

Appendix A

Interim Flows Project - Water Year 2011

Final Supplemental Environmental Assessment

Draft Financial Assistance Agreement and Related Correspondence with the Lower San Joaquin Levee District



September 2010

Financial Assistance Agreement

**UNITED STATES DEPARTMENT OF THE INTERIOR
 BUREAU OF RECLAMATION
 ASSISTANCE AGREEMENT**

1A. AGREEMENT NUMBER R10AC20009		1B. MOD NUMBER	2. TYPE OF AGREEMENT [] GRANT [X] COOPERATIVE AGREEMENT		3. CLASS OF RECIPIENT Special District			
4. ISSUING OFFICE (NAME, ADDRESS) Bureau of Reclamation Mid Pacific Region 2800 Cottage Way Sacramento, California 95825				5. RECIPIENT (NAME, ADDRESS, TELEPHONE) Lower San Joaquin Levee District 11704 West Henry Miller Avenue Dos Palos, California 93620 Phone: (209) 387-4545				
				EIN #:	770256884	County:	Merced	
				DUNS #:	006010375	Congress. Dist:	18, 19, 20, 21	
6. ADMINISTRATIVE POINT OF CONTACT (NAME, ADDRESS, TELEPHONE, E-MAIL) Jeff Palachat, MP 3818 Bureau of Reclamation Mid Pacific Region 2800 Cottage Way Sacramento, California 95825 Phone: (916) 978-5146 Email: spalachat@usbr.gov				7. RECIPIENT PROJECT MANAGER (NAME, ADDRESS, TELEPHONE, E-MAIL) Reggie Hill Lower San Joaquin Levee District 11704 West Henry Miller Avenue Dos Palos, California 93620 Phone: (209) 387-4545 Email: lsjld@elite.net				
8. GRANTS OFFICER TECHNICAL REPRESENTATIVE (NAME, ADDRESS, TELEPHONE, E-MAIL) David Mooney, MP 170 Bureau of Reclamation Mid Pacific Region 2800 Cottage Way Sacramento, California 95825 Phone: (916) 978-5458 Email: dmmooney@usbr.gov				9A. INITIAL AGREEMENT EFFECTIVE DATE: See block 17a		9B. MODIFICATION EFFECTIVE DATE:		
				10. COMPLETION DATE September 30, 2010				
11. PROGRAM STATUTORY AUTHORITY Omnibus Public Land Management Act of 2009, Title X, Subtitle A, Public Law 111-11, 42 USC 10004(b)(2)					CFDA 15.507			
12. FUNDING INFORMATION		RECIPIENT/OTHER	RECLAMATION	13. REQUISITION NUMBER 10201300001				
Total Estimated Amount of Agreement		\$0.00	\$184,833.64	14A. ACCOUNTING AND APPROPRIATION DATA H37 1591 2592 001 04 0 0 2013000 252R 411C				
This Obligation		\$0.00	\$184,833.64					
Previous Obligation		\$0.00	\$ 0.00					
Total Obligation		\$0.00	\$184,833.64					
Cost-Share %								
14B. TREASURY ACCOUNT FUNDING SYMBOL 14.0680								
15. PROJECT TITLE AND BRIEF SUMMARY OF PURPOSE AND OBJECTIVES OF PROJECT Operation and Maintenance of Flood Project Facilities Impacted By San Joaquin River Restoration								
16a. Acceptance of this Assistance Agreement in accordance with the terms and conditions contained herein is hereby made on behalf of the above-named recipient BY: _____ DATE: _____				17a. Award of this Assistance Agreement in accordance with the terms and conditions contained herein is hereby made on behalf of the United States of America, Bureau of Reclamation BY: _____ DATE: _____				
16b. NAME, TITLE, AND TELEPHONE NUMBER OF SIGNER Additional signatures are attached				17b. NAME OF GRANTS OFFICER				

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**Cooperative Agreement
Between
Bureau of Reclamation
And
Lower San Joaquin Levee District
For
Operation and Maintenance of Flood Project Facilities Impacted By San Joaquin River Restoration**

I. OVERVIEW AND SCHEDULE

1. AUTHORITY

This Cooperative Agreement (Agreement) is entered into between the United States of America, acting through the Department of Interior, Bureau of Reclamation, hereinafter referred to as “Reclamation”, and Lower San Joaquin Levee District, hereinafter referred to as the “Recipient”, pursuant to Omnibus Public Land Management Act of 2009, Title X, Subtitle A, Public Law 111-11, 42 USC 10004(b)(2).

2. PUBLIC PURPOSE

The Lower San Joaquin Levee District (LSJLD) operates and maintains a flood control system financially supported through landowner assessments. The change in operations at Friant Dam may result in increased operation and maintenance costs due to additional flow in the river and bypass system at different times than historical patterns.

3. BACKGROUND AND OBJECTIVES

In 1988, a coalition of environmental groups led by the Natural Resources Defense Council (NRDC), filed a lawsuit challenging the renewal of long-term water service contracts between the United States and the Central Valley Project Friant Division contractors (Friant Districts), *NRDC et al. v. Kirk Rodgers et al.* Case No. CIV S-88-1658 LKK/GGH. On September 13, 2006, after more than 18 years of litigation, NRDC, Friant Water Users Authority (FWUA), and the U.S. Departments of the Interior and Commerce agreed on terms and conditions for a Stipulation of Settlement (Settlement) with two goals:

- **Restoration** – To restore and maintain fish populations in “good condition” in the mainstem San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish; and
- **Water Management** – To reduce or avoid adverse water supply impacts on all of the Friant Division long-term contractors that may result from the Interim Flows and Restoration Flows.

The objective of the Lower San Joaquin Levee District Water Year 2010 Interim Flow Operation and Maintenance agreement is to provide financial assistance for changes in flood control costs as a result of the first year release of Interim Flows. Implementing activities associated with the San Joaquin River

Restoration Program (SJRRP) for operations and maintenance costs required to release and route Interim Flows without impacting performance of the flood control system.

4. PERIOD OF PERFORMANCE AND FUNDS AVAILABILITY

This Agreement becomes effective on the date shown in Block 17a of Form 7-2279, United States of America, Department of the Interior, Bureau of Reclamation, Assistance Agreement. The Agreement shall remain in effect until the date shown in Block 10 of Form 7-2279, United States of America, Department of the Interior, Bureau of Reclamation, Assistance Agreement. The period of performance for this Agreement may only be modified through written modification of the Agreement by a Reclamation Grants Officer (GO).

Pursuant to the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, all commonly known as Reclamation Law, funds for payment under this Agreement are included in Public Law 111-85, Energy and Water Development and Related Agencies Appropriations Act, 2010. Funding for any optional year of the Agreement is contingent upon subsequent Congressional funding.

Reclamation has \$184,833.64 available for this Agreement. The Government's obligation under this Agreement is contingent upon the availability of appropriated funds from which payment for Agreement purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the GO for this Agreement, and until the Recipient receives notice of such availability through formal modification of this Agreement by the GO.

5. SCOPE OF WORK

The Lower San Joaquin Levee District will be responsible for additional operation and maintenance activities as a result of the release of Water 2010 Interim Flows. The Levee District is responsible for operation and maintenance of the flood control system under existing conditions and has well developed practices for responding to flood control events. The scope of the agreement includes activities undertaken in excess of those likely to occur in the absence of restoration flows and relies on exiting maintenance practices and standards. The following subsections describe tasks.

5.1 Water Year 2010 Fall LSJLD Operations and Maintenance

A draft interim report of the activities undertaken for maintenance as a result of water year 2010 Fall Interim Flows will be submitted by February 27, 2010 in electronic Microsoft word and/or Excel format and 3 hard copies to:

Program Manager
San Joaquin River Restoration Program
2800 Cottage Way (MP-170)
Sacramento, CA 95825

Information in the report will include type and quantity of actions taken or hours expended in fulfilling activities under this agreement. This report provides a template for coordinating comments and feedback from SJRRP staff but no updates will be required during this task. Contents of the report should include the following subtasks.

5.1.1 Flapgate Inspection

Flapgate inspection includes verifying that each gate is closed prior to the release of flows in order to prevent flooding of surrounding lands. Patrols should be conducted according to standard LSJLD practices.

Activities will be documented in the WY 2010 Fall LSJLD Operations and Maintenance Report

5.1.2 Operation of Control Structures

Operation of control structures will permit the routing of Interim Flows and emergency actions to redirect flows in the case of unanticipated impacts. Operations will include Chowchilla Bypass Bifurcation Structure, Eastside Bypass Control Structure, and Mariposa Bypass Control Structure. Flow routing needs are described in the WY 2010 Interim Flows Environmental Assessment.

Activities will be documented in the WY 2010 Fall LSJLD Operations and Maintenance Report

5.1.3 Patrol of Levees

Levee patrols are required when inundation reaches the toe of a levee. Patrols will be conducted to identify potential issues with levee stability that require adjusting flows. Results will be reported directly to Friant Operations Staff according to emergency procedures developed during flood control operations.

Activities will be documented in the WY 2010 Fall LSJLD Operations and Maintenance Report

5.1.4 Assessment of Maintenance

The assessment of maintenance activities will include inspection of flapgates, structures, and channels to identify potential needs as a result of WY 2010 Interim Flows.

Activities will be documented in the WY 2010 Fall LSJLD Operations and Maintenance Report

5.1.5 Removal of Debris

Debris moved into flapgates or control structures as a result of WY2010 Interim Flows requires removal and disposal following standard LSJLD practices.

Activities will be documented in the WY 2010 Fall LSJLD Operations and Maintenance Report

5.1.6 SJRRP Reporting and Coordination

The LSJLD will meet with SJRRP program staff at the LSJLD headquarters at least once to present activities and receive comments on the interim report.

5.2 Water Year 2010 LSJLD Operations and Maintenance

A final report of the activities undertaken for maintenance as a result of water year 2010 Interim Flows will be submitted by September 30, 2010 in electronic Microsoft word and/or Excel format and 3 hard copies to:

Program Manager
San Joaquin River Restoration Program
2800 Cottage Way (MP-170)
Sacramento, CA 95825

Information in the report will include type and quantity of actions taken or hours expended in fulfilling activities under this agreement. The report should include fall period activities and incorporate comments from coordination with SJRRP staff during the fall period. Reporting will include 14 calendar days for SJRRP comments between an administrative draft and final version. Contents of the report should include the following subtasks.

5.2.1 Flaggate Inspection

This sub-task is similar to the fall period and activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report

5.2.2 Operation of Control Structures

This sub-task is similar to the fall period and activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report

5.2.3 Patrol of Levees

This sub-task is similar to the fall period and activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report

5.2.4 Assessment of Maintenance

This sub-task is similar to the fall period and activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report

5.2.5 Removal of Debris

This sub-task is similar to the fall period and activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report

5.2.6 Control Vegetation

An increase in vegetation growth and the associated impacts on flood control stage may require spraying or mechanical removal. The LSJLD will follow standard practices to manage vegetation in impacted areas.

Activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report.

5.2.7 Excavate Sand

Mobilization of sand into constricted areas risk flood control capacity and requires excavation. The LSJLD will excavate material according to standard maintenance practices.

Activities will be documented in the WY 2010 LSJLD Operations and Maintenance Report.

5.2.8 SJRRP Reporting and Coordination

The LSJLD will meet twice with SJRRP program staff at the LSJLD headquarters to present activities and receive comments on the report.

6. RESPONSIBILITY OF THE PARTIES

6.1 Recipient Responsibilities

6.1.1 The Recipient shall be responsible for carrying out the Scope of Work in accordance with the terms and conditions stated herein. The Recipient shall adhere to Federal, state, and local laws, regulations, and codes, as applicable, and shall obtain all required approvals and permits. If applicable, the Recipient shall also coordinate and obtain approvals from site owners and operators.

6.1.2 The Lower San Joaquin Levee District is responsible for:

- Completion of the tasks and deliverables identified in the statement of work.
- Providing timely reports and invoices for work performed.
- Managing the schedule and budget not to exceed the authorization for the agreement.
- Notifying Reclamation as soon as possible of any issues or constraints that would impede or inhibit successful completion of the Statement of Work.

6.2 Reclamation Responsibilities

Substantial involvement between Reclamation and the Recipient is anticipated during the performance of this Agreement. In support of this Agreement, Reclamation will provide the following:

6.2.1 Reclamation is responsible for:

- Funding and providing timely payment of monthly invoices
- Providing direction and input on tasks and deliverables
- Responding to issues or constraints that would inhibit or impede the successful completion of the Statement of Work
- Coordination with implementing agencies on issues impacting execution of the Settlement.

7.2 Cost Sharing Requirement

The Recipient will provide cost-share for this project equal to but not less than 0 % .

7.3 Pre-Award Incurrence of Costs

The Recipient shall be entitled to have incurred costs for this Agreement for allowable costs incurred on or after N/A, which if had been incurred after this Agreement was entered into, would have been allowable, allocable, and reasonable under the terms and conditions of this Agreement.

7.4 Allowable Costs (2 CFR Part §225)

Costs incurred for the performance of this Agreement must be allowable, allocable to the project, and reasonable. The following Office of Management and Budget (OMB) Circular, codified within the Code of Federal Regulations (CFR), governs the allowability of costs for Federal financial assistance:

2 CFR Part 225 (OMB Circular A-87), "Cost Principles for State, Local, and Indian Tribal Governments"

Expenditures for the performance of this Agreement must conform to the requirements within this Circular. The Recipient must maintain sufficient documentation to support these expenditures. Questions on the allowability of costs should be directed to the GO responsible for this Agreement.

The Recipient shall not incur costs or obligate funds for any purpose pertaining to operation of the program or activities beyond the expiration date stated in the Agreement. The only costs which are authorized for a period of up to 90 days following the project performance period are those strictly associated with closeout activities for preparation of the final report.

7.5 Changes (43 CFR §12.70).

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see 43 §12.62) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes.*

(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award, *unless included in the initial funding proposal*. This approval requirement is in addition to the approval requirements of 43 §12.76 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.*

(1) A request for prior approval of any budget revision will be in the same budget form as the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see §12.62) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

7.6 Modifications

Any changes to this Agreement shall be made by means of a written modification. Reclamation may make changes to the Agreement by means of a unilateral modification to address administrative matters, such as changes in address, no-cost time extensions, the addition of previously agreed upon funding, or deobligation of excess funds at the end of the Agreement. Additionally, a unilateral modification may be utilized by Reclamation if it should become necessary to suspend or terminate the Agreement in accordance with 43 CFR 12.83.

All other changes shall be made by means of a bilateral modification to the Agreement. No oral statement made by any person, or written statement by any person other than the GO, shall be allowed in any manner or degree to modify or otherwise effect the terms of the Agreement.

All requests for modification of the Agreement shall be made in writing, provide a full description of the reason for the request, and be sent to the attention of the GO. Any request for project extension shall be made at least 45 days prior to the expiration date of the Agreement or the expiration date of any extension period that may have been previously granted. Any determination to extend the period of performance or to provide follow-on funding for continuation of a project is solely at the discretion of Reclamation.

8. KEY PERSONNEL

8.1 Recipient's Key Personnel

The Recipient's Project Manager for this Agreement shall be:

Mr. Reggie Hill, Secretary-Manager

Changes to Key Personnel require compliance with 43 CFR 12.70(d)(3).

8.2 Reclamation's Key Personnel

8.2.1 Grants Officer (GO):

Bureau of Reclamation
Attn: Jeff Palachat
Address: 2800 Cottage Way, Sacramento, CA 95825
Telephone: (916) 978-5146

The GO is the only official with legal delegated authority to represent Reclamation. The GO's responsibilities include, but are not limited to, the following:

- a) Formally obligate Reclamation to expend funds or change the funding level of the Agreement;
- b) Approve through formal modification changes in the scope of work and/or budget;
- c) Approve through formal modification any increase or decrease in the period of performance of the Agreement;
- d) Approve through formal modification changes in any of the expressed terms, conditions, or specifications of the Agreement;
- e) Be responsible for the overall administration, management, and other non-programmatic aspects of the Agreement including, but not limited to, interpretation of financial assistance statutes, regulations, circulars, policies, and terms of the Agreement;
- f) Where applicable, ensures that Reclamation complies with the administrative requirements required by statutes, regulations, circulars, policies, and terms of the Agreement.

8.2.2 Grants Officer Technical Representative (GOTR):

Bureau of Reclamation
Attn: David Mooney

Address: 2800 Cottage Way, Sacramento, CA 95825
Telephone: (916) 978-5458
E-mail: dmmooney@usbr.gov

The GOTR's authority is limited to technical and programmatic aspects of the Agreement. The GOTR's responsibilities include, but are not limited to, the following:

- a) Assist the Recipient, as necessary, in interpreting and carrying out the scope of work in the Agreement;
- b) Review, and where required, approve Recipient reports and submittals as required by the Agreement;
- c) Where applicable, monitor the Recipient to ensure compliance with the technical requirements of the Agreement;
- d) Where applicable, ensure that Reclamation complies with the technical requirements of the Agreement;

The GOTR does not have the authority to and may not issue any technical assistance which:

- a) Constitutes an assignment of additional work outside the scope of work of the Agreement;
- b) In any manner causes an increase or decrease in the total estimated cost or the time required for performance; or
- c) Changes any of the expressed terms, conditions, or specifications of the Agreement.

9. REPORTING REQUIREMENTS AND DISTRIBUTION

9.1 Noncompliance. Failure to comply with the reporting requirements contained in this Agreement may be considered a material non-compliance with the terms and conditions of the award. Non compliance may result in withholding of payments pending receipt of required reports, denying both the use of funds and matching credit for all or part of the cost of the activity or action not in compliance, whole or partial suspension or termination of the Agreement, recovery of funds paid under the Agreement, withholding of future awards, or other legal remedies in accordance with 43 CFR §12.83.

9.2 Financial Reports. Financial Status Reports shall be submitted by means of the SF-425 and shall be submitted according to the Report Frequency and Distribution schedule below. All financial reports shall be signed by an Authorized Certifying Official for the Recipient's organization.

9.3 Monitoring and reporting program performance (43 CFR §12.80)

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or

termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.*

(1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

9.4 Report Frequency and Distribution. The following table sets forth the reporting requirements for this Agreement.

REQUIRED REPORTS	Interim Reports	Final Report
Program Performance Report		
Format	No specific format required. See content requirements within Section 9.3 (43 CFR 12.80) above.	No specific format required. See content requirements within Section 9.3 (43 CFR 12.80) above.
Reporting Frequency	Quarterly	Final Report due upon completion of Agreement's period of performance
Reporting Period	For Quarterly Reporting: Federal fiscal quarters ending: December 31, March 31, June 30 September 30	Entire period of performance
Due Date	Within 30 days after the end of the Reporting Period	Within 90 days after the completion date of the Agreement
Submit to:	GO and GOTR	GO and GOTR
Financial Status Report		
Format	SF-425	SF-425
Reporting Frequency	Quarterly	Final Report due upon completion of Agreement's period of performance
Reporting Period	For Quarterly Reporting: Federal fiscal quarters ending: December 31, March 31, June 30 September 30	Entire period of performance
Due Date	Within 30 days after the end of the Reporting Period	Within 90 days after the completion date of the Agreement
Submit to:	GO and GOTR	GO and GOTR

10. REGULATORY COMPLIANCE

The Recipient agrees to comply with or assist Reclamation in compliance all regulatory compliance requirements and all applicable state, Federal, and local environmental and cultural and paleontological resource protection laws and regulations as applicable to this project. These may include, but are not limited to, the National Environmental Policy Act (NEPA) including the Council on Environmental Quality and Department of the Interior regulations implementing NEPA, the Clean Water Act, the Endangered Species Act, consultation with potentially affected Tribes, and consultation with the State Historic Preservation Office.

Certain environmental and other associated compliance are Federal responsibilities, and will occur as appropriate Reclamation will identify the need for, and assure the completion of, any appropriate environmental compliance requirements, as identified above, pursuant to activities specific to this assisted activity. Environmental and other associated compliance shall be completed prior to the start of this project. As such, notwithstanding any other provision of this Agreement, Reclamation shall not provide any funds to the recipient for Agreement purposes, and the Recipient shall not begin implementation of the assisted activity described in this Agreement, unless and until Reclamation provides written notice to

the recipient that all applicable environmental and regulatory compliance analyses and clearances have been completed, and the Recipient may begin implementation of the assisted activity.

II. RECLAMATION STANDARD TERMS AND CONDITIONS - STATES, LOCAL GOVERNMENTS, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS

1. REGULATIONS

The regulations at 43 CFR, Part 12, Subparts A, C, E, and F, are hereby incorporated by reference as though set forth in full text. The following Office of Management and Budget (OMB) Circulars, as applicable, and as implemented by 43 CFR Part 12, are also incorporated by reference and made a part of this Agreement. Failure of a Recipient to comply with any applicable regulation or circular may be the basis for withholding payments for proper charges made by the Recipient and/or for termination of support.

1.1 Colleges and Universities that are Recipients or sub-recipients shall use the following:

2 CFR Parts 215 and 220 (Circular A 21), "Cost Principles for Educational Institutions"

Circular A 110, as amended September 30, 1999, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations" (Codification by Department of Interior, 43 CFR 12, Subpart F)

Circular A-133, revised June 27, 2003, "Audits of States, Local Governments, and Non-Profit Organizations"

1.2 State, Local and Tribal Governments that are Recipients or sub-recipients shall use the following:

2 CFR Part 225 (Circular A 87), "Cost Principles for State, Local, and Indian Tribal Governments"

Circular A 102, as amended August 29, 1997, "Grants and Cooperative Agreements with State and Local Governments" (Grants Management Common Rule, Codification by Department of Interior, 43 CFR 12, Subpart C)

Circular A-133, revised June 27, 2003, Audits of States, Local Governments, and Non-Profit Organizations"

1.3 Nonprofit Organizations that are Recipients or sub-recipients shall use the following:

2 CFR Part 230 (Circular A 122), "Cost Principles for Non-Profit Organizations"

Circular A 110, as amended September 30, 1999, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations" (Codification by Department of Interior, 43 CFR 12, Subpart F)

Circular A-133, revised June 27, 2003, "Audits of States, Local Governments, and Non-Profit Organizations"

1.4 Organizations other than those indicated above that are Recipients or sub-recipients shall use the basic principles of OMB Circular A-110 (Codification by Department of Interior, 43 CFR 12, Subpart F), and cost principles shall be in accordance with 48 CFR Subpart 31.2.

1.5 43 CFR 12.77 sets forth further regulations that govern the award and administration of subawards by State governments.

2. PAYMENT

2.1 Payment Standards. (43 CFR §12.61)

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.*

(1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.*

(1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions, or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with §12.83(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.*

(1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State Agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to \$100 per year for administrative expenses.

2.2 Payment Method

Requesting Payments -- Requests for advance or reimbursement may be made by the following methods:

(1) SF-270, Request for Advance or Reimbursement - Recipients may submit an original and properly certified SF-270 form to the GO. For advance payments, this form may be submitted on a monthly basis, at least two weeks prior to the date on which funds are required, and on the basis of expected disbursements for the succeeding month and the amount of Federal funds already on hand. Requests for reimbursement may be submitted on a monthly basis, or more frequently if authorized by the (GO).

(2) Automated Standard Application for Payments (ASAP) - Recipients may utilize the Department of Treasury ASAP payment system to request advances or reimbursements. ASAP is a Recipient-initiated payment and information system designed to provide a single point of contact for the request and delivery of Federal funds.

Recipients interested in enrolling in the ASAP system, please contact Dee Devillier at 303-445-3461 or Sheri Oren at 303-445-3448.

3. PROCUREMENT STANDARDS (43 CFR §12.76)

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.*

(1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) Competition.

(1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §12.76. Some of the situations considered to be restrictive of competition include but are not limited to:

- (i) Placing unreasonable requirements on firms in order for them to qualify to do business,
- (ii) Requiring unnecessary experience and excessive bonding,
- (iii) Noncompetitive pricing practices between firms or between affiliated companies,
- (iv) Noncompetitive awards to consultants that are on retainer contracts,
- (v) Organizational conflicts of interest,
- (vi) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement, and
- (vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

- (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

- (ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed* —(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at \$100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §12.76(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.*

(1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.*

(1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see §12.62). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.*

(1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a “brand name” product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

- (1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)
- (2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000)
- (3) Compliance with Executive Order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees)
- (4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)
- (5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of \$2000 awarded by grantees and subgrantees when required by Federal grant program legislation)
- (6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2000, and in excess of \$2500 for other contracts which involve the employment of mechanics or laborers)
- (7) Notice of awarding agency requirements and regulations pertaining to reporting.
- (8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
- (9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.
- (10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
- (11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.
- (12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000)
- (13) Mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

4. EQUIPMENT (43 CFR §12.72)

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.*

(1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in §12.65(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of \$5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided Federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 12.72(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

5. SUPPLIES (43 CFR §12.73)

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding \$5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other Federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

6. INSPECTION

Reclamation has the right to inspect and evaluate the work performed or being performed under this Agreement, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If Reclamation performs inspection or evaluation on the premises of the Recipient or a sub-Recipient, the Recipient shall furnish and shall require sub-recipients to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

7. AUDIT (31 U.S.C. 7501-7507)

Non-Federal entities that expend \$500,000 or more in a year in Federal awards shall have a single or program-specific audit conducted for that year in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501-7507) and revised OMB Circular A-133. Federal awards are defined as Federal financial assistance and Federal cost-reimbursement contracts that non-Federal entities receive directly from Federal awarding agencies or indirectly from pass-through entities. They do not include procurement contracts, under grants or contracts, used to buy goods or services from vendors. Non-Federal entities that expend less than \$500,000 a year in Federal awards are exempt from Federal audit requirements for that year, except as noted in A-133, §___.215(a), but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and General Accounting Office (GAO).

8. ENFORCEMENT (43 CFR §12.83)

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

- (1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,
- (2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,
- (3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,
- (4) Withhold further awards for the program, or
- (5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not

allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to “Debarment and Suspension” under E.O. 12549 ((2 CFR 29.5.12 and 2 CFR 1400, Subpart C).

9. TERMINATION FOR CONVENIENCE (43 CFR §12.84)

Except as provided in 43 CFR §12.83 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §12.83 or paragraph (a) of this section.

10. DEBARMENT AND SUSPENSION (2 CFR §1400)

The Department of the Interior regulations at 2 CFR 1400—Governmentwide Debarment and Suspension (Nonprocurement), which adopt the common rule for the governmentwide system of debarment and suspension for nonprocurement activities, are hereby incorporated by reference and made a part of this Agreement. By entering into this grant or cooperative Agreement with the Bureau of Reclamation, the Recipient agrees to comply with 2 CFR 1400, Subpart C, and agrees to include a similar term or condition in all lower-tier covered transactions. These regulations are available at <http://www.gpoaccess.gov/ecfr/>.

11. DRUG-FREE WORKPLACE (43 CFR §43)

The Department of the Interior regulations at 43 CFR 43—Governmentwide Requirements for Drug-Free Workplace (Financial Assistance), which adopt the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq, as amended) applicable to grants and cooperative Agreements, are hereby incorporated by reference and made a part of this Agreement. By entering into this grant or cooperative Agreement with the Bureau of Reclamation, the Recipient agrees to comply with 43 CFR 43, Subpart B, if the

Recipient is not an individual, or with 43 CFR 43, Subpart C, if the Recipient is an individual. These regulations are available at <http://www.gpoaccess.gov/ecfr/> .

12. ASSURANCES AND CERTIFICATIONS INCORPORATED BY REFERENCE

The provisions of the Assurances, SF 424B or SF 424D as applicable, executed by the Recipient in connection with this Agreement shall apply with full force and effect to this Agreement. All anti-discrimination and equal opportunity statutes, regulations, and Executive Orders that apply to the expenditure of funds under Federal contracts, grants, and cooperative Agreements, loans, and other forms of Federal assistance. The Recipient shall comply with Title VI or the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and any program-specific statutes with anti-discrimination requirements. The Recipient shall comply with civil rights laws including, but not limited to, the Fair Housing Act, the Fair Credit Reporting Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Equal Educational Opportunities Act, the Age Discrimination in Employment Act, and the Uniform Relocation Act.

Such Assurances also include, but are not limited to, the promise to comply with all applicable Federal statutes and orders relating to nondiscrimination in employment, assistance, and housing; the Hatch Act; Federal wage and hour laws and regulations and work place safety standards; Federal environmental laws and regulations and the Endangered Species Act; and Federal protection of rivers and waterways and historic and archeological preservation.

13. COVENANT AGAINST CONTINGENT FEES

The Recipient warrants that no person or agency has been employed or retained to solicit or secure this Agreement upon an Agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide offices established and maintained by the Recipient for the purpose of securing Agreements or business. For breach or violation of this warranty, the Government shall have the right to annul this Agreement without liability or, in its discretion, to deduct from the Agreement amount, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee

14. TRAFFICKING VICTIMS PROTECTION ACT OF 2000 (2 CFR §175.15)

(a) To implement the trafficking in persons requirement in section 106(g) of the TVPA, as amended, a Federal awarding agency must include the award term in paragraph (b) of this section in—

- (1) A grant or cooperative agreement to a private entity, as defined in §175.25(d); and
- (2) A grant or cooperative agreement to a State, local government, Indian tribe or foreign public entity, if funding could be provided under the award to a private entity as a subrecipient.

(b) The award term that an agency must include, as described in paragraph (a) of this section, is:

I. Trafficking in persons.

a. *Provisions applicable to a recipient that is a private entity .*

1. You as the recipient, your employees, subrecipients under this award, and subrecipients' employees may not—

i. Engage in severe forms of trafficking in persons during the period of time that the award is in effect;

ii. Procure a commercial sex act during the period of time that the award is in effect; or

iii. Use forced labor in the performance of the award or subawards under the award.

2. We as the Federal awarding agency may unilaterally terminate this award, without penalty, if you or a subrecipient that is a private entity —

i. Is determined to have violated a prohibition in paragraph a.1 of this award term; or

ii. Has an employee who is determined by the agency official authorized to terminate the award to have violated a prohibition in paragraph a.1 of this award term through conduct that is either—

A. Associated with performance under this award; or

B. Imputed to you or the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 CFR part 180, “OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),” as implemented by our agency at 2 CFR part 1400.

b. *Provision applicable to a recipient other than a private entity .* We as the Federal awarding agency may unilaterally terminate this award, without penalty, if a subrecipient that is a private entity—

1. Is determined to have violated an applicable prohibition in paragraph a.1 of this award term; or

2. Has an employee who is determined by the agency official authorized to terminate the award to have violated an applicable prohibition in paragraph a.1 of this award term through conduct that is either—

i. Associated with performance under this award; or

ii. Imputed to the subrecipient using the standards and due process for imputing the conduct of an individual to an organization that are provided in 2 CFR part 180, “OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),” as implemented by our agency at 2 CFR part 1400.

c. *Provisions applicable to any recipient .*

1. You must inform us immediately of any information you receive from any source alleging a violation of a prohibition in paragraph a.1 of this award term.

2. Our right to terminate unilaterally that is described in paragraph a.2 or b of this section:

i. Implements section 106(g) of the Trafficking Victims Protection Act of 2000 (TVPA), as amended (22 U.S.C. 7104(g)), and

ii. Is in addition to all other remedies for noncompliance that are available to us under this award.

3. You must include the requirements of paragraph a.1 of this award term in any subaward you make to a private entity.

d. *Definitions* . For purposes of this award term:

1. "Employee" means either:

i. An individual employed by you or a subrecipient who is engaged in the performance of the project or program under this award; or

ii. Another person engaged in the performance of the project or program under this award and not compensated by you including, but not limited to, a volunteer or individual whose services are contributed by a third party as an in-kind contribution toward cost sharing or matching requirements.

2. "Forced labor" means labor obtained by any of the following methods: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

3. "Private entity":

i. Means any entity other than a State, local government, Indian tribe, or foreign public entity, as those terms are defined in 2 CFR 175.25.

ii. Includes:

A. A nonprofit organization, including any nonprofit institution of higher education, hospital, or tribal organization other than one included in the definition of Indian tribe at 2 CFR 175.25(b).

B. A for-profit organization.

4. "Severe forms of trafficking in persons," "commercial sex act," and "coercion" have the meanings given at section 103 of the TVPA, as amended (22 U.S.C. 7102).

(c) An agency may use different letters and numbers to designate the paragraphs of the award term in paragraph (b) of this section, if necessary, to conform the system of paragraph designations with the one used in other terms and conditions in the agency's awards

15. NEW RESTRICTIONS ON LOBBYING (43 CFR §18)

The Recipient agrees to comply with 43 CFR 18, New Restrictions on Lobbying, including the following certification:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the Recipient, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, and officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying" in accordance with its instructions.

(3) The Recipient shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Correspondence

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August 13, 2009

OFFICE OF RECLAMATION OFFICIAL BLUE COPY RECEIVED	
AUG 17 2009	
CODE	170 ✓
DATE	8-18-09

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Mr. Jason Phillips
Bureau of Reclamation
2800 Cottage Way, MP-140
Sacramento, California 95825-1898

Re: San Joaquin River Restoration Program -
Our conference call with Reggie Hill yesterday.

Dear Jason:

The Financial Assistance Agreement between the Lower San Joaquin Levee District will include the following parameters: (1) It will be for a fixed period of time, (2) It will be limited to the line item categories which were established in Reggie Hill's written estimate of the costs which the District will incur and (3) It will, at least superficially, to the total of Reggie Hill's estimate of costs which was approximately \$185,000.00 for the 2009-2010 water year.

It was my understanding from our telephone conversation on each of these items that

(1) Since the agreement cannot be ready before the October 1, 2009 beginning of the Water Year, the District can send a letter requesting "incurrence of costs", which, (assuming the Bureau would agree to it and you indicated that it would), would allow the recovery of costs incurred prior to the date the Financial Assistance Agreement is signed. At the other end of the term, it is recognized by the Bureau that the District believes that it will continue to incur costs after September 30, 2010, as a result of the Interim Flows released during the 2009-2010 water year. As I understood our conversation, the District not only would be negotiating a Financial Assistance Agreement for the project after October 1, 2010, but that, if there were funds remaining in the initial Financial Assistance Agreement the District could put in a claim for those funds and receive them for these purposes.

(2) Even though the contract will be limited for costs incurred in the activities identified in Reggie Hill's estimate, the District anticipates that it will have let a contract for technical assistance in order to work effectively with the Bureau of Reclamation in developing the appropriate Operation and Maintenance methods for maintaining the River (and any affected

Classification	ADM-13-00
Project	3437
Contract No.	09053601
Roller ID	1104717
Issue Input & Print	8/17/09 JS

Mr. Jason Phillips, Bureau of Reclamation

Re: San Joaquin River Restoration Program - Our conference call with Reggie Hill yesterday.
August 13, 2009

Page 2

portion of the bypass system) while they are wet. Similarly you indicated that, if it makes better financial sense for the Bureau to stop the interim flows for some period during the summer in order to aid in the operation and maintenance of the system it will certainly consider doing so. The discussion of the expansion of line items or the addition of other line items in order to accommodate the District's need to bring in outside help can take place while the contract for the first year is being processed. This should be ample time since your people have indicated that the turn around time from the date the District submits the contract documents in their final form until the Bureau produces a contract is anticipated to be 90 to 120 days. I understood that these talks could begin once David Mooney of your staff returns from vacation.

(3) We all acknowledge that the \$185,000.00 figure might be far too little and, if necessary as the year unfolds, additional funds can be added. Reggie particular wanted to point out that the numbers which he generated did not take into account different ways of operating and maintaining the system even though such different ways are reasonably anticipated because of the lack of a drying out period for the system under the regimen which will be in effect from October 1, of this year through the end of the project. He had been asked only for an estimated cost of cleaning up if the project stopped after the first year. We all realize that this would be an unreasonable expectation.

One more caveat I need to put on all of this: Reggie and I answer to the District's Board of Directors. We do not have the power to bind the District contractually. We can negotiate and attempt to develop the best contract possible for the District but the decision whether to enter into that contract or any other contract belongs to the Board of Directors. Judging from the mood of the Board of Directors at the end of the meeting on Thursday, I cannot say with any confidence that a majority of the Board will be willing to enter into any contract which they view as accommodating the River Restoration program. The members of the Board are certainly anxious to see that the restoration efforts do not, in any way, decrease the capacity of the flood control system to carry flood water. While you indicated your concurrence in this goal, it does not appear in the Settlement Agreement and your job is to effectuate the terms of the settlement agreement. As you pointed out, the Settlement Agreement does not contemplate any work of improvement in Reach 3, but it is apparent to anyone who studies this problem for very long that some work will need to be done there. Similarly the Settlement Agreement does not mention the capacity of the bypass system to carry flood flows but anyone who studies this problem very long realizes that if a segment of the bypass system is going to be used to convey Interim Flows and the Restoration Flows, some work of improvement will have to be performed in order to maintain at least the current level of flood protection. They just do not feel confident that this will be the final decision of Reclamation in carrying out the River Restoration project.

If there is anything at all in this letter which I did not put down correctly, we expect you

Mr. Jason Phillips, Bureau of Reclamation

Re: San Joaquin River Restoration Program - Our conference call with Reggie Hill yesterday.
August 13, 2009

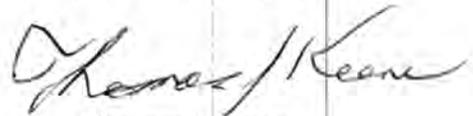
Page 3

to tell us at once. It is absolutely vital to our mutual efforts that there be no misunderstandings with regard to the issues addressed in this letter. I would ask that you send a letter confirming that you agree to all of the terms set forth in this letter but, even barring that, your failure to respond will be interpreted as your agreement and, under California law, that would constitute an adoptive admission.

We will be sending you the initial draft of the contract documents as soon as we can.

Very truly yours,

Linneman, Burgess, Telles,
Van Atta, Vierra, Rathmann,
Whitehurst & Keene



Thomas J. Keene

cc: Reggie Hill, Lower San Joaquin Levee District
Kevin Faulkenberry, Department of Water Resources
Jay Punia, Central Valley Flood Protection Board



United States Department of the Interior



BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

IN REPLY REFER TO:

MP-170
PRJ-1.00

SEP 11 2009

Mr. Reggie N. Hill
Secretary-Manager
Lower San Joaquin Levee District
11704 West Henry Miller Avenue
Dos Palos, CA 93620

Subject: Financial Assistance Agreement with the Lower San Joaquin Levee District Related to Water Year 2010 Interim Flows

Dear Mr. Hill: *Reggie*

Thank you for taking the time to talk with me on August 12, 2009, regarding the financial assistance agreement that the San Joaquin River Restoration Program (Program) is working to prepare with your agency. This letter is in response to Tom Keene's letter dated August 13, 2009, that was written to summarize key points from our August 12, 2009, conference call. I would like to clarify a few items and further describe our intent with regard to the subject agreement.

In summary, the Bureau of Reclamation (Reclamation) is currently working on a financial assistance agreement that will address the additional operations and maintenance activities that may be undertaken as a result of the Program's Water Year 2010 Interim Flows project. Under the terms of this agreement, the Lower San Joaquin Levee District (Levee District) will be reimbursed for work identified in the Statement of Work that is performed within the time period stated in the agreement, with the total reimbursement not to exceed the funding provided in the agreement.

Each item from Mr. Keene's August 13, 2009, letter is addressed below:

1. As identified in Mr. Keene's August 13, 2009, letter, the agreement cannot be ready before October 1, 2009. You may submit a letter requesting incurrence of costs for the activities within the scope of the agreement that take place on or after October 1, 2009. Although we see no challenges with authorizing pre-incurrence of costs at this time, only the appropriate government official can authorize pre-incurrence of costs. We cannot guarantee that Reclamation will authorize pre-incurrence of costs and request that you do not incur costs until you have received written authorization from the appropriate government official.

As described above, reimbursements under the agreement will not exceed the amount awarded, and the work needs to be performed within the time period stated in the agreement. If the statement of work, the estimated costs, or the timeframe changes during the execution of the agreement, we ask that you notify us at once. Reclamation will work to determine what changes, if any, need to be made to the agreement. Any modifications to the agreement, including extending the term of the agreement, will be addressed through a written modification. We cannot guarantee that Reclamation will execute a modification and request that you do not conduct work that is outside of the agreement without prior written authorization from the appropriate government official.

We would like to work with you to develop an agreement for additional operations and maintenance activities that may be undertaken as a result of the Program's longer-term Interim and Restoration flows. We anticipate that this longer-term agreement could be in place by October 1, 2010, so long as a Scope of Work is developed and agreed upon by early next year.

2. With regard to expenses for technical assistance to better understand the changes to the Levee District's future operations and maintenance methods that may result from the implementation of the Program, we would like to work with you to better understand this effort and ways of addressing the issue. At this time, such efforts are not included in the current agreement.

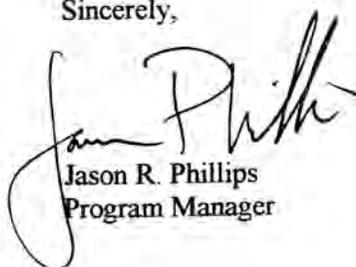
Regarding a reduction of Interim Flows for a short time period in the summer, if the Levee District identifies a significant cost savings resulting from such an action next year, Reclamation would be willing to discuss this possibility with the Settling Parties.

3. Mr. Keene's August 13, 2009, letter notes that the Levee District prepared its cost estimate based on your current operations and maintenance activities. Reclamation acknowledges this limitation to the cost estimate. As I have identified above, if the estimated costs change, please notify us at once. Reclamation will work to determine what changes, if any, need to be made to the agreement. Any modifications to the agreement will require written authorization from the appropriate government official.

With the clarifications above, I feel that we have a better mutual understanding of our discussions on our August 12, 2009, conference call. Please be advised that only the appropriate government official can agree to the terms for any future financial assistance agreement. Reclamation intends to work towards execution of a financial assistance agreement with the Levee District. However, the execution of such an agreement is governed by Federal laws and regulations and must be completed by the appropriate government official. We do not view Mr. Keene's August 13, 2009, letter as binding and representing terms that may be in a future financial assistance agreement.

We look forward to working with you as we implement the Program. Please contact me if you have any questions at 916-978-5455 or jphillips@usbr.gov.

Sincerely,



Jason R. Phillips
Program Manager

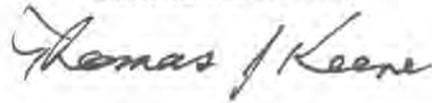
cc: Mr. Kevin Faulkenberry
Program Manager
Department of Water Resources
3374 E. Shields Avenue
Fresno, CA 93726

Mr. Jason Phillips, Bureau of Reclamation
Re: San Joaquin River Restoration Program - Operations Agreement.
October 2, 2009
Page 2

I have recommended to Reggie that we have an agenda item at the Levee District's Board meeting on October 13. We look forward to hearing your thoughts before then.

Very truly yours,

Linneman, Burgess, Telles,
Van Atta, Vierra, Rathmann,
Whitehurst & Keene



Thomas J. Keene

cc: Reggie Hill, Lower San Joaquin Levee District
Chris White, Central California Irrigation District
Chase Hurley, San Luis Canal Company



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898



MP-170
PRJ-1.00

OCT 15 2009

Mr. Reggie N. Hill
Secretary-Manager
Lower San Joaquin Levee District
11704 West Henry Miller Avenue
Dos Palos, CA 93620

Subject: San Joaquin River Restoration Program – Operations Agreement

Dear Mr. Hill:

This letter responds to correspondence from Mr. Thomas J. Keene dated October 2, 2009. Mr. Keene expressed concern that your estimate of the anticipated costs to the Lower San Joaquin Levee District (District) for the increased maintenance activities as a result of the San Joaquin River Restoration Program (Program) may be incorrect because certain assumptions you made regarding the operation of Mendota Dam and Sack Dam may have been incorrect when you developed information for such costs.

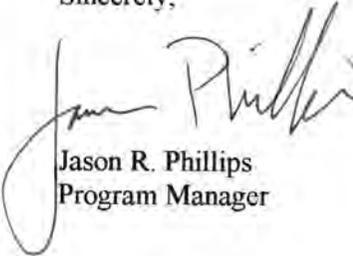
Reclamation is willing to meet with you to discuss any changes that may need to be made to the scope of work to reflect the new assumptions. While these discussions take place, I would recommend that we continue moving forward with processing and awarding the existing agreement, which is currently scheduled to be awarded at the end of November. Getting this agreement awarded right away without making changes will ensure that funding is available earlier and that it is available when needed. If we modify the existing scope of work now, it will delay the award altogether and delay the availability of funds.

I understand that Interim Flows represent a change from historical conditions and that the lack of experience with similar flows makes scoping potential work and estimating the associated costs difficult for the District. If the scope of work or costs change from those anticipated in the agreement, Reclamation will work with the District to determine what changes, if any, need to be made to the agreement.

With regards to the on-going discussions for an operations agreement with the Central California Irrigation District, San Luis Canal Company, and San Luis & Delta Mendota Water Authority, I welcome District participation as a party in these discussions.

Reclamation will contact you to further discuss your concerns on the scope of work for maintenance activities. Please contact me if you have any questions at 916-978-5455 or jphillips@usbr.gov.

Sincerely,



Jason R. Phillips
Program Manager

cc: Mr. Kevin Faulkenberry
Program Manager
Department of Water Resources
3374 E. Shields Avenue
Fresno, CA 93726

Mr. Christopher White, P.E.
General Manager
Central California Irrigation District
P.O. Box 1231
Los Banos, CA 93635

Mr. Chase Hurley
General Manager
11704 W. Henry Miller
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November 11, 2009

BUREAU OF RECLAMATION OFFICIAL FILE COPY RECEIVED		
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CODE	ACTION	SURNAME & DATE
170	✓	J. VIERRA
105	COPY MADE	

Mr. Donald R. Glaser
 Regional Director
 Bureau of Reclamation
 2800 Cottage Way
 Sacramento, California 95825-1898

Re: San Joaquin River Restoration Program
 Your letter of November 10, 2009 to Steve Chedester

Dear Mr. Glaser:

We have not been introduced. I serve as General Counsel to the Lower San Joaquin Levee District. Steve Chedester shared your letter with the District, presumably since the Levee District was discussed in one of the paragraphs of that letter. In reviewing it, the District felt it was appropriate to respond directly to you about some of the statements you made and the position which you have set forth for the Bureau of Reclamation.

Presumably the Bureau of Reclamation is working on a reimbursement agreement with the Levee District. We have been told this for two years and have yet to see a draft of the entirety of that document. One of the consequences of this is that we have no way of knowing whether there is any provision in the document for indemnification of the Levee District by the Bureau of Reclamation. Because of the District's concern in this regard, I have written to Jason Phillips to state that the Levee District wants to be included in the Operations Agreement being negotiated by the Central California Irrigation District.

As you no doubt are aware, the Mariposa Bypass and the Eastside Bypass north of Washington sit in easements for the flowage of flood waters. The Bureau of Reclamation has not thus far gained an expansion of the scope of the existing easements, a new non-exclusive easement or even a license agreement with these land owners for the passage of either interim or restoration flows. It appears from some of the documentation, (particularly the Final Environmental Assessment and Finding of No Significant Impact/Initial Study and Mitigated Negative Declaration) that the Bureau of Reclamation plans to give the Levee District the

REPLY IF YOU DO NOT
 WANT TO RECEIVE PLEASE INSERT

 NAME

 DATE

Central No	09076354
FILED NO.	1019105
Date Input & Initials	11-16-09

Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation
Re: San Joaquin River Restoration Program - Letter of November 10 to Steve Chedester.
November 11, 2009
Page 2

discretion once the water reaches the structure at the head of the Mariposa Bypass as to which bypass to use. If a landowner downstream of that bifurcation wants to sue for trespass because of a lack of easement or license for the passage of non-flood waters, the Levee District will be an indispensable party. The Levee District needs an operations agreement so that it can have a contractual right to compel the Bureau of Reclamation to pay the cost of the Levee District's defense and indemnify it for any liability associated with the passage of these waters.

It seems to us that, from the Bureau of Reclamation's perspective, you should want an operations agreement with the District in order to have a right to direct the District on where to send restoration flows. For example, recently the Restoration Administrator suggested diverting Interim Flows into the Chowchilla Canal Bypass during the construction of the improvements contemplated in Reach 2 b. The Levee District is under no obligations to make this happen without an operations agreement, the essential provision of which would be an agreement for the Bureau of Reclamation to defend, indemnify and hold the District harmless from any liability which arises from the passage of water from the River Restoration Project.

We believe that, to send non-flood waters down the River to the Eastside Bypass, as you suggest, without gaining permission from the landowners adjacent to the Bypass for their passage, the Bureau of Reclamation is taking unfair advantage of the Levee District's position at the downstream end of the lower San Joaquin River. We are faced with three choices: (1) send the water down Reach 4 B, which, as you are aware, would flood farms in that area, since the River has been too silted up in that area for generations to allow the passage of significant amounts of water; (2) send the water all the way down the Eastside Bypass and so trespass on the property adjacent to the Eastside Bypass and run the risk of being sued by one or more of these property owners or (3) send the water down the Eastside to the Mariposa Bypass and then down the length of the Mariposa Bypass, and so trespass on the property adjacent to the Mariposa Bypass and run the risk of being sued by one or more of these property owners.¹ This is hardly consistent with the promise in the legislation for there to be no third party impacts.

The position which you set forth in your letter is news to us. We know of no law which says that the fact water has not flowed down Reach 4 B as you put it, for decades, in any way

¹This actually creates additional potential liability. As we have explained on a number of occasions to Jason Phillips and again, recently, in response to the Final Environmental Assessment and Finding of No Significant Impact/Initial Study and Mitigated Negative Declaration, to get the water into the Mariposa Bypass would require ponding in order to get the water over the elevated entrance point. This necessitates the backing up of the water in the Eastside Bypass which interferes with one landowner's mining of sand from the bypass adjacent to his farm upstream of the bifurcation structure.

Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation

Re: San Joaquin River Restoration Program - Letter of November 10 to Steve Chedester.

November 11, 2009

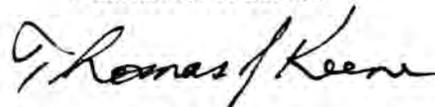
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expands the scope of the easement in which the Eastside and Mariposa Bypasses were constructed to allow for the passage of anything but flood waters. The Bypasses are not natural water ways. They are owned by the State of California which has already taken the position that the easements in question will not allow for the passage of restoration flows because they are not flood waters, (enclosed is a copy of the memorandum written to that effect by the Department of Water Resources legal counsel which was provided to the Levee District and to Jason Phillips in November of 2008). Presumably the land owners will agree with the State of California, Department of Water Resources and bring suit against the Levee District and the Bureau of Reclamation. But again, from the Levee District's perspective, it does not matter who wins or loses that case because the Levee District will be broke long before the final decision in such litigation.

Please, do not, as your letter suggests is your intention, leave the Levee District caught between the landowners along the bypasses and the Bureau of Reclamation. You would be condemning us to being necessary parties to litigation which we cannot afford and do not want. Instead, give us an indemnification clause in either the Financial Assistance Agreement which is supposedly in the works or as a party to the Operations Agreement you are negotiating with the exchange contractors or in our own Operations Agreement.

Very truly yours,

Linneman, Burgess, Telles,
Van Atta, Vierra, Rathmann,
Whitehurst & Keene



Thomas J. Keene

cc: Honorable Diane Feinstein, United States Senate
Honorable Barbara Boxer, United States Senate
Honorable Dennis Cardoza, House of Representatives
Honorable George Radanovich, House of Representatives
Honorable Jim Costa, House of Representatives
John Engbring, U. S. Fish & Wildlife Services
Rhonda Reed, National Marine Fisheries Service
Jeffrey R. Single, California Department of Fish & Game
Paula Landis, California Department of Water Resources
Victoria Whitney, State Water Resources Control Board
Kathy Mrowka State Water Resources Control Board

Mr. Donald R. Glaser, Regional Director, Bureau of Reclamation
Re: San Joaquin River Restoration Program - Letter of November 10 to Steve Chedester.
November 11, 2009
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Monty Schmidt, National Resources Defense Council
Ronald Jacobsma, Friant water Users Authority
Reggie Hill, Lower San Joaquin Levee District
Steve Chedester, San Joaquin River Exchange Contractors

Memorandum

Date: November 19, 2008

To: Paula Landis, Acting Chief
Division of Planning & Local Assistance

From: Scott Morgan, Staff Counsel
Department of Water Resources

Subject: Property rights in the Eastside Bypass held by the Sacramento & San Joaquin
Drainage District

Question

Do flowage easements in the Eastside Bypass held by the Sacramento and San Joaquin Drainage District confer a right to utilize the bypass for restoration flows in conjunction with the San Joaquin River Restoration Program?

Answer

Flowage easements in the Eastside Bypass held by the Sacramento and San Joaquin Drainage District do not confer a right to utilize the bypass for restoration flows in conjunction with the San Joaquin River Restoration Program.

Background

In *NRDC et al. v. Kirk Rodgers et al.*, environmental groups sued the U.S. Bureau of Reclamation and Central Valley water contractors over renewal of long-term water service contracts. A preliminary ruling favorable to the plaintiffs on key issues led to negotiation of a settlement agreement among the parties.¹

The settlement agreement establishes dual goals of "restoring and maintaining fish populations in 'good condition' in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River" and "reduce or avoid adverse water supply impacts to all of the Friant Division long-term contractors."

This State is participating in the San Joaquin River Restoration Program (SJRRP or "Program") pursuant to a Memorandum of Understanding (MOU) between parties to litigation and State agencies including the Department of Water Resources (DWR or Department). The SJRRP's Environmental Compliance and Permitting Workgroup prepared a draft document entitled "Initial Program Alternatives Evaluation" describing eight alternative actions designed to achieve Restoration and Water Management objectives of the Initial Program Alternatives.

¹ *Natural Resources Defense Council v. Rodgers*, U. S. Dist. Ct. (East. Dist.), Notice of Lodgment of Stipulation of Settlement, Case No. CIV S-88-1658 LKK/GGH, filed September 13, 2006

The Initial Program Alternatives Report states that the Program intends to commence "Interim Flows" that will include water released from Friant Dam in accordance with the Restoration Flow schedule contained in the Settlement no later than October 1, 2009, and continuing until full Restoration Flows begin. The Program has contemplated different scenarios for the interim Flows, including releasing different volumes of water and alternate fates for whatever water is released. One of the options being considered is to use the Eastside Bypass in lieu of the natural river channel for at least part of the flow.

The Eastside Bypass was constructed by the Department of Water Resources on behalf of the State Reclamation Board (now the Central Valley Flood Protection Board, hereinafter "Board") as part of the Lower San Joaquin Flood Control Project. The LSJFCP is a joint State-Federal flood control project that has been authorized by both Congress² and the California Legislature.³

The original plan for the LSJFCP involved the construction of structural flood control features downstream of the mouth of the Merced River by the federal government and purchase of flowage easements over a significant swath of low-lying, flood-prone valley real estate by the State. The easements above the mouth of the Merced River covered an area of over 100,000 acres that would be used as a natural detention basin. In 1945, when the State authorized the project, the cost of flowage easements over this area was estimated at less than \$1 million. Eight years later the estimated cost of acquiring those easements had risen to over \$12 million and the land, which had previously been viewed as relatively unproductive, was now considered valuable agricultural land. Because of the magnitude of change to the original project design, the Board lacked authority to unilaterally change the project.⁴ Ultimately, the revised project was approved by Congress⁵ and the State legislature.⁶

Property acquired for the revised Lower San Joaquin Flood Control Project, including construction of the Eastside Bypass, required acquisition of property rights. Those rights are held by the State through the Sacramento and San Joaquin Drainage District. The Central Valley Flood Protection Board has management and control over the District, including its property.⁷

Property Rights in the Eastside Bypass

The Department's office of Land & Right of Way has identified 44 different deeds containing the description of property rights conveyed to the District for the purpose of constructing the Lower San Joaquin Flood Control Project. Most of these deeds convey property rights in multiple parcels. The District owns a

² Federal Flood Control Act of 1944 (58 Stat. 887)

³ State Water Resources Act of 1945 (Stat. 1945, Ch. 1514, p. 2834, § 33)

⁴ 24 Atty.Gen.Opin. 259, Dec. 23, 1954.

⁵ Ch. 687, Pub. 327, Aug. 9, 1955

⁶ Water Code § 8621 (Stats.1955, Ch. 1048)

⁷ Water Code § 8502

significant amount of the property of the Bypass in fee, and over the rest it holds one or more easements, some of which are subject to reservations on behalf of the fee holder. (See Map) The District owns most Bypass lands in fee from its southern end to about the Sand Sough Connector. From the Sand Slough Connector north, however, the District holds mostly easements. The easements provide different rights based upon what was needed at a particular location, and include such rights as to excavate to construct San Joaquin River levees, construct, operate & maintain San Joaquin River Flood Control project, establish roads for use in flood control project, locate public facilities, spoil material during construction of the San Joaquin River Flood Control project, or clear vegetation the Board determines interferes with the free flow of water. (All deeds are reproduced in PDF in the attachment.) Of particular interest here are those easements that confer the right to flow water resulting from this or any future San Joaquin River Flood Control project. The following language, from Deed 2496, is typical:

To flow, without recourse by grantor, his successors or assigns, for compensation for past, present or future damage therefrom, any and all waters which may as the result of any present or future flood control project of the State of California, from time to time inundate the said real property.

The question is whether such language confers the right to pass restoration flows through the Bypass.

Easements

An easement is a legal interest in the lands of another.⁸ It confers a restricted right to specific, limited, definable use or activity upon property that is something less than fee ownership.⁹ Easements may be created in a variety of ways, including through express grant or reservation (the method by which the Sacramento and San Joaquin Drainage District acquired property rights in the Eastside Bypass at issue here).¹⁰

An easement founded upon a grant confers *only* those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee.¹¹ A clear and specific grant for a particular use is decisive as to the scope of rights contained in an easement.¹²

⁸ *Eastman v. Piper*, 68 Cal.App. 554, 560, 229 P. 1002, 1004 (Cal.App. 2 Dist. 1924)).

⁹ *Scruby v. Vintage Grapevine, Inc.*, 37 Cal.App.4th 697, 702 (Cal.App.1.Dist.1995)

¹⁰ Civ. Code § 806

¹¹ *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 579, 110 P.2d 983, 985 (CA.1941)

¹² *Wilson v. Abrams*, 1 Cal.App.3d 1030, 1035, 82 Cal.Rptr. 272, 275 (Cal.App. 1969)

That said, it is understood that, as one court observed, the world moves.¹³ In recognition of this (and in spite of the above-mentioned general rules), easements created for one use *may* be put to another use through application of what is sometimes described as the "doctrine of shifting uses." The idea is that an easement granted for one purpose may be used for another – including a purpose that could not have been imagined at the time the original grant was made. Generally speaking, uses that are within the reasonable contemplation of the parties in terms of the purpose of the easement, and may be undertaken without surcharging the easement are permissible, but unanticipated, abnormal uses, or uses that increase the burden on the underlying property are not.¹⁴

Two factors are especially important. First, whether the new use is part of the natural evolution of things and, second, whether the new use materially increases the burden on underlying property.¹⁵ So, for example, an easement for a public road could be used for the construction and operation of a railway, which occupies the same space and is meant for the same purpose,¹⁶ but not to install electric power lines, which is a discrete purpose.¹⁷ If the owner of the easement attempts to change the character of an easement, the owner of the servient estate may seek, and may be granted an injunction to stop the unauthorized use.¹⁸

Although the use to which an easement may be put is elastic, it is not infinitely so. The default rule is to read the express terms of the grant, and limit the scope of the easement to precisely those terms. In certain circumstances, where it is eminently reasonable to do so, the express terms of the grant may be read so as to permit uses of the easement that are functionally equivalent to those expressly authorized. This flexibility is limited by two requirements. First, the sought after use must indeed be the functional equivalent of the use authorized. Second, the new use cannot surcharge the servient estate.

Although the Eastside Bypass easements do not contain language suggesting they may be used for restoration flows, the grant for flood flows is extremely broad. The easements provide a right to inundate property from "any and all waters ... of any present or future flood control project." An alternate question arises whether certain SJRRP flows, if characterized as "flood" flows, would be allowed by this language. The answer hinges on the word "characterized."

Without doubt, existing easements confer upon the Board the legal rights it would need to use the Bypass for virtually any flows associated with a flood control

¹³ *Montgomery v. Santa Ana & W. Ry. Co.*, 104 Cal. 186, 192-193, 37 P. 786, 788 (Cal.1894)

¹⁴ *Wall v. Rudolph*, 198 Cal.App.2d 684, 692, 18 Cal.Rptr. 123, 128 (Cal.App.1961)

¹⁵ *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 803, 212 Cal.Rptr. 31, 34 - 35 (Cal.App. 2 Dist., 1985)

¹⁶ *Montgomery v. Santa Ana & W. Ry. Co.*, 104 Cal. 186, 192-193, 37 P. 786, 788 (Cal.1894)

¹⁷ *Brown v. Voight*, 112 Cal.App.2d 569, 572, 246 P.2d 698, 700 (Cal.App. 4 Dist.1952)

¹⁸ *Vestal v. Young*, 147 Cal. 715, 717, 82 P. 381, 382 (Cal.1905)

Paula Landis

November 19, 2008

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project. If the Board, in cooperation with the Corps, designed a flood project that inundated the Bypass in the same manner as the restoration project, the existing easements would be sufficient for that purpose.

The plan here is not for the Board or the Corps to develop a new flood protection project that imposes new or different burdens on existing easements – although the easement language would allow this. The plan of the SJRRP is to restore flows for the benefit of the fishery. Although a flood project might obtain the same result by way of a different path, to convert the restoration project into a flood project as a pretext to avoid paying for the necessary property rights would likely be understood as such by the courts.

Conclusion

The express terms of the easements granted here are clear on their face: the board acquired the right to flow any and all waters from this or any future flood control project. The rights acquired are relatively broad in so far as they relate to flood flows. The board did not, however, acquire the right to flow any *other* waters across this land.

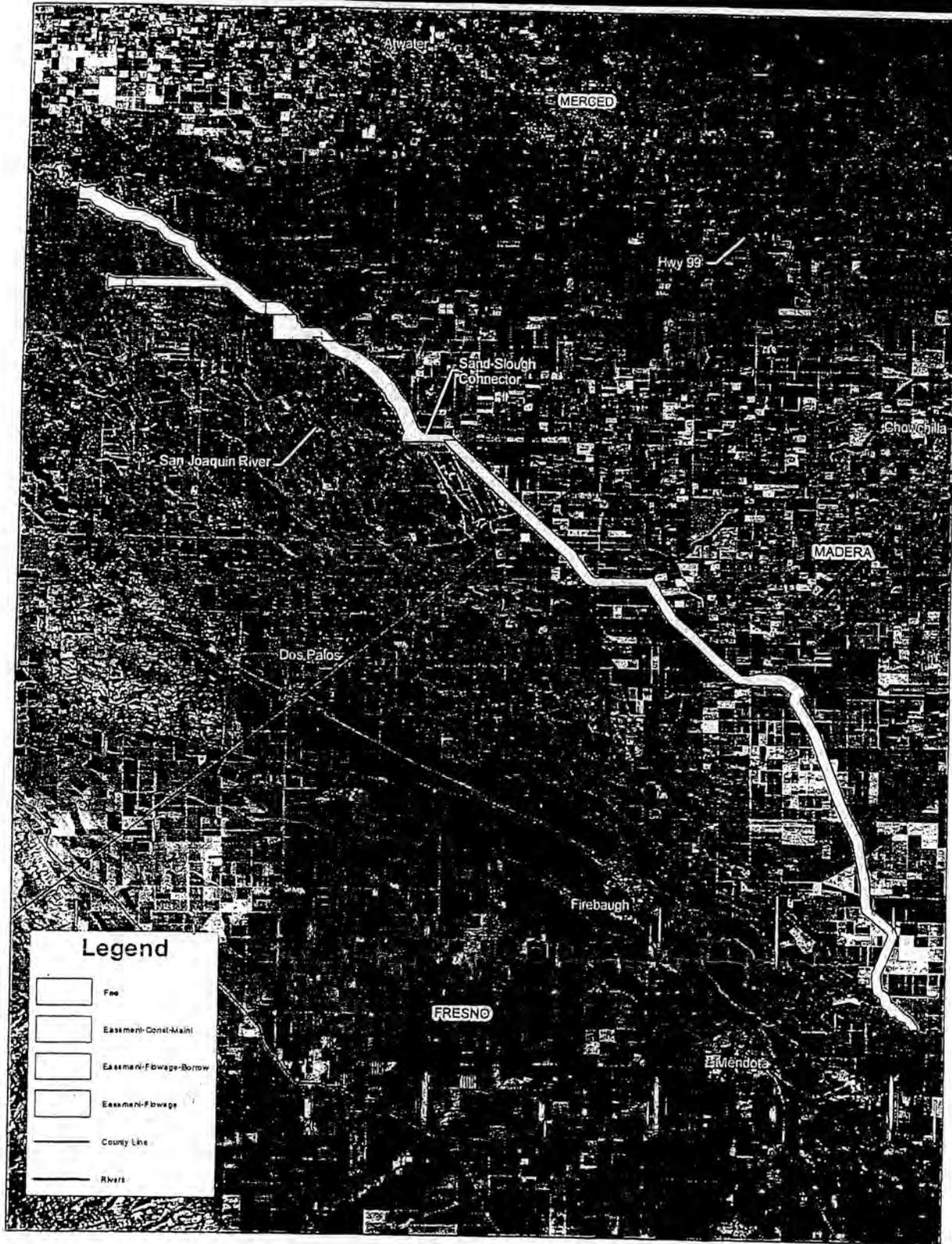
The introduction of restoration flows into the Eastside bypass, unless restricted to those stretches of the Bypass owned in fee, will require the acquisition of additional property rights. Easements held by the state do not cover this activity.

Although the State holds broad property rights to inundate the Eastside Bypass with flood waters, simply redefining the project as a "flood" project is unlikely to succeed in allowing the introduction of restoration flows without acquiring additional property rights. However, in determining the value of those rights, the incremental burden imposed upon the fee owner should not include any burden from additional flood flows for which existing easements have already provided compensation.

Attachment

cc: Ward Tabor
Laurence Kerckhoff
Bob James

Sacramento & San Joaquin Drainage District Property



Legend

-  Fee
-  Easement-Consolidate
-  Easement-Forage-Borrow
-  Easement-Forage
-  County Line
-  Rivers

0 1.5 3 6 9 12 Miles

EASTSIDE BYPASS





IN REPLY REFER TO:

MP-170
PRJ-1.00

United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

FEB 4 2010



Mr. Reggie N. Hill
Secretary-Manager
Lower San Joaquin Levee District
11704 West Henry Miller Avenue
Dos Palos, CA 93620

Subject: Financial Assistance Agreement with the Lower San Joaquin Levee District Related to Water Year 2010 Interim Flows and Use of the Eastside and Mariposa Bypasses to Convey Such Flows

Dear Mr. Hill:

This letter is in response to Tom Keene's letter dated November 11, 2009, regarding the financial assistance agreement that the Bureau of Reclamation is preparing to address the additional operations and maintenance activities that may be undertaken by the Lower San Joaquin Levee District (Levee District) as a result of the San Joaquin River Restoration Program's (SJRRP) Water Year 2010 Interim Flows Project. In his letter, Mr. Keene expressed concerns with regard to the use of the Eastside and Mariposa bypasses to convey Interim and Restoration flows that I will also address in this letter. The Lower San Joaquin River Flood Control Project (Flood Control Project), authorized by Congress in 1944 to protect irrigated agricultural lands and associated developments, is operated and maintained by the Levee District under the Flood Control Project's Operation and Maintenance Manual for Levee, Irrigation and Drainage Structures, Channels and Miscellaneous Facilities (Flood Control Manual). Maintaining or improving the existing flood carrying capacity of the Flood Control Project is important to both the Levee District and the SJRRP.

I understand that the Levee District may need to undertake additional operation and maintenance activities as a result of the Water Year 2010 Interim Flows Project. Reclamation prepared a financial assistance agreement that will reimburse the Levee District for these additional activities and the agreement is awaiting your signature. Additionally, we would like to work with you to develop a second, long-term agreement with the Levee District for future operations and maintenance activities that may be undertaken as a result of the SJRRP's Interim and Restoration flows. We anticipate that this long-term agreement could be in place by October 1, 2010, so long as a Statement of Work is developed and agreed upon by early 2010. These agreements are separate from the operations agreements being negotiated by the Central California Irrigation District.

We are aware that the lands held in the Eastside and Mariposa bypasses are subject to easements generally executed in the early 1960s between the landowner and the Sacramento and San Joaquin Drainage District. These easements generally allow for the construction, reconstruction, enlargement, repair, operation, and maintenance of the Flood Control Project. These easements also generally allow for flowing “any and all waters which may, as a result of any present or future flood control project of the State of California, from time to time inundate the said real property.” In Mr. Keene’s letter, he expressed concerns that these flowage easements may not allow for the use of the bypasses to route Interim Flows into the Eastside and Mariposa bypasses and that new or expanded easements are needed.

As previously stated, the Flood Control Project is operated and maintained by the Levee District consistent with the Flood Control Manual. The Flood Control Manual includes operating criteria for the San Joaquin River Control Structure, that regulates flows into Reach 4B1, and the Sand Slough Control Structure that regulates flows into the Sand Slough and Eastside Bypass. Specifically, the Flood Control Manual states that “the first 50 cfs [cubic feet per second] of flow in the river will be diverted into Sand Slough and that all flows in excess thereof will be diverted as equally as possible between the river and Sand Slough” (Flood Control Manual page 95). The Schematic Diagram of Design Flows for Adopted Plan, Appendix D of the Flood Control Manual, shows a design capacity of 1,500 cfs in the San Joaquin River below the San Joaquin River Control Structure. The Flood Control Manual states:

“... the channels of the project shall be maintained and kept clear of regrowth of vegetation. This is necessary as regrowth of vegetation will change the flood flow characteristics of the project channels. The purpose of channel maintenance is to insure that the channel is kept in as good a condition as when the channel was constructed” (Flood Control Manual pages 65, 66)

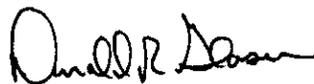
The Levee District’s current and historical practice to not maintain the San Joaquin River channel from the San Joaquin River Control Structure at Sand Slough to the confluence with the Mariposa Bypass deviates from the Flood Control Manual. Flows have not been allowed to pass into the natural river channel at that location for many decades although the Flood Control Manual specifies splitting flows at the Sand Slough Control Structure such that flows in the river would be diverted at the structure as equally as possible between the river and Sand Slough after the first 50 cfs is diverted into the Sand Slough. The Levee District’s operation of the San Joaquin River Control Structure as part of the Flood Control Project has resulted in this structure functionally becoming a permanent diversion point and all river flows now pass through the Sand Slough and the Eastside Bypass. We anticipate that the Levee District will continue to operate the Flood Control Project as it has for more than 40 years, routing any and all waters reaching the Sand Slough Control Structure into the bypass system to avoid damages in Reach 4B1 of the San Joaquin River. All flows routed at this point into the bypass system are a result of the Flood Control Project and thus, routing these flows into the bypass system is consistent with the current flowage easements.

In Mr. Keene’s letter, he noted in several places that the Levee District is seeking indemnification for actions taken related to the Interim and Restoration flows. There is no

mechanism for Reclamation to provide such indemnification as this would be in violation of the Anti-Deficiency Act (31 U.S.C. § 1341). However, Reclamation is working to address similar concerns raised by the Central California Irrigation District, the San Luis Canal Company, and others by preparing two separate agreements. The first agreement addresses the legal liability that these facility owners and/or operators believe may be associated with operating their facilities to pass the Interim Flows. The second agreement is an operations plan for tracking and, if necessary, reducing Interim Flows. It is my understanding that the Levee District is part of these discussions and is considering being a signatory to these agreements. These agreements would be the appropriate mechanism to address the Levee District's concerns.

We remain committed to working closely with you in the planning, design, and implementation of the Settlement and Public Law 111-11. If you have any questions, please contact me or Mr. Jason Phillips at 916-978-5456 or jphillips@usbr.gov.

Sincerely,



Donald R. Glaser
Regional Director

cc: Honorable Dianne Feinstein
United States Senate
Washington, DC 20515

Honorable Barbara Boxer
United States Senate
Washington, DC 20515

Honorable George Radanovich
House of Representatives
Washington, DC 20515

Honorable Dennis Cardoza
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Honorable Jim Costa
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Continued on next page.