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RUST, TIMOTHY <trust@usbr.gov>

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## M&I Shortage Policy

1 message

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Kriz, Ed <ekriz@roseville.ca.us>

Mon, Dec 8, 2014 at 3:50 PM

To: "Trust@usbr.gov" <Trust@usbr.gov>

Cc: "Mulligan, Jim" <JMulligan@roseville.ca.us>, "Andrew Ramos (AJR@bkslawfirm.com)" <AJR@bkslawfirm.com>

Tim and Team,

Thanks for the meeting this afternoon and the information on the EIS project. As you know, the current deadline for comments is January 12<sup>th</sup>, 2015. While I appreciate the desire to move this effort forward and get it completed the requested review schedule is quite constrained and bridges both Thanksgiving and Christmas/New Year holidays. I am requesting an extension to February 20<sup>th</sup> for agencies to have time for a more thorough review.

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Thank you for this consideration.

Ed Kriz

*Director*

Environmental Utilities

City of Roseville

2005 Hilltop Circle

Roseville, CA 95747

(916) 774-5714

[www.roseville.ca.us](http://www.roseville.ca.us)





## Municipal and Industrial Water Shortage Policy Draft EIS Public Meeting Comment Sheet



There are several options to provide written comments. You can provide your written comments by turning in this form at the public meeting. You may also e-mail your comments directly to [trust@usbr.gov](mailto:trust@usbr.gov) with the subject line "Municipal and Industrial Water Shortage Policy" or mail this form to the Bureau of Reclamation (mailing address is on the back of this card). Whatever method you choose, please note that all written comments must be received no later than 5:00 p.m. (Pacific Standard Time) on **Monday January 12, 2015**.

PLEASE PRINT CLEARLY. PLEASE NOTE THAT ALL COMMENTS BECOME PART OF THE PUBLIC RECORD.

Name: Jim Mulligan

Organization (If applicable): City of Roseville

Address: 2005 Hilltop Circle, Roseville, CA 95747

Phone: 916) 774 5148 Fax: ( ) \_\_\_\_\_

Email: jmulligan@roseville.ca.us

Date: 12/8/14

Comment:

① Please extend the comment period beyond January 12, 2015 so the holidays don't impact public comment response.

② Please integrate the EIS schedule with the COA re-negotiation process as changes to the COA that balance and benefit the CVP would potentially change the EIS alternatives analysis. It seems hasty to finalize an M&I shortage policy based on a flawed COA.



March 13, 2015

**VIA EMAIL AND U.S. MAIL**  
**(TRUST@USBR.GOV)**

Mr. Tim Rust  
Bureau of Reclamation  
2800 Cottage Way, MP-410  
Sacramento, California 95825

Re: Draft Environmental Impact Statement for CVP Municipal and Industrial  
Water Shortage Policy – Comments of the City of Roseville and San Juan  
Water District

Dear Mr. Rust:

This letter provides comments on the draft environmental impact statement (DEIS) for the Central Valley Project (CVP) Municipal and Industrial Water Shortage Policy (Shortage Policy) specifically from the City of Roseville and San Juan Water District. This letter focuses on an issue relatively unique to the City and the District, namely the effect of a term in the Bureau of Reclamation's water-right permits for Folsom Dam and Reservoir – Term 14 – on CVP water-service contract allocations from water in that reservoir.

Before providing these comments, we would like to express our appreciation for Reclamation's efforts to manage the limited water supplies that have been available to it at Folsom Reservoir during the on-going drought. As you know, the City and the District depend on diversions directly from the reservoir as our primary water supplies. To preserve those supplies, Reclamation has taken significant steps to preserve water stored in the reservoir. We particularly appreciate that Reclamation's projected operations for 2015 would maintain storage in the reservoir at, if not comfortable levels, at least levels would remain above our water-supply intake this year.

It is important to our agencies that Reclamation complete a Shortage Policy that states how Reclamation will allocate water to CVP municipal and industrial water-service contractors in drier years. Reclamation has been developing a Shortage Policy for many years and we commend your efforts to complete it. Our agencies stand ready to work with Reclamation to make the Shortage Policy and the environmental impact statement for it as good as they can be.

In that vein, we would like to identify, as relevant to Reclamation's consideration of the DEIS and a final Shortage Policy, a point on which we disagree with Reclamation. As you



Mr. Tim Rust  
March 13, 2015  
Page 2

probably are aware, our agencies and others have exchanged with Reclamation several letters concerning Term 14 and the obligations to our agencies that Reclamation accepted in its water-right permits for Folsom Dam and Reservoir. Those letters and their attachments are enclosed with this letter. As they discuss in more detail, Term 14 states, subject to some conditions, that Reclamation will ensure that the "present and prospective" needs of qualifying contractors in Placer, Sacramento and San Joaquin Counties are "fully met" from water that Reclamation diverts under its water-right permits for Folsom Dam and Reservoir. The water-right decision that granted those permits to Reclamation, Decision 893, stated that those permits would allow Reclamation to "adequately supply" communities "naturally dependent" on the American River. As our previous letters have discussed, based on Term 14's language and Decision 893, we believe that Reclamation must prioritize CVP water-service contract deliveries from Folsom Reservoir to our agencies and other agencies whose water-service contracts are protected by Term 14. The DEIS identifies our concerns about Term 14 as an issue of known controversy, but does not indicate that allocating water according to that water-right permit term is part of the Shortage Policy's purpose and need. The DEIS also does not contain a project alternative that would involve such an allocation. We therefore believe that the DEIS and its Shortage Policy alternatives are inconsistent with Reclamation's water-right permits for Folsom Dam and Reservoir and the laws that apply to the DEIS and the Shortage Policy.


We provide these comments in hopes of advancing the Shortage Policy to a successful resolution. We know that Reclamation is facing difficult questions during the continuing drought and appreciate your efforts that have improved our water-supply reliability. If you have any questions about this letter, please do not hesitate to contact Rich Plecker, the City's Environmental Utilities Director, at [rplecker@roseville.ca.us](mailto:rplecker@roseville.ca.us) or Shauna Lorange, the District's General Manager, at [slorange@sjwd.org](mailto:slorange@sjwd.org).

Very truly yours,

CITY OF ROSEVILLE

SAN JUAN WATER DISTRICT

By:   
\_\_\_\_\_  
Carol Garcia  
Mayor

By:   
\_\_\_\_\_  
Edward J. Costa  
President

Enclosures

Letter to Mr. Tim Rust, dated January 27, 2012  
Letter to Mr. Tim Rust, dated March 14, 2012  
Letter to Mr. Rick Woodley, dated June 25, 2012  
Letter to Mr. David Murillo, dated May 3, 2013  
Letter to Mr. Mike Kashiwagi, dated June 7, 2013  
Letter to Mr. Tom Howard, dated March 10, 2014  
Letter to Mr. Tom Howard, dated April 25, 2014  
Letter to Mr. Michael Buckman, dated May 13, 2014

Enclosure 1  
Letter to Mr. Tim Rust, dated January 27, 2012



January 27, 2012

Mr. Tim Rust  
U.S. Department of the Interior  
Bureau of Reclamation, Mid-Pacific Region  
2800 Cottage Way  
Sacramento, California 95825

Re: Central Valley Project M&I Water Shortage Policy – Deliveries to  
American River Division and Reclamation Water-Right Permits

Dear Mr. Rust:

We have appreciated the Bureau of Reclamation's openness to comments and participation by CVP contractors like our agencies during Reclamation's process for finalizing its 2001 draft M&I Water Shortage Policy. As American River Division contractors, however, we continue to have significant concerns about the 2005 environmental assessment (EA) that Reclamation prepared for the 2001 draft policy because Reclamation's March 8, 2011 notice of intent to prepare an environmental impact statement (NOI) states:

The 2001 M&I WSP was modified by, and is being implemented in accordance with, Alternative 1B in the 2005 EA.

As you know, the 2005 EA stated that it will not always be feasible to provide public health and safety levels of CVP supplies to American River Division water-service contractors because our Division includes no CVP agricultural contractors from whom water could be reallocated to provide such levels of supplies. (2005 EA, pp. 3-2, 4-53.) This issue was discussed at length during Reclamation's 2010 workshops concerning the finalization of the 2001 draft M&I Water Shortage Policy. Reclamation's 2011 NOI, however, does not clarify how Reclamation intends to address that issue in defining its proposed project and alternatives in the draft environmental impact statement (DEIS) that it is now preparing.

Our agencies believe that, in preparing the DEIS, Reclamation should not continue the 2005 EA's approach concerning deliveries to the American River Division. Reclamation delivers American River water to agricultural contractors south of the Delta, so such contractors do receive supplies from the same source as the American River Division. The 2005 EA's approach would be inconsistent with not only Reclamation's historical practices, but also with Term 14 in the water-right permits under which Reclamation diverts water at Folsom Dam and Reservoir, specifically Permits Nos. 11315 and 11316. That Term 14, as included in those Reclamation permits by the State Water Rights Board in its Decision 893, states:

Deliveries of water under permits issued pursuant to Application 13370 and 13371 [Permits Nos. 11315 and 11316] shall be limited to deliveries for beneficial use within Placer, Sacramento and San Joaquin Counties and shall not be made beyond the westerly or southerly boundaries thereof, except on a temporary basis, until the needs of those counties, present or prospective, are fully met provided, however, that agreements in accordance with Federal Reclamation laws between permittee and parties desiring such service within said counties are executed by July 1, 1968.

(Decision 893, p. 72; see also *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4<sup>th</sup> 674, 814 (discussing Term 14).)

Reclamation has signed agreements extending Term 14's July 1, 1968 deadline to December 31, 1975. (State Water Resources Control Board [SWRCB] Decision 1356, pp. 7-8; SWRCB Decision Amending and Affirming, As Amended, Decision 1356, pp. 6-7 (December 17, 1970).) A number of American River Division CVP water-service contracts were signed before the 1975 deadline, including the contracts of the City of Roseville, Placer County Water Agency, Sacramento Municipal Utility District and San Juan Water District. The 2005 EA's approach toward deliveries to the American River Division therefore would not be consistent with Reclamation's water-right permits and should not be continued in the DEIS on which Reclamation is currently working.

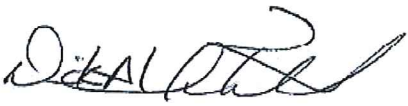
We have appreciated Reclamation's willingness to discuss at some length the problems raised by its 2005 EA's statements about deliveries to American River Division contractors. We believe that we collectively made progress on this issue during Reclamation's 2010 workshops and want to ensure that the DEIS reflects this progress. Accordingly, we would be happy to discuss with you further how Reclamation plans to handle deliveries to the American River Division in accordance with Term 14 in its DEIS.

Mr. Tim Rust  
January 27, 2012  
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Please do not hesitate to contact us if you have any questions.

Very truly yours,

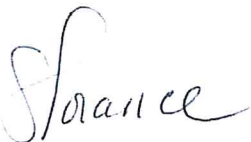
CITY OF ROSEVILLE

By:   
Derrick Whitehead  
Environmental Utilities Director


PLACER COUNTY WATER AGENCY

By:   
David Breninger  
General Manager

SAN JUAN WATER DISTRICT

By:   
Shauna Lorange  
General Manager

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT

By:   
John DiStasio  
General Manager and Chief  
Executive Officer

8683/M &I Shortage Policy/L012712AmRiver Divn

Cc: Tammy Laframboise, Bureau of Reclamation  
Mike Finnegan, Bureau of Reclamation  
Bureau of Reclamation CVP M&I Water Shortage Policy Staff  
CVP M&I Water Shortage Policy Stakeholder Group



Enclosure 2

Letter to Mr. Tim Rust, dated March 14, 2012



March 14, 2012

Mr. Tim Rust  
U.S. Department of Interior  
Bureau of Reclamation, Mid-Pacific Region  
2800 Cottage Way  
Sacramento, California 95825

Re: Central Valley Project M&I Water Shortage Policy – Draft EIS  
and Term 14 of Folsom Unit's Water-Right Permits

Dear Mr. Rust:

As our agencies stated at the February 10, 2012 workshop concerning Reclamation's possible approach for preparing a draft environmental impact statement (EIS) for the CVP M&I water shortage policy, our agencies believe that Reclamation's EIS must reflect compliance with Reclamation's water-right permits for the CVP's Folsom Unit. At that workshop, you briefly stated an interpretation of Term 14 in those permits, which are Permits Nos. 11315 and 11316. For the reasons stated in this letter, our agencies disagree with that interpretation. Reclamation's EIS must reflect the contractual allocations to our agencies required by Term 14 in those water-right permits.

*1. Term 14 of Folsom Unit Permits And Reclamation's Apparent Interpretation Of It*

Term 14 in Permits Nos. 11315 and 11316 states:

Deliveries of water under permits issued pursuant to Application 13370 and 13371 shall be limited to deliveries for beneficial use within Placer, Sacramento and San Joaquin Counties and shall not be made beyond the westerly or southerly boundaries thereof, except on a temporary basis, until the needs of those counties, present or prospective, are fully met provided, however, that agreements in accordance with Federal Reclamation laws between permittee and parties desiring such service within said counties are executed by July 1, 1968.

The 1968 deadline was extended to December 31, 1975 under agreements signed by Reclamation. (Decision 1356, pp. 7-8; Decision Amending And Affirming As Amended, Decision 1356, p. 1 (1970).)

Our agencies are within the counties to which Term 14 applies and signed our CVP water-service contracts before Term 14's 1975 deadline. At the February 10, 2012 workshop, however, you stated an interpretation of Term 14 under which its only effect was to allow agencies like ours to sign such contracts before other agencies and now does not affect Reclamation's allocations of water diverted and stored in the CVP's Folsom Unit. As explained below, such an interpretation would defeat the purpose of Term 14, as stated in the water-right decision – Decision 893 – that approved the Folsom Unit's permits and adopted Term 14. Reclamation's EIS must incorporate an interpretation of Term 14 that reflects that purpose, as recognized by the State Water Resources Control Board (SWRCB) and, more recently, the California Court of Appeal.

2. *Decision 893 And The Court of Appeal's Last Delta Decision Explain That Term 14 Is A Substitute For Granting Local Agencies Their Own Water-Right Permits*

Decision 893 concerned not just Reclamation's applications for the Folsom Unit's permits, but also numerous applications by local agencies to appropriate water from the American River. Those agencies included, among others, the City of Roseville and districts serving areas to which San Juan Water District now provides wholesale water supplies (Citrus Heights and Fair Oaks). (Decision 893, p. 53.) In Decision 893, the State Water Rights Board did not grant the applications by agencies to serve areas near Folsom Reservoir, but instead stated:

The points or points of diversion under each of those applications is Folsom Dam and/or Nimbus Dam to which right of access has not been acquired by the applicants. Accordingly, issuance of permits to those applicants would be meaningless in view of the obvious necessity of contracting with the United States for a supply of water from the Federal facilities. The service areas which those applicants desire to supply may be supplied equally well and with less administrative confusion by contract with the United States. Permits are being issued to the United States to appropriate enough American River water to adequately supply the applicants naturally dependent on that source and availability of water to such applicants is reasonably assured by the terms to be contained in the permits to be issued to the United States restricting exportation of water under those permits insofar as exportation interferes [*sic*] with fulfillment of needs within Placer, Sacramento and San Joaquin Counties. Other applicants in more remote areas must if necessary seek water from other sources.

(Decision 893, p. 54.)

Accordingly, the State Water Rights Board inserted Term 14 in Reclamation's Folsom Unit permits in order to grant agencies along the American River rights to water substantially similar to their own water-right permits while also reducing the "administrative confusion" that would have been associated with granting those permits. Such permits would have provided local agencies firm water supplies subject only to senior water rights and the conditions of the permits themselves.

Reclamation's apparent interpretation of Term 14, however, would allow Reclamation to allocate American River water to agencies within the counties covered by that term on the same basis as all other CVP water-service contractors. Such an interpretation would conflict with Term 14's explicit protection of the relevant counties' ability to obtain supplies to serve their "present or prospective" needs. Such an interpretation also would conflict with the State Water Rights Board's stated rationale for adopting Term 14 and would – contrary to that Board's intent – cause the exportation of water appropriated by the CVP's Folsom Unit to interfere with "fulfillment of needs within Placer, Sacramento and San Joaquin Counties."

Such an interpretation would conflict with not only Decision 893, but also the California Court of Appeal's most recent Delta decision, which interpreted Term 14. In its 2006 decision in the *State Water Resources Control Board Cases* (2006) 136 Cal.App.4<sup>th</sup> 674, the Court of Appeal described the above-quoted portion of Decision 893 and Term 14's effect as follows:

[T]he Water Rights Board was explaining that the availability of water to applicants within Placer, Sacramento, and San Joaquin Counties that were naturally dependent on the American River was "reasonably assured" by the permit condition that restricted the export of water appropriated under the American River permits until the needs of those counties were fully met.

(*State Water Resources Control Board Cases* (2006) 136 Cal.App.4<sup>th</sup>, at p. 814 (this decision is often referenced as the "Robie Decision").)

3. *Subsequent State Water Resources Control Board Decisions Confirm Term 14's Intent And Do Not Reduce Its Effect*

The SWRCB has issued four post-Decision 893 decisions that discuss Term 14. None of those decisions has amended Term 14, limited its effect or changed its intent.

The SWRCB's decisions concerning Auburn Dam's water-right permits confirm our interpretation of Decision 893 and Term 14. Decision 1356 approved Reclamation's water-right applications for Auburn Dam and initially imposed a term on the resulting permits similar to Term 14. (Decision 1356, p. 16 (Term 19).) Based on a petition for reconsideration filed by Contra Costa Water District, however, the SWRCB removed



Term 19 from the Auburn Dam permits. In its December 17, 1970 Decision Amending and Affirming, As Amended, Decision 1356, the SWRCB stated the following about Term 14 (pp. 3-4):

The condition reflected a determination by the State Water Rights Board, based upon evidence in that proceeding, that giving to the three counties a preferential right to contract with the United States within a limited period of time for sufficient water to meet their future requirements was in the public interest and was an exercise of the Board's authority under Water Code Sections 1253, 1255 and 1257 (see page 52 of Decision D 893.)

The facts upon which the Board's determination was based were these: In the hearing leading up to Decision D 893, several entities within the three counties had pending applications to appropriate water from Folsom Reservoir, each seeking permits in its own name. Some of the applications had earlier priorities than the applications of the United States. However, the project works were owned and operated by the Federal Government, and, obviously, permits to those agencies would have been meaningless in view of the patent necessity of contracting for a supply of water from the federal facilities. The service areas which those applicants desired to supply could be supplied equally well by contract with the Federal Government rather than pursuant to independent permits. Permits were therefore issued to the United States to appropriate sufficient American River water to supply those who were then seeking permits and who were naturally dependent on that source, and availability of water to such applicants was to be assured, for a reasonable period, by the terms imposed in the United States' permits. The applications of others more remote from the river, such as Hollister Irrigation District and the City of San Jose, were denied in their entirety. The Board stated that they "must, if necessary, seek water from other sources" (page 54).

In that December 17, 1970 decision, the SWRCB went on to explain that its deletion of Term 19 did not affect any contracts for water supplies for Placer, Sacramento and San Joaquin Counties that Reclamation already had signed (pp. 6-7):

The Board's action is not to be construed in any sense as a "repudiation" of the agreements that have been executed with the United States nor is it to be construed as giving preference to more remote areas to contract for water from the subject project.

In its 2008 order revoking Reclamation's permits for Auburn Dam, the SWRCB briefly discussed Term 14 as follows:

In Decision 893, the State Water Rights Board found that it would be in the public interest to allow the counties of Sacramento, San Joaquin and

Placer (the counties) a specified period of time to negotiate water supply contracts with Reclamation before water from the Folsom Unit of the CVP could be delivered outside of those counties.

(Order WR 2008-0045, p. 22.)

Nothing in that 2008 order revised Term 14's protection of the ability of agencies in the relevant counties to obtain water to satisfy their "present or prospective" needs under their CVP contracts. In fact, that 2008 order reiterated that Term 14 was intended to reduce the administrative confusion that would have resulted if agencies had been granted their own water-right permits at Folsom Reservoir. (Order WR 2008-0045, p. 22 fn. 9.)

A 1982 SWRCB order concerning a permit for appropriations from the Pit River Arm of Shasta Lake also identified that potential administrative confusion as supporting Term 14 and stated that the 1982 permit did not present similar confusion with Reclamation's diversions at Shasta Dam. (Order No. 82-11, p. 4.)

In Decision 1641, the SWRCB briefly discussed Term 14, but did nothing to reduce the protection it provides for our agencies.<sup>1</sup> Nothing in Decision 1641 deleted Term 14 from the Folsom Unit's water-right permits or modified Term 14 in any way. Decision 1641 briefly discussed Term 14 in a footnote (p. 127, fn. 72), but it is noteworthy that the SWRCB did not modify that term even as it authorized Reclamation – for the first time – to deliver water appropriated under one of the Folsom Unit's permits (Permit No. 11316) for irrigation. (See Decision 1641, pp. 127 fn. 73, 163.)

No post-SWRCB decision has modified Term 14 in Reclamation's Folsom Unit permits, even though the SWRCB has expanded the authorized uses that Reclamation could make of water appropriated under those permits. In fact, the SWRCB's post-Decision 893 decisions consistently have recognized that Term 14 effectively was a substitute for granting agencies in Placer, Sacramento and San Joaquin Counties their own water-right permits to appropriate water at Folsom Dam. As discussed above, the interpretation of Term 14 that Reclamation stated at the February 10 workshop would defeat this purpose of Term 14 and therefore is incorrect.

#### 4. *Conclusion*

Like all California water-right permit holders, Reclamation must comply with its permits' terms in operating its facilities. (Water Code §§ 1391, 1831.) Term 14 of Reclamation's Folsom Unit permits requires that Reclamation "fully meet" our agencies'

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<sup>1</sup>In Decision 1641, the SWRCB discussed Decision 893's terms in response to an argument by Westlands Water District that it was a legal user of water under Reclamation's water-right permits. In the Robie decision cited above, the California Court of Appeal ultimately decided that Westlands did have that status, but that its rights had not been injured by the relevant change to Reclamation's permits. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4<sup>th</sup> at pp. 804-805.)

Mr. Tim Rust  
March 14, 2012  
Page 6

contractual needs before exporting water appropriated under those permits outside of Placer, Sacramento or San Joaquin Counties. This does not necessarily mean that our agencies will always receive 100% of our CVP water-service contract amounts, given that Folsom Reservoir can store only a limited portion of the American River's runoff.

Term 14, however, does mean several things. First, it means that Reclamation's CVP M&I water shortage policy cannot discriminate against the American River Division, as proposed in Reclamation's 2005 environmental assessment. Second, it means that Reclamation cannot adopt a "no action alternative" in its EIS for that policy that would apply the same allocations to our agencies as to agricultural contractors in the export service areas. Third, it means that all of Reclamation's EIS alternatives must ensure that our agencies' water-supply needs are met. The operations by Reclamation that would be necessary to ensure compliance with Term 14 should be generally consistent with Reclamation's current operations, given Reclamation's variable allocations to divisions north and south of the Delta.


As always, we appreciate Reclamation's openness to comments during its development of the CVP M&I water shortage policy.

Very truly yours,

CITY OF ROSEVILLE

PLACER COUNTY WATER AGENCY

By:



Derrick Whitehead  
Environmental Utilities Director

By:

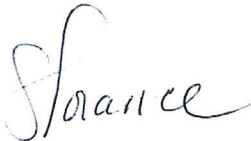


David Breninger  
General Manager

SAN JUAN WATER DISTRICT

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT

By:



Shauna Lorance  
General Manager

By:



Paul Lau  
Assistant General Manager  
Power Supply & Grid Operations

Cc: Michael Inthavong, Bureau of Reclamation  
Amy Aufdemberge, Assistant Regional Solicitor  
CVP M&I water shortage policy stakeholders  
8683/M&I Shortage Policy/L031412 Term 14

Enclosure 3

Letter to Mr. Rick Woodley, dated June 25, 2012





June 25, 2012

Mr. Rick Woodley  
Regional Resources Manager  
U.S. Department of Interior  
Bureau of Reclamation, Mid-Pacific Region  
2800 Cottage Way  
Sacramento, California 95825-1898

Re: Central Valley Project M& Water Shortage Policy – Draft EIS and  
Term 14 of Folsom Unit's Water-Right Permits

Dear Mr. Woodley:

Thank you for your June 1, 2012 letters to our agencies in response to our March 14, 2012 letter concerning the application of Term 14 in Reclamation's water-right permits for the Folsom Unit (Permits Nos. 11315 and 11316) and its relationship to the environmental impact statement (EIS) that Reclamation is preparing for its municipal and industrial (M&I) shortage policy. Your letter correctly states that, at this time, our agencies and Reclamation do not have the same understanding concerning the requirements that Term 14 imposes on Reclamation's operation of the Folsom Unit. We believe that Reclamation's June 1 letter contains several key incorrect statements and omissions. We explain these incorrect statements and omissions in detail below. We believe that, when Reclamation reconsiders these points, it will agree with our interpretation of Term 14, as will be necessary for Reclamation to complete an EIS for the M&I water shortage policy that complies with the National Environmental Policy Act.

The June 1 letter contains the following key omissions and inaccurate statements:

1. The June 1 Letter Fails To Account For Decision 893's Explicit Statement Of The Intent Underlying Term 14

As quoted at length in our March 14 letter, the State Water Rights Board's Decision 893 – which granted the Folsom Unit's permits to Reclamation – expressly stated the following intent underlying Term 14:

Mr. Rick Woodley  
June 25, 2012  
Page 2

Permits are being issued to the United States to appropriate enough American River water to adequately supply the applicants naturally dependent on that source and availability of water to such applicants is reasonably assured by the terms to be contained in the permits to be issued to the United States restricting exportation of water under those permits insofar as exportation interferes [sic] with fulfillment of needs within Placer, Sacramento and San Joaquin Counties. Other applicants in more remote areas must if necessary seek water from other sources.

(Decision 893, p. 54 (emphasis added).)

We have included copies of the relevant pages of Decision 893 for your ease of reference.

The June 1 letter does not discuss this portion of Decision 893. Nothing in the June 1 letter explains how Reclamation's interpretation of Term 14 can be reconciled with Decision 893's express statement that Term 14 is intended to ensure that Reclamation does not deliver water appropriated from the American River outside Placer, Sacramento and San Joaquin Counties to the detriment of agencies protected by that term.

Furthermore, nothing in the June 1 letter acknowledges, or attempts to reconcile Reclamation's position with, the interpretation of Term 14 that the Court of Appeal stated in *State Water Resources Control Board Cases* 136 Cal.App.4<sup>th</sup> 674 (Cal.App. 2006). As quoted in our March 14 letter, the Court of Appeal interpreted Decision 893 as follows:

[T]he Water Rights Board was explaining that the availability of water to applicants within Placer, Sacramento, and San Joaquin Counties that were naturally dependent on the American River was "reasonably assured" by the permit condition that restricted the export of water appropriated under the American River permits until the needs of those counties were fully met.

(*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4<sup>th</sup>, at p. 814.)

We have included copies of the relevant pages of the Court of Appeal's decision for your ease of reference.

In *California v. United States*, 438 U.S. 645, 674-679 (1978), the U.S. Supreme Court declared that the Reclamation Act's section eight, 43 U.S.C. § 383, requires Reclamation to comply with the terms of water-right permits issued by California regulatory agencies unless Congress has clearly stated a contrary intent. As discussed further below, nothing in the Folsom Unit's authorizing legislation excuses Reclamation from complying with Term 14, which Reclamation accepted having full knowledge of that legislation's contents.

2. The June 1 Letter Mistakenly States That The Local Water-Right Applications That Term 14 Superseded Were Only For Natural Flows

As discussed at length in our March 14 letter, Term 14 effectively superseded water-right applications by our agencies and our predecessors that would have had priority over Reclamation's applications for the Folsom Unit. Reclamation's June 1 letter, however, states that this fact does not support the application of Term 14 consistent with Decision 893's explicit intent because those applications were only for a "natural flow right." Specifically, the June 1 letter states (emphasis added):

We appreciate the history you detailed in your March 14, 2012 letter regarding being afforded an opportunity to enter into a federal water service contract under the federal Reclamation laws in lieu of being granted a natural flow right by the SWRCB. One advantage of a CVP water service contract is that the source is generally water stored in CVP facilities and has a greater reliability than a natural flow right.

As explicitly stated in Decision 893, however, applications by our agencies and predecessors that were superseded by Term 14 included substantial storage of American River water (pp. 5, 11 (emphasis added)):

Application 12295 by City of Roseville seeks a permit for 350 cfs by direct diversion, year-round, and 120,000 afa by storage between October 1 and June 1 from American River for municipal purposes. The water is to be diverted and stored at Folsom Dam and will be used at the City of Roseville and environs.

Application 12300 by Fair Oaks Irrigation District seeks a permit for 50 cfs by direct diversion between April 1 and October 31 and 25,500 afa by storage between October 1 and June 1 from American River for irrigation and domestic purposes. The water is to be diverted and stored at Folsom Dam and will be used within Fair Oaks Irrigation District having an irrigable area of approximately 3,600 acres . . .

Application 12667 by Citrus Heights Irrigation District seeks a permit for 50 cfs by direct diversion, year-round, and 28,000 afa by storage between October 1 and June 1 from American River for irrigation and domestic purposes. The water is to be diverted at Folsom Dam and will be used within Citrus Heights Irrigation District.

Contrary to the June 1 letter, Reclamation's current interpretation of Term 14 would deny benefits that local agencies' water-right applications that Term 14 superseded would have granted. Specifically, Reclamation's application of an M&I water shortage

policy that does not account for Term 14 would not be the equivalent of the water-right applications that Term 14 superseded.

3. The June 1 Letter Mistakenly States That Reclamation Policy, As Reflected in CVP Water Service Contracts, Does Not Support Applying Term 14 According To Decision 893's Explicit Intent

The June 1 letter states "Reclamation's policy on shortage conditions, as expressed in your water contracts, is that CVP water service contractors share in shortages to CVP supplies, to the extent practicable, in accordance with the M&I water shortage policy." This statement fails to support Reclamation's interpretation of Term 14 for at least three reasons.

First, as discussed above, the Reclamation Act's section eight requires that Reclamation comply with the terms of its California water-right permits. (See *California v. United States*, *supra*, 438 U.S. at 674-679.) Whatever Reclamation's internal policies may be, they do not allow Reclamation to violate the Reclamation Act by refusing to implement water-right permit terms like Term 14.

Second, the Central Valley Project Improvement Act (CVPIA) indicates that the "Project Water" that Reclamation allocates under CVP water-service contracts must be allocated according to the terms of Reclamation's water-right permits. Two definitions in CVPIA reflect this specific congressional mandate. CVPIA section 3405(f) defines the term "Central Valley Project water" as "all water that is developed, diverted, stored, or delivered by the Secretary . . . in accordance with the terms and conditions or water rights acquired pursuant to California law." (Emphasis added.) Similarly, CVPIA section 3406(b)(2) defines the term "Central Valley Project yield" as "the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing at the time of enactment of this title have been met." (Emphasis added.) CVPIA therefore requires Reclamation to implement Term 14 according to Decision 893's explicitly stated intent.

Third, the terms of our CVP water service contracts follow CVPIA's mandates in allocating water to our agencies. Most of our contracts define the key term "Project Water" – which is what Reclamation would distribute under the M&I water shortage policy – to be the water that Reclamation diverts under the terms of its water right permits. For example, Article 1(u) of San Juan's 2006 long-term water service contract, Roseville's 2011 interim contract and PCWA's 2011 interim contract defines "Project Water" as follows (emphasis added):

Project Water shall mean all water that is developed, diverted, stored, or delivered by the Secretary in accordance with the statutes authorizing the



Project and in accordance with the terms and conditions of water rights acquired pursuant to California law.

Article 10 of SMUD's 1970 CVP water-service contract requires Reclamation to "use all reasonable means to guard against a condition of shortage in the quantity of water available to the District [SMUD] pursuant to this contract." (Emphasis added.) Reclamation must comply with the terms of its water-right permits, so compliance with those terms is necessarily a "reasonable means to guard against a condition of shortage" in water delivered under SMUD's 1970 contract. Article 10 of that contract therefore requires Reclamation to comply with Term 14 in allocating water to SMUD.

Consistent with the Reclamation Act's section eight – as interpreted by the U.S. Supreme Court in *California v. United States* – and CVPIA, our water service contracts' explicit terms require Reclamation to implement Term 14's preference, as explicitly described in Decision 893.

4. The June 1 Letter Mistakenly Characterize Our Agencies As Relying On The Area-Of-Origin Laws

The June 1 letter, in its footnote two, states: "Reclamation is not obligated by state law to grant preferences to water stored in CVP facilities. 'Area of origin' protections apply only to natural flow rights . . . ." Our agencies' position in the current matter is based not on California's area-of-origin laws, but rather on Term 14 that the State Water Rights Board inserted into the Folsom Unit's purpose for the explicit purpose of ensuring that our agencies' "needs . . . present or prospective, are fully met . . . ." While that term does protect area-of-origin interests to some extent, Reclamation's obligation to comply with it derives not from the area-of-origin laws themselves, rather from its obligation to comply with all terms of its water right permits. Water Code §§ 1391, 1410(a); *Environ. Defense Fund v. East Bay Mun. Utility Dist.*, 26 Cal.3d 183, 197 (Cal. 1980). For this reason, and contrary to the June 1's footnote two, the recent decision in *Tehama-Colusa Canal Authority v. U.S. Department of Interior*, 2011 U.S. Dist. LEXIS 83497 (E.D.Cal. 2011), is irrelevant here.<sup>1</sup>

5. The June 1 Letter's Interpretation Of The Folsom Unit's Authorizing Legislation Ignores That Legislation's Own Terms

The June 1 letter states, in footnote two, "[w]e note that the authorizing legislation for the American River Division, 63 Stat. 852, includes Congress' intent that American River Division facilities be integrated with the CVP and use for the 'widest possible public benefit,' similar to the Congressional authorization language at issue in TCCA [*sic*] case." This statement apparently refers to section four of that legislation.

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<sup>1</sup>Our agencies also believe that the *Tehama-Colusa* decision was incorrect and await the Ninth Circuit Court of Appeals' decision on appeal.

The June 1 letter ignores the following language contained in section two of the Folsom Unit's authorizing legislation (63 Stat. 853 (emphasis added)):

Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs.

In other words, in authorizing the Folsom Unit, Congress specifically recognized that California law gives "priority to the counties and areas of origin for present and future needs." Reclamation complied with this congressional directive partly by accepting Term 14 in the Folsom Unit's water-right terms to protect our agencies. While the June 1 letter acknowledges the Folsom Unit's authorizing legislation, nothing in that letter explains how Reclamation's interpretation of Term 14 could comply with that legislation's specific congressional directive concerning "State water laws . . . giving priority to the counties and areas of origin for present and future needs."

6. Term 14's Text And Intent, As Well As Reclamation's Past Practice, Indicate That Reclamation's Claim That Term 14's Effect Expired In 1975 Is Incorrect

The June 1 letter's footnote three states, in relevant part: "We believe that the Term 14 preference for beneficial use in the named counties by federal water service contract ended in 1975." The June 1 letter does not seek to reconcile this statement with Term 14's text, which indicates that the 1975 date (as an extension of the 1968 deadline adopted in Decision 893) is a deadline for the execution of contracts that would be covered by Term 14. Term 14's text that states the preference for our agencies – "Deliveries of water . . . shall not be made beyond the westerly or southerly boundaries thereof [of Placer, Sacramento and San Joaquin Counties], except on a temporary basis, until the needs of those counties, present or prospective, are fully met" – is not modified by the time deadline, which is part of the later clause that begins "provided, however . . . ." The June 1 letter states no explanation for how the 1975 deadline could modify the service obligation created by Term 14. Similarly, the June 1 letter contains no explanation for how applying a 1975 deadline to that service obligation could be consistent with Decision 893's explicit statement of intent concerning Term 14's effect. As discussed above in detail, the June 1 letter does not address that statement of intent at all.

Furthermore, if the June 1 letter's statement about the 1975 deadline is read as favorably as possible, it suggests that Reclamation views Term 14 as creating only a contracting preference for our agencies. Reclamation's past practice, however, does not reflect any such reading of Term 14. For example, Reclamation signed a contract to deliver CVP water to Westlands Water District in 1963, after Decision 893's issuance in

1958 and before Reclamation signed water-service contracts with some of our agencies. *Westlands Water Dist. v. United States*, 337 F.3d 1092, 1097 (9<sup>th</sup> Cir. 2003). Reclamation's past practice therefore indicates that it did not view Term 14 as establishing a contracting preference – as opposed to an allocation preference – for our agencies.

7. Reclamation's Interpretation Of Decision 1641 Cites No Authority And Ignores The Court Of Appeal's Interpretation Of That Decision

The June 1 letter states, in footnote three, "Term 14 has been superseded by Decision 1641's approval of Reclamation's consolidated place of use petition." As discussed in our March 14 letter, however, nothing in Decision 1641 revised Term 14 in any way. Reclamation's June 1 cites no authority to support its implicit claim that the State Water Resources Control Board (SWRCB) superseded Term 14 without actually saying it was doing so. Finally, the June 1 letter also does not address the Court of Appeal's 2006 decision concerning Decision 1641, which explicitly interprets Term 14 as having continuing effect following Decision 1641. (*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4<sup>th</sup>, at p. 814.)

8. Reclamation's Position On Public Health And Safety Supplies Demonstrates The Invalidity Of Reclamation's Interpretation Of Term 14

The June 1 letter states (emphasis added):

M&I contractors are allocated water according to their historic use, and Reclamation will make efforts to meet the public health and safety needs of M&I contractors under conditions of extreme shortages to CVP supplies.

In other words, notwithstanding the fact that Decision 893 explicitly states the intent to adopt a term "restricting exportation of water under [the Folsom Unit's] permits insofar as exportation interferes [*sic*] with fulfillment of needs within Placer, Sacramento and San Joaquin Counties" (Decision 893, p. 54), Reclamation will not commit to ensure our agencies even public health and safety levels of supply under our CVP water service contracts. Reclamation's refusal to make even this minimum commitment indicates that its interpretation of Term 14 would do nothing to ensure that, in Term 14's words, "the needs of [Placer and Sacramento] counties, present or prospective are fully met . . . ." Reclamation's interpretation of Term 14 therefore conflicts with that term's text and intent.

Conclusion


We appreciate Reclamation's effort to respond to our concerns with its June 1 letter. Unfortunately, that letter's interpretation of Term 14 contains numerous omissions and errors. The most fundamental of these problems with the June 1 letter is its failure to consider or address Decision 893's explicit statement of what it intended to do in adopting Term 14 as part of Reclamation's water-right permits for the Folsom Unit. The June 1 letter then compounds this error by failing to account for the Court of Appeal's 2006 interpretation of Term 14 according to this statement of intent.

We urge Reclamation to reconsider its June 1 letter and ensure that its EIS for the M&I shortage policy reflects Reclamation's compliance with Term 14 according to its explicit intent and terms. Reclamation cannot prepare an EIS that complies with the National Environmental Policy Act if its project description does not comply with the water-right permit terms that apply to the Folsom Unit as required by the Reclamation Act. "Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS." *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 866 (9<sup>th</sup> Cir. 2004).


We look forward to discussing this matter with you further.

Very truly yours,

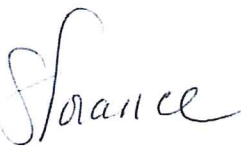
CITY OF ROSEVILLE

By:   
Derrick Whitehead  
Environmental Utilities Director

PLACER COUNTY WATER AGENCY

By:   
David Breninger  
General Manager

SAN JUAN WATER DISTRICT

By:   
Shauna Lorange  
General Manager

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT

By:   
Paul Lau  
Assistant General Manager  
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Enclosures

Cc: Donald Glaser, Regional Director, Bureau of Reclamation



Mr. Rick Woodley  
June 25, 2012  
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Michael Finnegan, Bureau of Reclamation  
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Michael Inthavong, Bureau of Reclamation  
Amy Aufdemberge, Assistant Regional Solicitor  
CVP M&I water shortage policy stakeholders

8683/M&I Shortage Policy/L062512 Term 14  
6/25/2012 8:28 AM

Enclosure 4  
Letter to Mr. David Murillo, dated May 3, 2013



CITY OF  
**FOLSOM**  
DISTINCTIVE BY NATURE



May 3, 2013

Mr. David Murillo  
Regional Director  
U.S. Department of Interior  
Bureau of Reclamation, Mid-Pacific Region  
2800 Cottage Way  
Sacramento, California 95825-1898

Re: Folsom Reservoir Management and Central Valley Project Allocations

Dear Mr. Murillo:

Our agencies write to express our serious concerns about the Bureau of Reclamation's planned management of Folsom Reservoir, and its allocations of CVP water-service contract supplies, this year. We believe that Reclamation is putting our communities' water supplies at serious risk and is not complying with the terms of Folsom Reservoir's water-right permits. We request a meeting with you, and Reclamation's Central Valley Operations staff, as soon as possible to discuss these serious issues. We will seek Reclamation's commitment that it will:

- Manage Folsom Reservoir's storage to ensure that the hundreds of thousands of people we serve will have adequate water supplies if the winter of 2013-2014 were to be dry – similar to the winters of 2007-2008, 2008-2009, 2011-2012 and 2012-2013; and
- Comply with the terms of its water-right permits for Folsom Reservoir by making CVP allocations consistent with those term's explicit language and the state's intent in including those terms in those permits.

*Background on Our Region and Agencies*

Because this region's communities were among the first in California, our agencies and others in this region hold, in the American River, some of the most senior water rights in the State of California. For example, San Juan Water District (San Juan) and the City of Folsom both hold water rights that date to the 1850s. The American River – and therefore Folsom Reservoir – provides a primary – and, in some cases, the only – water supply for our communities. Moreover, downstream of the reservoir, the City of Sacramento, Carmichael

Water District, Sacramento County Water Agency and Sacramento Suburban Water District use American River water. These surface-water supplies enable effective management of the region's groundwater supplies, which historically were overdrafted.

Notwithstanding this region's natural reliance on the American River, its agencies' very senior water rights and the protection provided by the area-of-origin laws that govern the CVP, we are necessarily dependent on Reclamation's operation of Folsom Reservoir. We – and every member of every community we serve – therefore are put at risk if Reclamation's operation of Folsom Reservoir does not ensure that it will continue to contain sufficient water to meet our region's needs. Unlike other areas of California, our region must rely solely on its local water sources to meet those needs.

*Reclamation's Planned Management of Folsom Reservoir and Risks to This Region's Water Supplies in 2014*

Reclamation has disclosed its plans for operating the CVP this year and they cause us serious concern about the risk to this region's water supplies next year. Reclamation's projected operations will create unacceptable risks for this region in 2014 if the winter of 2013-2014 were to be dry. Reclamation's March 2013 90% Forecast indicates that, under very dry, 90% exceedance conditions, Reclamation would draw storage in Folsom Reservoir down from 544,000 acre-feet at the end of May 2013 to a low of 191,000 acre-feet at the end of December 2013. (That forecast is enclosed.) According to that forecast, of this 353,000 acre-feet of drawdown, 299,000 acre-feet of it would occur between the end of May and the end of September, which appears to indicate that the draw-down will occur primarily to support Delta exports. While conditions this year may not be as dire as a 90%-exceedance year, the fact that Reclamation would plan to draw Folsom Reservoir down to 191,000 acre-feet of storage is a significant problem. According to Reclamation's forecast, that amount of storage would leave the reservoir at 365 feet, which only about 30 feet above water-supply intakes in the reservoir that serve our agencies. This margin for error is much too small given the fact that our agencies are – in the words of the water-right decision that granted Reclamation its water-right permits for the reservoir – "naturally dependent" on the American River. (Decision 893, p. 54 (copy enclosed).)

Even if conditions ultimately are not as dire as the 90%-exceedance level, Reclamation's planned operations are creating significant risks to our region. A comparison to the historically dry year of 1976-1977 is enlightening. There were approximately 400,000 acre-feet in Folsom Reservoir's storage when the 1976-1977 water year began on October 1, 1976. In 1976-1977, the reservoir eventually dropped to about 150,000 acre-feet in September 1977. (We have enclosed the CDEC display indicating this progression during 1976-1977.) Reclamation's planned operations very well may draw Folsom Reservoir down this year as low as it was on October 1, 1976, if not even lower as projected in the 90%-exceedance forecast. In effect, Reclamation apparently is willing to risk at least a repeat of 1977 storage levels – notwithstanding the fact that hundreds of thousands more people live in this region than lived here in 1977. While it may be appealing to believe that a year as dry as 1976-1977 is not likely to recur next winter, we note that each of the past two winters has included a three-month period as dry as any on record.

If conditions like those in 1976-1977 were to recur next winter, our communities could have a water-supply disaster in 2014 given just how low Reclamation apparently is willing to draw the reservoir this year. This is an unacceptable risk for this region, much of which has no surface water available to it other than water from the American River. Notwithstanding this region's senior water rights, they will be of no use if there is not enough water available in the reservoir.

*Reclamation's 2013 CVP M&I Allocations and Reclamation's Water-Right Permits for Folsom Dam and Reservoir*

We also are concerned about Reclamation's allocations of water to CVP M&I water-service contractors in 2013. Reclamation has allocated to American River Division M&I contractors 75% of their adjusted historic use, while allocating to M&I contractors serviced by Shasta Reservoir 100% of their full contract supplies and Delta-export M&I contractors 70% of their adjusted historic use. The allocation to American River Division contractors does not comply with Term 14 in Reclamation's water-right permits for Folsom Dam and Reservoir (Permits Nos. 11315 and 11316).

In Decision 893, the State Water Rights Board imposed Term 14 on Reclamation's permits in order to ensure that water agencies in this region would have their "present or prospective" needs "fully met" by Reclamation before Reclamation committed American River water to others. (The enclosed excerpts from Decision 893 include Term 14.) As explained in March 14, 2012 and June 25, 2012 letters to Reclamation, the City of Roseville, San Juan Water District, Placer County Water Agency and the Sacramento Municipal Utility District signed water-service contracts with Reclamation that are protected by Term 14.

Reclamation's M&I allocations, in combination with its 2013 operational projections, demonstrate that Reclamation has sufficient water available to it from Folsom Reservoir to fully meet the American River Division contractors' water demands, but is choosing to allocate that water elsewhere. According to Reclamation's 2005 environmental assessment for the CVP M&I water shortage policy, the combined water-service contracts of this region's American River Division contractors total 180,750 acre-feet and we have not sought delivery of that full collective contract amount this year. Reclamation's March 2013 90% Forecast indicates that, in the 90%-exceedance scenario, Reclamation would draw Folsom Reservoir's storage down by 324,000 acre-feet between the end of May 2013 and the end of October 2013. Reclamation's March 2013 50% Forecast (copy enclosed) indicates that, in the 50%-exceedance scenario, Reclamation would draw the reservoir's storage down by 310,000 acre-feet between the end of May 2013 and the end of October 2013. Each of these projected drawdowns is about one-third of the reservoir's total storage.

In combination with the relatively low amount of contract deliveries our region's contractors are seeking, the very substantial projected drawdown of Folsom Reservoir storage indicates that, whatever this year's projected hydrology, Reclamation is depending substantially on those drawdowns to meet downstream demands. The fact that these drawdowns are occurring because of Reclamation's operational choices, and not dry hydrology, is indicated by the fact that M&I contractors that are serviced by Shasta Reservoir are receiving no reduction in their water supplies this year. Based on past experience and Reclamation's statements in the administrative