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November 30, 2000

VIA FACSIMILE AND CERTIFIED MAIL

Ms. Betty Riley
U.S. Bureau of Reclamation
2800 Cottage Way, MP-152
Sacramento, CA 95825

Re: The West Side Irrigation District/CVP Contract

Dear Betty:

This letter contains the comments of The West Side Irrigation District on the November 20, 2000 draft CVP M&I Shortage Policy.

INTRODUCTION

The West Side Irrigation District entered into a water service contract with the United States in 1977 for both irrigation and municipal water. Section 7 of the Contract clearly specified that M&I use was allowed under the contract. The 1977 contract provided that shortages would be allocated among those entitled to use water from the Delta Mendota Canal according to a formula, on a pro-rata basis. There was no discussion of a priority for M&I water use, nor was there any provision placing the contractor on notice that others would be entitled to a higher priority for water. The allocation formula is carried over in the District's current interim contract.

The proposed CVP M&I Shortage Policy arbitrarily selects certain CVP contractors to receive a higher priority for CVP water because they use it for M&I purposes. This policy would decrease the amount of water available to all other CVP contractors, and violate the water allocation requirements of the water service contracts. There is no basis in law or policy that would support implementation of such a policy. Nothing in CVP contracts, nor in Reclamation law, grants any CVP contractor or CVP purpose of use any special priority or preference to water over any other CVP contractors or CVP purpose of use. Yet, through this proposed policy the Bureau attempts to grant selected CVP contractors a priority over other CVP contractors with the same purpose of use.

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The draft policy raises complex legal and policy issues. Despite this fact, the Bureau is treating the policy as a fait accompli, stating in workshop sessions that no major changes will be made. Final adoption of this policy would violate the majority of the CVP water service contracts as well as commitments made by the United States in 1977 when the policy was first circulated for public comment.

ANALYSIS AND MITIGATION

The 1977 Draft Administrative Proposal states that:

> "Reclamation recognizes that any policy that provides a minimum level of reliability to M&I contractors may put an additional burden on the agricultural contractors and hence rural communities. Consequently, as stated in the Administrative Proposal, Reclamation is committed to completing an analysis to identify and understand these impacts and to explore potential mitigation measures before any M&I water shortage policy is finalized." (at page 10).

This analysis has not been undertaken. The CVPIA PEIS alternatives assume that the policy will be implemented as it provides for maximum shortage of 25% for CVP Municipal and Industrial Water Service Contracts. [Final PEIS, October 1999, Table II-1] Consequently, there has been no comparison of operations with a pro-rata allocation of shortages to all contracts and operations applying the M&I Shortage Policy. Without this analysis there is no way to quantify the impact on other CVP contractors, both M&I and Agricultural, and no way to require mitigation.

In its 1997 responses to comments, Interior stated that it:

> "... believes that any water from a permanent transfer or assignment of CVP water that occurs after September 30, 1994, from agricultural to M&I purposes should retain the agricultural shortage. The transferee or assignee may request that water obtained be eligible for M&I reliability, but any adverse impacts to agricultural water supplies must be fully mitigated by the transferee or the assignee." (at page 13).

The requirement that M&I use authorized by law, but implemented after September 1994 fully mitigates adverse impacts to agricultural water supplies, but M&I use implemented prior to September 1994 not be required to do so is arbitrary and capricious.

ARBITRARY USE OF 1994

The Department of the Interior released its initial draft Municipal and Industrial water shortage policy on February 17, 1994 and requested public comment. That Draft Policy did not contain any reference to a 1994 date. In fact, that policy was based upon historical use, and reasonably defined historical use as the average CVP water deliveries during the last three years of normal water deliveries, adjusted for growth. Nothing in that draft policy would have triggered concern for CVP contractors contemplating future M&I usage, nor placed it on notice that it needed to "identify its projected M&I use".

Public meetings on the policy were held in 1995 and 1996, and it was in the June 9, 1997 draft Administrative Proposal on Urban Water Supply Reliability that the September 1994 date was first incorporated. By that time, however, the magical September 1994 date was already cast in stone. Reclamation indicates that "September 1994 was selected because it was the end of the fiscal year in which the draft M&I Water Shortage Policy was released for comment". However, as mentioned above, at the time that the draft was released for comment there was no indication that future M&I demands had to be identified by contractors by a date certain, if ever. Reclamation has not articulated a rationale basis for incorporation of September 1994 as a punitive cut-off date in the policy.

The terms and conditions of the November 20, 2000 M&I Water Shortage Provisions state that the M&I Water Shortage Policy applies only to that portion of the CVP water used historically for M&I purposes and "identified as projected M&I demand as of September 30, 1994." There is no definition, however, of how a contractor would have "identified" its "projected M&I Demand" at that time. Short of providing all CVP contractors with written notice and requesting them to identify their projected M&I demands, Reclamation cannot arbitrarily cut-off a contractor's opportunity to obtain a priority equal to that of other similarly situated contractors.

CONCLUSION

Reclamation is attempting to accommodate the legitimate needs of municipal contractors to be able to rely on their water supply for planning purposes. However, it attempts to do so in an arbitrary manner that cannot be supported by law and violates current Reclamation policy and water service contracts. The proposed policy results in adverse impacts to CVP contractors not covered by the policy, which is a violation of their contracts. The selection of an arbitrary date results in disparate treatment of similarly situated contractors. Finally, no NEPA analysis on the proposed priority has been undertaken.

Reclamation cannot proceed to adopt the policy in its current form.

Very truly yours,

JEANNE M. ZOLEZZI
Attorney-at-Law

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cc: Ms. Barbara Kleinert, The West Side Irrigation District

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