

August 5, 2002

Michael J. Ryan
U.S. Bureau of Reclamation
Shasta Area Manager
16349 Shasta Dam Boulevard
Shasta Lake, CA 96019-8400

Re: Comments – USBR 7/11-2002 Draft of Settlement Contract

Dear Mr. Ryan:

Representatives of the Contractors have had an opportunity to review the above-referenced draft and to also consider the information obtained during our July 17, 2002 negotiation session. Following are our comments/suggestions.

1. With the exception of the 6th Recital, the modifications/changes in the 7/11-2002 Draft of the Settlement Contract (hereinafter “7/11 Draft”) through page 4, line 8, are acceptable.

2. As discussed, we believe that the substance of the “reservation of rights” provision is best dealt with in the context of the litigation with some type of cross-reference, within the Settlement Contract, to the litigation documents. With this in mind, we would delete the 6th Recital.

3. Article 1(a) — We would add the word “Surface” before “water” in the definition of “Base Supply.”

4. A *new* Article 1(b) — We would add a definition to the Settlement Contract for “Basin-Wide Water Management Plan. A proposed definition is provided below:

(b) "Basin-Wide Water Management Plan" shall mean the mutually agreeable basin-wide water management plan developed by the United States Bureau of Reclamation and various Contractors in the Sacramento River watershed in accordance with: (1) the agreement entitled "Memorandum of Understanding Between Named Sacramento River Settlement Contractors and the United States of America For the Preparation of Data in Aid of the Renewal of the Settlement Contracts," as executed by the parties thereto in January 1997; and (2) the related agreement entitled "Cost Share Agreement Between Participating Sacramento River Settlement Contractors and the U.S. Bureau of Reclamation For Technical Studies in Preparation For Renewal of Settlement Contracts," dated August 31, 1998.

5. Existing Article 1(b) — We agreed to modify the definition of "Charges" as follows:

"Charges" shall mean the payment for Project Water that the Contractor is required to pay to the United States in addition to the "Rates" specified in this Contract. The Contracting Officer will, on an annual basis, determine the extent of these Charges. The type and amount of each Charge shall be specified in Exhibit D.

6. Existing Article 1(d)(2) — This article should be corrected to both reflect the Existing Contract language as well as current circumstances, as follows:

The second sentence and following of Article 1(d)(2) should be a new paragraph which refers to Articles 1(d)(2) and 1(d)(1). It should read as follows:

For the purpose of determining a critical year, the computed inflow to Shasta Lake shall be performed in a manner that considers the extent of upstream development above Shasta Lake during the year in question, and shall be used as the full natural flow to Shasta Lake. In the event that major construction has occurred or occurs above Shasta Lake after September 1, 1963 and which has materially altered or alters the regimen of the stream systems contributing to Shasta Lake, the computed inflow to Shasta Lake used, to define a critical year, will be adjusted to eliminate the effect of such material alterations. . . .

7. Existing Article 1(l) — We would add the word "Surface" before the word "Water" in the definition of "Project Water."

8. A new Article 1(q) — We would add a definition to the Settlement Contract of “Surface Water.” A proposed definition is provided below:

(q) “Surface Water” shall mean only those waters that are subject to appropriation as surface water under California law.

I believe that this new definition of “Surface Water” and the modifications to the definition of “Base Supply” and “Project Water” are consistent with our discussions during the July 17, 2002 negotiating session.

9. We agree to the provisions of Article 1 that I have not otherwise discussed.

10. Article 2 — We agree to the Article 2, 7/11 Draft language.

11. Article 3 — We propose the following modifications to Article 3(b):

(b) The Contractor may have acquired rights to divert water from the Sacramento River during the period April through October, ~~which that~~ were obtained after the date of execution of the Existing Contract, or the Contractor may acquire such rights in the future. All diversions made from the Sacramento River, pursuant to such rights, during the period April through October, shall not be considered a part of the quantity of ~~Base Supply and Project Water specified in Exhibit A Contract Total;~~ Contract Total; Provided, that the quantities diverted pursuant to the above rights shall be identified on the schedule submitted pursuant to Article 3(c) below.

We assume that this “after acquired water” can be scheduled prior to “Project Water.”

12. With respect to Article 3(c), payment provision, we are attempting to schedule a technical session to discuss the question of benefits. We also have asked for an example of how the provision would operate. We assume that a shift of water from, for example, October to April could result in a benefit to CVP operations and that this potential benefit will be accounted for when considering claimed impacts. (We note parenthetically that the provisions of Article 3(c)(2) should be deleted in any event. From a practical standpoint, in many cases, neither the Contractor nor Reclamation is aware of “excess diversions” until after they have occurred.)

13. The first sentence of Article 3(c) should be revised to read:

Before April 1 and before the first day of each month thereafter when a revision is needed, the Contractor will submit a written schedule to the Contracting Officer indicating the Contract Total to be diverted by the Contractor during each month under this Settlement Contract.

14. Article 3(e) is still under discussion. We have asked that the proposed language be clarified by deleting the word "guidelines." We have also asked that the language be modified to provide that Reclamation's "consent" not be "unreasonably withheld" and that it be "timely." In this regard, we suggest a time within which Reclamation will complete its review, or the proposed transfer is deemed approved. We have further requested that Article 3(e)(2) should stand on its own merits; that is, Reclamation's "consent" *not* involve a determination of "compliance" with the matters dealt with in Article 3(e)(2). We also believe that it would be helpful to add language that provides that movement of water pursuant to the Basin Wide Water Management Plan is not a transfer.

15. I believe that we agreed that the language on page 12, line 17, of the 7/11 Draft should be modified to read as follows: ". . . Settlement Contract for surface irrigation or underground storage for the benefit of the lands shown on . . ." Assuming this is the case, we agree with the language of Article 4.

16. We agree with the language of Article 5.

17. With the understanding that language cross-referencing other related agreements will be added to individual Settlement Contracts, as appropriate, we agree with the language in Article 6.

18. We propose the addition of the following language prior to the last sentence in Article 7(b).

The Existing Contract, which evidences in excess of 40 years of diversions, for agricultural uses, of the quantities of water provided for in Article 3, and the underlying water rights of the Contractor will be considered in developing an appropriate base-line for the Biological Assessment prepared pursuant to the Endangered Species Act, and in any other needed environmental review.

19. With respect to the “take-or-pay” issues that are addressed in Article 8, we propose the addition of the following concept prior to the last sentence in Article 8(a):

The Contractor may notify the Contracting Officer not later than [DATE], in any year, that it will not take all or a portion of its Project Water. In that event, the amounts of Project Water on Exhibit “A” will be modified to reflect that notification and Rates and Charges will be imposed based upon that modification. The modification will be for a period of _____ years with an option on the part of the Contractor to return to the full Exhibit A amounts of Project Water provided for in this Settlement Contract at the end of this period.

20. As we discussed during the July 17, 2002 negotiating session, we believe that what is dealt with in the 7/11 Draft Article 9(b) language at page 22, lines 11-21, was negotiated and dealt with as part of the preceding proviso and we are not willing to open that issue for re-negotiation. To do so would be to re-evaluate and re-balance the fundamental risk assessment that was undertaken 40 years ago.

21. Articles 10 and 29 — I have attached what we understand has been agreed to with respect to language for these articles.

22. We would propose modifying Article 20, as follows:

Delete the phrase “of Place of Use” from the heading.

~~19 20. (a) Unless the written consent of the United States is first obtained consulted no change shall be made in the place of water use shown on Exhibit B.~~

~~(b a)~~ While this ~~contract~~ Settlement Contract is in effect, no change shall be made in the area of the Contractor as shown on its Exhibit B, by ~~inclusion or exclusion~~ annexation or detachment of lands, by dissolution, consolidation, or merger or otherwise, ~~except upon~~ unless the Contracting ~~Officer’s written assent thereto~~ Officer is first consulted. Such consent will not be unreasonably withheld and will be provided in a timely manner. [There may need to be Contractor specific language added.]

~~(e b)~~ In the event lands are ~~annexed to or excluded~~ detached from the area of the Contractor, as provided herein, the quantity of Project Water to be diverted may be increased or decreased, as may be appropriate, pursuant to a supplemental agreement to be executed in respect thereto.

23. We agree to the balance of the 7/11 Draft.

I assume that we will focus on the remaining issues in disagreement during our August 14, 2002 negotiating session. I would also like to confirm that we, in fact, have "agreement" on the other provisions of the Settlement Contract. In this context, any final agreement on the provisions of the renewal Settlement Contracts will require individual Settlement Contractor approval.

Very truly yours,

Stuart L. Somach
General Counsel
Glenn-Colusa Irrigation District

SLS:sb

Encl.

cc: J. Mark Atlas
Kevin M. O'Brien
Paul Bartkiewicz
William H. Baber
John Kenny
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R.O. Draft 05/15-2002
SRSC Draft 05/22/02
SRSC Draft 05/31/02
R.O Draft 6/21/02
SRSC Draft 7/9/02
Revision Agreed to During
7/17/02 Negotiating Session
(Drafted 8/4/02)

MEASUREMENT OF WATER

10. (a) All water diverted by the Contractor from Sacramento River will be diverted at the existing point or points of diversion shown on Exhibit A or at such other points as may be mutually agreed upon in writing by the Contracting Officer and the Contractor.

(b) All water diverted from the Sacramento River pursuant to this Contract will be measured or caused to be measured by the United States at each point of diversion with existing equipment or equipment to be installed, operated, and maintained by the United States, and/or others, under contract with and at the option of the United States. The equipment and methods used to make such measurement shall be in accordance with sound engineering practices. Upon request of the Contractor, the accuracy of such measurements will be investigated by the Contracting Officer and any errors appearing therein will be corrected.

(c) The right of ingress to and egress from all points of diversion is hereby granted to all authorized employees of the United States. The Contractor also hereby grants to the United States the right to install, operate, maintain and replace such

equipment on diversion or carriage facilities at each point of diversion as the Contracting Officer deems necessary.

(d) The Contractor shall not modify, alter, remove, or replace diversion facilities or do any other act which would alter the effectiveness or accuracy of the measuring equipment installed by the United States or its representatives unless and until the Contracting Officer has been notified with due diligence and has been given an opportunity to modify such measuring equipment in such manner as may be necessary or appropriate. In the event of an emergency the Contractor shall notify the United States within a reasonable time thereafter as to the existence of the emergency and the nature and extent of such modification, alteration, removal, or replacement of diversion facilities.

(e) The Contractor shall pay the United States for the costs to repair, relocate, or replace measurement equipment when the Contractor modifies, alters, removes, or replaces diversion or carriage facilities.

~~(f) Contractor and Contracting Officer shall develop a mutually agreeable surface water delivery water measurement program which shall be implemented by Contractor, and such measurement program shall be consistent with the conservation and efficiency criteria evaluating water conservation plans as provided in Article 29(a).~~

(g) All new surface water delivery systems installed within the lands delineated on Exhibit B after the effective date of this Contract shall also comply with the measurement provisions described in this Article.

Deleted: (f) (*Contractor Specific*) By _____ [DATE] _____, the Contractor shall ensure that, unless the Contractor establishes an alternative measurement program satisfactory to the Contracting Officer, all surface water delivered for irrigation purposes on the lands delineated on Exhibit B is measured at each agricultural turnout. The water measuring devices or water measuring methods of comparable effectiveness must be acceptable to the Contracting Officer. The Contractor shall be responsible for installing, operating, and maintaining and repairing all such measuring devices and implementing all such water measuring methods at no cost to the United States. The Contractor shall inform the Contracting Officer in writing by April 30 of each Year of the monthly volume of surface water delivered to the lands delineated on Exhibit B during the previous Year. This information will be used by Reclamation to satisfy the water measurement requirements of the Contractor's water conservation plan, as set forth in Article 29 of this Contract.¶

WATER CONSERVATION

29. (a) Prior to the diversion of Project Water, the Contractor shall be implementing an effective water conservation and efficiency program based on the Basin-Wide Water Management Plan and/or Contractor's water conservation plan that has been determined by the Contracting Officer to meet the conservation and efficiency criteria for evaluating water conservation plans established under Federal law. The water conservation and efficiency program shall contain definite water conservation objectives, appropriate economically feasible water conservation measures, and time schedules for meeting those objectives. Continued diversion of Project Water pursuant to this Contract shall be contingent upon the Contractor's continued implementation of such water conservation program. In the event the Contractor's water conservation plan or any revised water conservation plan completed pursuant to subdivision (c) of Article 29 of this Contract have not yet been determined by the Contracting Officer to meet such criteria, due to circumstances which the Contracting Officer determines are beyond the control of the Contractor, Project Water deliveries shall be made under this Contract so long as the Contractor diligently works with the Contracting Officer to obtain such determination at the earliest practicable date, and thereafter the Contractor immediately begins implementing its water conservation and efficiency program in accordance with the time schedules therein.

(b) The Contractor shall submit to the Contracting Officer a report on the status of its implementation of the water conservation plan on the reporting dates specified in the then existing conservation and efficiency criteria established under Federal law.

(c) At five (5)-year intervals, the Contractor shall revise its water conservation plan to reflect the then current conservation and efficiency criteria for evaluating water conservation plans established under Federal law and submit such revised water management plan to the Contracting Officer for review and evaluation. The Contracting Officer will then determine if the water conservation plan meets Reclamation's then current conservation and efficiency criteria for evaluating water conservation plans established under Federal law.

(d) If the Contractor is engaged in direct ground-water recharge, such activity shall be described in the Contractor's water conservation plan.

[Add definition of "Basin-Wide Water Management Plan" as new Article 1(b).]