

**Refuge Water Supply Negotiations  
Negotiation Session  
June 19, 2000**

**Summary of Meeting**

Participants: Stan Yarbrough (USBR-Sacramento), Jim Turner (Office of the Solicitor), Rob Allerman (USBR-Sacramento), Felix Arteaga (CDFG), Nancee Murray (Attorney, CDFG), John Beam (CDFG), Joel Miller (USFWS), Kim Forrest (USFWS), Natalie Wolder (USBR-Willows), Chuck Marshall (USBR-Sacramento), Buddy Smith (USBR-Tracy), Jon Anderson (USBR-Fresno), Sheryl Carter (USBR-Fresno), Barbara Hidelburg (USBR-Fresno), Daniel Cardozo (Grassland Water District), Pepper Snyder (Grassland Water District), Jeff Kerry (GWD), Jim Moore (GWD), Dean Kwasny (GWD), Matt Franck (CH2M Hill)

Public: Robert Stackhouse (Central Valley Project Water Users Association), Maria Solis (East Bay Municipal Utility District)

The session began at 1:00 p.m.

Stan Yarbrough asked all attendees to please sign the sign-in sheet. He then reviewed the Role of the Public during the negotiation session and mentioned the public would be provided the opportunity to comment at the end of the session.

Mr. Yarbrough asked the California Department of Fish and Game (Department), Grassland Water District (District) and the U.S. Fish and Wildlife Service (Service) to each provide a letter to Reclamation listing the negotiation team members, their role and telephone number.

Discussion commenced on the “draft” water service contract that was provided to the Department and the District on June 13, 2000 by e-mail with a hard copy and transmittal letter also sent on June 13, 2000. Mr. Cardozo provided his initial comments, listed in his order of significance rather than in order in the contract. Mr. Cardozo started by noting that there had not been sufficient time to completely review the document in detail, however his comments are as follows:

- a) the District will need to meet with CDFG and FWS to review all comments.
- b) the District will provide a redline/strikeout by the next meeting.
- c) this negotiation process is not seen as an adversarial situation.
- d) the District feels that full implementation of the “Act” and the “Administrative Proposal” is critical.

1. Delivery of Level 4 supplies is an “obligation” of the Secretary and “shall” be provided. The “shall” is stated many times. Significant concern related to the language in the draft for providing the Level 4 supplies.
2. Shortage Provision - The language in the draft contract should be the same as in the statute. Concern as to use of irrigation water contractors where the statute uses agricultural deliveries.
3. Definition of Critically Dry Year - The language in the draft is not complete as in other

contracts for the Sacramento River and Exchange contractors contracts.

4. The definitions for Level 2 water supplies and Level 4 water supplies in the draft is different than the “Act” and should be exactly the same.
5. Suitable quality water - the definition is inconsistent with the definition used in the conveyance contracts. The “Act” requires water of suitable quality be delivered to the refuges.
6. Pooling and Transfers - Suggest that the two issues be addressed in separate articles and pooling could be a subsection of reductions. All refuges should be included in the pooling as was reflected in the “Administrative Proposal”. The draft does not appear to reflect this approach.
7. Water Conservation - the ICP report that was prepared as a cooperative effort has been intended to be the framework and guide for water conservation on the refuges and it is not even mentioned in the draft contract. FURTHER... the “Administrative Proposal” reflects that conserved water would go to other wetland and wildlife needs.
8. Acquired water and water rights - the two (2) draft contract articles are inconsistent and future acquired water should not reduce the quantity of CVPIA Level 2 water supplies.

There are also some technical legal concerns that will need to be reviewed and the redline markup will show those:

- a) Concern as to including the article on ESA
- b) Limitations on U.S. Liability goes beyond Windstar and is too broadly worded.
- c) Validation of contract, the District believes this does not apply since this is not a repayment contract.

Felix Arteaga then laid out the Department’s issues which were basically the same as those provided by the District. Mr. Arteaga stated he would like to see a definition for beneficial use and points of delivery. He then summarized the Department’s major issues:

- a) Treatment of existing water rights and future water rights
- b) Too much authority lies with Reclamation, seems to be a lack of partnering
- c) Constraint on availability of water
- d) Contradictory terms between water and water rights
- e) Will be looking closely at exhibits

Mr. Yarbrough stated he had available drafts of the exhibits to the contracts. He asked the District what their time frame would be to prepare a redline/strikeout version of the contract addressing the issues presented today. Mr. Yarbrough noted he hoped it would be before the next negotiation session. Mr. Cardozo was hopeful too that he could have a redline/strikeout draft available. Mr. Yarbrough asked Mr. Arteaga if the time line sounded feasible. Mr. Arteaga responded yes.

The group then proceeded through the contract.

Joel Miller stated he didn't have much more to add to what had already been said by the District and the Department. He offered looking at the recitals, more could be added to emphasize the team approach, which would then need to be defined. He suggested phrases such as "Spirit of cooperation and coordination", "Assure benefits", "Assure water supply required by law, and other requirements of law", "optimizing benefits".

Mr. Cardozo asked if the final recital was the place where the existing water supplies were defined in the contract. Mr. Yarbrough responded Exhibit A is referred to in Article 3. Mr. Cardozo asked why there was no mention of the existing agreements Reclamation has with the District. Mr. Yarbrough responded he was working on that now, that reference to the existing agreements would be somewhere in the contract, either in the recitals or as an article in the contract.

Mr. Cardozo remarked the definition of critically dry year was not as complete as it is in other Reclamation contracts. Mr. Arteaga added it's the paragraphs that follow when looking at the other contracts which reference the Shasta Index. Jim Turner asked to which contracts were Mr. Cardozo and Mr. Arteaga referring. Mr. Cardozo and Mr. Arteaga replied they were referring to the San Joaquin Exchange contracts and the Sacramento River settlement contracts.

Mr. Arteaga asked, with regard to the contractor boundary, if the definition was referring to a specific geographical area of the refuge. He felt the definition was confusing. Mr. Yarbrough replied yes. Jim Moore asked what "if such revisions are acceptable to the Contracting Officer" meant in the definition for Contractor Boundary. Buddy Smith said it's the area to which Project water will be delivered. Mr. Moore still was not clear on the definition and suggested just revising exhibit B. Mr. Turner offered the District was saying they would acquire lands and simply revise Exhibit B and Reclamation saying the portion of the land within the refuge boundary after the land acquisition. He stated this language is similar to the language in the general water service contracts. Mr. Cardozo remarked he believed it was Interior's policy to find, save, conserve water and that those supplies could go to other wetland purposes. Mr. Turner offered if the District acquired lands without acquiring additional water, then the District would be spreading water over an even greater area which may not meet the objectives of the law. Mr. Cardozo remarked if the District acquired additional water or conserved, then that is water which can then be used, and the obligations under this contract stay the same.

Mr. Cardozo asked why the definitions for Level 2 and Level 4 do not use the language of the Central Valley Project Improvement Act (Act). Mr. Yarbrough responded the Act says in accordance with the Dependable Water Supply Needs Table. Kim Forrest stated the current definitions imply a ten year rolling average. Mr. Yarbrough stated the definitions were taken from the 1989 Report on Refuge Water Supply Investigations. Mr. Miller suggested adding "San Joaquin Basin Action Plan Report" to the definitions. Mr. Arteaga suggested the 1989 Report will be included if the definitions reference the Act.

Mr. Cardozo remarked he would like to think about the definition of Incremental Level 4. He said he's not sure how it's phrased relates to Reclamation's obligations in the Act.

Mr. Cardozo stated he felt the definition for Non-Project Water was too broad. Mr. Arteaga asked if Reclamation was talking about the future. Mr. Cardozo offered the District doesn't feel it's appropriate to discuss the future. Mr. Turner then offered a hypothetical situation. If the District or the Department goes out and gets someone to commit a water supply for 20 years over and above what's provided in the contract, why shouldn't Reclamation look at that? He asked how it could be ignored. Mr. Cardozo replied the Act says Level 2. Mr. Turner added to each refuge. Mr. Cardozo remarked there is no incentive under this contract to go out and get water. He offered if the District can find water over and above Level 2 to expand and enhance the wetland area, Reclamation's position is inconsistent with the objective and purpose of the Act. He said he wouldn't want to subtract that quantity from the District's Level 2 supply. Mr. Arteaga offered he doesn't think the Department is going to come across large amounts of water. Nancee Murray offered the definition mixes present and future language. Mr. Moore asked Reclamation to consider adding "water acquired". Mr. Arteaga noted water or water rights does not take into account the quality of the water nor the timing in terms of need of that water, it's not firm. John Beam asked if it was Reclamation's intent to identify those waters defined as Level 1 and make them the firm supply. Mr. Miller suggested there may be two parts to the definition: available supply which would be non-project, OR water assigned to the U.S. for delivery. One is pre-existing and the second is a new supply which could be Level 4. Mr. Turner agreed and stated he wanted to make it clear with the U.S. goes out and acquires water to implement Level 4, that the water doesn't suddenly become CVP water, otherwise Reclamation is going to have other CVP contractors asking for water too.

Mr. Arteaga offered there are some refuge areas where water is delivered and then pumped up into the refuge's distribution system. He asked that recognition of the refuge boundary be on the discharge side of the pump, because only after the water is pumped, does it become usable. Mr. Turner asked if Reclamation would incur the cost of pumping. Discussion continued on the plumbing in the San Joaquin Valley.

Mr. Cardozo asked what the basis was for including a term in the agreement. He said he was still thinking about this issue. He suggested Reclamation keep in mind the whole framework of this process as the purposes and objectives are very different from Reclamation's regular contracting process. Mr. Cardozo offered habitat needs don't have a term. He continued by saying the fact that this language is consistent with other contracts is not a good enough basis for including it in the contract. Mr. Yarbrough stated by including a term in the contract, Reclamation has a basis to revisit contract language. He also noted there are other interested parties and he's looking at the intent of the whole project. Mr. Cardozo said he would like to see the same provisions the Ag. service contractors want as far as Reclamation's intent to renew if the contract is going to have a term.

Mr. Moore asked if in Article 3(a), Reclamation meant to refer to Articles 9 and 10. Mr. Yarbrough replied the references should be to Articles 7 and 8. He noted this is where Exhibit A comes in with the water quantity.

Mr. Moore asked what Reclamation intended with the language in the proviso, “to the extent the Contracting Officer has been able to acquire...” Ms. Forrest suggested the language was referring to Level 4 and the language of the Act. Mr. Cardozo stated Congress said “shall” in three different places, they didn’t say “to the extent”. Mr. Yarbrough distributed Exhibit A. He said he included a table for the District and the Department, but he does not have the tables ready for the Memorandum’s of Understanding with the Service. Mr. Yarbrough noted the exhibits are a first cut. Mr. Cardozo said he assumed Reclamation has a different interpretation/reading of the Act. Mr. Yarbrough offered the Act said there will not be an involuntary reallocation of Project yield. He said if Reclamation doesn’t have the money or can’t find a willing seller, the water cannot be acquired. Mr. Turner noted the language says “voluntary methods which include . . .”, condemnation is not included in the language of the Act. Mr. Turner also noted that water may be very difficult to acquire in the future. Mr. Cardozo suggested the water under Section 3406(d)(1) was to be provided and supplemented by the Level 4 increment. He said Congress knew what quantity of Level 4 was needed, and therefore, in Congress’ view, there was sufficient water available to meet the plain statutory mandate. Mr. Cardozo stated Congress did not make this a “contingent” obligation. He said he would draft some language.

Mr. Cardozo asked why compliance with the Endangered Species Act (ESA) was included in the contract. Mr. Turner offered Reclamation is finding itself being faced with the obligation to comply with ESA requirements. He said Reclamation does not have the authority to oversee and manage within the refuge boundary. Mr. Turner continued by saying Reclamation is asking the contractor to come in and work with Reclamation so no environmental requirements are violated. Ms. Forrest said the refuges are already obligated to comply with ESA. She asked why Reclamation was dialing it in, now Reclamation has to oversee another agency.

The group reviewed Exhibit A. Discussion occurred on whether the reference to (1) within the text of Subsection 3406(d)(1) was correct. Mr. Cardozo suggested this was a typo and the reference should be to (2), referring to the incremental Level 4.

Mr. Moore asked about Article 3(e). Pepper Snyder said with regard to the 53,000 acre-feet, the District has been getting 125,000 acre-feet since day 1, would they now only get 81,000 acre-feet? Mr. Yarbrough replied he could not answer Mr. Snyder’s question right now. He said when a shortage is declared, Reclamation will make up the water supply to a maximum reduction of 25%. Mr. Yarbrough said Reclamation would take the 125,000 acre-feet and reduce that amount by 25%. He said if there were reductions to the other sources of supply, Reclamation would make up the water quantity so those supplies are not reduced by more than 25%. Mr. Cardozo stated Reclamation needs to clarify this point. Mr. Yarbrough offered the shortage would be applied to the quantity in the 1989 Report. Mr. Cardozo asked if the 125,000 acre-feet would be provided under the terms of this contract. Mr. Yarbrough replied the existing contract

quantities would stay subject to the provisions of the existing contracts while the 71,500 acre-feet would be subject to the provisions of this contract. Mr. Cardozo stated how Reclamation accounts for the water is one thing. He said he's concerned with the terms and conditions that will apply. Mr. Yarbrough remarked Reclamation could leave the existing contracts as is or incorporate those contracts into this contract which has a shortage provision and a term. Mr. Cardozo replied the District is prepared to suspend the water rights under the existing contracts, however, he's concerned that the District does have a permanent water right which was the result of litigation. Mr. Cardozo continued by saying the District doesn't want to be left with nothing if the CVPIA goes away. He said he wants to preserve the water right of 50,000 acre-feet in perpetuity.

Mr. Moore stated Article 3(e) doesn't go far enough. He asked for how long and under what conditions could water be stored in San Luis Reservoir. Mr. Moore also asked if Level 4 water could be stored. Mr. Yarbrough responded the administrative proposal says only Level 2 water can be stored. Mr. Moore offered he didn't see any reference in the Administrative proposal. Mr. Yarbrough said he would get a copy of the rescheduling guidelines to Mr. Moore.

Mr. Cardozo asked if Reclamation was going to revise Exhibit A to amend the footnote to include the 125,000 acre-feet. Mr. Yarbrough responded yes.

Mr. Moore asked how the preliminary water forecast addressed in Article 4(a) would be provided. Mr. Turner offered this information could be provided in writing. Mr. Moore responded that's a start.

Mr. Cardozo offered the Administrative Proposal discussed a collaborative process. He asked why this idea was left out; and asked that there be a more formal recognition of the collaborative process.

Mr. Cardozo questioned the language in Article 8(b). Mr. Turner offered this contract was being prepared at the same time as the draft long term renewal contract. He said the group could equate what this contract says with the language in the long term renewal contract. Mr. Turner said Reclamation does not use the word "agriculture" anywhere in the contract, the word "irrigation" is used instead. Mr. Cardozo stated if Reclamation want's to replace a term, then that term should be defined at a minimum.

Ms. Murray stated Article 10 was an odd article to have in the contract. Mr. Turner replied this article has been in the project contracts for years. If the group wants to modify this language, then Reclamation will have to go back to the Commissioner's office. He said if the language is not inconsistent with the way the District or the Department operates, he just as soon as leave it as is.

Mr. Cardozo remarked he will suggest some changes to Article 11 which may trigger Reclamation's internal review process.

Mr. Arteaga asked the meaning of Article 12. Ms. Murray remarked the group has already had discussions on “hereafter acquired”. She said the Department believes Level 1 is considered as a contribution toward Level 2 and there wouldn’t be anything else which should be considered as a contribution toward Level 2. Ms. Murray noted the Department believes reference to Level 1 should be considered as water rights now owned. Mr. Cardozo suggested the final language consider the scope of the contract in relation to existing contracts. Mr. Arteaga remarked he needed some clarification on this issue. Mr. Yarbrough offered water rights would be supplemented with Level 2 water.

Mr. Turner stated Article 17 is not regulating control of the water rights, but these water rights will count toward Level 2. He said Articles 12 and 17 could be grouped into one article with a subarticle (a) and (b).

Mr. Moore asked why Reclamation was holding pooling and rescheduling hostage in Article 16. Mr. Arteaga stated the Department will totally rewrite this Article as the Department feels Reclamation is getting into wetland management with this article.

Mr. Moore asked why Article 23 was included. Mr. Turner replied there is language in Reclamation law that says water service and repayment contracts are to be confirmed. Mr. Cardozo disagreed saying he had checked Reclamation law.

The negotiation session concluded at 4:15 p.m.

Mr. Yarbrough then opened the floor for public comment.

Mr. Robert Stackhouse, CVPWUA. Mr. Stackhouse had three comments:

1. Definition of Critically Dry Water-Year. He said it was his understanding Reclamation is trying to get away from the Shasta Index.
2. Point of Delivery. Mr. Stackhouse said the CVP water contractors would like to have their water relifted at no cost as well.
3. Level 4 storage in San Luis Reservoir. He would like to see the language, what would be the conditions and how would it impact the priorities.

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**Action Items**

Reclamation

1. Provide rescheduling guidelines for South of Delta.

California Department of Fish and Game

1. Provide suggested contract language in redline/strikeout format before the next scheduled negotiation date of June 30, 2000.

U.S. Fish and Wildlife Service

1. Provide suggested contract language in redline/strikeout format before the next scheduled negotiation date of June 30, 2000.

Grassland Water District

1. Provide suggested contract language in redline/strikeout format before the next scheduled negotiation date of June 30, 2000.