

**EXHIBIT "A"**

**Lower San Joaquin Levee District**  
11704 West Henry Miller Avenue, Dos Palos, CA 93620  
Telephone: (209) 387-4545  
FAX: (209) 387-4237

MAR 23 2007

*Directors*

Lloyd Roduner, Chairman  
Henry J. Favier, Vice Ch.  
Roy Catania  
Sean Howard  
Paul Hunger, Jr.  
Robert D. Kelley, Jr.  
Donald C. Skinner

*Secretary-Manager*

Reggie N. Hill

*Superintendent*

James E. Batey

March 21, 2007

Mr. Kirk Rogers  
Regional Solicitor  
U. S. Department of the Interior  
Bureau of Reclamation, m.p. 100  
2800 Cottage Way  
Sacramento, CA 95825-1898

Re: Implementing the settlement agreement in NRDC v. Kirk Rogers

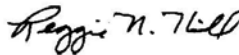
Dear Mr. Rogers:

This morning I met with Jason Phillips, of the Bureau of Reclamation, and Paula Landis of the California Department of Water Resources in the office of the District's attorney, Tom Keene, about the role the Lower San Joaquin Levee District is to play in the implementation of the settlement agreement. A number of alternatives were discussed, including the District's participating as a Cooperating Agency in the NEPA process and the District receiving some assurance that it would be given notice of any recommendation made by the Restoration Administrator so that the District, like other members of the public would have an opportunity to comment before the Bureau acted on the Restoration Administrator's recommendations.

On behalf of the District, I would appreciate receiving something in writing from you outlining what the Bureau sees as being the District's role in this process.

Very truly yours,

Lower San Joaquin Levee District



Reggie N. Hill

**EXHIBIT "B"**



IN REPLY  
REFER TO:

MP-120  
PRJ-1.10

United States Department of the Interior

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

APR 27 2007

APR 19 2007

RECEIVED  
APR 25 2007

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

Dear Mr. Hill:

This is in response to your March 21, 2007, letter to me regarding the role of the Lower San Joaquin Levee District (Levee District) in the implementation of the Natural Resources Defense Council et al. v. Rodgers et al. Stipulation of Settlement (Settlement). Discussions between the Bureau of Reclamation and the Levee District are timely and helpful as the process of implementing the Settlement is just beginning.

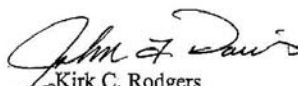
Over the next several years, all of the actions proposed in the Settlement will be carefully studied and impacts assessed before any action is taken, including releasing restoration flows from Friant Dam. Outreach and coordination with those who stand to be affected by the proposed actions, such as the Levee District, will be critical during these studies to ensure our assessment is accurate and all necessary actions are taken into account. I believe such coordination is crucial to ensuring the success of the Settlement. With respect to a more formal relationship for this coordination, I believe including the Levee District as a cooperating agency in the National Environmental Policy Act (NEPA) process would likely be the best approach. We will be in contact with you about formalizing such an arrangement once the NEPA process gets underway.

As you are aware, on February 26, 2007, Reclamation entered into a Memorandum of Understanding (MOU) with a group of Third Parties with downstream interests. This MOU acknowledges the interest of a group of identified Third Parties along the San Joaquin River in the implementation of the restoration and water management activities as well as in maintaining the agricultural economy of the region. An important commitment in this MOU is that the Program Manager (representing the Secretary of the Interior) will use reasonable efforts under the circumstances to provide the Third Parties with any recommendation made by the Restoration Administrator to the Secretary of the Interior or his designee regarding a matter that is a subject of the MOU. Reclamation will also make all reasonable efforts under the circumstances to make these same recommendations available to the general public at the same time. This should allow the Levee District the same opportunity to review and provide timely comments to recommendations made by the Restoration Administrator.

2

We look forward to working with you as our efforts with regard to the Settlement move forward. Should you require further information, please do not hesitate to contact Mr. Jason Phillips, Interim Program Manager, San Joaquin River Restoration Program, at 916-978-5033 or e-mail [jphillips@mp.usbr.gov](mailto:jphillips@mp.usbr.gov).

Sincerely,

  
Kirk C. Rodgers  
FOR Regional Director

cc: Ms. Nancy Saracino  
Chief Deputy Director  
California Department of Water Resources  
1416 Ninth Street  
Sacramento, CA 95814

Mr. Steve Thompson  
Director  
U.S. Fish and Wildlife Service  
2800 Cottage Way  
Sacramento, CA 95825

Mr. Rodney McInnis  
Regional Administrator  
Southwest Regional Office  
National Marine Fisheries Service  
501 West Ocean Boulevard  
Long Beach, CA 90802

Mr. Ryan Broddrick  
Director  
California Department of Fish and Game  
1417 Ninth Street  
Sacramento, CA 95814

**EXHIBIT "C"**

State of California

The Resources Agency

## Memorandum

Date: November 19, 2008

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

From: Scott Morgan, Staff Counsel  
Department of Water Resources

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

### Question

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

### Answer

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

### Background

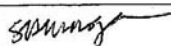
In *NRDC et al. v. Kirk Rodgers et al.*, environmental groups sued the U.S. Bureau of Reclamation and Central Valley water contractors over renewal of long-term water service contracts. A preliminary ruling favorable to the plaintiffs on key issues led to negotiation of a settlement agreement among the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

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

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

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

SURNAME  
DWR 155 (Rev 11/04)



Paula Landis  
November 19, 2008  
Page 2

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

The Eastside Bypass was constructed by the Department of Water Resources on behalf of the State Reclamation Board (now the Central Valley Flood Protection Board, hereinafter "Board") as part of the Lower San Joaquin Flood Control Project. The LSJFCP is a joint State-Federal flood control project that has been authorized by both Congress<sup>2</sup> and the California Legislature.<sup>3</sup>

The original plan for the LSJFCP involved the construction of structural flood control features downstream of the mouth of the Merced River by the federal government and purchase of flowage easements over a significant swath of low-lying, flood-prone valley real estate by the State. The easements above the mouth of the Merced River covered an area of over 100,000 acres that would be used as a natural detention basin. In 1945, when the State authorized the project, the cost of flowage easements over this area was estimated at less than \$1 million. Eight years later the estimated cost of acquiring those easements had risen to over \$12 million and the land, which had previously been viewed as relatively unproductive, was now considered valuable agricultural land. Because of the magnitude of change to the original project design, the Board lacked authority to unilaterally change the project.<sup>4</sup> Ultimately, the revised project was approved by Congress<sup>5</sup> and the State legislature.<sup>6</sup>

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

#### Property Rights in the Eastside Bypass

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

<sup>2</sup> Federal Flood Control Act of 1944 (58 Stat. 887)

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

<sup>4</sup> 24 Atty.Gen.Opin. 259, Dec. 23, 1954.

<sup>5</sup> Ch. 687, Pub. 327, Aug. 9, 1955

<sup>6</sup> Water Code § 8621 (Stats.1955, Ch. 1048)

<sup>7</sup> Water Code § 8502



Paula Landis  
November 19, 2008  
Page 3

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

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

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

#### Easements

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

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

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

<sup>9</sup> *Scrubby v. Vintage Grapevine, Inc.*, 37 Cal.App.4th 697, 702 (Cal.App.1.Dist.1995)

<sup>10</sup> Civ. Code § 806

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

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

Paula Landis  
November 19, 2008  
Page 4

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

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

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

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

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

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

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

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

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

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

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

Paula Landis  
November 19, 2008  
Page 5

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

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

#### Conclusion

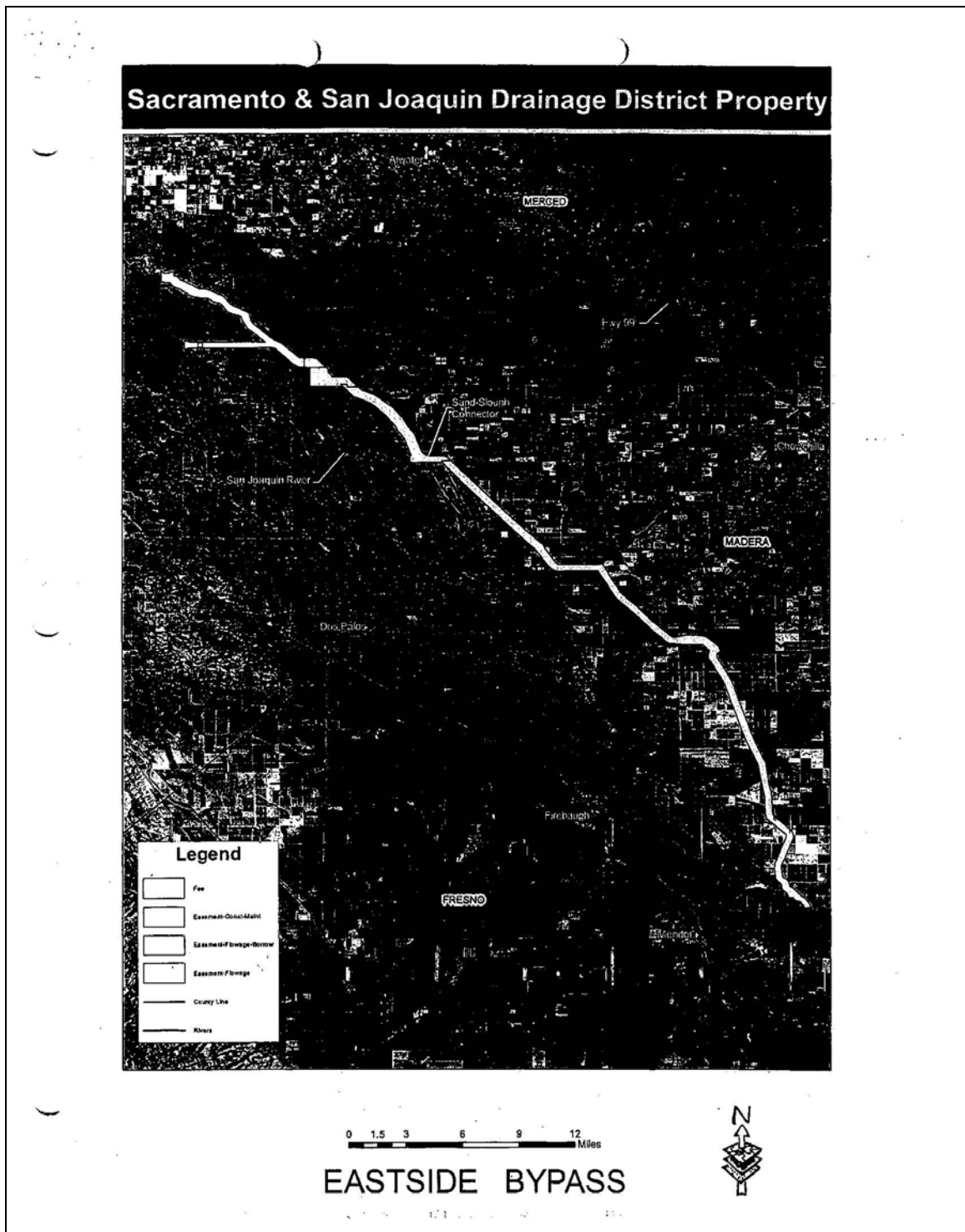
The express terms of the easements granted here are clear on their face: the board acquired the right to flow any and all waters from this or any future flood control project. The rights acquired are relatively broad in so far as they relate to flood flows. The board did not, however, acquire the right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

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

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

#### Attachment

cc: Ward Tabor  
Laurence Kerckhoff  
Bob James



**EXHIBIT "D"**

LAW OFFICES OF  
LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,  
RATHMANN, WHITEHURST & KEENE

EUGENE J. VIERRA  
DIANE V. RATHMANN  
ALFRED L. WHITEHURST  
THOMAS J. KEENE

PHILLIP R. McMURRAY

JAMES E. LINNEMAN, OF COUNSEL

L. M. LINNEMAN (1902-1983)  
JOSEPH B. BURGESS (1902-1990)  
JAY H. WARD (1942-1995)  
C. E. VAN ATTA (1919-1997)  
JESS P. TELLES, JR. (1920-2004)

1820 MARGUERITE STREET  
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(209) 392-2141  
FAX (209) 392-3964

December 23, 2008

654 K STREET  
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LOS BANOS, CA 93635  
(209) 826-4911  
FAX (209) 826-4766

312 WEST 19<sup>TH</sup> STREET  
P. O. BOX 2263  
MERCED, CA 95344  
(209) 723-2137  
FAX (209) 723-0899

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

Re: The Lower San Joaquin Levee District's Board of Directors' meeting of  
December 9, 2008, and the meeting in your office of December 12, 2008.

Dear Jason:

In discussing this matter with Reggie Hill, it occurred to us that there were some potential problems in the time line which we discussed during the meeting of December 12.

As Craig Moyle undoubtedly informed you, at the District Board meeting, the District made it clear to the representatives of the Bureau of Reclamation that, since the District has been designated as a "cooperating agency" under NEPA by the Bureau of Reclamation, (see Kirk Rodgers' letter of April 19, 2007, to Reggie Hill), the Levee District would like the opportunity to review draft NEPA documents before they are made public. If this is not possible, at the very least, we would like to be informed as soon as possible when documents will be released for public comment, (preferably before they are released), or, at the very least, with out delay when such a document is released for comments and provided copies of the document in question. It was my request that a copy go both to Reggie and to me so that we do not lose any time in starting our review if one of us is absent from our office. As I read the NEPA regulations, this is required of the Bureau at the very least. We would also hope that the Department of Water Resources follow this same process.

While the NEPA regulations suggest that a cooperating agency should normally pay its own costs of participating in the NEPA process, they also provide that:

"The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests."  
Section 1501.6 of the NEPA regulations.

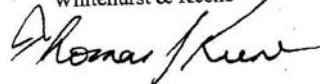
Mr. Jason Phillips, Bureau of Reclamation  
Re: The Lower San Joaquin Levee District's Board of Directors' meeting of December 9,  
2008, and the meeting in your office of December 12, 2008.  
December 23, 2008  
Page 2

As you know, the Levee District has a very small budget and cannot afford to pay additional attorney's fees or fees to other consultants, such as engineers, to review such documents but, just as obviously, you recognize that the participation of the Levee District in this process is essential both to the property owners in the District but also to the integrity of the process. The agreement which you will be working out with Reggie Hill needs to address these issues. The Levee District's Board of Directors made it plain that it expects this agreement to be retroactive so that it includes the time that I have spent in the meeting of October 22, and the time which I have had to spend reviewing and commenting on the EA and FONSI for the Stream Gage project and the application for an encroachment permit for that project.

You had indicated in the meeting of December 12, that you and/or the technical people who work for the Bureau would be meeting with Reggie and the District's people, along with representatives of the other responsible agencies, (such as the Department of Water Resources and possibly the Flood Board and, if they wished, the Army Corp of Engineers, some time in January. You also indicated that the Draft EA for the first year of the River Restoration project was anticipated for release in March. We believe that this sequence of events may be too fast. The agreement, once it is worked out by the technical people, will have to then be reviewed by the lawyers for the Bureau of Reclamation, (which, as I recall, comes out of the Solicitor's office), and by me. While I will certainly do my best to review it as quickly as possible, my experience with the attorneys for the Bureau leads me to the conclusion that their review will take somewhat longer than mine. I would, therefore, urge you to expedite the schedule of the agreement with the Levee District as much as possible.

Very truly yours,

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



Thomas J. Keene

cc: Reggie Hill, Lower San Joaquin Levee District  
Craig Moyle, MWH Americas Inc.  
Paul Landis, Department of Water Resources

LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,  
RATHMANN, WHITEHURST & KEENE  
ATTORNEYS AT LAW  
DOS PALOS, CALIFORNIA

**EXHIBIT “E”**



LAW OFFICES OF  
LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,  
RATHMANN, WHITEHURST & KEENE

EUGENE J. VIERRA  
DIANE V. RATHMANN  
ALFRED L. WHITEHURST  
THOMAS J. KEENE

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FAX (209) 826-4766

JAMES E. LINNEMAN, OF COUNSEL

L. M. LINNEMAN (1902-1983)  
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C. E. VAN ATTA (1919-1997)  
JESS P. TELLES, JR. (1920-2004)

312 WEST 19TH STREET  
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FAX (209) 723-0899

January 22, 2009

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

Re: San Joaquin River Restoration Program - Initial Program Alternatives  
Report.

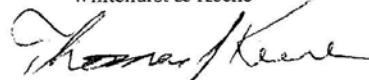
Dear Jason:

My client has asked me some question about the specifics of the alternatives which were being studied in the NEPA/CEQA process. I went to the above referenced document and found only rather vague summary language in describing the particular alternatives. Could you please provide me with a more detailed statement of the alternatives under consideration or could you direct me to a resource which could provide that sort of information.

The District is trying to be prepared for fulfilling its role in this process and we would appreciate, as always, the Bureau's help in this process.

Very truly yours,

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



Thomas J. Keene

cc: Reggie Hill, Lower San Joaquin Levee District

**EXHIBIT “F”**



IN REPLY REFER TO:

MP-170  
ENV-6.00

REC'D FEB 9 - 2009

## United States Department of the Interior

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



FEB - 4 2009

Thomas J. Keene  
Linneman, Burgess, Telles, Van Atta,  
Vierra, Rathmann, Whitehurst & Keene  
1820 Marguerite Street  
Dos Palos, CA 93620

Subject: Letter Regarding the San Joaquin River Restoration Program National Environmental  
Policy Act Process and Request for a Funding Agreement

Dear Mr. Keene:

This is in response to your letter of December 23, 2008, in which you expressed concern over the National Environmental Policy Act (NEPA) review process timeline for the San Joaquin River Restoration Program (SJRRP). You also requested an agreement between the Bureau of Reclamation (Reclamation) and the Lower San Joaquin Levee District (Levee District) to fund the Levee District's participation in the NEPA process.

Reclamation believes that the participation of the Levee District in the implementation of the SJRRP is important. As the implementation of the SJRRP moves forward, the Levee District may be asked to take on additional maintenance responsibilities along the San Joaquin River. In these circumstances, it may be appropriate for Federal funding associated with the SJRRP be used to cover the costs of these activities. In light of this, Reclamation and the Department of Water Resources (DWR) have initiated discussions with the Levee District to identify specific activities of the Levee District that are a direct result of SJRRP implementation and determine whether additional funds for these activities will be required. Once agreement is reached between Reclamation, DWR, and the Levee District regarding such activities, a formal funding agreement with the Levee District may be necessary. I appreciate your willingness to help expedite the completion of such an agreement if one is deemed necessary.

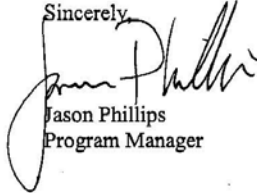
Concerning funding, at the time you made your request and incurred the cited costs, Reclamation and the Levee District did not have a funding agreement in place as the basis for reimbursing such costs. As a result, we must decline your request. I would also like to clarify that the Levee District has not been designated as a cooperating agency under NEPA for the Program Environmental Impact Statement/Report (PEIS/R). The process, established in 40 CFR Section 1501.6, to request and confirm cooperating agency status, has not been initiated or executed between Reclamation and the Levee District.

Subject: Reply Letter to T. Keene

2

I look forward to working with you as we move forward on this matter. Please feel free to contact me if you have any additional questions or concerns. I can be reached at 916-978-5455 or [jphillips@mp.usbr.gov](mailto:jphillips@mp.usbr.gov).

Sincerely,



Jason Phillips  
Program Manager

cc: Reggie Hill  
Secretary-Manager  
San Joaquin River Levee District  
11704 West Henry Miller  
Palos, CA 93620

Paula Landis, P.E.  
Acting Chief  
Division of Integrated Regional Water Management  
Department of Water Resources  
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Craig Moyle  
Public Affairs Specialist  
MWH Americas, Inc.  
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**EXHIBIT "G"**

LAW OFFICES OF  
LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,  
RATHMANN, WHITEHURST & KEENE

EUGENE J. VIERRA  
DIANE V. RATHMANN  
ALFRED L. WHITEHURST  
THOMAS J. KEENE

JAMES E. LINNEMAN, OF COUNSEL

L. M. LINNEMAN (1902-1983)  
JOSEPH B. BURGESS (1902-1990)  
JAY H. WARD (1942-1995)  
C. E. VAN ATTA (1919-1997)  
JESS P. TELLES, JR. (1920-2004)

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(209) 723-2137  
FAX (209) 723-0899

February 20, 2009

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

Re: San Joaquin River Restoration Program - Your letter responding to my  
letter of December 22, 2008.

Dear Jason:

We received your letter on February 9, 2009. I have still not received a response to my letter of January 22, 2009. Might I expect that in a more timely manner than the response to my letter of December 22, 2008?

As I understand Reclamation's position, it does not have the legal authority to enter into an agreement to make third parties whole until after the legislation pending in Congress passes and, even then, it would have no authority to reimburse expenses incurred prior to the date of the reimbursement agreement. What I do not understand about your position is that, not only has Reclamation formed a task force and staffed it but it has also retained a consultant to work on this project without the legislation having passed. Presumably these people are being paid and do not have to work on the promise of being paid only when and if the legislation passes and, even then, not being paid for the work performed prior to the passage of the legislation. Presumably you are also moving forward with the NEPA compliance for the first year since you have stated in the task force meetings that you expect an initial draft of that document to be produced by some time in March. Surely the people working on that project are being paid by Reclamation. You have also stated that initial NEPA document for the rest of the period of interim flows will be out for comment this summer. Presumably you have someone working on this as well. How can Reclamation pay an outside contractor to do all of these things but then claim a lack of authority to reimburse the Levee District until legislation passes?

As for the District's status as a cooperating agency under NEPA, I have been relying on the letter which the District received on April 27, 2007, from the Regional Director of Reclamation. In that letter he stated:

Mr. Jason Phillips, Bureau of Reclamation

Re: Your letter to me responding to my letter of December 22, 2008.

February 20, 2009

Page 2

With respect to a more formal relationship for this coordination [between the Levee District and the Bureau of Reclamation], I believe including the Levee District as a cooperating agency in the National Environmental Policy Act (NEPA) process would likely be the best approach. We will be in contact with you about formalizing such an arrangement once the NEPA process is underway.

Section 1501.6 of the NEPA regulations, which sets out the basic framework for cooperating agencies, specifically states that its purpose is to emphasize cooperation among governmental agencies early in the NEPA process. It provides that the lead agency shall request the participation of each cooperating agency in the NEPA process "at the earliest possible time". The lead agency is to use the proposals of the cooperating agencies with special expertise, "to the maximum extent possible consistent with its responsibility as the lead agency." The lead agency is to meet with the cooperating agency at the request of the cooperating agency.

Because of your repeated statement about the production of a NEPA document by March, it was my understanding that the NEPA process was, in fact, underway and that the Levee District was participating in that process by participating in the meetings which you have been holding. Under Section 1502.12 of the NEPA regulations, a cooperating agency has a duty to comment on a NEPA document unless the cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement. If it does not have enough information, the cooperating agency has a duty to specify any additional information it needs to comment adequately on the draft statement's analysis under Section 1503.3. We had hoped that any delays caused by the District's review of the NEPA documents could be reduced by the District's participation in these meetings. We had also understood that the District was to be reimbursed its costs, perhaps under the provisions of Section 1501.6 (b) 8, which provides that a cooperating agency would

Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses if request from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

In response to your statement that the "process established in 40 CFR Section 1501.6, ..... has not been initiated or executed between Reclamation and the Levee District," it has been a number of months since I first looked at Section 1501.6, but when I did look at after the letter identifying the Levee District as a cooperating agency, I saw no formal process. We took Kirk Rogers' identification of the District as a cooperating agency as a request from the Bureau of Reclamation to analyze the impact on flood protection of the River Restoration Project as a

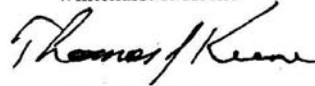
Mr. Jason Phillips, Bureau of Reclamation  
Re: Your letter to me responding to my letter of December 22, 2008.  
February 20, 2009  
Page 3

cooperating agency. The district has made no secret of the fact that it will need to contract with someone to review the Bureau of Reclamation's NEPA documents and that, while I am the District's General Counsel, I am an outside contractor and so, when the District has me participate in meetings with the Bureau of Reclamation, the District is incurring additional expenses. Since the Bureau of Reclamation was proceeding with the preparation of the NEPA documents and had contracted with a consulting firm for Craig Moyle's time and to have someone start to work on the NEPA documents, I had assumed that you had a budget. It came as a surprise to me that you either do not have one or did not plan to reimburse the District for its activities as a cooperating agency when you drafted that budget.

I would suggest to you that, if you do not have a budget for these activities you have violated federal laws and regulations. If you do have a budget, then contrary to the position you have taken in your recent letter, you do have the legal authority to reimburse the District's costs of performing the analysis of the impacts of the River Restoration process on flood protection including the work which I have performed on behalf of the District in this regard.

Very truly yours,

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



Thomas J. Keene

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



**EXHIBIT "H"**



IN REPLY REFER TO:

MP-170  
ENV-6.00

## United States Department of the Interior

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



FEB 25 2009

REC'D FEB 27 2009

Thomas J. Keene  
Linneman, Burgess, Telles, Van Atta,  
Vierra, Rathmann, Whitehurst & Keene  
1820 Marguerite Street  
Dos Palos, CA 93620

Subject: San Joaquin River Restoration Program – Initial Program Alternatives Report and Your  
Letter Responding to my Letter of December 22, 2008

Dear Mr. Keene:

This is in response to your letters of January 22, 2009, and February 20, 2009, in which you requested a detailed statement of the alternatives under consideration for the San Joaquin River Restoration Program (SJRRP) and information concerning the Bureau of Reclamation's (Reclamation) budget and authority for SJRRP.

In accordance with implementation of the Settlement, the Implementing Agencies (IA) of the Settlement prepared the Initial Program Alternatives Report (IPAR) to describe the alternatives formulation process and the formulation of initial program alternatives that were intended to meet the SJRRP's Restoration and Water Management goals. The IAs are currently preparing the Program Alternatives Report (PAR). This report further refines the alternatives presented in the IPAR and describes in greater detail the development of alternatives to be evaluated in the Program Environmental Impact Statement/ Report (PEIS/R). The PAR is scheduled to be made available for review to the public in March, 2009.

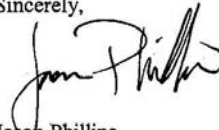
The IAs are currently preparing the PEIS/R and have made substantial progress toward completing an administrative draft. This document will address regional influences, secondary effects and cumulative impacts that would result from implementing broad alternatives to accomplish the goals and objectives of the SJRRP. Specific actions to implement the SJRRP will be taken by the IAs through subsequent site-specific projects. In mid-2009, the IAs will begin site-specific studies, including appropriate environmental compliance documents and feasibility analysis, on multiple projects including the Reach 2B modifications, the Mendota Pool Bypass, the Arroyo Canal and Sack Dam modifications, and the Reach 4B Low Flow Channel. For these projects, we expect at least three subsequent EIS/R documents to be prepared that will include site-specific information and alternatives analysis.

2

Concerning your inquiry into Reclamation's budget and authority for SJRRP, Department of the Interior agencies are currently authorized and funded to work on initial planning and environmental review activities under the Central Valley Project Improvement Act, P.L. 102-575, Title XXXIV. All contractors or other Federal government agencies currently working directly with Reclamation to provide technical support to SJRRP are either under formal inter-agency agreement or under Federal contract in accordance with Federal acquisition law and regulation.

Please feel free to contact me if you have any additional questions or concerns. I can be reached at 916-978-5455 or [jphillips@mp.usbr.gov](mailto:jphillips@mp.usbr.gov).

Sincerely,



Jason Phillips  
Program Manager

cc: Reggie Hill  
Secretary-Manager  
Lower San Joaquin River Levee District  
11704 West Henry Miller  
Palos, CA 93620

Paula Landis, P.E.  
Acting Chief  
Division of Integrated Regional Water Management  
Department of Water Resources  
San Joaquin District  
3374 East Shields Avenue  
Fresno, CA 93726

Craig Moyle  
Public Affairs Specialist  
MWH Americas, Inc.  
3321 Power Inn Road, Suite 300  
Sacramento, CA 95826

**EXHIBIT "I"**

Page 1 of 1

Subj: **Re: Reimbursement Agreement**  
Date: 5/30/2009 6:49:18 A.M. Pacific Daylight Time  
From: JPHILLIPS@mp.usbr.gov  
To: tjkeene2@aol.com  
CC: lsild@elite.net, DMMOONEY@mp.usbr.gov, KAYLEE.ALLEN@sol.doi.gov, dfua@water.ca.gov, faulkenb@water.ca.gov, jpunia@water.ca.gov

Hi Tom - The agreement we are working on is to help pay for the Levee District accomplish its operation and maintenance responsibilities that may be increased due to the first year of Interim Flows. I reported to the RMC yesterday that the earliest Reclamation will be able to fully complete this agreement is by August.

Jason

>>> <tjkeene2@aol.com> 5/29/2009 3:03 PM >>>  
Jason:

Attached to this e-mail is a first draft of a Memorandum of Agreement concerning the reimbursement of the Levee District by the Bureau of Reclamation. Since, as you know, the District will have to spend considerable effort to comment in a timely manner on the NEPA documents which will be coming out within the next two weeks, and since you have taken the position that there can be no reimbursement for costs incurred prior to the signature of the agreement, perhaps it would be appropriate to have one agreement for the immediate problem with another dealing with longer term issues.

??  
-- Tom Keene

Tuesday, June 16, 2009 AOL: Guest

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MEMORANDUM OF AGREEMENT BETWEEN  
THE UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION AND  
THE LOWER SAN JOAQUIN LEVEE DISTRICT  
FOR THE REIMBURSEMENT OF COSTS INCURRED BY THE DISTRICT  
CAUSED BY THE SAN JOAQUIN RIVER RESTORATION PROJECT

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Whereas, on or about September 13, 2006, the United States Bureau of Reclamation entered into a Stipulation and Settlement of litigation in United States District Court for the Eastern District of California, commonly known as *Natural Resources Defense Council, et al., v. Kirk Rodgers*, Civ No. S-88-1658 - LKK/GGH, (hereinafter referred to as the Settlement Agreement);

Whereas, the Settlement Agreement called for the construction of certain physical changes to the lower San Joaquin River between Gravelly Ford and the confluence of the San Joaquin River with the Merced River;

Whereas, the Lower San Joaquin Levee District, (hereinafter referred to as the District), was not a party to litigation which the Settlement Agreement addressed but is responsible, under contract with the State of California, Central Valley Flood Protection Board, for the operation and maintenance of certain flood control facilities on the lower San Joaquin River, including but not necessarily limited to the Chowchilla Canal Bypass, the Mariposa Bypass and the Eastside Bypass, along with their respective appurtenances, as well maintenance of the pilot channel of the lower San Joaquin River itself within the jurisdictional limits of the District;

Whereas, the Settlement Agreement states (at paragraph 7,) that the parties to the Settlement Agreement did not intend nor believe that the implementation of the Settlement Agreement would have material adverse effects on any third parties;

Whereas, the Settlement Agreement provides, (at paragraph 10,) that the Bureau of Reclamation may enter into such appropriate agreements, memoranda of understanding, contracts, cost-sharing agreements or other relationships with applicable State or local agencies or other persons or entities as may promote the timely and cost-effective completion of the improvements which the Settlement Agreement requires to be constructed;

Whereas, the Settlement Agreement provides,(at paragraph 19 (a),) that the Secretary of the Interior, on behalf of the Bureau of Reclamation, may enter into memoranda of understanding or other agreements to facilitate the implementation of the Settlement Agreement;

Whereas, the Settlement Agreement provides, (at paragraph 21 (a)(4),) that the Secretary of the Interior shall expend federal funds in the first fiscal year after the enactment of the federal legislation contemplated by the Settlement Agreement for the purpose of implementing the Settlement Agreement;

Whereas, the federal government has adopted the Omnibus Public Land Management Act of 2009, which is the legislation contemplated by the Settlement Agreement which, at Section 1009(a)(3) provides that, "to the extent that costs incurred solely to implement this Settlement would not otherwise have been incurred by any entity or public or local agency or subdivision of the State of California, such costs shall not be borne by any such entity, agency or subdivision of the State of California, unless such costs are incurred on a voluntary basis.";

Whereas, the District is a local public agency in California in that it is a special purpose district (organized under the Lower San Joaquin Levee District Act) which has involuntary incurred and anticipates that it will continue to involuntarily incur costs solely because of the implementation of the Settlement Agreement and which costs the District would not otherwise have incurred;

Whereas, by letter dated April 19, 2007, Kirk C. Rodgers, the Regional Director of the Mid-Pacific Region of the Bureau of Reclamation, indicated the Bureau of Reclamation to include the District as a cooperating agency under the National Environmental Policy Act, (NEPA) process for the purposes of reviewing and commenting on the environmental documents which the Bureau of Reclamation will have to write, publish and adopt in order to implement the Settlement Agreement;

Whereas, the District agrees with the Bureau of Reclamation that it should be designated a cooperating agency under NEPA, but recognizes that it does not have adequate staff or financial resources to hire staff to perform an adequate review of the proposed NEPA documents in the time permitted by NEPA and the applicable regulations;

Whereas, Section 1501.6(b) of the NEPA regulations provide that the lead agency, (which in this case is the Bureau of Reclamation), is to include in its funding requirements for NEPA compliance, money to fund those major activities or analyses it requests from co-operating agencies.;

Whereas, Section 1503.3( c ) of the NEPA regulations provides that a cooperating agency is responsible for expressing any reservation about a proposed action on the grounds of environmental impacts and specify the mitigation measures which it considers necessary to allow it to grant or approve related requirements or concurrences;

Now, therefore, it is agreed between the parties hereto as follows:

1. The foregoing recitals are true and correct and are incorporated herein by this

reference.

2. Expenses Incurred Prior to the Signing of this Agreement: The Bureau of Reclamation will immediately implement a process by which the federal government, (whether through the Bureau of Reclamation or through another federal agency), other than the individuals assigned to the San Joaquin River Restoration Program, will review the bills and supporting information provided by the District for the work which the District's staff, outside engineers and outside legal counsel have performed thus far as a consequence of the Bureau of Reclamation's initial steps to implement the Settlement Agreement and in preparation for the opportunity to comment on the NEPA documents which will be circulated by the Bureau of Reclamation in order to implement the Settlement Agreement. Any and all bills which are approved as being work which the District or its agents performed but which would not have had to be performed but for this project or as being the incremental cost of additional work in a task which would have had to be performed regardless of the threat of the implementation of the Settlement Agreement will be paid without undue delay to the District.

3. Cost of the District's Participation in the NEPA process: . It is essential to the success of the San Joaquin River Restoration Project that it be implemented in such a way so not to adversely impact the level of flood protection which the District currently provides to the property owners and other residents of the District. This can be accomplished only by the District having the financial ability to review the proposed documents thoroughly and in a timely manner without adverse economic impacts to the District. Due to the immanent beginning of the circulation of proposed NEPA documents for the implementation of the Settlement Agreement, the Bureau will immediately institute a process which will allow for the prompt payment to the District of funds which the District reasonably expends to review these documents. "Prompt payments", in this case, is to take no more than two months from the date of submission of the documentation by the District to the date of the receipt of funds from the Bureau of Reclamation. It is fully anticipated that these expenditures will include legal counsel, consulting engineers, possible computer modeling and compensation to the District for its own manager's time.

4. Increased Cost to the District of operation and maintenance due to Project Implementation:

A. The Bureau of Reclamation and the Lower San Joaquin Levee District have each acknowledged that, as the Settlement Agreement is implemented, the District will necessarily incur additional costs in operating and maintaining the flood protection system for a number of reasons. These costs will include but are not limited to the need for additional training and the use of alternative means of vegetation management, including but not necessarily limited to the use of herbicides which can be used in close proximity to waters which will be released into navigable streams and waterways and which will eventually flow into and through the San Joaquin Delta and San Francisco Bay estuary and the possible need for additional employees because of the inefficiencies which necessarily result from having to use more labor intensive means of operation and



maintenance. The parties further acknowledge that it is difficult to anticipate exactly what these costs will be until the parties know exactly which of the alternative routes being studied in the NEPA process will be used, whether project flows will, for the life of the project go through the bypass system, (and how flood flows are to be managed in light of the loss of capacity in the bypass system) and until the parties have more experience with the interim flows, the improvements which will be constructed as a part of the implementation of the Settlement Agreement and the project flows, once they begin. The parties also acknowledge that the District cannot and should not be required to incur these costs or to incur such costs without reimbursement for a significant period of time.

B. The Bureau will institute a process which will allow for the prompt payment to the District of funds which the District reasonably expends to review these documents once these costs have been ascertained by the District. It is anticipated that, while some of these costs will be known within by the end of the interim flows anticipated for the autumn of 2009, and others will be known by the end of the interim flows anticipated for the spring of 2010, but others will not be known until different parts of the Settlement Agreement are implemented and the District has had the opportunity to adjust to the increased or decreased demand for operation and maintenance services caused by the changed circumstances. "Prompt payments", in this case, is to take no more than two months from the date of submission of the documentation by the District to the date of the receipt of funds from the Bureau of Reclamation, however it is acknowledged that some costs are likely to be recurring and the parties will negotiate addenda to this Memorandum of Agreement which address the ongoing compensation of the District by the Bureau of Reclamation for these costs.

Now, therefore, the parties have set their hands on the dates set forth next to their signatures as evidence of their agreement with the terms set forth herein above.

Lower San Joaquin Levee District

Dated:

\_\_\_\_\_  
Lloyd Roduner, Chairman of the Board of Directors

United State of America, Department of the Interior,

Dated:

\_\_\_\_\_, Regional Director,  
Mid-Pacific Region, Bureau of Reclamation

**EXHIBIT "J"**

Subj: **Re: Reimbursement Agreement**  
Date: 6/2/2009 3:36:17 P.M. Pacific Daylight Time  
From: [JPHILLIPS@mp.usbr.gov](mailto:JPHILLIPS@mp.usbr.gov)  
To: [Tjkeene2@aol.com](mailto:Tjkeene2@aol.com)  
CC: [DMMOONEY@mp.usbr.gov](mailto:DMMOONEY@mp.usbr.gov), [faulkenb@water.ca.gov](mailto:faulkenb@water.ca.gov)

Tom - The financial assistance agreement that USBR sends to the Levee District to review and sign will be the formal agreement with all of the terms and conditions. That agreement will probably be sent over in the next 2 months and a separate MOA is not needed. I will see about getting a draft agreement for the Levee District in advance for review. In general, the tasks being supported under the agreement will be:

- Check flapgates
- Make adjustments to control gates
- Patrolling levees when flows are present
- Assessment of needed maintenance after flows
- Removal of debris from structures
- Vegetative management - herbicide application
- Sand displacement - control structures
- Record keeping
- Project evaluation

It is important to note that Reclamation and DWR are fully covering the costs for professional services to analyze and document the effects of the Settlement, including any possible effects to flood control facilities, the capability to route future flood flows, and any mitigation measures. Therefore, I do not see a need for Reclamation to provide additional funds to cover such activities a second time. DWR's Flood program will be covering the review of the analysis from the non-federal standpoint.

Jason

JASON PHILLIPS  
Program Manager  
San Joaquin River Restoration Program  
Bureau of Reclamation  
(916) 978-5455  
[www.restoresjr.net](http://www.restoresjr.net)

>>> <[Tjkeene2@aol.com](mailto:Tjkeene2@aol.com)> 6/1/2009 9:22:39 AM >>>

Thank you for the update. Could you please either forward my draft or give me the e-mail address so that I can send a copy of my draft to the attorney who will be working on this on behalf of the Bureau of Reclamation?

Is it possible to break out the task of reviewing the environmental documents and make that a separate agreement which is fast-tracked so that the District is not caught in the bind of either not adequately reviewing those documents (so that there are things which could be corrected at this stage which are not -- which is not in the best interests of either the project or the District) or reviewing them but at a time when the District's expenditures are not subject to reimbursement because no reimbursement agreement has been signed, (which is clearly not in the best interests of the District and, because it is likely to result in a back lash from District property owners, in the long run will not be in the best interest of the project in the longer term).

Tuesday, June 02, 2009 AOL: Guest

## **Response to Comments from Lower San Joaquin Levee District and Attachments: Exhibits A through J**

### ***Nontechnical Comments***

**LSJLD-1:** The U. S. Department of the Interior, Bureau of Reclamation (Reclamation) and the California Department of Water Resources (DWR) will continue to work with the Lower San Joaquin Levee District (LSJLD) to develop an agreement on the actions necessary to implement the Proposed Action. Vegetation management and flood system maintenance and operations in the river and flood bypass channels are expected to continue.

**LSJLD-2a:** Reclamation is in the process of identifying lands that may be subject to agreements with landowners. Flows would not be released until necessary agreements are in place. No revisions to the Draft Environmental Assessment/Initial Study (EA/IS) text were necessary in response to this comment; therefore, the Environmental Assessment/Initial Study text was not modified.

**LSJLD-2b:** Reclamation and DWR are unaware of any Conditional Use Permits for mining activities in Reach 2A or in Eastside Bypass Reach 2. Excavation of sand in Reach 2A could continue in parts of the channel that would not be inundated, and/or between November 20, 2009, and February 1, 2010, when Interim Flows would not be released. Text in Section 4.0 revised to clarify this.

**LSJLD-3:** See response to comment LSJLD-1.

**LSJLD-4:** See response to comment LSJLD-1. The Final EA/IS addresses impacts to flood control operations as a result of the Water Year (WY) 2010 Interim Flows project. Operational changes as a result of the long-term Interim and Restoration flows are outside of the scope of the EA/IS; however, Reclamation and DWR are working on the development of the Program Environmental Impact Statement/Report (PEIS/R) that will address the potential impacts of implementation of long-term Interim and Restoration flows. Reclamation and DWR intend to work with the LSJLD as part of the PEIS/R process to address changes in the LSJLD's long-term operation, and maintenance activities.

**LSJLD-5a:** Comment noted; the text was revised to clarify flow routing options that may be implemented.

**LSJLD-5b:** Figure reference revised. The text was revised to clarify. See response to comment LSJLD-5a. Interim Flows would be diverted for exchange and recirculation to Friant Division Long Term Contractors to the extent the diverted water can replace other existing Central Valley Project delivery obligations, if any. The text was revised to clarify.

**LSJLD-5c:** See response to comments LSJLD-5b and 5d.

**LSJLD-5d:** Only paved roads would be used as detour routes; the text was revised to clarify.

**LSJLD-5e:** Flows would not inundate the channel year-round under the Proposed Action. Sediment mobilization due to less than 1 year of flow is anticipated to be *de minimis*, as described in Sections 2.0 and 4.0 of the Draft EA/IS. See response to comment LSJLD-2b. No revisions to the Draft EA/IS text were necessary in response to this comment; therefore, the text was not modified.

**LSJLD-6a:** See responses to comments LSJLD-1, -5a through -5e. The Final EA/IS considers and evaluates the impacts of the use of the Eastside and Mariposa bypasses for routing of Interim Flows. The project description includes a Vehicular Traffic Detour Plan that addresses potential alternate routes for transportation purposes. Reclamation and DWR are unaware of any Conditional Use Permits for mining activities in Reach 2A or in Eastside Bypass Reach 2 and, as described in Section 4.0 of the Draft EA/IS, Interim Flows would not be of sufficient quantity to affect mining operations and reclamation activities that may be in place. No revisions to the Draft EA/IS text were necessary in response to this comment; therefore, the text was not modified.

**LSJLD-6b:** Comment noted. The purpose of the Proposed Action is to implement the provisions of the Settlement pertaining to WY 2010. No revisions to the Draft EA/IS text were necessary in response to this comment; therefore, the EA/IS text was not modified.

***Technical Comments***

**LSJLD-7:** Section 2.2.2 discusses the flow considerations by reach, including estimated infiltration losses. The text was revised for clarification.

**LSJLD-8:** The text was revised to reflect comment.

**LSJLD-9a:** The text was revised to reflect that the north end of the Chowchilla Bypass is the confluence of the Fresno River. Text is revised to clarify that Chowchilla Bypass and Chowchilla Canal Bypass are the same feature.

**LSJLD-9b:** The Chowchilla Bypass and Eastside Bypass Reach 1 capacities were adjusted based on revisions to reflect the confluence point of the two bypasses. Table 2-4 was revised with the 12,000 cubic feet per second estimated existing capacity. Design capacities described in Section 3 are according to DWR documents.

**LSJLD-9c:** See response to comment LSJLD-6a. The text was revised to clarify that WY 2010 Interim Flows would have a lower priority, to channel capacity, than flood flows.

**LSJLD-9d:** The text was revised for clarification on the function of the Sand Slough Control Structure.

**LSJLD-10a:** The text was revised as suggested.

**LSJLD-10b:** The text was revised as suggested.

**LSJLD-10c:** See response to comment MCDPW-2 in this chapter.

**LSJLD-11:** The descriptions of project and nonproject levee sections were revised to include project levees upstream from the Sand Slough Control Structure.

**LSJLD-12:** The Proposed Action does not inhibit the development of a Central Valley Flood Protection Plan. Reclamation and DWR have jointly developed the Proposed Action in a manner that is consistent with the Central Valley Flood Control Act. As described in response to comment, LSJLD-1 and -4, Reclamation and DWR intend to develop an agreement with the LSJLD to address additional operations and maintenance activities as a result of WY 2010 Interim Flows. The text was revised to clarify this.


**LSJLD-13:** See response to comment LSJLD-1.

**LSJLD-14:** See response to comment LSJLD-1.

**LSJLD-15:** See response to comment LSJLD-1 and 4.

**LSJLD-16:** See response to comment RMC-30 in Chapter 4. Because of access limitation and boating barriers downstream from Reach 1, the enhancement to boating will primarily occur in Reach 1. Thus, Finding 14 was revised to state "(primarily canoers and kayakers on Reach 1)." No access is presumed nor is any boating activity anticipated to occur in the bypasses.

### 3.7 Lower Tule River and Pixley Irrigation District



**Lower Tule River**  
Irrigation District

SINCE 1950

Anton G. Simonich  
*President*

Gary Fernandes  
*Vice President*

Jim Costa  
*Director*

John Roeloffs  
*Director*

Tom Barcellos  
*Director*

Daniel G. Vink  
*General Manager*

Eric Limas  
*Treasurer*

Beth Grote-Lewis  
*Assessor*

Alex Peltzer  
*Legal Counsel*

**LTR&PID - 1**

July 15, 2009

Mr. Jason Phillips  
SJRRP Program Manager  
U.S Bureau of Reclamation  
2800 Cottage Way, MP – 170  
Sacramento, Ca 95825-1898

Mr. Kevin Faulkenberry  
DWR SJRRP Program Manager  
Department of Water Resources  
3374 E. Shields Avenue  
Fresno, Ca 93726

Re: Interim Flow EA/IS Comments

Dear Mr. Phillips and Faulkenberry,

Please accept these comments on behalf of the Lower Tule River Irrigation District and the Pixley Irrigation District (Districts). The Districts disagree with the general tone of the document that there are no significant environmental effects associated with putting Interim Flows down the River. While Friant Districts may have agreed to the adverse impacts by virtue of Settlement, the EA/IS and related decision documents should not take the position that there aren't any significant adverse effects. We reference in particular Item #9 on page 10 wherein it states:

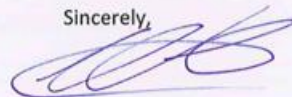
*"The Proposed Action will not significantly impact hydrology and water quality. The Proposed Action would not substantially deplete groundwater supplies or interfere with groundwater recharge because of a decrease in deliveries to CVP. WY 2010 Interim Flows would follow existing channels and would not increase the rate or amount of surface runoff. WY 2010 Interim Flows would also not exceed existing channel capacity and would not include the release of flows in addition to flood flows, if any."*

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Page 1 of 2

We understand that the EA/IS is related only to the 2010 Flows, but nonetheless have trouble with the mischaracterization of the impacts of the proposed action. It is our view the action should require an EIS/EIR and not just the minimal NEPA CEQA work up. The No Action Alternative is to not put any water down the River, so to say that there will be no significant impact to Friant Division groundwater or that it won't interfere with groundwater recharge is a misstatement of the short and long term impacts. Thank you in advance for considering our comments.

Sincerely,



Dan Vink  
General Manager  
Lower Tule River & Pixley ID

Cc: Friant Water Users Authority  
LTRID Board / PIXID Board

DGV/cc



## **Response to Comments from Lower Tule River and Pixley Irrigation District**

**LTR&PID-1:** As stated in response to comment RMC-1 (Chapter 4), The Water Year (WY) 2010 Interim Flows constitute a complete project under the National Environmental Policy Act because it is a demonstration project that has independent utility and provides useful information on flows, temperatures, fish needs, seepage losses, shallow groundwater conditions, recirculation, recapture and reuse conditions, channel capacity (high and low flows), and levee stability regardless of the future implementation of the Stipulation of Settlement in *NRDC, et al., v. Kirk Rodgers, et al.*. These data are useful independent of the San Joaquin River Restoration Program (SJRRP), particularly with respect to understanding the flood management system and seepage. While the Proposed Action is one of the first steps in implementing the SJRRP, the Proposed Action can be implemented successfully in meeting its purpose and need and objectives without any subsequent SJRRP activities. WY 2010 Interim Flows would not have significant impacts, and would not require the preparation of an Environmental Impact Statement/Report. As described in Section 4.0 of the Draft Environmental Assessment/Initial Study (EA/IS), the Proposed Action is likely to affect groundwater conditions but these effects are not considered significant. See also responses to comments FWUA-76 and FWUA-81.

### 3.8 Merced County Department of Public Works



**DEPARTMENT OF PUBLIC WORKS  
Professional Services Division**

Paul A. Fillebrown  
Director

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Equal Opportunity Employer

July 20, 2009

Mr. Jason Phillips  
SJRRP Program Manager  
US Bureau of Reclamation  
2800 Cottage Way, MP-170  
Sacramento, CA 95825-1898

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

RE: Draft Environmental Assessment and Finding of No Significant Impact (EA/FONSI); Initial Study and Mitigated Negative Declaration (IS/MND) for the Water Year 2010 Interim Flows Project

Dear Mr. Phillips and Mr. Faulkenberry:

The Merced County Department of Public Works has reviewed the draft of EA/FONSI; IS/MND for the Water Year 2010 Interim Flows Project and wishes to offer the following comments:

Proposed Action/ Project Description

- MCDPW-1** The draft EA/FONSI; IS/MND examines the impacts of changes in the Operation of Friant Dam resulting in increased flows to the San Joaquin River for the 2010 water year, (October 1, 2009 to September 30, 2010). It is the County's understanding that the Bureau of Reclamation and the Department of Water Resources intends to change the operations for the Friant Dam beyond the 2010 water year. If this is in fact the case, the proposed action/project description should be clarified to explain such later actions will require additional environmental review under NEPA and CEQA.

Additional Flows in the Mariposa Bypass and Resulting Impacts to Dan McNamara Road

- MCDPW-2** The draft EA/FONSI; IS/MND acknowledges that there will be additional flows into the Mariposa Bypass resulting in the additional flooding and closure of Dan McNamara Road. This road is an important access road for a substantial, intensely farmed, agricultural area of the County. Depending on the timing and duration of the closure of this road, agricultural operations could be disrupted resulting in an impact to these activities.

The flooding of Dan McNamara Road also results in additional maintenance costs to the county as a result of the need to grade the road and occasionally bring in additional material following an extended flooding event.

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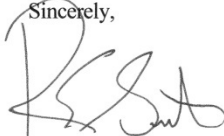
The draft EA/FONSI; IS/MND indicates that there is a detour plan that will "provide convenient and parallel roadway access" in the event that Dan McNamara Road is flooded, however no such detour plan is described in the document.

Additional Analysis Needed to Support the Findings of the Draft EA/FONSI; IS/MND

**MCDPW-3** The County believes that additional analysis and information needs to be provided to identify impacts resulting from the additional flooding and resulting closure of Dan McNamara Road. Until this information and analysis is provided, the County does not concur with Findings 10 and 15 of the draft EA/FONSI, nor with conclusion 2 of the draft IS/MND.

Thank you for the opportunity to comment. Should you have any questions concerning these comments please contact me at the telephone number or email address listed below.

Sincerely,



Robert E. Smith  
Director of Special Programs  
Merced County Department of Public Works  
715 Martin Luther King Jr. Way  
Merced, CA 95341

(209) 385-7601  
[rsmith@co.merced.ca.us](mailto:rsmith@co.merced.ca.us)

cc: James Fincher, County Counsel  
Paul Fillerbrown, Director of Public Works

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## **Response to Comments from Merced County Department of Public Works**

**MCDPW-1:** Please see Section 1.3.3 for clarification on the relationship between the WY 2010 Interim Flows and the San Joaquin River Restoration Program (SJRRP) Program Environmental Impact Statement/Report (PEIS/R). The SJRRP PEIS/R will evaluate the program-level and cumulative effects of the future potential implementation of the SJRRP, including the project-level and cumulative effects of both Interim Flows and Restoration Flows. The PEIS/R is being developed and is not yet available.

**MCDPW-2:** Comment noted. The text was revised in Section 2.0 of the Final Environmental Assessment/Initial Study to provide clarity on the vehicular traffic detour plan. The detour plan would be prepared and implemented before roadway inundation. Reclamation would coordinate with Merced County to evaluate the condition of Dan McNamara Road after potential inundation.

**MCDPW-3:** Comment noted. See response to comment MCDPW-2.