FINAL ENVIRONMENTAL ASSESSMENT (11-049)

THREE DELTA DIVISION AND FIVE SAN LUIS UNIT WATER SERVICE INTERIM RENEWAL CONTRACTS 2012-2014

Appendix D
Comment Letters and Reclamation's Response to Comments

February 2012

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January 5, 2012

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Ms. Rain Healer
South Central California Area Office
U.S. Bureau of Reclamation
1243 N St
Fresno, CA 93721

Re: Comments on Draft EA/FONSI for Three Delta Division and Five San Luis Unit Water Service Interim Renewal Contracts 2012–2014

Dear Ms. Healer:

I. INTRODUCTION

On behalf of North Coast Rivers Alliance, California Sportfishing Protection Alliance, Friends of the River and the Winnemem Wintu Tribe, we respectfully submit the following comments on the Draft Environmental Assessment ("EA") and Draft Finding of No Significant Impact ("FONSI") for Three Delta Division and Five San Luis Unit Water Service Interim Renewal Contracts 2012–2014 ("Project"). The EA and FONSI are deficient and an Environmental Impact Statement ("EIS") must be prepared, as required by the National Environmental Policy Act ("NEPA").

Coalition-1

The Bureau of Reclamation ("Reclamation") based its EA and FONSI on the false premise that it had no discretion to reduce or eliminate water deliveries in renewing the interim contracts. Analysis of the Central Valley Project Improvement Act ("CVPIA") – with which Reclamation attempts to support its faulty premise – demonstrates that the interim contracts are discretionary and therefore that a full review of the interim contract renewals in an EIS is required by NEPA. Reclamation also biased its analysis by excluding from the "Study Area" all the source waters that are harmed including the Trinity, American, and Sacramento rivers, the Delta, and their watersheds.

Because Reclamation erroneously assumed that it lacked discretion to disapprove or reduce the amount of water diverted and delivered under the interim contracts, it assumed that renewal of the existing contracts was the baseline or background environment, leading to the fallacious conclusion that renewal of the contracts would have no environmental impact. This

erroneous assumption also rendered its consideration of alternatives an empty gesture. The EA presents only two alternatives, the Proposed Action and the No Action Alternative. The No Action Alternative, however, is the *same project* as the Proposed Action with only one small pricing difference. Under both so-called "alternatives," Reclamation would continue to deliver water in the same amounts to the contractors. The No Action Alternative failed to consider *non-renewal* of the contracts, contrary to the expressly discretionary terms of the CVPIA (discussed below). Moreover, alternatives proposing a reduced quantity of water deliveries were improperly eliminated from further consideration. Reclamation's decision to limit its consideration to two virtually identical "alternatives" – each of which renews the contracts fully and delivers the same water quantities – undercuts the EA's entire purpose and usefulness, hopelessly masking the impacts of the proposal.

Coalition-1 cont.

Equally erroneous is Reclamation's decision to limit the Study Area covered by the EA to the service area of the contracts. This irrational limitation completely ignores the impacts of the diversions of water to be delivered under the contracts on source watersheds including the American, Trinity and Sacramento Rivers. Those impacts on these rivers and their vulnerable fish and wildlife must be addressed in Reclamation's NEPA review.

Coalition-2

II. DISCUSSION

A. <u>The EA misinterprets Reclamation's authority under the CVPIA and accordingly improperly assumes that the contracts will be renewed, even under the No Action Alternative.</u>

The EA's No Action Alternative improperly assumes that Reclamation *will* approve renewal of the interim contracts as is. The stated reason is that "[n]on-renewal of existing contracts is considered infeasible" because "Reclamation has no discretion not to renew existing water service contracts" under section 3404(c) of the CVPIA. EA 11. This is a misreading of Reclamation's authority under the CVPIA, which expressly permits Reclamation *not* to renew an *interim* contract.[1] Accordingly, the EA should have considered non-renewal of the contracts as

Coalition-3

[1] Section 3404(c) of the CVPIA reads, in pertinent part, as follows:

(c) Renewal of Existing Long-Term Contracts.--Notwithstanding the provisions of the Act of July 2, 1956 (70 Stat. 483), *the Secretary shall, upon request, renew any existing long-term* repayment or *water service contract* for the delivery of water from the Central Valley Project *for a period of 25 years and may renew such contracts for successive periods of up to 25 years* each.

(1) No such renewals shall be authorized until appropriate environmental review, including the preparation of the environmental impact statement required in section 3409 of this title, has been completed. *Contracts which expire prior to the*

the No-Action Alternative, in order to provide Reclamation with information about the environmental consequences of exercising the discretion expressly granted to it.

The EA relies upon the first set of italicized language (*supra* n. 1) for the proposition that "the Secretary **shall** . . . renew any existing long-term . . . contract" and therefore it has no discretion not to execute an interim renewal of the contracts. EA 11 (emphasis in original). But this is not the relevant language. The pertinent part of section 3404(c) is in subsection (1), which states that "[c]ontracts which expire . . . **may** be renewed for an interim period. . . ." (Emphasis added.) Congress clearly knew the difference between the mandatory "shall" and the permissive "may," as reflected by the fact that the statute provides that the Secretary "shall" execute a first long-term renewal, but only "may" execute "successive" long-term renewals. Because the statute clearly employs discretionary language, directing that Reclamation "may" issue interim renewals of expired contracts, *Reclamation has discretion not to renew the contracts*. Therefore, the No Action Alternative should have considered the environmental impacts of *not* renewing the contracts. Its failure to do so violates NEPA.

Coalition-3 cont.

Furthermore, even assuming contrary to law that the CVPIA did not give Reclamation discretion not to renew the contracts, this would not be a sufficient reason to dismiss non-renewal as an alternative. NEPA is intended to "inform [all] three branches of government." *Rhode Island Committee on Energy v. Gen. Svcs. Admin.*, 397 F.Supp. 2d 41, 56 n.19 (D.C.R.I. 1975). Accordingly, "even if an alternative requires 'legislative action', this fact 'does not automatically justify excluding it from an EIS.'" *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 815 (9th Cir. 1987) (quoting *City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986)).[2] Even if Reclamation *were* required to renew the contracts, analyzing the impact of not renewing them would help inform Congress about the environmental consequences of the CVPIA, and the need for its potential amendment to avoid or reduce those impacts. For both of these reasons, the No Action Alternative should have been *non-renewal* of the contracts.

> *completion of the environmental impact statement required by section 3409 may be renewed for an interim period not to exceed three years in length, and for successive interim periods of not more than two years in length,* until the environmental impact statement required by section 3409 has been finally completed, at which time such interim renewal contracts shall be eligible for long-term renewal as provided above. . . .

(Emphasis added.)

[2] *Methow Valley* was "reversed only in part" by the Supreme Court at 490 U.S. 332. *Methow Valley Citizens Council v. Regional Forester,* 879 F.2d 705, 706 (9th Cir. 1989). "The Supreme Court . . . did not address the portion of the Ninth Circuit decision dealing with alternatives; thus, that aspect of the Circuit court's decision remains good law." Remy, *et al., Guide to CEQA*, p. 1028 n. 78 (11th ed. 2007).

B. The EA fails to consider a reasonable range of alternatives.

"[C]ourts require consideration of a reasonable range of alternatives in environmental assessments as well as in impact statements." Mandelker, *NEPA Law and Litigation,* § 10:30. The EA fails to consider a reasonable range of alternatives. In fact, the only alternative considered was the No Action Alternative, which as discussed above was identical to the Proposed Action save only a slight difference in pricing. The EA repeatedly states that the pricing difference would not make any difference as to the Project's impacts. *E.g.,* EA 20, 21, 23. Essentially, no alternatives at all were considered. A proper range of alternatives would have considered interim contract renewals at amounts less than the current allocation along with nonrenewal of the contracts. Such alternatives would show the environmental impacts of such reductions, giving Reclamation, Congress and the public a proper understanding of the contract renewals' impacts. The EA's failure to provide a reasonable range of alternatives violates NEPA.

Coalition-4

C. The EA's entire analysis is fatally skewed by Reclamation's claimed lack of discretion.

1. Impacts Analysis

Reclamation repeatedly claims that "[i]mpacts . . . associated with the Proposed Action would be comparable to those described under the No Action Alternative" and therefore the Proposed Action, the renewal of the interim contracts, would not have *any* environmental impacts. *See, e.g.*, FONSI at 3-6; EA 21, 23-4. Such an analysis is akin to starting a race at the finish line – there is simply no place to go. The EA provides some information on potential impacts, but then invariably concludes that the water deliveries would continue with or without the renewal contracts, and therefore Reclamation's action has no effect on the environment. This holds true for all analyses of specific impact categories and for the EA's cumulative impacts section as well. As discussed above, however, Reclamation is under no legal obligation to renew the interim contracts. Therefore, the EA's vapid impacts analysis is based on an invalid premise and must be redone to address the actual impacts of the contract renewals.

Coalition-5

2. Compliance with other laws

The EA also avoids discussing the impacts of contract renewal on Reclamation's compliance with other environmental statutes by claiming that renewals are mandatory and thus they change nothing. For example, the EA states that "[t]he Proposed Action would deliver water through existing facilities to existing irrigated agricultural lands which already receive delivered water" and therefore the contract renewals "would have no effect on birds protected by the Migratory Bird Treaty Act [("MBTA")]." EA 42. The status-quo premise of this non-analysis, as with the EA's excuse for its lack of any impact analysis, strips away all substance, leaving only a comparison of two actions that are *exactly the same*. This premise is flat wrong.

Coalition-6

Coalition-6 cont.

The CVPIA does not mandate renewal of the interim contracts. To the contrary, it expressly confers discretion on Reclamation *not* to renew them. Thus regarding the MBTA example, Reclamation must compare the effects on migratory birds of continued water diversions and deliveries under the interim contracts with the effects of reduced – or no – diversions and deliveries of that water. The same comparative analysis is required in place of Reclamation's non-analysis of the renewals' compliance with the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, and the Clean Water Act. Reclamation's failure to undertake a substantive analysis of the renewal contracts and their compliance with all these other environmental laws violates NEPA.

D. <u>The EA ignores most of the Project's impacts by limiting the Study Area to the lands receiving the water deliveries.</u>

Coalition-7

The EA ignores the fact that each water delivery requires a water diversion, and that each water diversion has an environmental impact on its water *source*. It accomplishes this biased analysis by limiting its consideration of environmental impacts to the service areas of the San Luis Unit contractors, where those receiving the deliveries naturally insist that the deliveries are beneficial. EA 13. The EA ignores the *diversions'* environmental impacts on the water *sources* – including the American, Trinity, and Sacramento rivers, and the Delta – by narrowly defining the "Study Area" to exclude the areas most adversely affected, including the source watersheds. This error is prejudicial because the PEIS from which this EA was tiered "did not analyze site specific impacts of contract renewal," and thus likewise ignored impacts on the source watersheds. EA 3. The Study Area must be expanded so as to encompass *all* areas potentially affected by the Project's site specific impacts, including all water sources and their watersheds. Reclamation's failure to do so violates NEPA. Furthermore, since the deliveries' impacts outside the Study Area are plainly significant, an EIS must be prepared.

III. CONCLUSION

Coalition-8

For all of these reasons, North Coast Rivers Alliance, California Sportfishing Protection Alliance, Friends of the River and the Winnemem Wintu Tribe urge Reclamation to reject the proposed EA and FONSI and to prepare an EIS.

Thank you for considering our comments on this important matter.

Very truly yours,

Stephan C. Volker
Attorney for North Coast Rivers Alliance,
California Sportfishing Protection Alliance,
Friends of the River and the Winnemem Wintu Tribe

SCV:taf

Response to Coalition Comment Letter, January 5, 2012

Coalition-1 Environmental Assessment (EA)-11-049 *Three Delta Division and Five San Luis Unit Water Service Interim Renewal Contracts 2012-2014* and its scope of analysis were developed consistent with National Environmental Policy Act (NEPA) regulations, guidance from the Council on Environmental Quality (CEQ). The analysis in EA-11-049 finds in large part that the renewal of the interim contracts is in essence a continuation of the "status quo", and that although there are financial and administrative changes to the contracts, the contracts continue the existing use and allocation of resources (i.e., the contracts are for the same amount of water and for use on the same lands for existing/ongoing purposes). The EA therefore focused on the potential environmental effects resulting to proposed changes to the contract as compared to the No Action Alternative. Using the No Action Alternative as a baseline for comparison is supported by CEQ's opinion concerning renewal of some Friant contracts that appeared in the Federal Register on July 6, 1989, and their guidance document addressing the 'NEPA's Forty Most Asked Questions' (Question 3).

In accordance with NEPA, an EA is initially prepared to determine if there are significant impacts on the human environment from carrying out the Proposed Action. Reclamation has followed applicable procedures in the preparation of EA-11-049 *Three Delta Division and Five San Luis Unit Water Service Interim Renewal Contracts 2012-2014.* The EA includes the required components of an EA as described in the CEQ's NEPA regulations: discussion of the need for the proposal, alternatives as required, environmental impacts of the proposed action and alternatives, and listing of agencies and persons consulted.

EA-11-049 tiers off the Central Valley Project Improvement Act (CVPIA) Programmatic Environmental Impact Statement (PEIS) to evaluate potential site-specific environmental impacts of renewing the interim water service contracts for the three Delta Division and five San Luis Unit contracts. The CVPIA PEIS provided a programmatic evaluation of the impacts of implementing the CVPIA. Four alternatives, 17 supplemental analyses, the Preferred Alternative, and a No Action Alternative were evaluated in the PEIS. In addition, the PEIS analyzed the region-wide and cumulative impacts of the CVPIA including the renewal of Central Valley Project (CVP) water service contracts. The diversion of water for delivery under the interim contracts is an on-going action and the current conditions of that diversion are discussed in the PEIS. As described in Section 1.2, the purpose of the Proposed Action is to execute eight interim contracts in order to extend the term of the contractors' existing interim renewal contracts for two years, beginning March 1, 2012 and ending February 28, 2014. Execution of these eight interim contracts is needed to continue delivery of CVP water to these contractors, and to further implement CVPIA Section 3404(c), until their new long-term contract can be executed.

EA-11-049 analyzed the contract-specific impacts of short-term interim renewal contracts for the eight contracts all of which are related to the delivery of CVP water within the service area boundaries of the contracts. The service area boundaries for the eight contracts are contained within portions of Fresno, Kings, and San Joaquin Counties as well as all of Santa Clara County as stated in EA-11-049.

In accordance with the Department of the Interior's NEPA regulations (43 CFR Part 46.310), EAs are not required to develop alternatives unless there are issues related to unresolved conflicts concerning alternative uses of available resources. The Reclamation Project Acts of 1956 and 1963 provide for the renewal of existing contracts upon request under terms and conditions mutually agreed upon. Such terms and conditions provide for increases or decreases in rates or charges and, subject to fulfillment of all obligations, provide for a first right to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the contractor's boundaries. Additionally, Section 3404(c) of the CVPIA states that the "…Secretary shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of 25 years and may renew such contracts for successive periods of up to 25 years each." The purpose of this EA is to evaluate the impacts on the human environment from the renewal of interim contracts. Given legal and regulatory constraints and the short term nature of the proposed action, the two action alternatives in the EA provide a reasonable range of alternatives for this action.

Reclamation is unaware of any provision within the CVPIA that modified pre-existing law concerning the rights of contractors to a stated quantity of the project yield for the duration of their contracts and any renewals thereof provided they complied with the terms and conditions of those contracts and Reclamation law. Section 1(4) of the "Administration of Contracts under Section 9 of the Reclamation Project Act of 1939" dated July 2, 1956 provided this for irrigation contractors and Section 2 of the "Renewal of Water Supply Contracts Act of June 21, 1963" provided this for M&I contractors. The CVPIA only altered the 1956 Act with respect to the automatic right of renewal for irrigation contracts, not the provision related to contract quantity. The Water Needs Assessment demonstrates a need for water beyond the contract amounts, even with full allocation. Reclamation therefore believes the agency is legally constrained to not consider such an alternative when a water needs analysis has demonstrated a need for such water for beneficial use, another requirement of Reclamation law. Reclamation therefore does not believe the contract quantities to be unrealistic from the demand side. The contract has provided ample notice to contractors that Interior will operate the CVP for all Project purposes and will not be biased going forward in its role working to address the future water needs of California.

Coalition-2 As described previously, EA-11-049 analyzed the contract-specific impacts of short-term interim renewal contracts for the three Delta Division and five San

Luis Unit contracts all of which are related to the delivery of CVP water within the service area boundaries of the contracts. The service area boundaries for the eight contracts are contained within portions of Fresno, Kings, and San Joaquin Counties as well as all of Santa Clara County as stated in EA-11-049. Impacts of continuing the diversions through the implementation of CVPIA were discussed in the CVPIA PEIS.

Coalition-3 See Response to Coalition-1.

Coalition-4 See Response to Coalition-1.

Coalition-5 See Responses to Coalition-1 and Coalition-2.

Coalition-6 EA-11-049 discloses potential impacts on both Federally listed species and migratory birds. Reclamation did not conclude that the Proposed Action would have no effect on Federally listed species, as we are requesting a Biological Opinion from the U.S. Fish and Wildlife Service (Service) for this action.

The consultation and coordination section of the draft EA for the Migratory Bird Treaty Act contains an error. The Proposed Action may affect some migratory birds, as explained in the main text of the EA. In addition, the California least tern is also included in Reclamation's request for formal consultation with the Service under section 7 of the Endangered Species Act (ESA). The Service, who administers both the ESA for this species, as well as the Migratory Bird Treaty Act, will review the information that Reclamation has provided. This error has been corrected in the Final EA.

As described in Section 4.2 of the EA, the Fish and Wildlife Coordination Act (FWCA) does not apply to the Proposed Action. This law only applies whenever an agency proposes (directly or under license or permit) to impound, divert, control or otherwise modify a body of water. Since there would be no construction and water would move in existing facilities the FWCA does not apply.

See also Responses to Coalition-1 and Coalition-2.

Coalition-7 See Response to Coalition-1.

Coalition-8 Comments noted.

Hoopa Valley Tribal Council

Hoopa Valley Tribe

P.O. Box 1348 ~ Hoopa, California 95546 ~ Phone (530) 625-4211 ~ Fax (530) 625-4594

Leonard E. Masten Jr.
Chairman

By Email: csiek@usbr.gov
rhealer@usbr.gov

January 20 , 2012

Ms. Rain Healer
Natural Resources Specialist
South-Central California Area Office
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

Mr. Chuck Siek
Supervisory Natural Resources Specialist
South-Central California Area Office
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

Re: Delta Division, San Luis Unit and Cross Valley CVP interim renewal contracts--Comments of the Hoopa Valley Tribe on draft EA-11-049 and EA-11-011 and FONSI-11-049 and FONSI-11-011

Dear Ms. Healer and Mr. Siek:

In notices of December 12 and 28, 2011, the Bureau of Reclamation announced the opportunity to comment on the referenced draft environmental assessments (EA) and draft findings of no significant impact (FONSI) for contracts and certain exchange arrangements between the Bureau of Reclamation and water users in the Delta Division[1] and San Luis Unit,[2] as well as with certain Cross Valley water users.[3] Comments on the Delta Division and San Luis Unit contracts were due on January 10. Comments on the Cross Valley contracts are due on January 26. We were advised by Ms. Healer that these comments would be accepted for late filing. We appreciate your consideration. Hoopa-1

The environmental review of the referenced contracts is inadequate and incomplete. The contracts should not be executed until they are brought into compliance with the requirements of the Central Valley Project Improvement Act (CVPIA) Pub. L. 102-575 Title XXXIV, particularly §§3404 and 3406(b)(23), which specifically impose financial obligations on

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[1] City of Tracy 14-06-200-4305A-IR12-B and 7-07-20-W0045-IR12-B; Pajaro Valley Water Management Agency, Santa Clara Valley Water District, and Westlands Water District DD # 1 14-06-200-3365A-IR12-B.

[2] Westlands Water District 14-06-200-495-IR2; Westlands Water District DD#1 14-06-200-W0055-IR12-B; Westlands Water District DD #1 14-06-200-8018-IR12-B; Westlands Water District DD #1 14-06-200-8092-IR12; Westlands Water District DD #2 No. 14-06-200-3365A-IR12-C

[3] County of Fresno 14-06-200-8292A-IR14; Hills Valley Irrigation District 14-06-200-8466A-IR14; Kern-Tulare Water District 14-06-200-8601A-IR14, Kern-Tulare Water District (Rag Gulch) 14-06-200-8367A-IR14; Lower Tule River Irrigation District 14-06-200-8237A-IR14; Pixley Irrigation District 14-06-200-8238A-IR14; Tri-Valley Water District 14-06-200-8565A-IR14; and County of Tulare 14-06-200-8293A-IR14.

Hoopa-1 cont. contractors to pay the full cost of Trinity River fishery restoration as a cost of service and a precondition to receipt of Central Valley Project (CVP) water.

Hoopa-2 By letter of February 14, 2008 to Leslie Barbre in the Mid-Pacific Region's Sacramento, CA office, the Hoopa Valley Tribe (Tribe) filed comments on proposed interim renewal contracts with some or all of the entities (or their predecessors) covered by these EAs and FONSIs. Notwithstanding the Tribe's comments, the Bureau approved those contracts. The February 14, 2008 letter is submitted as an attachment to this letter, which incorporates all of the 2008 letter's comments as if set forth in this letter. The Tribe provides the following additional comments.

Both EAs and FONSIs raise identical issues affecting concerns and interests of the Tribe. While reference is made in these comments to the Delta Division and San Luis Unit EA-11-049 and FONSI-11-049, the comments apply to the Cross Valley EA and FONSI as well.

FONSI Page 2

The FONSI states in part, with emphasis added:

> The Proposed Action will continue the existing interim renewal contracts, with only minor, administrative changes to the contract provisions to update the previous interim renewal contracts for the new contract period. . . .
>
> The eight interim water service contracts contain provisions that allow for adjustments resulting from court decisions, new laws, and from changes in regulatory requirements imposed through re-consultations. Accordingly, to the extent that additional restrictions are imposed on CVP operations to protect threatened or endangered species, those restrictions will be implemented in the administration of the eight interim water service contracts listed in Table 1. As a result, by their express terms the interim renewal contracts analyzed in the EA will conform to any applicable requirements lawfully imposed under the federal Endangered Species Act (ESA) or other applicable environmental laws.

Hoopa-3

As set out in more detail at pages 5 to 11 of the February 14, 2008 letter, the contracts do not comply with the CVPIA's provisions pertaining to funding Trinity River restoration. Provisions identified in the 2008 letter needed to conform the contracts with the CVPIA in this regard should be made prior to their execution.

FONSI Page 3

With regard to water resources, the FONSI states in part:

Hoopa-4

> Water delivery during the interim renewal contract period will not exceed historic quantities. Therefore, there will be no effect on surface water supplies or quality.

For a number of reasons, it is not sufficient to state that water deliveries to the contractors will not exceed historic amounts.

Hoopa-4 cont.

First, historic deliveries exceed what is permitted by the law of the Trinity River. The 2000 Trinity River Mainstem Fishery Restoration Record of Decision (ROD) reduced the historic quantities of water available for diversion by the CVP's Trinity Division to the Central Valley by an annual average of 250,000 acre-feet.

Second, the Bureau of Reclamation is obligated by the Act of August 12, 1955, 69 Stat. 719, to release annually not less than 50,000 acre-feet of Trinity Division water and make it available to Humboldt County and downstream water users, including the Hoopa Valley Tribe. The Bureau of Reclamation has notified the Tribe that that water is not going to be made available to the Trinity basin as required by law, but is instead being included in the water budget for use in the Central Valley particularly as a component of the Bay-Delta Conservation Plan, which is currently under development. The Tribe and Humboldt County wrote to Secretary Salazar and California Governor Brown on January 28, 2011 raising this and other issues, but no response has been forthcoming.

It is unlawful to commit the 50,000 acre-feet obligated to the Trinity River basin to the Central Valley for any purpose. The Tribe has a pending request for a Solicitor's opinion confirming the state of the law in this regard. I was personally advised by a representative of the Secretary in 2010 that such an opinion would be forthcoming by the end of that year. More than two years have passed and the opinion still has not been issued. The Department's failure to act is prejudicial to our trust assets, especially in view of actions being taken in the Department to commit Trinity Division water to purposes and uses outside the Trinity River basin.

Third, the ROD's fishery flow releases have to be of a certain temperature to be effective for restoration. Temperature is substantially affected by the level of carryover storage in the Trinity Lake.

The contracts should be amended to include provisions by which the contractors accept these changed water availability conditions.

FONSI Page 4

Hoopa-5

The FONSI limits the review of extending the contracts to salmonid species' designated critical habitat in the Central Valley but does not address the impacts on Trinity River salmonid habitat that is required to be restored at the contractors' expense pursuant to section 3406(b)(23) of the CVPIA. The contracts should be amended to include provisions by which the contractors accept these Trinity River fishery restoration funding obligations and conditions on water delivery.

FONSI Page 5

Hoopa-6

Because there will be no physical changes to existing facilities pursuant to the interim contracts, the FONSI concludes that there will be no effect on Indian trust assets. This is incorrect. The

Hoopa-6 cont.

fishery resources of the Trinity River are tribal trust assets. Section 3406(b)(23) of the CVPIA establishes an express trust responsibility for those assets in the Secretary's operation and administration of the CVP. Among the trust responsibilities are enforcement of the statutory mandate in section 3406(b)(23) of the CVPIA that water contractors pay the full cost of Trinity River restoration. The only means the Tribe knows of doing so consistent with fiduciary standards is to incorporate the payment obligation into the contracts expressly so that continuity in funding can be assured and future causes of controversy may be avoided or reduced with respect to whether contractors have an obligation to pay for Trinity River restoration. This is not a speculative concern. The contractors formally have asserted that they have no financial restoration obligation and have never withdrawn from that position. See Central Valley Project Improvement Act Section 3406 Assessment submitted by letter of December 6, 2005 to Assistant Secretary Water and Science Mark Limbaugh from the CVP Water Association and the Northern California Power Agency.

Your attention to these comments is appreciated.

Sincerely,

Leonard E. Masten Jr.
Chairman

Attachment

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Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

P.O. Box 1348 • HOOPA, CALIFORNIA 95546 • Phone 625-4211 • Fax 625-4594

Clifford Lyle Marshall, Sr.
Chairman

February 14, 2008

By Facsimile: 916-978-5292
and Email: lbarbre@mp.usbr.gov

Ms. Leslie Barbre
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Re: Hoopa Valley Tribe Comments -- Two-year interim renewal CVP Contracts

Dear Ms. Barbre:

Pursuant to the Bureau of Reclamation's (Reclamation) December 14, 2007, notice, the Hoopa Valley Tribe (Tribe) submits the following comments on the referenced contracts, which Reclamation proposes to renew pursuant to the Central Valley Project Improvement Act (CVPIA).[1]

Introduction

The Tribe submits these comments in the interest of protecting its vested rights in the Trinity River fishery, which are recognized in the program established for Trinity River restoration pursuant to the CVPIA, as well as other laws, judicial decisions, and administrative actions pertaining to the Trinity River. Reclamation's notice states that there are 17 Central Valley Project (CVP) contractors affected by this renewal procedure.[2] These comments are addressed to all of those contracts and focus on the limitations on diversions of Trinity River water to the Central Valley and cost accounting issues and their related impacts on the CVPIA's environmental restoration mandates,

[1] Public Law 102-575 Title XXXIV, 106 Stat. 4600, October 30, 1992.
[2] They are: County of Tulare, County of Fresno, Hills Valley Water District, Kern Tulare Water District, Rag Gulch Water District, Pixley Irrigation District, Tri-Valley Water District, Lower Tule River Irrigation District, City of Tracy (2 contracts), Pajaro Valley Water Management Agency, Santa Clara Valley Water District, Westlands Water District Distribution District 1, Westlands Water District Distribution District 1 (3 contracts), and Westlands Water District Distribution District 2 (1 contract).

particularly Trinity River fishery restoration.[3] The comments conclude with recommended text for inclusion in the contracts.

Background of the Trinity River Division of the CVP

The Act of August 12, 1955, Public Law 84-386, 69 Stat. 719 (1955 Act) authorized construction and operation of the CVP's Trinity River Division (TRD). The TRD is the only source of water that is imported to the Central Valley. In its natural course, the Trinity River is a tributary of the Klamath River, which empties into the Pacific Ocean. Because the TRD is a trans-basin diversion facility, Congress was specially attentive to the interests of the Klamath-Trinity basin. Accordingly, although section 2 of the 1955 Act requires integration of the TRD with existing and future units of the CVP to "effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available," that instruction is subject to two distinct provisos.

> *Provided* That the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months of July through November . . . unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish and wildlife and propagation thereof . . . : *Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

The first proviso qualifies the integration of the TRD into the CVP with a direction to the Secretary to determine needed releases from the TRD to the Trinity River for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. The second proviso provides that "not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." The State of California issued a number of permits associated with the TRD in 1959.[4] Among the conditions established by the state in the permits was Condition 8[5] that applied to the first proviso and Condition 9[6] that applied to the second proviso of the 1955 Act.

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[3] This is not the first time the Tribe has raised issues with CVP contract renewals. On November 19, 2003, the Tribe filed an administrative appeal with the Commissioner of Reclamation regarding certain long-term CVP contracts. That appeal remains pending. The Tribe has also commented on various CVP contract renewals on thirteen other occasions between 2004 and 2006.

[4] State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959).

[5] Condition 8. "Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;
October 1 through October 31 200 cfs

Limitations on operation of the Trinity River Division

The Solicitor explained the significance of the 1955 Act's provisos in a memorandum opinion from the Solicitor to the Assistant Secretary, Land and Water Resources (1979 Opinion). In that opinion, the Solicitor explained that the TRD's authorization in the 1955 Act created an exception to the general integration of CVP functions:

> On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

1979 Opinion at 3-4. Thus, the 1979 Opinion clarifies that the 1955 Act does not require management of the TRD to maximize benefits to the Central Valley. Rather, it states that the provisos in section 2 establish a priority for in-basin uses of TRD water over diversions to the Central Valley.

The Solicitor's analysis is consistent with general rules of statutory analysis. The Supreme Court describes the role of the proviso in legislation as follows:

> The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. Minis v. United States, 15 Pet. 423, 525. Although it is sometimes misused to introduce independent pieces of legislation. Georgia Railroad & Banking Co. v. Smith, 128 U.S. 174, 181; White v. United States, 191 U.S. 545, 551. Here, however, the proviso is plainly employed in its primary character.

Cox v. Hart, 260 U.S. 427, 435 (1922).

November 1 through November 30 250 cfs
December 1 through December 31 200 cfs
January 1 through September 30 150 cfs
Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule."

[6] Condition 9. "Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users."

In the parlance of Cox v. Hart, the "substantive enactment" in section 2 of the 1955 Act is the instruction that the TRD be integrated into the CVP. The provisos except from that instruction the water that Congress allocated in the two provisos for the instream fishery needs of the Trinity River fishery and the mandate to release water from the TRD and make it available to Humboldt County and downstream water users.

The second proviso is not an exception, limitation, or some other qualification on the first proviso in section 2 of the 1955 Act. The case law uniformly concludes that provisos are "generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause." Wayman v. Southard, 23 U.S. 1, 30 (1825) The object of the two provisos in the 1955 Act is to except from the integration instruction in the "enacting clause" any use of water for the Trinity River mainstem fishery and water made available to Humboldt County and downstream water users.

As the Court in Cox v. Hart, supra, observed, a proviso is sometimes used to introduce independent pieces of legislation:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.

Id. at 181.

This may indeed have been what occurred in the legislative process leading to the enactment of the second proviso. By way of background the House version of the TRD authorization, H.R. 4663, was reported out of the Committee on Interior and Insular Affairs on May 19, 1955. House Report No. 602, 84th Cong., 1st Sess. Section 2, as approved by the Committee contained only the first proviso regarding releases for fish and wildlife. Report No. 602 at 6. Thereafter the bill went to the Rules Committee which issued Report No. 732 on June 7, 1955. The text of the rule is reported at page 7961 of the Congressional Record on June 9, 1955. In the debate on H.R. 4663 pursuant to the rule, Congressman Ellsworth made the following statement at page 7962 of the Congressional Record:

> When this bill was brought before the Rules Committee there was also a question regarding the protection of another area of California. . . .
>
> [I]t is also my understanding that another amendment will be offered by the committee which will probably satisfy the

> opposition to the bill by another Representative from California. As I understand it, this amendment will be offered to assure to Humboldt County, Calif., an additional 50,000 acre-feet of water from the rivers concerned, which should properly take care of the neighboring area.

The addition of the Humboldt County proviso thus occurred later in the legislative process and after the fishery water provision had been fully considered. The Humboldt County proviso is independent of, and for an entirely different purpose than, the Trinity mainstem fishery water supply.[7] Accordingly, the two provisos are exceptions to the integration instruction in the 1955 Act and the second proviso is not an exception to the first.

The Secretary's authority under the first proviso of the 1955 Act was implemented on two occasions after operation of the TRD began in 1964. In each case, TRD releases to the Trinity River were successively increased above the statutory minimum. The first increase was in 1981, and the second was in 1991. See Trinity River Flow Evaluation-Final Report, (TRFE) Appendices B and C (June 1999). Neither of those actions proved to be adequate for the needs of the Trinity River fishery. They were intended principally to provide water to enable studies to occur of the long term needs of the fishery. In fact, the releases under those secretarial actions did little more than simulate severe, drought-like conditions.

CVPIA -- Trinity River Restoration and CVP Contract Reform Directives

The CVPIA fundamentally changed federal policy pertaining to CVP operations, water deliveries, and the payment obligations of CVP contractors. Among other things, the CVPIA:

> (1) established fish and wildlife restoration as a coequal CVP purpose with irrigation and other uses;
>
> (2) established restoration mandates and timelines for fulfilling that purpose;
>
> (3) required contracts for CVP water to incorporate that policy;
>
> (4) assigned, in substantial measure, the cost of restoration programs to CVP water and power contractors; and

[7] In addition, the State permit condition explicitly requires the annual release from the TRD of at least 50,000 acre-feet of TRD water to be made available to Humboldt County and downstream water users. That permit condition governs the conduct of the Bureau's operation of the CVP. The permit condition has been in place since 1959 and has never been challenged by the Bureau in any administrative or judicial proceeding.