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November 30, 2000

Lester A. Snow, Regional Director
United States Bureau of Reclamation
2800 Cottage Way, E-1604
Sacramento, CA 95825

Betty Riley-Simpson
United States Bureau of Reclamation
2800 Cottage Way, E-2905
Sacramento, CA 95825

Re: Comments by Plain View Water District and Sacramento County
Water Agency on the Draft M&I Water Shortage Provisions

Dear Mr. Snow and Ms. Riley-Simpson:

This firm serves as special legal counsel to the Plain View Water District and Sacramento County Water Agency. The following comments regarding the Draft Central Valley Project M&I Water Shortage Provisions ("WSP") are submitted on behalf of the Plain View Water District ("PVWD") and Sacramento County Water Agency ("SCWA"). PVWD and SCWA have related, but somewhat different, concerns. Thus, this letter will address their respective concerns separately.

Plain View Water District

It is the position of PVWD that the proposed WSP contains internal inconsistencies that make it inappropriate for adoption. In addition, the WSP establishes an impermissible discriminatory position with respect to its Ag to M&I conversion reliability provisions. PVWD's original water service contract provided that water delivered pursuant to that contract could be used for either agricultural or M&I purposes. Its interim contract similarly provides that water delivered can be used for either purpose.

PVWD's demand for M&I water during the term of a renewed long-term contract is expected to increase dramatically. PVWD projects that approximately 30% of its current contract amount will be dedicated to M&I purposes within the next 20 years. By

imposing the proposed conversion policy, the United States Bureau of Reclamation ("Reclamation") is effectively denying PVWD full use of its contractual entitlement to meet the demands within the district.

The proposed policy is also inconsistent with the intent of the drafters of the Central Valley Project Improvement Act ("CVPIA"). During the floor discussion of CVPIA, Congressman Mineta raised concerns about preferential treatment of certain M&I contractors. In response to his concerns, Congressman Miller explicitly stated that it was not the intent of the legislation to deprive CVP M&I contractors of a reliable water supply. To the contrary, Mr. Miller indicated that the Secretary of the Interior was directed by the legislation to operate the project in a way that does not jeopardize human health and safety. (Congressional Record H11511-11512, October 5, 1992.)

The proposed policy on Ag conversions to M&I discriminates against M&I contractors such as PVWD and creates a potential health and safety problem of significant magnitude. There is no rationale that justifies preferential treatment among the M&I contractors.

Representatives from Reclamation stated that the Ag to M&I conversion terms are already established in accordance with M&I projections made in 1994 and will not be changed. In light of the fact that the WSP is currently in the comment stage, Reclamation should not have already made a "final" decision on what is clearly an integral component of the WSP. Adhering to this position would be to make futile the entire process that Reclamation has established for submitting comments on a draft WSP. This type of sham process would not withstand any type of rational scrutiny.

As previously noted, Reclamation is unjustified in relying on M&I projections from 1994 as a cap on the amount of subsequently converted Ag to M&I water that will benefit from its M&I reliability policy. Reclamation purports to find support for its position by claiming that setting a cut-off date for M&I conversion reliability at 1994 encourages contractors to seek supplemental water supplies. Reclamation's theory is that contractors will be forced to seek supplemental water supplies or cease future M&I development. This policy is a naïve and simplistic approach to apportioning a finite CVP water supply that ignores complex realities.

First, the draft WSP assumes supplemental water supplies even exist, or that they will serve to create reliability of M&I supply. In the case of PVWD, it has groundwater which, arguably, could be utilized as a supplemental supply. The City of Tracy, however, has refused to recognize PVWD's groundwater as a reliable source during environmental review of new development. The truth appears to be that municipalities are afraid to recognize supplemental supplies as a substitute for at least some assurance of

CVP M&I reliability. Of note, the draft WSP's health and safety provisions¹ that permit Reclamation to look at all water supplies in times of emergency are serious disincentives to capital investment in a supplemental water supply. Why would "Contractor A" invest significant sums of money in developing an emergency supplemental water supply when a neighboring "Contractor B" that failed to plan ahead might end up getting "Contractor A's" supplemental water in times of drought? A policy that allows consideration of a contractor's supplemental water supplies in determining what level of drought service Reclamation provides will lead to fewer supplemental supply projects. With less supplemental water available, service areas will see health and safety implications at much higher percentages of CVP historical use.²

Second, the process whereby Reclamation capped each contractor's post-1994 converted M&I water reliability was fundamentally flawed. In 1994 Reclamation required contractors to estimate their projected M&I needs over the next 25 years. Reclamation never stated that the conversion policy would be tied to the 1994 projected need. Two years later, Reclamation announced that the Ag to M&I conversion reliability cap would be set at the 1994 projected need. Moreover, Reclamation imposed a higher fee on future projected M&I deliveries, thus creating an incentive for contractors to underestimate their future needs. Contractors were not on notice of the full implications (or even the actual implications) of the 1994 projected need calculation.

The manner in which the conversion "policy" was implemented, if it has been implemented, brings to light a fundamental problem with the entire contract renewal process: there exists great uncertainty regarding the law governing CVP contracts. Until the November 21, 2000, meeting, most contractors were not even aware Reclamation had an identifiable collection of policies regarding CVP contracts. Despite assurances at the November meeting that a "policy binder" exists, the legal significance of these policies and the issue of whether they are even binding on Reclamation is unclear. The contract renewal "policies," and the WSP, in particular, can only be appropriately addressed through promulgation of rules and regulations.³ Failure to establish rules and regulations, to date, adds to the uncertainty facing CVP contractors regarding the WSP.

Rules and regulations will interject a degree of due process by permitting all the potentially affected members of the public the opportunity to participate. Section 3408(a)

¹ It is unclear whether Reclamation's proposed policy regarding health and safety applies to M&I demand that is met by water converted from Ag post-1994.

² In other words, while current health and safety levels may be at 20% of historic use (this figure is just an example), this figure could rise to 30% if contractors abandon current supplemental supply projects and choose not to engage in future projects.

³ Reclamation's current process of allowing public comment on proposed policies has no legal significance and cannot be a substitute for properly promulgated rules and regulations adopted pursuant to the APA.

of the CVPIA provides the necessary authority for Reclamation to promulgate rules and regulations. Section 3408(a) expressly states that “[t]he Secretary is authorized and directed to promulgate such regulations . . . as may be necessary to implement the intent, purpose and provisions of . . . [the CVPIA].” Thus, based upon the express language of section 3408(a), PVWD believes that contract renewal regulations are not only desirable, but are required by the CVPIA. Therefore, PVWD strongly urges Reclamation to promulgate rules and regulations as soon as possible implementing clear provisions of the CVPIA.

Providing zero reliability for post-1994 converted M&I water is inconsistent with the criteria used by the State of California for public health and safety levels during times of extreme drought. Without providing some base-level of reliability, Reclamation’s policy invites serious problems in the future. If increasing growth pressures persuade municipalities to permit development supplied by post-1994 converted M&I water, a future drought will undoubtedly cause public health and safety problems in these areas.

Sacramento County Water Agency

SCWA has a contract that was executed in 1999 pursuant to Public Law 101-514. Its contract is solely for municipal and industrial purposes. Because the contract was executed subsequent to 1994, it is unclear how the proposed policy on M&I shortages is to be applied, if at all.

SCWA takes the position that it is entitled to no less than the other M&I contractors using their respective water supply for M&I purposes prior to 1994. Public Law 101-514 directs Reclamation to assess annually SCWA’s need for water, taking into consideration the agency’s full utilization of existing water entitlements, water conservation and metering, as well as programs to maximize conjunctive use of surface water. Accordingly, SCWA is required by law to maximize other sources of water prior to using its CVP water supply. Thus, to the extent that Reclamation’s proposed policy is designed to force contractors into seeking supplemental supplies, SCWA is already required to do so.

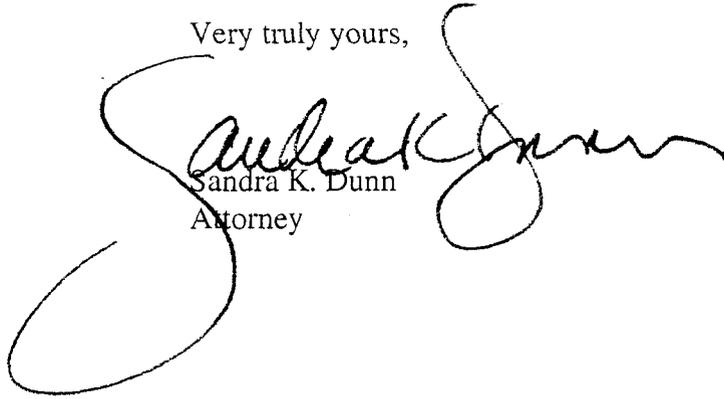
Moreover, the legislative history of Public Law 101-514 demonstrates that Congress recognized a much greater need for water than the 22,000 acre-feet of water that is established in SCWA’s water service contract.

By already imposing a requirement that SCWA conjunctively use its water, it should be entitled to receive no less than 75% of its contractual entitlement. However, in light of the unique nature of the SCWA contract, consideration should be given to providing near 100% of contract entitlement even in the case of significant CVP water shortage.

Lester A. Snow
Betty Riley-Simpson
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PVWD and SCWA appreciate the opportunity to comment on the WSP and, in particular, encourage Reclamation to reevaluate the M&I conversion provisions.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Sandra K. Dunn'. The signature is written in a cursive, flowing style with large loops and a long horizontal tail.

Sandra K. Dunn
Attorney

SKD:sb