



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611

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2000 Pennsylvania Avenue, N.W., Suite 5300, Washington, DC 20006
Phone: (202) 785-0600 | Fax: (202) 785-1234 | www.bbklaw.com

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San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

J. G. Andre Monette
(202) 370-5303
andre.monette@bbklaw.com

Testimony of J.G. Andre Monette on the House Natural Resources Committee’s Water, Oceans, and Wildlife Subcommittee hearing on H.R. 4723, the Salmon Focused Investments in Sustainable Habitats Act of 2019 (“FISH Act”)

Chairman Huffman, Ranking Member McClintock, and Subcommittee Members:

Thank you very much for giving me the opportunity to testify on H.R. 4723. My name is Andre Monette and I am a partner in the Washington DC office of Best Best & Krieger. I am an attorney and my practice focuses on assisting clients with water supply and water quality issues in the American west. My clients, by and large, are farmers, and cities and public agencies that provide water supply and sewage treatment, all of whom like to think of themselves as friends of the environment. My comments today are my own, but my experience working on these issues informs my testimony.

I think it bears noting how important it is for all of our citizens to have access to a clean, healthful supply of water. Water is life. It is the foundation of our food supply, and it is the foundation of our economy. Without it, we have nothing. I highlight that because there are many countries in the world where access to potable water and sewage treatment are not given, and the struggle for health, equality and economic development is very real.

The water supply system we have in the Western United States is unprecedented in the history of the world. We can move wet water thousands of miles from Redding California to the Mexican border at San Ysidro, based on a network rivers, canals and reservoirs. On the Colorado, we can share water between seven states and a foreign country with a network that allows transfers and trading across thousands of miles of watershed. Via this network, a desalination project in Baja California, Mexico could produce water that offsets demand in Las Vegas.

The connectivity of this infrastructure allows water managers to maximize efficiency of their supplies, and provides resiliency in the event of drought or other natural disaster. The system provides the foundation for the great cities of the American west:

- San Francisco – Hetch Hetchy
- Silicon Valley – California State Water Project
- Phoenix – the Colorado River and the Salt River Project
- Las Vegas – the Colorado River



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- Boise – the Snake River
- Southern California – a portfolio of supplies including the State Water Project and the Colorado River.

Without this system, the economic engine powering these cities would not exist. California's economy, the 5th largest in the world, would not exist. Which is why it is so critical that Congress consider the impacts to western water supply infrastructure when developing legislations.

H.R. 4723, the Salmon Focused Investments in Sustainable Habitats Act of 2019 ("FISH Act") proposes to do three things: establish salmon conservation areas and strongholds; provide grants for habitat restoration projects in these areas; and create a new standard in the National Environmental Policy Act ("NEPA") for projects that take place in locations that could impact the salmon conservation areas and strongholds.

On its face, the bill appears well-intentioned and in fact provides federal dollars for habitat restoration projects – something that very few people would object to. However, as always, the devil is in the details, and the bill as currently drafted has the potential to intersect with other federal laws in a manner that would constrain the ability of water agencies and users to continue to operate.

As currently drafted, the FISH Act imposes no limit on how or where a Salmon Conservation Area can be established. Paragraph (3)(1)(c) provides that a watershed must only be "regionally significant for the conservation of salmon" in order for it to be designated as a Salmon Conservation Area. There is no requirement that salmon actually be present in the watershed, or that the watershed be currently suitable for salmon. It may only require some party in the federal government to decide that it would be nice if salmon could live there some day. And this decision could be made without input from water users in the watershed.

This aspect of the FISH Act is directly contrary to a recent Supreme Court decision interpreting the Endangered Species Act. In *Weyerhaeuser Co., v. United States Fish and Wildlife Service*, 586 US __, 139 S. Ct. 361 (2018), the Supreme Court held that the Fish and Wildlife Service lacks authority under the Endangered Species Act to designate areas as critical habitat if the subject species is not present.

In that case, the U.S. Fish and Wildlife Service ("FWS") included a privately owned parcel of land in Louisiana in an expanded designation of critical habitat for the dusky gopher frog. The endangered frogs had not inhabited the land for decades, and it would have needed to be restored to be suitable for the frogs. In a unanimous decision, the Court found that FWS acted beyond its authority under the Endangered Species Act. The FISH Act appears designed to create a new source of authority for such action with respect to salmon, despite the fact that the Supreme Court found the concept unlawful.



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Designation of a protected area matters to water users on a river because the designation could stop water projects directly, via interplay with Section 404 of the Clean Water Act, or via state laws like the California Environmental Quality Act.

For example, the Clean Water Act, and federal regulations issued pursuant thereto, require the Army Corps of Engineers to consult with FWS before issuing a 404 permit, and prohibit the Corps from issuing a permit if doing so would have “[s]ignificantly adverse effects . . . on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat . . .” (40 C.F.R. §230.10(c)(3).)

Under the FISH Act, this regulation could be construed to mean that if a project involves work that triggers section 404 of the Clean Water Act, it cannot go forward in a Salmon Conservation Area or Salmon Stronghold unless it has no impact on salmon habitat – even if salmon are not present, and substantial improvements to the watershed must be made before the habitat is suitable for salmon. The FISH Act’s NEPA requirements would impose similar restrictions.

The FISH Act would create a new standard for projects that take place in or near the proposed Salmon Conservation Areas. The bill provides that: “any Federal action carried out with respect to a salmon conservation area identified under section 4 shall be the action that has the least adverse impact on such salmon conservation areas.”

The proposed language would be a major change to NEPA. As presently written, NEPA applies to “Major Federal Actions.” The proposed change would apply it to any federal action, no matter how small. More importantly, it would mandate that only projects that have no impact on salmon habitat could move forward if the federal government is involved in any way. The impact of this kind of requirement could be very disruptive. Maintenance to existing infrastructure in Salmon Conservation Areas could be shut down. The ability of water suppliers to operate could be shut down.

Additionally, requiring the least adverse project for salmon could prevent certain types of projects that would otherwise be beneficial for the environment. A habitat conservation project for a bird or other species of fish might not be the best project for salmon and under the proposed standard, might not be able to move forward. At a minimum, the proposed change will create confusion over how to implement the new standard because there are different existing standards in NEPA and the Clean Water Act.

Lastly, dedicating federal dollars to habitat conservation is a laudable goal. It appears that the current draft of the FISH Act is intended to achieve that goal, but with additional conditions. Congress has other options with less risk of unintended consequences. These include block grants, grants administered by EPA via its “State and Local Assistance Grants” program, or grants for habitat conservation programs that give money for salmon habitat restoration projects without creating special conservation areas or changing NEPA. In all cases, a wide range of stakeholder input is critical to a successful program, especially if there are complex interplays with other laws.



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Thank you for your focus on this important issue and for the opportunity to provide input on the current draft of the FISH Act. I look forward to working with the Committee and its members on this and similar legislation.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. G. Monette', with a large, sweeping flourish extending to the right.

J. G. Andre Monette
of BEST BEST & KRIEGER LLP