

FINAL Environmental Assessment

Delivery and Use of Unreleased San Joaquin River Restoration Flows (Water Contract Years 2016-2025)

Attachment A – Public Comments and Responses



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List of Abbreviations and Acronyms

CVP	Central Valley Project
Delta	Sacramento–San Joaquin River Delta
EA	Environmental Assessment
Exchange Contractors	San Joaquin River Exchange Contractors Water Authority
Friant Contractors	CVP Friant Division long-term contractors
Reclamation	U.S. Department of the Interior, Bureau of Reclamation
Settlement	Stipulation of Settlement in <i>NRDC, et al., v. Kirk Rodgers, et al.</i>
SJRRP	San Joaquin River Restoration Program
Restoration Flows	San Joaquin River Restoration Flows
URFs	Unreleased Restoration Flows
WCY	Water Contract Year

1.0 Introduction

This attachment contains the comments and responses to comments for the Draft Environmental Assessment (EA) for the sale, exchange, or banking of Unreleased Restoration Flows (URFs) from Friant Dam with a range of parties, including Central Valley Project (CVP) Friant Division long-term contractors (Friant Contractors) and others during Water Contract Years (WCY) 2016-2025. The Draft EA was released by U.S. Department of the Interior, Bureau of Reclamation (Reclamation) for public review on January 8, 2016 for a 30-day review period.

Two sets of comments were received on the Draft EA. Section 2.0, “Comments,” contains a list of the agencies and organizations who commented on the Draft EA and presents the comment letters. Section 3.0, “Responses to Comments,” presents the responses to comments.

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2.0 Comments

This section contains copies of comment letters received from agencies and organizations. Table 2-1 indicates the commenting entity and abbreviation used to identify commenters. Individual comments within a comment letter are delineated by the abbreviation and sequential number (e.g., NRDC-1). Responses to comments are provided in Section 3.0, “Responses to Comments” and are numbered corresponding to the numbers assigned in the letter. Modifications to the Draft EA made in response to comments are included in the Final EA.

Table 2.1. Summary of Comment Letters Received and Abbreviations Used to Identify and Respond to Comments

Abbreviation	Agency	Affiliation
SJRXC	San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition	Local Agency, Organization
NRDC	Natural Resources Defense Council and The Bay Institute	Organization

2.1 Comments from the San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition

NEW YORK
LONDON
SINGAPORE
PHILADELPHIA
CHICAGO
WASHINGTON, DC
SAN FRANCISCO
SILICON VALLEY
SAN DIEGO
BOSTON
HOUSTON
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NEWARK
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CHERRY HILL
LAKE TAHOE
MYANMAR
OMAN
*A GCC REPRESENTATIVE OFFICE
OF DUANEMORRIS*
MEXICO CITY
ALLIANCE WITH
MIRANDA & ESTAVILLO

February 8, 2016

VIA E-MAIL & USPS

Mr. Chad Moore
Bureau of Reclamation
2800 Cottage Way, MP-170
Sacramento, CA 95825

Via email to cmoore@usbr.gov

Re: Comments of the San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition to the Draft Environmental Assessment for the Delivery and Use of Unreleased San Joaquin River Restoration Flows (Water Contract Years 2016-2025)

Dear Mr. Moore:

The following comments are submitted on behalf of the San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) and the San Joaquin River Resource Management Coalition (RMC), referred to hereafter for convenience collectively as Exchange Contractors.

The Exchange Contractors have very few comments to the draft environmental assessment (DEA). Our comments are set forth below.

The DEA should make clear that unreleased restoration flows must not interfere with the rights of the Exchange Contractors pursuant to either the Exchange Contract or Purchase Agreement. Both of these documents should be specifically identified within the DEA as they require non-interference with the Exchange Contractors' rights as set forth in various court cases, State Water Resources Control Board decisions, and the San Joaquin River Restoration Settlement Act (P.L. 111-11).

SJRXC-1

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Duane Morris

Ms. Kellye Kennedy
February 8, 2016
Page 2

There may be circumstances where the Exchange Contractors are receiving their water from the San Joaquin River due to releases from Millerton. Since unreleased restoration flows are within the same water year, it is entirely possible that this water would have to be provided to the Exchange Contractors on the basis of their senior water rights and contract with the United States. Unreleased restoration flows must not interfere with fulfillment of Reclamation's priority obligations in this regard. SJRXC-1 (continued)

Reading the DEA, it leaves the erroneous impression that the priority for the release of otherwise unreleased restoration flows should be into the San Joaquin River rather than for delivery to the Friant contractors. However, a review of the provisions of settlement agreement paragraphs 13(I)(1), (2), and (3), makes it clear that the first consideration should be, if practical, to bank, store or exchange unreleased restoration flows for future use to supplement future restoration flows or to transfer or sell such water and deposit the proceeds into the restoration fund. SJRXC-2

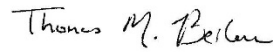
In a year such as 2016, it is the view of the Exchange Contractors that it is not practical to bank, store or exchange unreleased restoration flows unless it is necessary to meet the Exchange Contractors' rights. Absent that requirement, given that this is a drought recovery year, the most practical use of that water is to meet water supply needs within the Friant division. Hence, at least for drought recovery years, unreleased restoration flows not otherwise needed to fulfill the rights of the Exchange Contractors should be transferred or sold to the Friant contractors. SJRXC-3

References.

The references in the DEA failed to cite the San Joaquin River Restoration Settlement Act (P. L. 111-11), the Exchange Contract or Purchase Agreement as documents consulted in preparing the DEA. SJRXC-4

In conclusion, thank you for the opportunity to comment on the DEA.

Very truly yours,



Thomas M. Berliner

cc: San Joaquin River Exchange Contractors Water Authority
San Joaquin River Resource Management Coalition

DM26519954.1 R0899/00001

2.2 Comments from the Natural Resources Defense Council and the Bay Institute

Page Number	Line Number(s)	Commenter	Comment
1-8	6	Natural Resources Defense Council and the Bay Institute	In our discussion last Friday, we talked about describing "elements" of the URF program as defined by Paragraph 131 that are not being implemented at this time such as sales outside of the POU and exchanges to 3rd parties (Priority 2A). Perhaps "mechanisms" is a better word but the sentiment in the preceding sentence could be inserted here or in the introduction as others suggested.
1-10	5-6	Natural Resources Defense Council and the Bay Institute	I appreciate this addition in the draft. Could say "substantive changes and expansion of the URF program". The expansion would included URF mechanisms or elements that could sales outside the POU to entities such as MWD or exchanges with 3rd parties. I understand that exchanges with 3rd parties within the POU may already have coverage in this EA since a Friant contractor would need to be involved. What this EA does not directly address as spelled out in Paragraph 131 are Priority 2A actions that in some cases (banking) require directed authority from DOI.
2-3	11-12	Natural Resources Defense Council and the Bay Institute	As we discussed Friday, this sentence can be interpreted to mean that Priority 2A actions are "infeasible", which is presumably not what you meant. I understand that a Priority 2A actions requires a Friant contractor to be involved to get the water behind Millerton but that involvement could involve Reclamation providing banked water to a Friant contractor (e.g. Kern Delta banking and that water provided to Arvin - Edison using mechanisms already done in the 1999 Pilot project.
2-3	21-26	Natural Resources Defense Council and the Bay Institute	Appreciate the addition of this paragraph. As stated previously could add the term "expansion" to where it states "additional environmental coverage would be obtained if needed to changes and expansion of the URF program".
2-4	23-24	Natural Resources Defense Council and the Bay Institute	Prompted by our discussion last Friday, I talked to the RA about the these two sentences to clarify whether the URF program should have the flexibility of: 1. holding back a small amount of the URF's for a period of time to see if it was need for release later in the year and 2. whether URF's could be carried over into the next contract year as long as it did not have a water supply impact (being the first to spill in a wetter year) As I noted Priority 3 of the Paragraph 131 allows for re-scheduling and does not prohibit those actions. You wondered why the RA would not just schedule the "extra" water for later in the year if he felt that he needed it and thus it would need to be a URF. Tom indicated that he would try to schedule any additional water beyond the Exhibit B hydrograph amounts as early as possible in the contract year for use later in the year if he felt that he needed it using Paragraph 4d mechanisms. When I pointed out that he could not anticipate all his needs and invoking Paragraph 4d is an untested mechanism, he understood that the URF's gives him the water and some flexibility to have it available later in the year if needed or even in the following contract year. I am not contemplating much water and if it was not needed then it still could be sold later in the contract year (summer). The issue of URF carryover does not need to be stated in this EA since it does not affect the EA coverage for the different mechanisms. It is a policy determination and the fact that an outdated Friant Operating Guideline (FOG) can be interpreted as prohibiting it should not rule over the URF program unless there is a clearly stated statutory prohibition on URF carryover.

Comments extracted from a PDF file of the January 2016 Draft EA with comment markup submitted to Chad Moore (SJRRP) by Peter Vorster on behalf of NRDC and the Bay Institute on 2/9/2016.

NRDC-1

NRDC-2

NRDC-3

NRDC-4

NRDC-5

2.0 Comments

Comments extracted from a PDF file of the January 2016 Draft EA with comment markup submitted to Chad Moore (SJRRP) by Peter Vorster on behalf of NRDC and the Bay Institute on 2/9/2016.

Page Number	Line Number(s)	Commenter	Comment
2-4	23-24	Natural Resources Defense Council and the Bay Institute	Monty also noted that if for some reason that there were unsold URF's then they should not "disappear" because of a carryover prohibition. Recommend that the paragraph end with something like " URFs would be promptly scheduled for delivery once they are sold or exchanged. The SJRRP in consultation with the RA could hold back X% for use later in the contract year or allocate unsold URF's." I realize the latter statement may create some Friant heartburn but unless you have take or pay contracts then providing for a limited amount of flexibility for the URF's should not be prohibited.
3-1	26-27	Natural Resources Defense Council and the Bay Institute	See comment above about carryover. This prohibition not needed as long as any carryover does not cause a water supply impact.
3-4	33-35	Natural Resources Defense Council and the Bay Institute	As noted above that it is "speculative to assume precisely how water users both in and outside of the Millerton POU would use the water", recommend that this paragraph note that these potential impacts might not materialize. My comments in the Admin draft describe that in more detail.
3-5	28-31	Natural Resources Defense Council and the Bay Institute	As we discussed last Friday, it is not appropriate to reject Alternative A for speculative impacts. It was indicated that the FONSI could be worded so it does not reject Alternative A outright since it may be determined that selling water outside the POU may be a useful mechanism for the URF program in the future. It was proposed that the FONSI could state the Alternative A was not advantageous mechanism for the URF program at this point in time since it required a POU change.

NRDC-6

NRDC-7

NRDC-8

NRDC-9

San Joaquin River Restoration Program

----- Forwarded message -----

From: **Schmitt, Monty** <mschmitt@nrdc.org>
Date: Tue, Feb 9, 2016 at 5:52 AM
Subject: RE: Comments on the Draft EA for the Delivery and Use of URF's
To: Peter Vorster <vorster@bay.org>, Chad Moore <cmoore@usbr.gov>
Cc: "Obegi, Doug" <dobegi@nrdc.org>

Chad,

Thank you for working with Peter to incorporate our comments and address our concerns. We recognize the amount of work you have put into the URF program and the EA and want to help make this a successful part of the SJRRP. I believe our significant concerns can be addressed with minor changes Peter has discussed with you and are included here in writing. As a matter of the Settlement Agreement, the few points Peter has raised here are fundamental to ensuring the water supplies dedicated to the river are manageable to benefit achieving the Restoration Goal. As such, they are essential and need to be covered in the EA. We would appreciate talking further with you about how these will be resolved before the final EA is released.

Best,

Monty

From: Peter Vorster [vorster@bay.org]
Sent: Monday, February 08, 2016 10:35 PM
To: Chad Moore
Cc: Schmitt, Monty
Subject: Comments on the Draft EA for the Delivery and Use of URF's

Chad – As I indicated on your voice-mail, I was not able to prepare comments on the Draft EA for Monty to review before COB although he and I discussed some of them earlier today. I appreciated the opportunity to discuss our comments on the Admin Draft EA last Friday and I now can see the places in which additions and clarifications were made to the EA. There was not enough time for me to prepare more formal page and line number comments. I suggested on the VM that I could submit them tomorrow after Monty's and Doug Obegi's review but you seemed pretty adamant about wanting something before midnight tonight. Thus I am submitting the attached Draft EA with comments included in bubbles associated with the yellow-highlighted sections. Every highlighted section has a comment bubble, the text of which may not always appear immediately on-screen; clicking on the bubble will make the text appear.

The main points include:

1. We discussed last Friday about describing "elements" of the URF program as defined by Paragraph 13I that are not being implemented at this point in time such as sales outside of the POU and exchanges to 3rd parties (Priority 2A). Perhaps "mechanisms" as used in the Purpose and Needs section is a better word to use but it is important to note that there may be changes (as already noted in the document) or possible expansion of the mechanisms in the URF program to fully implement Paragraph 13i and which may or may not potentially need additional environmental documentation. NRDC-10

2. I understand that exchanges with 3rd parties within the POU may already have coverage in this EA since a Friant contractor would need to be involved. What this EA does not directly provide coverage for as spelled out in Paragraph 13i are Priority 2A actions that in some cases (banking) require directed authority from DOI. The EA should not insinuate that Priority 2A actions are infeasible. NRDC-11

NRDC-12

3. In the attached I summarize my conversation with the RA and the need for the URF program to have the flexibility to hold back a small amount of URF's and be able to carryover URF's to the following as long as it does not have a water supply impact. The issue of URF carryover does not need to be stated in this EA since it does not affect the EA coverage for the different mechanisms. It is a policy determination and the fact that an outdated Friant Operating Guideline (FOG) can be interpreted as prohibiting it should not rule over the URF program unless there is a clearly stated statutory prohibition on URF carryover. Monty also noted that if for some reason that there were unsold URF's then they should not "disappear" because of a carryover prohibition.

NRDC-13

4. As we discussed last Friday, it is not appropriate to reject Alternative A for speculative impacts. It was suggested that the FONSI could be worded so it does not reject Alternative A outright since it may be determined that selling water outside the POU may be a useful mechanism for the URF program in the future. It was proposed that the FONSI could state the Alternative A was not an advantageous mechanism for the URF program at this point in time since it required a POU change.

Feel free to call me if you have any questions,

Peter Vorster
Hydrogeographer
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3901 Balfour Ave
Oakland Ca 94610
vorster@bay.org
510-444-5755
415-272-4209 cell

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3.0 Responses to Comments

The following responses were prepared to answer questions or comments received on the Draft EA. Sections 3.1 and 3.2 isolate each commenter's comments and provide responses as outlined in the letters presented in Sections 2.1 and 2.2.

3.1 Responses to Comments from San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition

3.1.1 SJRXC-1

Under the terms of the 1939 Exchange Contract and Purchase Agreements (as amended), if Reclamation cannot meet its contractual obligations through delivery of water from alternate sources such as the Sacramento-San Joaquin River Delta (Delta), the San Joaquin River Exchange Contractors (Exchange Contractors) have the right to exercise their reserved San Joaquin River water rights through receipt of water released from Friant Dam. Article 16 of the Second Amended Contract for Exchange of Waters (Exchange Contract) says that "This contract shall never be construed as a conveyance, abandonment or waiver of any water right, or right to the use of water of the Contracting Entities, or as conferring any right whatsoever upon any person, firm or corporation not a party to this contract, or to affect or interfere in any manner with any right of the Contracting Entities to the use of the waters of the San Joaquin River, its channels, sloughs and tributaries, except to and in favor of the United States to the extent herein specifically provided."

Additionally, the State Water Resources Control Board's water rights change order for the San Joaquin River Restoration Program (SJRRP) states that it does not "modify or amend the rights and obligations of parties" to the Exchange Contract and Purchase Agreement, and nothing in the order "changes Reclamation's obligations with respect to the Exchange Contractors or with respect to obligations under Schedule 2 of Contract Ilr 1145." By definition, URFs are Restoration Flows and are thus subject to the SJRRP's water rights permits, which do not modify or amend Reclamation's obligations to the Exchange Contractors under the established agreements.

Additional clarifying text has been added to Section 1.1.4, "Water Rights and Place of Use."

3.1.2 SJRXC-2

The priorities for delivery and use of URFs as described in the EA are reflective of the priorities established in Paragraph 13(i) of the Stipulation of Settlement in *NRDC, et al., v. Kirk Rodgers, et al.* (Settlement): (1) sales and banking/exchanges with the Friant Contractors, (2) sales and banking/exchanges with third parties, and (3) release of water

from Friant Dam on a modified schedule as recommended by the Restoration Administrator. These priorities are described in Section 1.1.1, “Unreleased Restoration Flows” and Section 1.3, “Relation of the Proposed Action to the Settlement.” Under these priorities, the Settlement and Proposed Action, as analyzed in this EA, give the Friant Contractors “first right of refusal” to enter into agreements with Reclamation to receive URFs; only in the event that Friant Contractors do not enter into such agreements would priorities (2) or (3) be pursued, potentially allowing URFs to be released into the San Joaquin River. This is further described in Section 2.2, “Proposed Action.”

3.1.3 SJRXC-3

The commenter’s proposal to return URFs to the general Friant water supply without following the priority actions identified in Paragraph 13(i) of the Settlement is not within Reclamation’s discretion for managing Restoration Flows, and would be inconsistent with the Settlement. The Proposed Action does, indeed, give first priority to selling URFs to Friant Contractors. Reclamation will only pursue the Proposed Action described in the EA if URFs do, in fact, exist independent of volumes that are scheduled to be released into the San Joaquin River and independent of water needed to meet the Exchange Contractors’ requirements. Also, see response to comment SJRXC-2.

3.1.4 SJRXC-4

These references have been added to the EA in Section 1.1.4, “Water Rights and Place-of-Use” and in Chapter 6.0, “References.” Also, see response to comment SJRXC-1.

3.2 Responses to Comments from Natural Resources Defense Council and the Bay Institute

3.2.1 NRDC-1

The action alternatives analyzed in this EA include anticipated mechanisms for implementation of Paragraph 13(i) of the Settlement. The current Proposed Action does not preclude Reclamation from further refinement of the implementation of the Settlement with regards to Paragraph 13(i). If, as implementation of the Settlement continues to evolve, changes in the Proposed Action are required, Reclamation will complete additional environmental analysis as necessary. Clarifying text on the scope of the EA related to the URF program has been added to the first section of Chapter 1.0, “Introduction.”

3.2.2 NRDC-2

Changes to the URF program could only occur within the boundaries of the mechanisms and priorities identified in the Settlement; Reclamation is not contemplating “expansion” beyond the priorities in the Settlement. However, should new mechanisms for distributing URFs become available to Reclamation within the bounds of the Settlement, those will be duly considered along with completion of any additional environmental compliance documentation, as necessary. Clarifying text has been added to Section 1.3, “Incorporation of Existing Environmental Documents.”

3.2.3 NRDC-3

The text in Section 2.2, “Proposed Action” has been changed from “infeasible” to “not practical...at this time.”

3.2.4 NRDC-4

See response to comments NRDC-1 and NRDC-2.

3.2.5 NRDC-5

While storage is identified for priorities one and two “with Friant Division long-term contractors” and “with third parties” in the Settlement’s Paragraph 13(i), storage is not identified in the Settlement for priority three, which gives the Secretary of the Interior authority to “[r]elease the water from Friant Dam during times of the year other than those specified in the applicable hydrograph as recommended by the Restoration Administrator...” Thus, the Settlement does not specifically call out the intent to store URFs within a Reclamation facility such as behind Friant Dam. The SJRRP does not plan on pursuing options for the interannual storage (i.e. carryover) of URFs at this time. Of additional consideration, interannual storage of water supplies in Friant Dam incurs costs; these costs are paid by the Friant Division. Provisions for funding operations and maintenance costs associated with interannual storage of Restoration Flows have not been provided for in the Settlement. Clarifying text related to this has been added to Section 2.2, “Proposed Action.”

3.2.6 NRDC-6

See response to comment NRDC-5. The fraction of URFs that could be held back would be dictated by a number of conditions, including hydrology, reservoir storage, and demand for contract supplies and URFs. Overly constraining the day-to-day operational parameters of the URF program by establishing a firm percentage to hold back in any given year could result in increased risk of spilling URFs or missing opportunities for supporting the Restoration Goal.

3.2.7 NRDC-7

See response to comment NRDC-5.

3.2.8 NRDC-8

Clarifying text has been inserted into Section 3.3.1, “Resources of Potential Concern,” to note that the degree to which these impacts materialize would depend upon the precise nature of the URF program to deliver water supplies outside the current Millerton Place of Use.

3.2.9 NRDC-9

The EA should not be interpreted as rejecting Alternative A before a decision on Federal action is made; the intent of the EA is to disclose the potential impacts of one or more action alternatives in comparison to the potential impacts of the No Action Alternative. A final decision on the selected alternative is described in the Finding of No Significant Impact.

3.2.10 NRDC-10

See responses to comments NRDC-2 and NRDC-4.

3.2.11 NRDC-11

See response to comment NRDC-3.

3.2.12 NRDC-12

See response to comment NRDC-5.

3.2.13 NRDC-13

See response to comment NRDC-9.