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Subject: Hoopa Valley Tribe's comments on draft EA and FONSI re Municipal and Industrial Water Shortage Policy

Hello Mr. Lewis,

Attached please find the comments prepared on behalf of the Hoopa Valley Tribe. Please let me know if you have any problem opening the document.

Thanks

Tom Schlosser
206 386 5200

CC: "Rodgers, Kirk" <krodgers@mp.usbr.gov>, "Thompson, Steve" <Steve_Thompson@fws.gov>

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DLEWIS (David Lewis)

KRODGERS CC (Kirk Rodgers)

fws.gov

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LAW OFFICES
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
A PROFESSIONAL SERVICE CORPORATION

FRANK R. JOZWIAK (WA)
KYME A.M. MCGAW (WA, OK)
MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
ROB ROY SMITH (WA, OR, ID)

1115 NORTON BUILDING
801 SECOND AVENUE
SEATTLE, WA 98104-1509

TELEPHONE: (206) 386-5200
FACSIMILE: (206) 386-7322

OF COUNSEL
SHARON I. HAENSLY (WA)

April 22, 2005

WWW.MSAJ.COM

COMPTROLLER
M. ANN BERNHEISEL

Mr. David Lewis
Bureau of Reclamation
2800 Cottage Way, MP-730
Sacramento, CA 95825

Fax: 916-978-5094
Email: dlewis@mp.usbr.gov

Re: Proposed Finding of No Significant Impact and Environmental Assessment
Regarding Municipal and Industrial Water Shortage Policy (March 2005)

Dear Mr. Lewis:

On behalf of the Hoopa Valley Indian Tribe ("Tribe"), we submit the following comments concerning the Municipal and Industrial Water Shortage Policy-Central Valley Project, California Draft Environmental Assessment and Draft Finding of No Significant Impact ("FONSI").

The draft FONSI states that all of the alternatives considered are limited by existing water availability to the CVP water service contractors. It states that reallocation would be limited to the total amount allocated to the Irrigation CVP water service contractors, if and when the water is available. Draft FONSI at 2. It states: "Because water is reallocated between CVP M&I and Irrigation users in the same water year, there is no change in storage in CVP reservoirs or to allocations of water to refuge water supplies, instream flows, or senior water right holders." *Id.* at 3. These statements are critically important if, as we understand, they are intended to clearly subordinate water deliveries and the M&I reallocations to the instream fishery flow requirements of the Trinity River as specified in the Trinity River Flow Evaluation Final Report of June 1999 ("TRFEFR"), pursuant to CVPIA § 3406(b)(23), Pub. L. 102-575. Please clarify that the Trinity River instream flow requirements are among the "instream flows" which will not be changed by the CVP M&I Water Shortage Policy.

These comments reflect the Tribe's ongoing concern with management of the CVP, which includes the CVP long-term contracts, the Trinity River Division, and their effects on the federally-reserved fishing rights of the Tribe.

A. Nature of the Tribe's Interest

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The Hoopa Indians follow exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Hoopa culture and economies, and the Tribe holds property rights in the Trinity River Basin fishery. See Mem. from John D. Lesly, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The lower twelve miles of the Trinity River and a stretch of the Klamath River flows through the Hoopa Valley Reservation.

The CVP has a direct and dramatic effect on fisheries reserved for the Tribe. The Trinity River Division ("TRD"), which is part of the CVP, diverts water from the Klamath-Trinity River Basin by means of a system of dams and trans-mountain diversion works. Act of August 12, 1955 ("1955 Act"), 69 Stat. 719, Pub. L. 84-386 (authorizing construction and operation of the TRD). Water diverted by the TRD eventually flows into the Sacramento River and Delta, and becomes part of the supply available to satisfy CVP water service delivery contracts.

In section 2 of the 1955 Act, Congress expressly made diversion to the Central Valley subject to requirements for fish and wildlife preservation and propagation in the Klamath-Trinity River Basin. However, upon completion of the TRD in 1964, up to 90% of the Trinity's flow was diverted. TRFEFR at 8, 63-64. Fishery studies throughout the late 1970s and early 1980s determined that the operation of the TRD was the single greatest contributor to the Trinity fishery declines. The devastating effects on the anadromous fishery resulted in listing of Klamath-Trinity coho salmon under both State and Federal Endangered Species Acts.

Congress has enacted a number of laws intended to restore the Trinity River fishery. In particular, CVPIA § 3406(b)(23) directed the Secretary to determine and, upon concurrence of the Tribe, implement permanent instream fishery flow requirements and operating criteria and procedures for the Trinity River Division to restore and maintain the Trinity River fishery. This provision was one of many Congress added to the CVP authorizing legislation in 1992 in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources, mitigating fish and wildlife impacts, and providing water deliveries to irrigators and municipalities and industrial users. See, e.g., CVPIA § 3406(a).

In accordance with the specific directive of CVPIA § 3406(b)(23), the Trinity River Flow Study was completed in June 1999. The Tribe concurred in the Flow Study results on December 18, 2000. Related environmental reviews were completed and, on December 19, 2000, the Secretary and the Tribe signed a record of decision ("ROD") implementing a suite of habitat improvement actions including instream fishery flow releases from the TRD commensurate with those recommended in the Flow Study.

The Tribe is committed to ensuring that Reclamation actions comply with applicable law, including the CVPIA, the Endangered Species Act ("ESA"), 16 U.S.C. § 1631 *et seq.*, and the government's trust responsibility to the Tribe. The Tribe is also fully committed to the timely implementation of the scientifically based fishery flow requirements set forth in the Trinity River Flow Study and mandated by the ROD. See *Westlands v. United States*, 275 F. Supp.2d 1157 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. July 13, 2004), *reh'g denied* (9th Cir. Nov. 8, 2004) (upholding the Trinity River EIS and concluding that "nothing remains prohibiting the full implementation of the ROD, including its complete flow plan for the Trinity River").

B. Specific Comments

The DEA indicates the M&I Water Shortage Policy will be referenced in all but seven groups of CVP long-term contracts. ES-1. The Hoopa Valley Tribe has separately submitted comments on a number of the proposed long-term CVP water service contracts. It appears that the M&I Water Shortage Policy was sometimes omitted from the contracts for the Delta-Mendota Canal Unit, although it is not one of the seven exceptions noted in the EA. Very large allocations of water are delivered under the seven groups of contracts to which the M&I Water Shortage Policy is expressly inapplicable. Since the M&I Water Shortage Policy is inapplicable unless specifically referenced, the extent to which this policy will be applied, and therefore its environmental impact is unclear and should be clarified in the Final EA.

Reclamation has noted elsewhere that many M&I contractors are not using the full M&I portion of their contract total. As a result, if the M&I water shortage allocation were applied to the full contract entitlements, the resulting allocation for some contractors would exceed their current demand. For example, Reclamation notes in the Delta-Mendota Canal Unit responses to comments (February 2005) that "the provision for "seventy-five percent M&I reliability" will be applied to a contractor's *historic use*, with certain adjustments, up to the CVP projected M&I demands as of September 30, 1994." *Id.* at 7. The possibility that the M&I Water Shortage Policy would increase current demand should be more fully spelled out in order to assess the environmental impact of this Policy.

The study area for this EA is unreasonably narrow. Although the EA purports to study areas with "water rights holders affected by CVP operations," Figure 1-1 shows that affected water rights in Humboldt and Del Norte County are omitted. The TRFEFR graphically demonstrated the adverse effects of CVP operations on Indian trust resources and senior water rights throughout the Trinity and Klamath Rivers. The study area for this EA should include such areas in order to satisfy the analysis requirements of NEPA. For example, the provisions of Chapter 5 Affected Environment and Environmental Consequences are very incomplete without discussion of the Trinity River Valley and lower Klamath River. Thus, Indian Trust Assets of the Hoopa Valley and Yurok Tribes are mentioned but only with a single sentence. EA at 5-88.

Mr. David Lewis
April 22, 2005
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C. Conclusion

The Tribe urges Reclamation to clarify in the FONSI that the proposed action will be subordinate to steps necessary to protect the Tribe's senior federally-reserved fishing and instream water rights. Thank you for the opportunity to comment on the M&I DEA. We trust our comments will be appropriately considered and addressed in final NEPA documentation for this proposed action.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW



Thomas P. Schlosser
Attorneys for the Hoopa Valley Tribe

TPS/nmc

cc: Kirk Rodgers
Steve Thompson