

Statement of Estevan Lopez
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U.S. Department of the Interior
before the
Subcommittee on Water and Power
Committee on Energy and Natural Resources
United States Senate
on
S. 2533 (Feinstein) – California Long Term Provisions for Water Supply and Short Term
Provisions for Emergency Drought Relief Act
May 17, 2016

Chairman Lee, Ranking Member Hirono and members of the Subcommittee, I am Estevan Lopez, Commissioner of the Bureau of Reclamation, in the Department of the Interior (Department). Thank you for the opportunity to appear before the Subcommittee today to provide the Department's views on S. 2533, the California Long Term Provisions for Water Supply and Short Term Provisions for Emergency Drought Relief Act. We understand that the overall goals of S. 2533 are to maximize water supplies, increase our scientific understanding of the ecosystem, and maintain compliance with the Endangered Species Act (ESA) and the current biological opinions governing operation of the state and federal water projects. The Department supports these goals as the appropriate approach for both the near-term and long-term in addressing the impacts of drought in California. Focused attention and efforts from all levels of government, as well as the private sector, will be necessary to increase water supply reliability while maintaining environmental protections that are critical to California. This approach is simply a reality given long-term drought, climate change, and other challenges facing the Bay-Delta region.

The Department appreciates the seriousness of the current water supply situation in California and continues to take actions that address drought in the short-term as well as to build drought resiliency over the long-term. As the Subcommittee knows, the Department and its bureaus have worked with an unprecedented level of cooperation across agency lines and in partnership with the State of California to maximize water supplies and reduce the impact of the current drought while also protecting the environment. We also want to acknowledge Senator Feinstein, who has been a leader in these efforts and a strong supporter of strategies to address the impacts of the drought on families, farms, the economy of the State of California, and the environment. We appreciate Senator Feinstein's efforts in developing S. 2533 and the frequent technical assistance reviews undertaken with the Department and other agencies operating in California as the bill has been in development.

At the operational level, the bill provides operational directives on pumping rates during stormflow events, fish entrainment, reduced predation of listed fish, and real-time monitoring of listed fish species of concern to the projects. These provisions may result in the ability to provide modestly more water for agricultural users and could create ecosystem benefits if implemented, at least in some flow and seasonal weather scenarios. The bill brings visibility to several aspects of the operations of the Central Valley Project, allowing the Department and other agencies to allocate resources and to be better poised to take advantage of opportunities

that improve water management. As one example, provisions of the bill extending the time period to convey voluntary water transfers water transfers may provide additional options to drought-stricken water users for obtaining water supplies, while addressing issues related to the timing of the conveyance of that water through the Bay-Delta. The bill allows federal agencies to ensure necessary actions related to the transfers are in process with sufficient time to ensure benefits from the transfers can be maximized. Another example is the authorization to increase pumping during some winter storm events. This authorization allows the agencies to be prepared on very short notice to take advantage of this additional potential water supply, while remaining protective of listed species.

We are aware of much discussion by some stakeholders over whether the provisions of S. 2533 are consistent with the ESA and biological opinions governing operation of the state and federal projects. The provisions of this bill add new statutory language to direct the actions of the Secretaries in the implementation of their responsibilities under the ESA and other applicable law, generating issues around whether these provisions are intended to supersede or otherwise modify existing requirements in the current biological opinions governing the system. We understand that the author of the legislation intends that these provisions be interpreted as consistent with the ESA and implemented in a manner that is consistent with the current biological opinions, even while directing the Secretaries to exercise their existing discretion to adaptively manage these operations based upon the best available science and as conditions warrant. We very much appreciate and concur with this intent, and we believe that we are able to implement these directives in a manner that is consistent with the ESA and the biological opinions.

We are also mindful that new statutory language generates new litigation opportunities, which we hope to minimize. We are therefore open to working with the bill sponsor and the Members of this Committee to address some of the ambiguities in the current text. For instance, the operative language in Title III prohibits actions that would cause additional adverse effects to listed species beyond those analyzed in the biological opinions. Our interagency review has determined that there is a potential drafting anomaly in that the operative language- “the Secretaries shall take no action pursuant to this Act that would cause additional adverse effects on the listed fish species beyond the range of effects anticipated to occur [under] the applicable biological opinion” - is found in sections 301(e) and 303(a), but is not present in section 302. While the operative language modifies the entire Act, in order to minimize any attempt to construe Section 302 as not being subject to this standard, we recommend similar operative language is included in Section 302 so it is clear that all actions under Section 302 are subject to this standard. We would also note that the proposed operable standard contemplates a longer time period (for the duration of the opinions) than may be pertinent to the actions at hand (short-term, real time), suggesting that some modest language changes might be warranted.

We also note the savings clause in section 701 which states that S. 2533 shall not be interpreted or implemented in a manner that “overrides, modifies, or amends” the ESA or the application of the biological opinions. The combination of these provisions leads us to conclude that the directives in this legislation are to be implemented in a manner consistent with the ESA and the current biological opinions for the federal and state projects. We stand ready to work with the bill sponsor and the Committee on modest technical and conforming amendments to the

language where warranted. We would also like to encourage the use of crystal clear legislative history in the form of committee reports and accompanying floor statements to minimize litigation during implementation, and we would be pleased to work with the Member on such supporting material.

Moreover, while S. 2533 codifies the flexibility we have exercised in our drought contingency plans over the past several years, we also wish to be clear that there is little, if any, operational flexibility remaining in the biological opinions beyond that already being exercised. Consequently, as indicated by the 2015 Statement of Administration Position on H.R. 2898 (Valadao), the Department will be concerned with, and likely oppose, any subsequent change in the authorizations contained in S. 2533 that purport to create additional flexibility in the biological opinions by amending those opinions or the ESA itself. It is critical that the decision-making involved in operating Reclamation's Central Valley Project and California's State Water Project be based on the best available science as applied pursuant to existing environmental laws.

In the longer term, S. 2533 authorizes significant new investments in proven water supply and conservation activities that will help make California's water supplies more resilient in the face of drought. Locally-supported projects such as water recycling, water efficiency improvements, desalination, groundwater storage, distributed treatment systems and surface water storage are given thoughtful consideration in S. 2533, with requirements for robust non-federal cost sharing for new projects. It has become clear that the traditional Reclamation business model, where feasibility studies for federal projects must be authorized, undertaken and then provided to Congress before an authorization for construction is received, does not always address the needs of project sponsors at the state and local level. Of the five California storage studies referenced in Section 115 of the bill, one is now complete and was submitted to Congress in July 2015 (Shasta Lake Water Resources Investigation); three are still in development (North of Delta Offstream Storage/Sites Reservoir, Los Vaqueros Reservoir, and Upper San Joaquin/Temperance Flat); and the latter, Upper San Joaquin/Temperance Flat is undergoing final review within the Administration; and the final study, referenced at Section 313(b)(5), San Luis Low Point Improvement Project (SLLPIP), requires further analysis and resolution of identified safety concerns at B.F. Sisk Dam (B.F. Sisk impounds San Luis Reservoir).

We are finding that state and local jurisdictions are developing their own funding for many of these types of projects and would like to have a federal partner but are unable to wait for an authorization for Reclamation to participate in such a project. Consequently, we are of the view that in addition to the traditional Reclamation paradigm for study, authorization, then participation in federal water projects, Congress should revisit a standing authorization that allows some level of investment in state and local projects as is contemplated in S. 2533. If enacted, the Department would implement the bill such that participation would be based on performance-based criteria for overall economic, technical, financial, and environmental feasibility for the proposed project. While it is anticipated that the state and local sponsors would undertake the required planning and pre-authorization studies, the Secretary would be able to provide technical assistance on these studies.

Sections 112, 121, and 131 through 141 of S. 2533 contain many new authorizations with different funding mechanisms. In general, the Department appreciates the bill's recognition that federal water resource investments can effectively leverage additional state, local, and private funds to encourage drought resiliency. The Department appreciates and fully supports the increase in WaterSMART funding authorization to \$500 million. The water and energy efficiency grant program has been tremendously successful in stretching water supplies in the West, and building drought resiliency. The Department advises that it is still assessing and evaluating the information necessary for it to determine whether RIFIA presents an effective and efficient use of taxpayer dollars. The Administration is exploring alternatives for infrastructure financing, including public-private partnerships, through the newly created a Natural Resources Investment Center within the Department of the Interior. We also understand the intent of these activities is to facilitate the best use of federal and non-federal dollars to reduce risk and improve the reliability of the Nation's infrastructure. While we support these goals, the authorizations in these sections do potentially overlap, thus we are appreciative of the clarification in section 121(c) prohibiting an eligible project from receiving grant funding from more than one program.

Section 113, dealing with Reservoir Operation Improvement, would direct the creation of pilot projects to implement revisions to water operations manuals. The Department notes that the directives of Section 113 fall on the U.S. Army Corps of Engineers, and that, pursuant to subparagraph 113(g)(3), the activities referenced would exclude Bureau of Reclamation (Reclamation) facilities. Reclamation agrees that maintaining operational standards that reflect both the current state of science as well as changes in climate and hydrology is an important part of supporting water resource management. In Fiscal Year 2015 Reclamation began a Reservoir Operations Pilot Initiative as part of the WaterSMART program. Historically, uncertainties in weather prediction and assumptions of an unchanging climate have resulted in conservative federal operating criteria for reservoir management. It is expected that in some locations these criteria will have to be updated with consideration for weather forecast technology and shifts in climate conditions. In 2015 Reclamation selected five pilot studies, one within each of Reclamation's regions, to initiate work that is expected to be completed in FY 2018. The Reservoir Operations Pilot Initiative is a high priority action under Reclamation's Climate Change Adaptation Strategy with a goal to increase water management flexibility. These activities are critical to understand where flexibilities may be increased through identifying trends in historic and projected climate, hydrology, sedimentation, and conjunctive groundwater management.

As stated in Deputy Secretary Connor's October 2015 testimony on S. 1894, the Department supports the discretionary approach to authorities found in Section 203 for the benefit of fish and wildlife. Provisions intended to build upon the agencies' current actions to improve data gathering, monitoring, and scientific methodologies can greatly benefit operations with respect to water supply and species protection. In particular, the language authorizing federal participation in a 100-percent locally funded pilot program to protect native anadromous fish in the Stanislaus River, Delta and other tributaries, if based upon well-shaped research strategies and developed through a collaborative scientific and technically disciplined process (akin to our work in the Collaborative Adaptive Management Team), could help create a strengthened predation research program able to provide near- and long-term benefits for the environment and for state and federal water users across California.

Finally, as noted above, we recognize that some stakeholders have expressed concern about the potential for differing interpretations of the language in S. 2533, particularly the emergency operations provisions in Sections 302 and 303. We appreciate that, in the day-to-day operational context of California water and drought, divergent perspectives could expect different outcomes from implementation of this bill. As a consequence, we acknowledge there is increased litigation risk under S. 2533 and that ongoing litigation could hamper the flexibility we are currently utilizing under the biological opinions to maximize water deliveries while maintaining full compliance with applicable environmental laws. We are also concerned that an increase in litigation could also have adverse effects on the development of California Water Fix, as collaboration is an important part of that process.

On balance, however, S. 2533 represents a constructive approach that contrasts with far more proscriptive language in House legislation, which the Department is on record as strongly opposing. While we are of the view that S. 2533 will help California's water supply, we are mindful that concerns voiced by other stakeholders regarding the operational provisions of S. 2533 have resulted in some controversy over the legislation. Thus, while the Department believes that concerns expressed about S. 2533 have been carefully considered, in the interest of providing additional tools to address the impacts of drought, we are prepared to work closely with this Subcommittee to discuss viable approaches to move forward legislation that addresses areas where widespread agreement exists, such as providing support for scientific studies, water conservation, reuse, recycling, and desalination. We believe these provisions are consistent with California's Water Action Plan as set forth by Governor Brown in 2014. As this Subcommittee is aware, water is a finite resource, and the more tools we have to increase our existing supply, the more options we have for meeting the many competing demands for this resource.

The Department appreciates the ongoing efforts of Senator Feinstein and this Subcommittee to work with our bureaus on the bill, and we pledge to continue this partnership moving forward. I would be pleased to answer questions at the appropriate time.