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CITY OF FRESNO
CONTRA COSTA WATER DISTRICT
EAST BAY MUNICIPAL UTILITY DISTRICT
SACRAMENTO MUNICIPAL UTILITY DISTRICT
SANTA CLARA VALLEY WATER DISTRICT

January 10, 2001

Ms. Betty Riley-Simpson
Mid-Pacific Region
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Re: Draft Central Valley Project M&I Water Shortage Policy (December 22, 2000)

Dear Ms. Riley-Simpson

This letter is written on behalf of the City of Fresno, Contra Costa Water District, East Bay Municipal Utility District, Sacramento Municipal Utility District, and the Santa Clara Valley Water District ("Five Contractors") and is in regard to your draft Central Valley Project M&I Water Shortage Policy dated December 22, 2000.

The Five Contractors are grateful for the significant effort put forth by Reclamation staff in the development of this draft policy. While the draft policy is not ideal from our perspective, it does treat many issues in an intelligent and good public policy manner. However, there remain a few issues which have not yet been addressed, and which the Five Contractors believe must be addressed in order for the draft policy to be clear, workable, effective, and promoting of our common goals.

As proposed, M&I reductions are a percentage of a historical usage number, as that number is then adjusted. A historical use number is selected (the selection criteria are discussed below), and that number is then adjusted upward to reflect growth, the use of non-CVP supplies, and other criterion. This "historical use as adjusted" is the number to which the percentage reduction is then applied.

There are, however, a number of detailed issues within that general framework that cause the Five Contractors significant concern. Those issues are discussed first. Following that discussion is a more detailed discussion relating to syntax and related issues.

1. Non-CVP Supplies: Reclamation's draft largely presents a workable framework for the accounting for non-CVP water supplies. However, there are three issues that the Five Contractors believe require further discussion. First, under Reclamation's draft, it is not clear that a contractor who relies upon non-CVP supplies receives a *one for one*

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credit for each acre-foot of non-CVP water. Rather, the draft policy simply says that an adjustment will be made, with no commentary on the degree of the adjustment. The concern here is that without stating that an acre-foot credit for each acre-foot of non-CVP water used will be given, it is ambiguous as to the extent of the credit or adjustment. Indeed, by giving full credit for use of non-CVP supplies, Reclamation can avoid creating an incentive for contractors to use the CVP supply in wet years. It should be clear that a contractor with multiple sources of supply can rely on the CVP in any year type to meet a portion of the actual use within the contractor's service area without regard to the historical breakdown of CVP and non-CVP supplies.

Second, the draft policy requires that the use of the non-CVP water (for which the contractor seeks the credit) must benefit the CVP as a whole, with no explanation of the meaning of the phrase "must benefit the CVP as a whole." Broadly construed, such a requirement is met every time that non-CVP supplies are used, because such use leaves more CVP supplies available for CVP contractors. We understand this to be the clear rationale for including non-CVP supplies into the formula for adjusted historical use. If, however, a more specific test is intended, it would seem that the test would never be met as there are parts of the project that are hydrologically disconnected, and thus while a non-CVP supply may significantly benefit the majority of the CVP community, or a significant region of the CVP as in the case of reduced usage by Santa Clara south of the Delta, there could be a single contractor in a hydrologically unconnected division that does not benefit. For this reason, the Five Contractors suggest that this condition be deleted.

Third, Reclamation's draft requires that Reclamation must approve the crediting of an amount of use of non-CVP water in advance of such use counting toward the adjusted historical use. Assuming this to be the case, the Five Contractors believe that the mechanisms of approval associated with adjustments for non-CVP supplies deserve mention in the policy. Specifically, the Five Contractors believe that the policy should provide that "upon request of the contractor, but no more frequently than once each Year, Reclamation shall consult with the contractor to update the adjustment of the contractor's historical use." In this way, the contractor can have increased certainty and predictability in knowing what its adjusted historical use is. In addition, such an updating procedure would also include updates on the issues of extraordinary conservation measures, and other relevant criteria.

2. Historical Use and Adjustments: Reclamation's draft proposes that base historical use (before adjustment) be based upon the last year in which 100% of the contractor's entitlement was made available. This definition is unduly restrictive, as it ignores what may be higher historical deliveries, and more relevant historical deliveries, in favor of what would be a hydrologically perfect year. Furthermore, it would assign to M&I users a wet year use for a dry year (the year in which the policy would come into play). Because M&I users are not being allocated shortages based on contract amount, but on historical use, the usage must be adjusted to a more appropriate level.

The Five Contractors propose that the base historical use be calculated individually for each contractor, based upon the average quantity of water put to beneficial use in the contractor's service area during the last three years of water deliveries not affected by water shortages (same language as in CCWD's 1994 Amended Contract). The calculated base historical use would be agreed upon during individual contractor negotiations and set forth in an exhibit to the contract which could be modified by the parties as necessary during the term (but without having to formally amend the contract).

3. Reference to Needs Analysis: Attached to the draft policy was a sheet entitled "CVP Analysis of Need for M&I Water." This table is included for the apparent purpose of listing the information in the last column of the table - namely the "Quantity of CVP Water Eligible for M&I Reliability." Reclamation's desire to include a listing of the quantity of water eligible for M&I reliability is understood. However, the Five Contractors are concerned about the inclusion in the table of the column entitled "2025 Projection of M&I Needs - Needs Assessment." These contractors do not understand the purpose for which this information is included as an attachment to the draft policy. In fact, the policy does not reference the "needs analysis" at all. The contractors are concerned that such inclusion somehow suggests that the information about what quantity of water was found to be an assessed need is somehow relevant to the policy - which it clearly is not. Therefore, the Five Contractors believe that all information not necessary for the table should be deleted from the table so as to eliminate potential future confusion. In addition, as the table purports to deal with a CVP-wide analysis, the Friant contractors should also be included.

4. Trigger for Health and Safety: In Reclamation's revised draft, the concepts of deliveries "below 75%" and the concept of "health and safety" needs have been severed, unlike in previous discussions. Instead, under Reclamation's draft, Reclamation has discretion on how to apportion shortage once M&I contractors are reduced to 75% and irrigation contractors are reduced to below 25%. Separately, M&I contractors are only entitled to deliveries to address our health and safety needs when the Governor has declared a water emergency. The danger to M&I contractors from this scheme, however, is that Reclamation could declare significantly reduced deliveries to M&I contractors when the Governor has not yet declared an emergency. For example, an emergency may exist for reasons unique to the CVP which do not implicate the rest of the State's water users.

   The Five Contractors believe that the following revised proposal would be logical from a public policy perspective. As used in the policy, health and safety is the level below which the contractor cannot satisfy the minimum health and safety demands within the contractor's service area. If this is truly the minimum deliveries which the contractor needs, then a trigger should not be required for the health and safety levels to apply. Rather, there should be an *omni-present floor* that ensures that the contractor will always receive at least health and safety levels. This approach is consistent with California Water Code section 350 which vests with the governing board of the water

agency the authority to determine when a water shortage emergency exists, and specifies standards to apply in determining when such an emergency exists.

5. Standards for Health & Safety: Reclamation's draft states that Reclamation will make the determination of what water deliveries are required in order to satisfy health and safety levels, and that such determinations shall be based upon state standards or other standards. A better and more sensible way to determine the health and safety level is to provide for consultation between the contractor and Reclamation. Under such a consultation, the contractor would determine the appropriate health and safety level in light of the unique circumstances within the contractor's service area. In this way the required expertise regarding local conditions is brought by the contractor while the consistency from plan to plan, to the extent appropriate, is ensured by Reclamation's involvement.

Following is a proposed redraft of the applicable portion of the draft Shortage Policy dealing with health and safety levels (both trigger issues and standards issues):

> Health and Safety Levels: Taking into consideration the contractor's available non-CVP water supplies (if any), Reclamation will not reduce deliveries to the contractor below the level necessary to protect health and safety. If the Contractor's available supply is reduced so that the contractor has reached or is approaching a water shortage emergency, prior to the contractor's governing body declaring such an emergency and before the contractor sets a minimum health and safety level, when practicable the contractor will consult with Reclamation and will review criteria applied by similarly situated California M&I water supply entities for determining appropriate public health and safety levels and purposes of water use during times of severe drought. Reclamation will endeavor to provide additional deliveries, beyond those to meet health and safety levels, when such water may be allocated to the contractor.

6. Extraordinary Conservation Measures: Another significant issue is that of extraordinary conservation measures. The Five Contractors recognize that as standards change in the region, state, and country, what is an extraordinary measure one year may be a best management practice in the future. Therefore, the Five Contractors understand the need for flexibility in the determination of extraordinary conservation measures. However, in order to achieve the certainty and reliability sought by the contractors, merely vesting in Reclamation the authority to recognize extraordinary conservation measures, where Reclamation has unrestrained discretion in "determining" what is a measure, is not adequate.

The Five Contractors suggest that the policy use an independent standard to determine whether a conservation measure is an extraordinary conservation measures. Specifically, the policy should state that when requested by the contractor or by Reclamation, but no more often than once every year, the contractor's conservation measures will be measured against the then-current Best Management Practices

developed by the California Urban Water Conservation Council. Any measures or water savings in excess of the BMPs will be considered extraordinary. In addition, special circumstances not addressed in the BMPs will be considered by Reclamation in calculating an adjustment for an extraordinary conservation measure. In this way Reclamation can achieve its goal of flexibility and the contractors will achieve their desired reliability and certainty.

7. Definition of Shortage: The Five Contractors also note that the first paragraph of the draft policy includes a listing of what may cause a shortage. The contractors note that the "definition" is slightly different than the "definition" contained in article 12 of the draft contracts. Since the shortages addressed by this draft policy only occur if there is a shortage under the contract, the contractors recommend the conformance of the "definition" in the policy" with the one in the draft contract.

8. Forecasting of Shortage: The Five Contractors are concerned about the potential for two types of problems resulting from Reclamation water availability forecasts. Reclamation forecasts of restricted deliveries to M&I contractors may result in contractors having to hold drought hearings and impose water use restrictions on their customers.

   Contractors are concerned about having to take such actions on the basis of January or February forecasts by Reclamation in years when subsequent precipitation eliminates the need for such measures. This problem can be eliminated if Reclamation agrees to not reduce availability of water to M&I contractors below 90% of the adjusted historical use until the 90% and 50% exceedance forecasts converge in April. If a determination is made that shortages do need to be applied greater than 90% of the adjusted historical use then they become effective June 15 which allows time for implementation.

   Contractors are also concerned about learning later in the year that water use restrictions are needed, and having to impose more stringent restrictions because the reduced allocation is based on a percentage of a full year's deliveries. This problem can be avoided if Reclamation agrees to reduce availability of water to M&I contractors in periods of shortage solely on a prospective basis, rather than retroactive to the beginning of a contract year, and to further limit the shortages at the beginning of a drought period.

9. Other Issues: The remainder of the issues relate to issues of syntax, technical corrections, and other issues of a relatively minor nature:

   9.1 Paragraph 2 (introduction), fourth line, second word - "would" should be changed to "will"

   9.2 Paragraph 3 (introduction), second line, fourth and fifth words - "and actual" should be deleted because we are speaking of future projected deliveries in this second half of the sentence

9.3 Paragraph 3 (introduction) third line - reverse the words "and" and "generally"

9.4 Paragraph 3 (introduction) fourth line - insert a comma after "Thus"

9.5 Paragraph 3 (introduction) second from the last *sentence* - should be made into a parenthetical

9.6 Paragraph 1 and throughout (policy) - the policy is clearer than previous drafts by distinguishing between "historical use" and "adjusted historical use." However, a further clarification could be made by instead distinguishing between "base historical use" and "adjusted historical use."

9.7 Paragraph 1 (policy) third line - a clarification is required because the language used speaks of [adjusted] historical use of CVP water. This is an improper limiter because the formula for non-CVP supplies permits non-CVP water to be included in the calculation for the adjusted historical use.

9.8 Paragraph 4 (policy) - the policy uses the term "contract entitlement." It should instead use the term "contract total," the term used in the south-of-Delta contracts.

9.10 Paragraph 4 (policy) fourth line - insert the word "by" after the word "reduced"

9.11 Tables 1 and 2 (policy) - the headers should read "irrigation *contract* allocations" and "M&I *contract* allocation."

9.12 Paragraph 6 (policy) second line - replace the phrase "will need to" with "may"

9.13 Paragraph 7 (policy) second-to-the-last sentence - move the sentence dealing with Reclamation's goal of providing health and safety levels for traditional irrigation deliveries into its own new paragraph. The concepts contained in the sentence have nothing to do with the M&I contractors being discussed in paragraph 7, and the inclusion of that sentence only adds confusion.

9.14 Paragraph a (definitions) - replace the phrase "the term historical use shall mean" with "the basis for determining the base historical use shall be"

9.15 Paragraph c (definitions) - immediately before the last sentence, insert the phrase "For example,"

9.16 The Five Contractors further suggest that Reclamation adopt the following definition for non-CVP supplies: "Non-CVP Supply shall include all water used from any source other than CVP water to satisfy M&I customer demand within Contractor's service area.

Once again, we appreciate the opportunity to comment on the draft policy. The Five Contractors believe that the draft policy, if modified in a manner consistent with the suggested changes in this letter, could be a fair and even handed policy that would benefit both M&I contractors and the United States.

Sincerely,

Gary W. Darling
Contra Costa Water District