasonably short. Similarly, proposed section 305 would authorize the Secretary to “deem a project in compliance with all necessary environmental regulations and reviews” if s/he determines that immediate project implementation is required to address “a specific and imminent loss of agriculture production upon which an identifiable region depends...” That provision would create a new statutory exemption from otherwise-applicable NEPA, ESA and related environmental review that appears both unprecedented and ill conceived.

Other provisions of H.R. 2898 seem equally problematic. Perhaps of greatest concern are the bill’s significant modifications to the Biological Opinions that federal wildlife experts have fashioned for listed Delta smelt and salmonids adversely affected by operation of the Central

Valley Project and State Water Project. Those Biological Opinions were developed over a period of years by those experts, pursuant to the mandates of the Endangered Species Act. The Bi-Ops were challenged in protracted litigation brought by agricultural interests and Central Valley water districts against federal wildlife agencies. They were ultimately upheld in now-final decisions of the U.S. Court of Appeals for the Ninth Circuit. With respect, permanent federal legislation is not the appropriate means of making changes to the Biological Opinions—certainly not the substantial revisions contemplated by H.R. 2898. These provisions of the bill would set a most unfortunate precedent and further politicize implementation of the ESA’s legal mandates.

More specifically, H.R. 2898’s provisions would require a level of precision in sampling of fish and water quality (.e.g., turbidity) that doesn’t currently exist and may well be unavailable in the future, given the present resources federal wildlife agencies have available. And by specifying the actions which they must take, the bill eliminates the ability of those wildlife agencies to utilize adaptive management strategies—or perform much management of listed species at all.

A related, major concern is H.R. 2898’s proposed section 313, which would repeal the federal government’s previous approval of the so-called San Joaquin River Settlement. That settlement resolved 18 years of protracted litigation over restoring flows to the dewatered San Joaquin River and—as approved by Congress—forged a legal and political compromise that promised to restore California’s second largest river to some modicum of environmental health. Repealing federal approval of that settlement would undoubtedly result in the parties returning to their litigation foxholes, recommencing the litigation, and thus resulting in additional expense, delay and uncertainty. Such a course will ultimately benefit no one. It will instead open a renewed front in California’s “water wars” that is contrary to the broader public interest—not to mention the environmental health of a vital state waterway and extensive riparian corridor.

Proposed section 602 would amend the Central Valley Improvement Act of 1992 (CVPIA) by creating a new Restoration Fund Advisory Board. In principle, convening a group of stakeholders for this purpose would seem uncontroversial. But the makeup of the proposed advisory board is extremely unbalanced, heavily dominated by CVP agricultural users, power contractors and municipal and industrial users, rather than reflecting a balanced representation of all relevant stakeholders. That imbalance is especially troubling given the CVPIA’s environmental objectives, as clearly articulated by Congress over two decades ago.

There are numerous other, specific flaws contained in H.R. 2898. Let me nevertheless focus on three thematic deficiencies of the bill. First, this proposed legislation reflects a “top-down” federal drought response strategy—one that would override Endangered Species Act protections for threatened and endangered species and one that runs counter to principles of cooperative federalism. There is perhaps no aspect of American environmental and natural resources policy that requires a more collaborative federal-state relationship than water management in the American West. In recent years, federal and California state water managers have developed a strong partnership designed to jointly manage an extreme drought in real-time. H.R. 2898 threatens that model of cooperative federalism in a way that, if enacted, will prove counterproductive and undermine the state-federal relationship in water management.

Second, H.R. 2898 represents a legislative effort to re-allocate finite water resources by taking water from environmental programs and transferring them to agricultural purposes. Whatever the wisdom or folly of that policy choice, a preferable strategy would be to “expand the pie” by creating *additional* water resources in the form of recycling, re-use, desalination and conservation projects, among other strategies. That approach is notably absent from H.R. 2898.

Third and finally, one thing all relevant stakeholders in California water policy—including agricultural interests--desire and need is greater certainty. H.R. 2898, by contrast, would appear to inject greater uncertainty into the operation of California’s federal and state-operated water systems at a time when the drought is already creating unprecedented strains on those systems.

S. 1894

S. 1894 builds on and improves upon some of the above-described, positive aspects of H.R. 2898. At the same time, S. 1894 lacks many of the deficiencies of the House bill. As a threshold matter, S. 1894 is by its terms a temporary measure, which seems appropriate under the present circumstances. H.R. 2898, by contrast, represents permanent legislation.

The Senate bill, unlike its House counterpart, embodies the “expand the pie” policy noted and endorsed immediately above. Title III of S. 1894, dealing with “Long-Term Water Supply Projects,” quite appropriately focuses on desalination and water reuse. Section 301 of the bill declares that “climate change and drought resiliency require additional water supply projects to cope with higher probabilities of longer more intense droughts.” Those contemplated water projects are not limited to surface water storage facilities, but also include water recycling, desalination, storm water capture, agricultural and urban water conservation strategies, etc. S. 1894 incorporates an ambitious program of federal grants to promote and facilitate such projects, thereby “expanding the pie” of available water supplies rather than simply reallocating a portion of finite surface water resources from one important use (environmental purposes) to another (agriculture).

Similarly, and like H.R. 2898, S.1894 seeks to “jump start” and ensure timely completion of several hotly debated surface storage proposals. But the Senate bill improves upon the House version by expanding the scope of the prescribed feasibility studies to include such additional/alternative water storage strategies as raising existing dam and reservoir systems, increasing groundwater storage, and expanded water conservation initiatives.

Increasing existing surface reservoir capacity when it is feasible to do so makes sense—especially given the fact that climate scientists warn that future reductions of the Sierra Nevada snowpack (California’s largest, natural “reservoir”) are a virtual certainty. And cutbacks in available surface water deliveries from the CVP and SWP have led many agricultural water users to replace that supply through expanded groundwater pumping. These unprecedented levels of groundwater pumping—especially in California’s San Joaquin Valley--have resulted in chronic overdraft of many of California’s already-overtaxed groundwater basins. Therefore, groundwater basin replenishment feasibility studies, as envisioned in S. 1894, provide another

type of water storage strategy that can in many cases be achieved at far lesser cost and with fewer adverse environmental impacts than new surface water storage projects. Such groundwater replenishment projects have the additional, salutary effect of helping to remedy some of the adverse effects of current groundwater overdraft practices, such as subsidence.²

Another positive feature of S. 1894 is its focus on California “drought-stricken communities.” (See section 323.) While most Californians have enjoyed uninterrupted water supplies for domestic uses despite the current drought, there are some notable and most unfortunate exceptions. In some of the most impoverished portions of the state—particularly in rural portions of the eastern San Joaquin Valley—small community water districts wholly dependent on groundwater have recently had their wells run dry. That is due in major part to the fact that larger agricultural and urban districts are drilling new, deeper wells that deplete the groundwater aquifers and render useless the shallower, pre-existing community water system-owned wells. S. 1894 notes that nearly 2000 community water service wells in California, which had previously served approximately 10,000 state residents, are now dry. The affected residents have been reduced to subsisting on delivered bottled water. S. 1894 appropriately includes as part of its federal drought response strategy financial assistance designed to remedy this economic hardship and environmental injustice.

Of critical importance, a key difference between the two bills is that S. 1894 does not legislate significant revisions to and partial repeals of the Endangered Species Act affecting California. I.e., the troublesome, ESA-related provisions in H.R. 2898 referenced above are notably absent from the Senate bill.

Finally, S. 1894 is superior to H.R. 2898 in that it better reflects the cooperative federalism model upon which successful federal-state water management and drought response depend. One prominent example is S. 1894’s inclusion of federal financial support for California state and federal “drought resilience projects.” Sections 401-412. The Senate bill similarly offers federal support—on a cost-sharing basis—for integrated water management strategies that California water districts are beginning to pursue and that need to be further incentivized. See section 421. And S. 1894 is careful to emphasize that it does not seek to displace or modify longstanding water rights protected under California state law. See, e.g., section 113. The bill affords similar comity to state water quality and related laws. *Ibid.*

² S. 1894 could actually be improved by more heavily and explicitly incorporating groundwater storage as an important, long-term drought response strategy for California. Many experts believe that groundwater storage strategies are more promising and cost-effective than new surface storage projects. Meanwhile, H.R. 2898 wholly ignores groundwater storage options, and focuses exclusively on surface water projects.

Conclusion

For the foregoing reasons, I believe the Committee should approve S. 1894 and decline to approve H.R. 2898.

I am grateful to the Committee for the opportunity to testify on this most important and timely subject. I would be pleased to respond to any questions members of the Committee may have.