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Via Facsimile and First-Class Mail

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August 27, 2004

Bureau of Reclamation  
ATTN: Frank Michny  
2800 Cottage Way  
Sacramento, CA 95825-1898

Re: Comments on Draft Supplemental Environmental Assessment and Draft Finding  
of No Significant Impact for Central Valley Project Interim Renewal Contract

Dear Mr. Michny:

On behalf of the Hoopa Valley Indian Tribe, we have reviewed and now submit the following comments on the above referenced Draft Supplemental Environmental Assessment (SEA) and Draft Finding of No Significant Impact (FONSI). These comments reflect the Tribe's ongoing concern with management of the Central Valley Project ("CVP"), which includes the Trinity River Division. Because of the CVP's effect on fisheries reserved for our tribe, we are committed to ensuring that Reclamation actions subject to the National Environmental Policy Act (NEPA) reflect and comply with recent court decisions requiring, for example, that mitigation measures imposed as a result of consultation under Section 7 of the Endangered Species Act be addressed in draft environmental review documentation prepared pursuant to NEPA. *See e.g. Westlands v. United States*, 275 F.Supp.2d 1157 (E.D. Cal. 2002) (discussed below). This approach ensures that the public is fully informed and has the opportunity to comment and participate in the decision-making process on all aspects of projects affecting the human environment.

Reclamation has tentatively concluded that the proposed project, the renewal of up to fifty-nine (59) water service contracts for a term of up to two (2) years, will have no significant impact requiring assessment in an Environmental Impact statement. Draft FONSI at 2. That conclusion, however, is unsupported in a number of particulars as more fully described below. It also relies in part on deferral of consideration of impacts to threatened and endangered species pending completion of consultation with NOAA-Fisheries and the Fish and Wildlife Service. *Id.* Such an approach is impermissible in light of recent court decisions.

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1. **Failure to Require Interim Contract Language to Reflect CVPIA Mandated Fishery Restoration Flows.**

On February 5, 2004, the Hoopa Valley Tribe ("Tribe") formally requested that language referencing the instream fishery flow requirements of the Trinity River be incorporated into the terms of interim renewal contracts between the Bureau of Reclamation ("Bureau") and Central Valley Project ("CVP") water service contractors. This language is authorized by section 3404 of the Central Valley Project Improvement Act, Pub. L. 102-575, 106 Stat. 4600 (1992) ("CVPIA"), which subjects new and renewal CVP water service contracts to the fishery restoration provisions of the CVPIA, which includes the Bureau's obligation to meet the fishery restoration requirements of the Trinity River as established by the Trinity River Flow Evaluation-Final Report ("Flow Study"). See CVPIA § 3406(b)(23).

Contract language acknowledging Trinity River restoration requirements also reflects long-standing congressional directives that prioritize Trinity fishery releases over transbasin diversions to Central Valley contractors and is consistent with the federal government's trust responsibility to protect and preserve the Hoopa Valley Tribe's federally reserved fishing right. The Tribe's request was narrowly tailored to require compliance with scientifically based fishery flow requirements set forth in the Flow Study. Those requirements must be implemented pursuant to CVPIA § 3406(b)(23), and should be included as conditions on supply made available for delivery to Central Valley Project contractors.

The decisions of the federal courts since the enactment of the CVPIA make clear that the Bureau can and should reduce quantities of water delivered when fishery needs demand greater allocations. See *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1998) (holding that the CVPIA modified priority of water users and thus changed contractual obligations under pre-existing long-term water delivery contracts); *NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (invalidating CVP renewal contracts for failure to comply with environmental requirements); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (recognizing Bureau's responsibility to manage project operations to "meet the requirements of the ESA, requirements that override the water rights of the Irrigators"). The Ninth Circuit has expressly recognized the Bureau's obligation to operate to meet the water needs of vested tribal fishing rights. *Klamath Water Users*, 204 F.3d at 1214 (holding that the Bureau has "a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"). Accordingly, the terms of interim renewal contracts should expressly acknowledge those requirements, and the impacts of incorporating those requirements into the contracts should be assessed in an EIS.

Express subordination of water service delivery obligations to fishery restoration needs is hardly unprecedented. *E.g. id.* The Bureau has historically included fishery restoration requirements as among the conditions on supply available to satisfy interim renewal contracts. For example, in *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995), the court noted that an interim renewal contract for allocations from the New Melones Reservoir provided "a maximum of 75,000 acre-feet of water annually, subject to availability after the Bureau satisfied the water

needs of in-basin users and higher priority out-of-basin users." *Id.* at 471 (emphasis added). The "in-basin" needs given priority under that contract included those of "fish and wildlife resources" in the Stanislaus River Basin established under CVPIA § 3406(c)(2). *Id.* Given that precedent, the Bureau would not be breaking new ground by heeding the command of CVPIA § 3404(c) to include similar conditions in the terms of interim renewal contracts.

As of the date of these comments, HVT has received no indication from Reclamation that the agency intends to honor the Tribe's February 5, 2004 request. Should such language be added to the interim contracts, additional environmental review may be necessary in order to evaluate what effect giving priority to the Trinity fishery flows will have on the availability of supplies and hence the reasonableness of the delivery obligations incurred in the interim contracts, as well as the various mitigation obligations outlined in the EA/FONSI. To the extent that additional mitigation measures may be required as a result of prioritizing Trinity fishery releases over contract deliveries, the effect of those mitigation measures must be fully and fairly presented in any draft NEPA documentation, so as to allow the public the opportunity to review and comment on that analysis. *See e.g. Westlands*, 275 F.Supp.2d at 1182.

## **2. Improper Deferral of Mitigation.**

As noted above, the SEA improperly defers consideration of impacts to threatened and endangered species pending completion of ESA § 7 consultation with NOAA-Fisheries and the Fish and Wildlife Service. Draft FONSI at 2; Draft SEA at 13.<sup>1</sup> Such an approach is impermissible under the recent ruling in *Westlands*, 275 F.Supp. 2d at 1182 -1185. In that case, the court found that a Draft Environmental Impact Statement (DEIS) did not adequately analyze the impact of the proposed action on certain ESA-listed species. *Id.* at 1183. Further, the court found that the DEIS "did not consider or identify mitigation measures" for those impacts, other than to "specify that mitigation for impacts...would consist of consulting with the Service on impacts and implementing any required conservation measures." *Id.* The court concluded that Reclamation violated NEPA.

That is precisely the approach adopted in the interim contract renewal SEA. In the words of the *Westlands* court, this approach "defers consideration of mitigation efforts" and "precludes the parties from meaningful analysis." *Id.* at 1184. *See also id.* at 1188 ("The omission of discussion of mitigation measures foreclosed any public input on the issues of whether and what CVP operations management alternatives existed and were feasible; and whether alternate water sources existed or if reduced flows could reduce the impact on species and other CVP users.").

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<sup>1</sup> The Draft SEA at page 11 purports to incorporate by reference the FWS Biological Opinion for 2002 interim contracts ("2002 Interim BiOp"), which it asserts contains "the commitments that reclamation will undertake during the proposed 2004 interim renewal period." To the extent that as a result of consultation on the 2004 renewal, FWS imposes RPMs, terms and conditions, or other requirements that differ in any respect from those contained in the 2002 Interim BiOp, the environmental impacts of those requirements must be disclosed to the public in a draft environmental document that is released to the public for review and comment.

Moreover, to the extent that mitigation measures are imposed as a result of deferred ESA § 7 consultation, either in the form of Reasonable and Prudent Measures (RPMs) or other terms and conditions that may have significant effects, the *Westlands* case requires that the environmental impacts of those mitigation measures be discussed “with reasonable thoroughness.” *Id.* at 1192. These measures and their environmental impacts must be disclosed to the public in a process that “included public participation”, *i.e.* they must be disclosed in a manner that allows meaningful public scrutiny, comment, and participation. *Id.* at 1198. By deferring discussion of species impacts pending completion of consultation with the fisheries agencies, the Draft EA/FONSI for interim contract renewals fails to meet these requirements.

### **3. Inadequate Discussion of Alternatives.**

The Draft EA is insufficient because it lacks any discussion of the “environmental impacts of the proposed action and alternatives” 40 C.F.R. § 1508.9 (emphasis added). Council on Environmental Quality (CEQ) regulations require that an environmental assessment “shall include” a discussion of the environmental impacts “of the proposed action and alternatives...” *Id.* The Draft EA/FONSI, however, discusses only the proposed action of renewing interim contracts for an additional two-year period on the same terms as previous interim contracts. It contains no comparative evaluation of alternatives to that action, and expressly excludes from consideration a number of reasonable alternatives, including non-renewal, tiered pricing, and renewal at reduced delivery amounts that would more accurately reflect current delivery constraints. *See* Draft EA at 8-9. A comparative analysis of differential environmental impacts of a range of alternatives to the proposed action must be undertaken in order to allow the public a meaningful opportunity to assess the proposed action.

### **4. City of Shasta Lake (City) – Unjustified Increase in Contract Amount.**

An addendum to the interim renewal contract proposed action/project description proposes increasing the City’s contract amount by 1650 acre-feet. The addendum asserts that no significant or demonstrable effects will result from this increase, in large part because actual use of water will not change due to the presumption that the City will “suspend the series of temporary water transfers it has relied upon in recent years.” However, no analysis is included addressing the potential scenario in which the City does not suspend transfers but instead seeks to further augment its supply by continuing to secure transfer of other CVP water.

Furthermore, there is no explanation as to why the revised contract amount is almost twice the City’s projected needs. The revised contract represents a 60% increase from current contract amount, over 46% more than 2003 projected actual use. The addendum claims that the City’s water usage has increased on average 4½ percent annually over the last four years, and thus projects that by 2005 the City will require 3,276ac-ft /year. The addendum also asserts that increasing water supplies will not affect regional settlement or development patterns, due to availability of groundwater supplies to meet projected urban development needs. Given these facts, there is no readily apparent justification, and certainly no justification given in the SEA, for the proposed increase to 4,400 ac-ft.

Bureau of Reclamation  
ATTN: Frank Michny  
August 27, 2004  
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Thank you for allowing us the opportunity to comment on the Draft EA/FONSI. We trust that our comments will be appropriately considered and responded to in any final NEPA documentation for this proposed action.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & McGAW

Thomas P. Schlosser



# Taxpayers for Common Sense National Taxpayers Union

May 3, 2004

The Honorable Gale Norton  
United States Department of Interior  
1849 C Street NW, Suite 6151  
Washington, DC 20240

Dear Secretary Norton:

On behalf of our members, the undersigned groups urge you to exercise fiscal responsibility as the Bureau of Reclamation (USBR) completes Central Valley Project (CVP) water contract renewals. USBR is negotiating on behalf of federal taxpayers and must draft contracts that are in the best interests of taxpayers. The agency has a chance to break with the heavily subsidized past and demonstrate a modicum of fiscal responsibility by implementing essential pricing reforms found in the Central Valley Project Improvement Act (CVPIA) of 1992. By following both the spirit and the letter of this law, the USBR can protect taxpayers and ensure repayment of project capital costs in at least 41 long-term contracts now being negotiated. Sidestepping these required reforms would guarantee that federal taxpayers are stuck with the vast majority of the project's \$3.6 billion tab.

We urge the Bureau of Reclamation to draft Central Valley Project water contracts that:

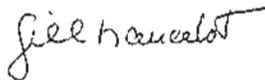
1. are short-term and must be fully renegotiated prior to any renewals;
2. bring water prices more in line with the open market;
3. create an effective rate structure to meet the legally-required 2030 date of complete project repayment;
4. realistically assess the water available in the system when promising water contract amounts, therefore ensuring that tiered pricing reforms included in the CVPIA go into effect.
5. set a good precedent for fiscal responsibility in federal water contracts throughout the West;

The Central Valley Project, originally intended to help destitute farmers recover from the Great Depression, has become the largest federal water project in the United States serving approximately 3 million acres of farmland and 2 million urban residents in the Central Valley. The CVP distributes more than 7 million acre feet of water a year, 90% of which goes to farmers. CVP contractors pay only a small fraction of the market rate for water due to federal price fixing. As a result of ridiculously cheap water rates, farmers use water lavishly in the Central Valley, including growing crops such as cotton, alfalfa, and rice in the California desert.

The Bureau of Reclamation should implement common sense pricing reforms that would save taxpayers millions of dollars, help encourage responsible water use in the west, and set a good precedent for future negotiations of more than 1800 water service contractors throughout the West. We urge you to implement CVPLA reforms to end the wasteful and unnecessary spending in the Central Valley Project.

Given skyrocketing budget deficits, we cannot afford to continue policies that waste taxpayer dollars. We urge you to implement rational reforms that will protect taxpayers. We would be happy to answer any questions you might have regarding this matter. Please contact Aileen Roder at Taxpayers for Common Sense at (202) 546-8500 x130 or [aileen@taxpayer.net](mailto:aileen@taxpayer.net) for more information.

Sincerely,



Jill Lancelot  
President  
Taxpayers for Common Sense



John Berthoud  
President  
National Taxpayers Union

BARBARA BOXER  
CALIFORNIA

COMMITTEES:  
COMMERCE, SCIENCE,  
AND TRANSPORTATION  
ENVIRONMENT  
AND PUBLIC WORKS  
FOREIGN RELATIONS

# United States Senate

HART SENATE OFFICE BUILDING  
SUITE 112  
WASHINGTON, DC 20510-0505  
(202) 224-3553

<http://boxer.senate.gov/contact>

September 1, 2004

The Honorable Gale Norton  
Secretary  
U.S. Department of Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Secretary Norton:

I write to request an extension of the deadlines for public comment on proposed renewals to Central Valley Project (CVP) contracts.

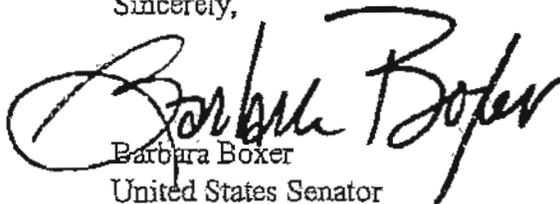
As you know, the CVP supplies about 20 percent of California's developed water supplies. The CVP contracts will have significant impacts on California's water supply, its fisheries and the San Francisco Bay-Delta ecosystem. All interested stakeholders – agriculture, urban and environmental – have issues of concern related to these contracts. An extended time for public comment would ensure all stakeholders have sufficient opportunity to provide feedback.

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Further, the biological opinion on a new operations plan for the CVP is not completed yet. This will provide critical information for assessing the impacts of the contracts on fisheries. Therefore, once the biological opinion is completed, I ask you to make sure the public is given adequate time to comment.

Thank you in advance for your attention to this important issue.

Sincerely,



Barbara Boxer  
United States Senator



# United States Senate

WASHINGTON, DC 20510-0504

<http://feinstein.senate.gov>

August 30, 2004

The Honorable Gale Norton  
Secretary of the Interior  
Washington, DC 20240

Dear Secretary Norton:

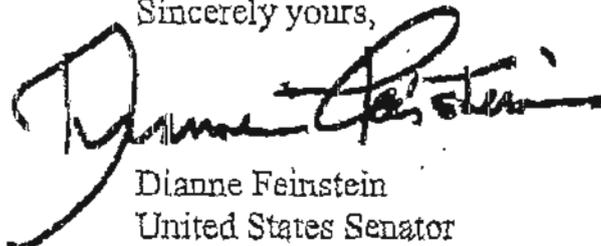
This is to request for an extension of the deadlines for public comment on the renewal of Central Valley Project (CVP) contracts.

There is much at stake here: long-term commitments concerning a substantial portion of California's water supply. Before any final decisions are made, the public should have the opportunity to comment based on an informed evaluation of potential impacts to endangered and threatened salmon and strategies for mitigating those impacts.

I ask that you provide a reasonable period for public input following the release of the biological opinion on the Operations Criteria and Plan (OCAP), which provides the most complete picture of the proposed contracts' effect on the fish.

Californians deserve this full disclosure before the federal government makes important decisions concerning our water future. Thank you for your consideration.

Sincerely yours,



Dianne Feinstein  
United States Senator

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Congress of the United States  
Washington, DC 20515

August 20, 2004

Hon. John Keys, Commissioner  
U.S. Bureau of Reclamation  
1849 C Street, NW  
Washington, DC 20240

Re: Renewal of the Central Valley Project long-term water contracts

Dear Commissioner Keys:

The undersigned Members of Congress have a strong interest in the appropriate allocation of California's water resources and the need to ensure prompt and full repayment of the federal investment in Reclamation projects, consistent with federal law. For reasons of fiscal responsibility and of equitable water use, we are extremely concerned about the imminent renewal of long-term Central Valley Project (CVP) contracts that are currently being proposed by the Bureau's Sacramento office.

First, it is our understanding that the Bureau has determined that many of these water districts will never have to repay the capital costs invested by the federal government in their water projects, compounding their generous interest subsidy with additional "ability to pay" capital subsidies. More than \$1 billion of the original federal investment in the CVP remains unpaid after over 50 years, despite federal repayment requirements. Because the Bureau has recouped only a bare fraction of its capital investments and continues to offer contracts with below-cost water prices, we believe it is essential that taxpayers be given a full opportunity to comment on these new contracts after the Bureau first makes public its rationale for waiving all capital costs and restoration charges for so many of these new contracts, and explains how complete CVP capital repayment will be ensured in a timely manner.

Second, the Bureau has already set final comment deadlines for several groups of proposed CVP contracts, including contracts for up to 322,000 acre-feet of water to the users in the Sacramento River Division, and for over 2,000,000 acre-feet in other contracts, before the public has reviewed the potential impact of these contracts on endangered salmon. As of this writing, almost three-quarters of the comment period for these contracts has elapsed without the required National Marine Fisheries Service (NMFS) analysis of potential impacts. The Central Valley Project Improvement Act (CVPIA) states as a central purpose the protection of fish, wildlife, and associated habitat; to rush through the process of approving long-term water contracts without this analysis runs counter to this core CVPIA purpose.

This type of long-term commitment could have enormous impacts on federal taxpayers, California's fisheries, and the San Francisco Bay-Delta ecosystem. Therefore, to better evaluate these impacts, we respectfully request the following:

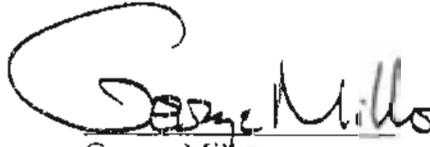
Hon. John Keys, Commissioner  
August 20, 2004  
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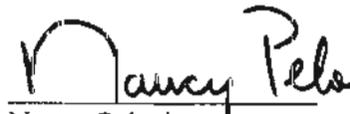
1. Please extend the comment period on all of the proposed contracts, and on the draft Environmental Assessments or Environmental Impact Statements on the contracts, by at least 60 days after the completion of the current Endangered Species Act consultation with the Department of Commerce to allow the public an opportunity to review the analysis by the NMFS on the impact of the contracts on endangered salmon. It is unfair to ask the public to evaluate the proposed contracts, and your proposed determination that the contracts will have "no significant impact" on the environment, before allowing the public to review the government's own analysis of likely impacts to fish habitat and endangered salmon runs.

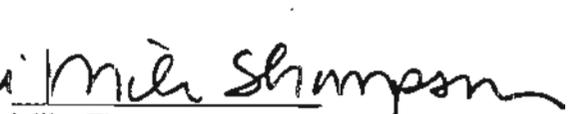
2. Please provide public workshops or hearings on these proposed contracts, their pricing terms and repayment assumptions, and their potential impacts on the environment before you close the comment periods. Especially as the current period for public comment on these important contracts overlaps with Congress' traditional district work period, and with many of our constituents' summer holidays, we are extremely concerned that many potential impacts will not be publicly understood and discussed until the window has closed. Only by giving the public an opportunity to ask questions and understand the impacts of these major 25-year water commitments can the Bureau hope to win confidence from the public that these contracts will benefit rather than harm the public interest.

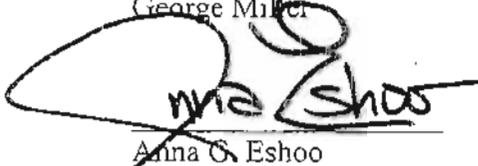
Thank you for considering our views. We request a response before your current comment deadline.

Very truly yours,

  
George Miller

  
Nancy Pelosi

  
Mike Thompson

  
Anna G. Eshoo

  
Ellen O. Tauscher

  
Howard L. Berman

Cc: The Hon. Gale Norton, Secretary of the Interior  
Mr. Kirk Rodgers, Regional Director, Mid-Pacific Region