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TESTIMONY
ON S. 1759
THE WATER TRANSFER FACILITATION ACT OF 2009
by
HAMILTON CANDEE
ALTSHULER BERZON LLP
On behalf of
GRASSLAND WATER DISTRICT

Subcommittee on Water and Power
Senate Committee on Energy and Natural Resources
Washington, DC

November 5, 2009

**TESTIMONY
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Thank you Madam Chairwoman and Members of the Subcommittee. I appreciate the invitation to testify before you today on S. 1759, The Water Transfer Facilitation Act of 2009, which is intended to facilitate and expand voluntary water transfers in the Central Valley Project in California. My name is Hamilton Candee and I am a partner in the San Francisco law firm of Altshuler Berzon LLP. I am appearing today on behalf of the Grassland Water District, which is a contractor of the Central Valley Project (CVP) located in Merced County and a beneficiary of voluntary water transfers in the CVP. Grasslands is a participating organization within the Central Valley Joint Venture, an entity that was specifically referenced in the 1992 Central Valley Project Improvement Act (CVPIA) for its central role in promoting and facilitating the acquisition of adequate water supplies for Central Valley wetland habitat, including national and state wildlife refuges and privately owned wildlife habitat. In its work on the proposed transfers legislation, Grasslands has been coordinating its efforts in particular with Audubon California and Defenders of Wildlife, and with Ducks Unlimited and California Waterfowl Association, all founding members of the Joint Venture. A recent brochure prepared by Joint Venture members about Central Valley wetlands and the importance of the CVP refuge water supplies is attached to my testimony.

While Grasslands is supportive of the goals of S. 1759, we believe certain changes are needed to ensure there are no unintended adverse impacts from the legislation and to reaffirm the importance of meeting the goals of CVPIA with respect to wetlands and refuge areas. We appreciate the encouragement we have received from the authors of the legislation to provide suggested language improvements and we look forward to working with the Committee and the staff to Senators Feinstein and Boxer to identify ways to address each of our concerns. My written testimony sets out a more detailed statement of the predicament faced by Central Valley wetlands and the importance of fully implementing the CVPIA's refuge water supply provisions to address this ongoing predicament. In the interest of time I will be providing a short summary of this testimony today but I ask that my full written statement, including the attachments, be included in the record of this hearing. Thank you.

Background:

The loss of wetlands since the 1850s has been well documented by a variety of publications and reports. Surveys in the 1850s estimated there to be over 4 million acres of wetlands in California's Central Valley. By the 1950s, expanding development decreased Central Valley wetlands to an estimated 290,000 acres. Continued decline of Central Valley wetlands occurred between 1950 and 1970. Water supplies for managed wetlands

during this period were not secure. Most managed wetlands depended upon agricultural irrigation return flows, low-priority water contracts, or non-binding agreements for their water supplies. This situation continued during the 1970s until a severe drought during the latter part of the decade greatly reduced wetland water supplies, and in some instances, eliminated all wetland water deliveries. The combination of drought and poor wetland water supply reliability resulted in significant impacts to wetland habitat and water bird populations, and in particular, wintering waterfowl.

Partly in response to this crisis, the North American Waterfowl Management Plan (NAWMP) was enacted in 1986 and the Central Valley was identified as one of the major focal points for addressing the needs of North American waterfowl. The Central Valley Habitat Joint Venture (CVJV) was formed in 1988. Based upon the findings of the subsequent 1989 federal Report on Refuge Water Supply Investigations, one of the top priority goals of the CVJV became securing firm, reliable water supplies for managed Central Valley wetlands. Several CVJV partners worked closely with Congress to include wetland water supply provisions within the Central Valley Project Improvement Act (CVPIA) of 1992. In summary, the CVPIA was to provide key wetland basins with sufficient water supplies for the purpose of achieving optimum habitat management in all but the most critically dry years. To date, the CVPIA remains the most important legislative action ever taken to protect and restore Central Valley wetland habitat

The CVPIA authorized and mandated that historic water supplies and 2/3 of baseline CVP mitigation requirements (collectively called "Level 2" supplies) must be provided by the Secretary of the Interior from the Central Valley Project. In addition, the incremental water supplies necessary for wetlands to operate at full habitat development levels (known as "Level 4" supplies) were to be acquired through purchase from willing sellers and provided in 10% increments per year until 2002, when full water supply requirements were to be met. These full water levels have not been achieved, due in large part to federal and state budget shortages, inconsistency in the timing of water deliveries, and increases in water costs on the spot market. This shortfall has been a serious problem for Grassland Water District and other federal and state wetlands in the Central Valley. As we analyze the new proposed legislation, our goal is to ensure that the bill does not inadvertently aggravate this shortfall by making it even more difficult for Interior officials to carry out their Level 4 mandate, as well as the related diversification goal of CVPIA that also depends on transfers to succeed.

Since enactment of the CVPIA in 1992, delivery of water supplies of adequate quality and quantity to public refuges and the privately-managed wetlands of the Grassland Resource Conservation District (GRCD) has improved wetland habitat quality and benefited many wetland-dependent wildlife populations, including waterfowl, shorebirds, colonial water birds, and several threatened and endangered species. These benefits have been documented in annual reports to Congress and a variety of studies and reports conducted by individual refuge units.

Several long-term water conveyance/supply contracts and agreements were negotiated during the 1990s that increase the reliability of the CVPIA water supplies to be delivered over the 25-year contract term. However, water costs have also escalated as

water acquisitions to meet CVPIA, urban, and agricultural needs resulted in a sharp increase in spot market prices, further stressing limited budgets. Even if fully realized, CVPIA's refuge water supply provisions did not resolve the issue of firm and reliable supplies to all the NWRs, WAs and private wetlands in the Central Valley. The CVPIA required the Secretary of the Interior to investigate and report to Congress the water supply needs for the remaining private wetlands of the Central Valley and those lands included in the CVJV wetland restoration objective. This investigation, known as the "Central Valley Wetlands Water Supply Investigations of December 2000," identified available water supplies for existing private wetlands and water supply requirements to meet the wetland restoration goal of the CVJV 1990 Implementation Plan.

We strongly believe that the refuge water supply provisions are among the Act's greatest achievements to date. Vast increases in restored wetland acreage, seasonally flooded spring and summer habitat, bird use numbers on Central Valley wetlands, and increases in non-waterfowl wetland dependent species are but a few examples of what the CVPIA has already accomplished. Despite these successes, we are concerned that this recovery cannot be fully realized without the Bureau of Reclamation being given the resources to meet their statutory Level 4 refuge water supply obligations, and could be further impacted in future years due to the rapid increase in water costs and increased competition for CVPIA Restoration Fund dollars. I am attaching a chart that shows the shortfall in Level 4 deliveries, and how that shortfall has increased in recent years as the spot market price of water has gone up.

The Water Transfers Legislation:

Grassland Water District and several of the individual organizations within the Joint Venture will be providing written comments in the days ahead making specific suggestions for changes to the legislation to prevent adverse impacts to wetlands. For example, some of these comments will focus on clarifying the provisions of Section 3 of S. 1759 to ensure that the call for expedited environmental review does not create unintended consequences; others will address the concern that Section 2's expanded exemption from CVPIA not allow for "paper water" transfers by which a particular district might try to sell water that it is not currently using, water which in fact may be in use by other water users or wetland areas.

In my present testimony, I wish to draw the Subcommittee's attention to two particular problems, which we believe are easily solved without causing any harm to the goals of the bill. First, we understand it is the intent of the authors of the legislation to preserve existing protections of federal and state environmental laws that are otherwise applicable to water transfers, with the sole exception of the expanded exemption in subsection 3405(a)(1)(m) of the CVPIA as provided in Section 2 of the present bill, and the directive for programmatic environmental reviews in Section 3 of the bill. Unfortunately, because of the structure of the legislation, especially its status as a stand-alone bill rather than an amendment to CVPIA, this intention is not as clearly reflected in the legislation as it should be. In particular, we believe the numerous protections for wetlands and refuge water supplies provided in the CVPIA must be clearly reaffirmed as conditions on the newly expanded transfers authorized by this legislation. We believe this

can be easily achieved in different ways (for example, by revisions to either Section 2(a) or to Section 2(b)) and will be submitting proposed language under separate cover to make clear that, just as the San Joaquin River Settlement is now protected in the current version of S. 1759, all other applicable provisions of federal and state law, including but not limited to NEPA, the Endangered Species Act, the CVPIA and state water transfer laws, are also fully preserved.

Second, we are concerned that the protection and restoration of wetlands under CVPIA will become more difficult as a result of the measures provided in this bill and, therefore, believe one or more mitigation measures are needed to help counteract this unintended adverse impact. This impact will result from the reduction in available water for acquisition by refuges, the increasing market price for acquired water as more buyers are seeking that available water, and potentially through increased priority placed on water supply transfers authorized by this bill. To help counteract this adverse impact, our recommendation is to include language within the bill to facilitate and expand a particular kind of voluntary transfer that will assist wetland areas, specifically language that facilitates transfers from one refuge area to another.

We believe this language will also help reduce costs to the Federal Government, assist Interior in meeting its existing CVPIA obligations, and encourage efficient use of refuge water supplies by federal, state and private wetland managers. While some may believe that Interior and its refuge customers already have the ability to accomplish such refuge-to-refuge transfers, the fact that they are not at all common and that refuge water in the Sacramento Valley that is not needed in a particular year is returned to the CVP for general delivery to urban or agricultural customers before the water supply needs of other CVPIA refuges are met, indicates that further authority and direction from Congress is needed. We would note that this mitigation provision would not only help Interior meet its Level 4 obligations, it would also help promote the diversification of Level 2 supplies, which requires more surface water supplies to be successful. Again, in the coming days we and other organizations within the Joint Venture intend to provide the Committee with specific language proposals to accomplish this straightforward mitigation concept within the structure of S. 1759.

Conclusion:

The wetlands of the Central Valley of California have national and international significance and are truly an important resource for our state and country. In the CVPIA, Congress made clear that these refuge areas need to receive an adequate water supply through the combined Level 2 and Level 4 programs. While we support the goal of facilitating water transfers that is at the heart of S. 1759, we urge the Committee to revise the legislation as necessary to ensure that unintended adverse impacts to our Central Valley wetlands are minimized and to ensure that refuge-to-refuge transfers are specifically authorized to provide mitigation for the inevitable impacts that are caused. Thank you for considering our testimony.



KEEP THE PROMISE OF WATER FOR CALIFORNIA'S MIGRATORY BIRDS



October 2009

California's natural legacy of birds is under threat

California hosts more than 600 species of birds – a level of diversity that no state can match. Moreover, our state is a major stop on the Pacific Flyway, a sort of migratory superhighway for birds between Alaska and South America.

California's Central Valley supports some of the greatest concentrations of wintering waterbirds in the world – millions of waterfowl and shorebirds, and hundreds of species of birds and resident wildlife including threatened and endangered species. At certain times of the year, the sky over these spectacular Central Valley landscapes comes alive.

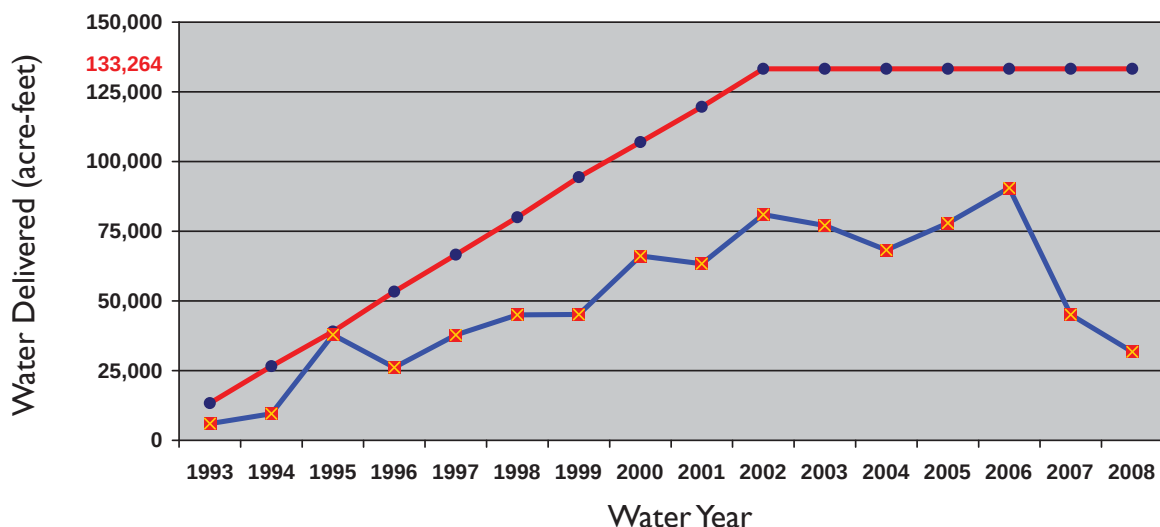
Over the last 100 years, the state's migratory bird populations have declined precipitously, and the primary reason for this is the loss of wetland habitat in the Central Valley. Land conversion coupled with tremendous demand for water – as well as drought – have caused a great deal of environmental damage.

Great strides have been made to help bring back our migratory birds. But today much of that progress is at tremendous risk because legislatively mandated commitments for water supplies to Central Valley refuges have not been fulfilled. We haven't kept our promise to California's migratory birds – and they're paying the price.



Brian Gilmore

Legally-mandated water supplies have never been delivered to Central Valley wetlands



● Amount of water mandated by CVPIA for optimal habitat
✕ Amount of water actually delivered
133,264 Acre-Feet: Total amount of water mandated annually for optimal habitat management on all CVPIA refuges

WE NEED TO KEEP OUR PROMISE TO CALIFORNIA'S MIGRATORY BIRDS

The Central Valley Project Improvement Act (CVPIA) was passed by Congress in part to compensate for the destruction of bird and wildlife habitat associated with the ecological disaster of Kesterson Reservoir, which turned thousands of acres of wetlands into selenium-laden ponds and killed or deformed vast numbers of wildlife.

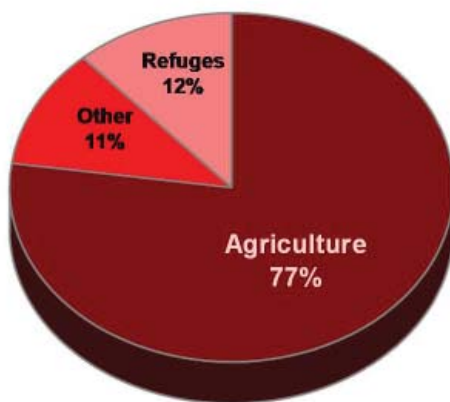
The legislation called for California's core wetland areas to receive federal water supplies. While this decision did return some of California's historic water supplies back to wildlife, this use still represents a small fraction of overall water supplies. Unfortunately, even this small obligation is not being met, due to the increased cost of water, water transfers, and decreased political attention to the public trust responsibilities associated with California's wetlands.

We cannot allow these critical wetlands to return to their beleaguered condition of the 1980s. While these supplies are obligated under federal law, the Bureau of Reclamation must still compete on the open market to purchase these supplies from willing sellers. Since 1993, the average cost of an acre foot of water has increased by more than 400%.

It is critical that Congress and the State of California take action to protect wetland water through the following actions:

- Increase federal funding to purchase adequate amounts of water for the seasonal needs of migratory and resident wetland-dependent birds.
- Fully mitigate all federal water transfer actions to avoid wetlands becoming a "third party impact." Moving water away from wetland and agricultural regions results in water market prices which wetlands cannot afford.
- Streamline wetland-to-wetland water transfers to allow managers to get CVPIA water where it is needed most in any given year. Wetlands should be afforded the same ability as any other water user to put diminishing water supplies to the best use for the needs of wildlife.
- The State of California must vigorously support its water supply obligations for state, federal and private wildlife areas as defined in the CVPIA.
- Support the inclusion of at least \$100 million for wetlands-related water supplies within all proposed funding solutions to restore the Bay-Delta system.

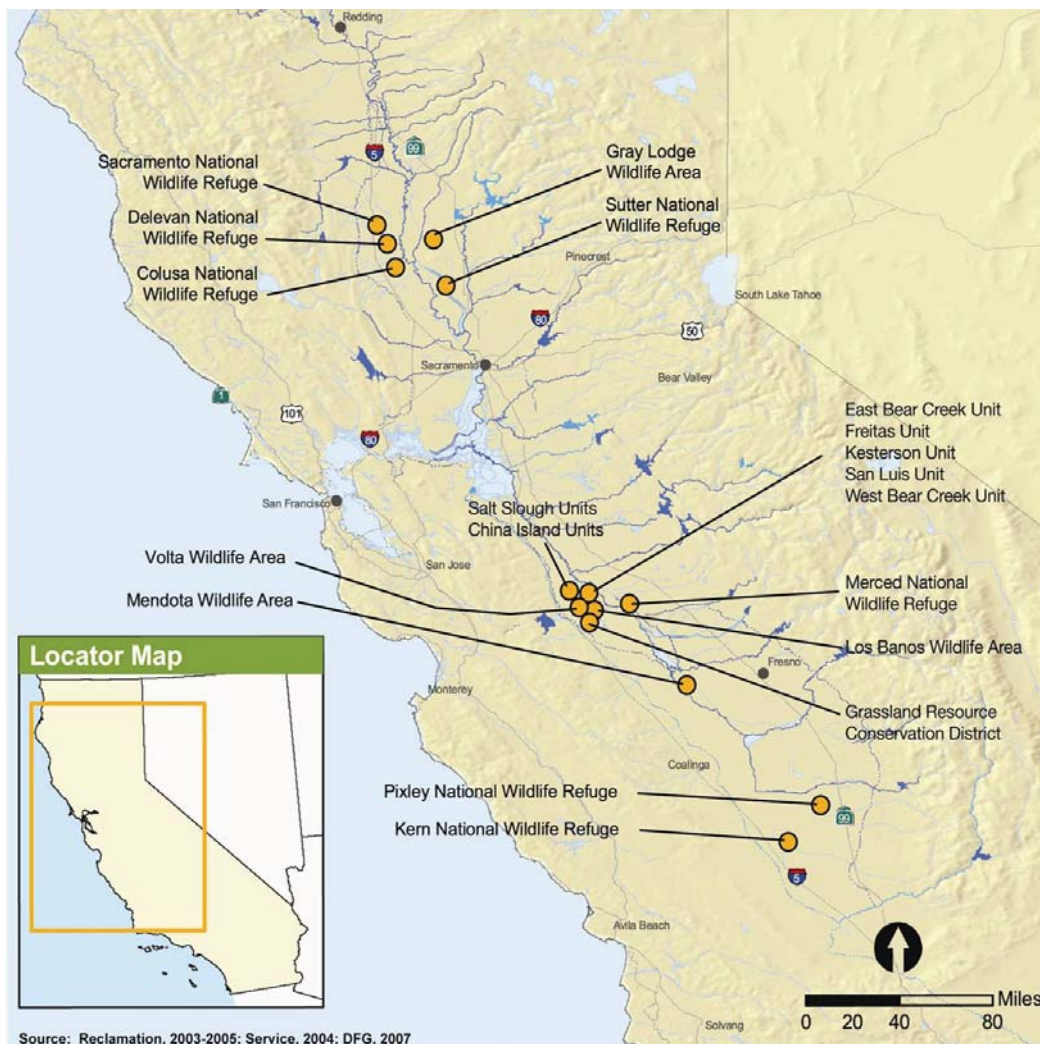
Central Valley Project water allocations
Congressional Research Service, March 2009



Mike Wolder

Central Valley Wildlife Refuges

U.S. Fish & Wildlife Service
California Department of Fish & Game
Grassland Resource Conservation District



The Central Valley Joint Venture is one of 18 Joint Venture partnerships in the United States, established under International Migratory Bird Plans.

Joint Venture Management Board:

Audubon California
CA Assn. of Resource Conservation Districts
California Waterfowl Association
Defenders of Wildlife
Ducks Unlimited
PRBO Conservation Science
River Partners
The Nature Conservancy
Trust for Public Land

Participating Organization

Grassland Water District

The mission of the Central Valley Joint Venture is to work collaboratively through diverse partnerships to protect, restore, and enhance wetlands and associated habitats for waterfowl, shorebirds, waterbirds, and riparian songbirds, in accordance with conservation actions identified in its 2006 Implementation Plan.

For more information, visit the Central Valley Joint Venture at www.cvjv.org

Annual CVPIA Refuge Incremental Level 4 Water Deliveries (1994-2008) - Plus Cost per AF since 2002

