The *Westlands* Court explained that "Courts have attempted to define the 'point of commitment,' at which the filing of an EIS is required, during the planning process of a federal project. 'An EIS must be prepared before any irreversible and irretrievable commitment of resources.' 40 C.F.R. § 1502.5(a) similarly provides, 'For projects directly undertaken by Federal agencies, the environmental impact statement shall be prepared at the feasibility analysis (go/no go) stage and may be supplemented at a later stage if necessary.'"[29]

Further, in *Metcalf v. Daley*,[30] the Ninth Circuit noted that an environmental assessment "must be 'prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'... The phrase 'early enough' means 'at the earliest possible time to insure that planning and decisions reflect environmental values.' The Supreme Court in referring to NEPA's requirements as 'action forcing,' has embraced the rule that for projects directly undertaken by Federal agencies, environmental impact statements 'shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.'"[31] In this case, the court ultimately concluded that NOAA and NMFS had violated NEPA's timing requirements by preparing a NEPA assessment after making the decision to support whaling by an Indian tribe.[32]

B. Legal Deficiencies with the MND:

RMC-20 The CEQA Guidelines provide that a public agency must not undertake actions relating to a proposed public project that would have a significant adverse affect on the environment, or limit its choice of alternatives or mitigation measures, before complying with CEQA. (14 Cal. Code Regs. § 15004(b)(2).) Pursuant to this authority, a public agency may not make a formal decision to approve or proceed with a project without first completing CEQA review and

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[29] *Westlands Water Dist. v. United States*, 850 F. Supp. 1388, 1421 (E.D. Ca. 1994) (*citing Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) and *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988), cert. denied 489 U.S. 1012 (1989)).

[30] 214 F.3d 1135 (9th Cir. 2000).

[31] 214 F.3d at 1142 (9th Cir. 2000) (*citing Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) and 40 C.F.R. §§ 1501.2, 1502.5(a)).

[32] *Id.* at 1145.

considering "a final EIR or negative declaration or another document authorized by these guidelines to be used in the place of an EIR or negative declaration." (Id.)

The CEQA review requirements apply to any "discretionary projects proposed to be carried out or approved by public agencies." (Public Resources Code § 21080(a).) CEQA obligations therefore arise at the time that a public agency proposes to "approve" a project.[33]

The term "approval" refers to a public agency decision that "commits the agency to a definite course of action in regard to a project." (14 Cal. Code Regs. § 15352(a).) The regulations further state that "Legislative action in regard to a project often constitutes approval." (Id.) The court pointed out that the CEQA Guidelines define "approval" of a project as the agency's "earliest commitment" to the project, not final approval of a project. (45 Cal.App.4th at 134; 14 Cal. Code Regs. § 15352(b).) The court further explained that the CEQA Guidelines define "approval" as occurring when the agency first exercises its discretion to execute a contract or agreeing to financial assistance, not when the last such discretionary decision is made. (*Id.*)

Here, there is no question but that when the State exercised its discretion to enter into the MOU, it knew that the SJRRP would have significant environmental effects. The State also knew there would be significant environmental effects when it pledged more than $100 million to help fund the SJRRP. The State knew that the Settlement required miles of river restoration, construction of major facilities, exactly what many of those facilities would be, where the new facilities would be located, loss of water to an area already in critical overdraft, and the exact hydrographs that were agreed to in the Settlement. There was nothing speculative about what programmatic, and for some actions, what project level actions would be taken

Pursuant to 14 Cal. Code Regs. § 15352(b), public agency approval of a project occurs "upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other forms of financial assistance, lease, permit, license, certificate or other entitlement for use of the project." Approval of a public agency project occurs when the agency is legally committed to proceed with the project.[34]

California courts have consistently held that post approval environmental review of a project is a clear violation of CEQA.[35] The California Supreme Court explained that "a development

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[33] *City of Vernon v. Board of Harbor Commissioners* (1998) 64 Cal.App.4th 677, 678.

[34] Id. at 688.

[35] *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

decision having potentially significant environmental effects must be *preceded*, not *followed*, by CEQA review."[36]

For example, in *Save Tara* a city approved a development agreement and conveyance of property, conditioned on later CEQA approval. The court in *Save Tara* held that the City still violated CEQA by committing to a course of action without having first subjected the project to proper CEQA review. The court explained that a public entity could not postpone preparation of an EIR or further CEQA review by use of a "CEQA compliance condition" stating that CEQA would be undertaken prior to the final approval of a project.

The court further explained that "when an agency reaches a binding, detailed agreement with a private developer and publicly commits resources and governmental prestige to that project, the agency's reservation of CEQA review until a later, final approval stage is unlikely to convince public observers that before committing itself to the project, the agency fully considered the project's environmental consequences."[37] Environmental review after approval of a project "would tend to undermine CEQA's goal of transparency in environmental decision making." (*Id.*) This is precisely what occurred in this instance.

In addition to issuing an environmental document long after the appropriate time had passed, the Initial Study and MND were not issued on the appropriate project. The State has segmented the SJRRP inappropriately. An initial study must consider all phases of a project, including planning, implementation and operation, and must include a review of phases planned for future implementation. (14 Cal. Code Regs. § 15063(a)(1).) This requirement follows logically from the principle that the "whole of the action" that may result in a physical change must be considered and that environmental analysis should not be deferred. (14 Cal. Code Regs. § 15378(a); Public Resources Code § 21003.1.)

The environmental review accompanying the first discretionary approval by a public entity must evaluate the impacts of the ultimate development authorized by the approval. This prevents agencies from chopping a large project into small ones, each with a minimal impact on the environment, to avoid full environmental disclosure. (See 14 Cal. Code Regs. § 15003(h); *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.)

DWR's deferral of environmental review of future aspects of the SJRRP constitutes an improper "segmentation" of the environmental review process, in violation of CEQA. A lead agency may

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[36] Id. at 134 (emphasis in original.)

[37] Id. at 136

not split a large project into small pieces in order to avoid environmental review of the entire project.[38] CEQA requires "that environmental considerations do not become submerged by chopping a large project in to many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences."[39]

Piecemeal environmental review that ignores the environmental impacts of the complete project is not permitted under CEQA. In *City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 251, for example, the court found that a county violated CEQA by preparing a negative declaration for a rezoning proposal while reserving preparation of an EIR until a later stage of approval.

A lead agency cannot review the environmental impacts of a proposed project "in a vacuum," separate from other components or phases of the project. (See *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1336, holding that a city violated CEQA by preparing a negative declaration for a new road and related utilities, instead of an EIR which also addressed development that would follow from the road construction, because "Construction of the roadway and utilities cannot be considered in isolation from the development it presages.")

In *City of Antioch* the court explained that "[a]lthough the environmental impacts of future development cannot be presently predicted, it is very likely these impacts will be substantial." (187 Cal.App.3d at 1336.) The court further explained that preparation of an EIR is required where "significant impacts were a realistic possibility, even though the exact form that development would take could not be known." *(Id.)* The court stated that "the difficulty of assessing future impacts . . . does not excuse preparation of an EIR; such difficulty only reduces the level of specificity required and shifts the focus to the secondary effects." (187 Cal.App.3d at 1337.)

An EIR must also analyze future expansion of a project or other action if it is a "reasonably foreseeable consequence of the initial project."[40] Specifically, future activities must be treated as part of the project in an impact analysis if these activities will, or are likely to, result in the approval of the project.[41]

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[38] *Orinda Ass'n. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171.

[39] *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.

[40] *Laurel Heights Improvement Association v. Regents University of California*, 47 Cal.3d at 396.

[41] *National Parks and Conservation Association v. County of Riverside* (1996) 42 Cal.App.4th 1505.

In *Christward Ministries v. Superior Court* (1986) 184 Cal.App.3d 180, the court found that a city violated CEQA by improperly piecemealing, or deferring, environmental review of later development and expansion of facilities that would be triggered by amendments to a general plan. The court noted that "it could hardly be said future projects were 'unknown' or merely speculative." (184 Cal.App.3d at 195.) The court concluded that "it is apparent the city impermissibly 'chopped up' the project into at least three separate projects . . . this is exactly the type of piecemeal environmental review prohibited by CEQA." (*Id.*)

Somewhat ironically, the State has issued the MND while it is simultaneously conducting environmental review of the SJRRP on a programmatic level. This is inappropriate inasmuch as the MND addresses the first year of flows on a multi-year program. For instance, in *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1207, the court explained, "Before reaching a decision on [a] project, the decision-making body of the responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration and feasible mitigation measures or alternatives within the agency's powers." (Quoting from 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality (2008) § 3.22, p. 126.) The court further stated: "Accordingly, if a responsible agency approves all or part of a project without first considering an EIR that has been or is being prepared by the lead agency and without making required findings, the responsible agency has not complied with CEQA and its approval must be set aside." (170 Cal.App.4th at 1207.) In *Riverwatch* the court found, based on Save Tara, that a water district violated CEQA because its approval and signing of an agreement to truck water to a landfill site, without any environmental review, committed the district to "a definite course of action," despite a provision in the agreement to subject the agreement to later CEQA review.

The timeline set forth in the Settlement does not excuse or justify the failure to comply with CEQA. A local government may not by contract delay its right to exercise its police power in the future, including the exercise of police power.[42] A contract that appears to surrender or impair such police power "is invalid as contrary to public policy if the contract amounts to a municipality's 'surrender' or 'abnegation' of its control of a municipal function."[43] In *Trancas Properly Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172, 180, the court held that a settlement agreement which included "commitments to take or refrain from regulatory actions" regarding a development project, such as zoning requirements, was "intrinsically invalid."

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[42] *Alameda County Land Use Association v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724.

[43] *108 Holdings Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 194.

The fact that neither the Settlement[44] nor the MOU reserved any discretion or authority on the part of the signatory public agencies to rescind, amend, or alter the agreement as a result of a subsequent CEQA process further establishes that the parties to the agreement did not comply with CEQA. (See *Riverwatch, supra*, in which the court based its decision, in part, on the fact that the respondent water district did not retain any discretion to approve or disapprove the agreement or to require mitigation measures or alternatives to the agreement as a result of a later EIR for the "project.")

The MND takes a very limited view of what analysis is required in light of the use of an Initial Study that results in a MND. However, as stated in *Riverwatch, supra,* at p. 1202, the court stated that in an EIR or negative declaration, the public agency must consider "feasible mitigation measures or alternatives." Here, the State has not considered any alternatives to the proposed project other than the no-action alternative and it has only considered mitigation regarding invasive plants, not any of the other impacts that are likely to occur, e.g. increased groundwater pumping, installation of monitoring wells, seepage under levees, flooding of fields or root zones, etc.

C. Comments on Specific Proposed Actions:

RMC-21

1. On page 2, first paragraph under "Proposed Actions" the document presents a "list" of potential diversion locations include Mendota Pool and Arroyo Canal. These diversion points listed must be coordinated and subject to agreements with the operating agencies controlling these diversion points. The sentence should read: "Subject to the appropriate agreements and permits, and subject to compliance with Sections 10004(b), (d), (f), (g), and (j), and 10009(a)(3) of the Act, [t]he Interim Flows..." These agreements must be in place prior to the release of Interim Flows and due to the likelihood of related environmental impacts it is likely necessary to include the impacts of those agreements in the environmental analysis. We encourage Reclamation to immediately commence discussions with local agencies pertaining to necessary agreements regarding the operations of Mendota Pool, Sack Dam and the Delta Mendota Canal (DMC).

RMC-22

2. The proposed action only references the 2006 settlement and not the Act (Public Law 111-11). The protections afforded to the so-called "third parties" should be specifically identified and explanation provided as to how significant adverse impacts to third parties will be avoided.

[44] We certainly acknowledge that the Act requires the Secretary to comply with NEPA and this comment should not be construed otherwise. However, the Act does not pertain to the State, which has its own separate responsibilities regarding compliance with CEQA.

D. Findings in FONSI:

RMC-23

1. Finding #2 is incorrect. Flows that may inundate productive farmland are not existing conditions. As a result of these new flows, there is a likelihood of significant impacts to agricultural resources. The assertion that "these flows would be similar to existing conditions" is not correct. Under existing conditions there are never flows in the dry reaches of the San Joaquin River in October when Interim Flows are scheduled to start. This is a problem in Reaches 2, 3, 4 and the Eastside Bypass. The EA/IS must analyze the impacts of flows released in October into the Eastside Bypass as these flows will prevent the adjoining farms from being able to drain tailwater into the bypass. The report needs to clearly identify areas of productive farmland and grazing lands that may be inundated. Any flows above what has historically been delivered as "water supplies" through Reach 3 will likely cause inundation or saturation in numerous locations from Reaches 2A through 4. Documentation has been created by APN's in which landowners have documented seepage and or flooding impacts that will occur when river flows are above the base line of existing year round irrigation/wildlife delivery flows. (See Attachment 1)

RMC-24

2. Finding #3: The EA/IS needs to address the cumulative impacts of activity on unpaved roads that must comply with agriculture air quality rules.

Landowners/farmers must comply with SJVAPCD rules on unpaved roads. While the rule cited was correct as far as it went and items it was applied to (EA/IS p4-9, 4.3 Air Quality & Appendix F, p1-2, lines 9-15), the methodology used to characterize effects as less than significant was based on emissions from heavy duty diesel equipment only, not the vehicles themselves used for transportation to eradication sites, which agriculture is subject to with our unpaved roads.

The SJRRP crews will be traveling on private, unpaved roads which are subject to Rule 8011 (general regulations), 8061 (paved and unpaved roads), and 8081 (ag sources). According to Appendix F, the "Invasive Species Monitoring and Management Plan" for WY 2010 Interim Flows, the invasive species removal crew will have at minimum a vehicle + haul truck (trailer for bobcat/backhoe) which will equal 3 axles, triggering the lower VDT (vehicle daily trip) limits of 25 or less per day without CMP dust control measures. {Note: The crew is 7 employees, at minimum an 8 passenger van pulling a trailer; if that combination is even possible-depends on engine and size of equipment hauling.}

Agriculture is allowed 25 trips (1 way = 1 trip) within a 24 hour period for 3+ axles. The crew will at minimum make 4 trips = in AM, out noon, in after noon hour, out P.M. (depending on combination of vehicles & haul trucks) with the minimum use of 1 van + 1 trailer, thereby using 16% of the farmers' allowable trips. This will trigger CMP dust control actions for farmers/landowners, watering roads or other dust control measures. This results in an unmitigated, third party financial impact.

The recent notification discouraging/not allowing watering of roads due to severe drought conditions has yet to be revised. Land owners have heard that this issue will be addressed, but no official notice has been received.

See the following authorities:
http://www.valleyair.org/rules/1ruleslist.htm
http://www.valleyair.org/rules/currntrules/r8061.pdf
http://www.valleyair.org/rules/currntrules/r8081.pdf
http://www.valleyair.org/rules/currntrules/r8011.pdf

RMC-25

3. Finding #4: Appendix F delineates the methodology for invasive species removal and treatment. The proposed treatment is multi-year glyphosate applications. This treatment may be lead to herbicide resistance. According to Appendix F, all sites will be visited 1 year after initial treatment and treated again, if necessary. If treated again, the site will be revisited one additional time the following year *and treated a third time, if necessary* (emphasis added). This approach of applying one chemical without changing to a different mode of action chemical can lead to herbicide resistance (See, Western Farm Press – Johnson grass resistance in Argentina, Monsanto reports other resistant weed species in US).

Also, the State of California, Agricultural Pest Control Supervision Aquatic Plan Eradication Program, has discovered that South American Sponge Weed has been introduced into Reach 1 of the SJR. In 2006, the last time that Friant released enough water to make a hydraulic connection to the Mendota Pool, South American Sponge Weed was washed into the Pool and began spreading into the canals and drains of the diverters from the Pool. The State of California has spent significant resources over the last couple of years attempting to eradicate this invasive, noxious weed from the Pool, canals and drains. The report needs to identify the impact and control mechanisms to prevent spreading this weed by any supplemental flow regime.

It also should be noted that the MND identified mitigation for invasive weed control, but the FONSI has not. This is a violation of the Act, Sec. 10004(d).

RMC-26

4. Finding #5: The Act, Sec. 10004(h), requires an analysis of the performance of the Hills Ferry barrier, as well as other barriers that may be necessary. The EA/IS does not describe the actions that will be undertaken to make these assessments. Once Interim Flows commence, the potential for attraction of fall run salmon to the upper San Joaquin River will increase and become likely. What actions will be undertaken to assess whether it will be necessary for DFG to install the fish barrier at Hills Ferry during the Interim Flow period?

Once Interim Flows commence there will also be a regular inflow of warm water to the San Joaquin River just upstream of the Merced River. What actions will be taken to ensure that this warm water does not adversely impact Merced River salmon?

RMC-27

5. Finding #7: This finding states there will be a temporary increase in groundwater pumping and a related increase in aquifer compaction could occur. This raises two significant issues. If, as contended in the EA/IS the action is temporary, it does not follow that there would be a concomitant increase in groundwater pumping. This suggests the farmers in the Friant division will be suffering loss of water from this "temporary" change in flows, which is an impact that is not analyzed. Given that this area of the San Joaquin Valley is already in chronic overdraft. In fact the USGS Report entitled "Groundwater Availability of the Central Valley Aquifer, California", Professional Paper 1766, 2009 indicates the Tulare Basin (the majority of the Friant Water Users Service Area south of Madera County) is over drafted by an average of 1.4 million acre-feet per year under the existing condition. The Madera County AB 3030 plan of 2005 indentified an 80,000 af annual overdraft in western Madera County, under existing conditions. Additional extensive pumping required to support this transfer will have lasting significant overdraft impacts on the aquifer which supports agricultural uses and potable water supplies for numerous small communities within the area. The EA/IS suggests this is likely to occur as it cites the possibility of subsidence, i.e. "aquifer compaction." Subsidence is a <u>permanent</u> condition. Once soil in an aquifer is dewatered, it cannot be expanded in the future. Therefore, subsidence is a significant impact causing ground surfaces to fall, which impacts permanent structures and utilities, as well as decreases the storage capacity of the groundwater aquifers. These are long term significant impacts. If these impacts are likely to occur from just the first year's implementation of the SJRRP, then longer term impacts could be very severe as the succeeding years' flows are implemented. The Cumulative Impacts section of the EA/IS

fails to address this issue, despite the pending PEIS and other environmental review processes currently underway regarding project specific effects.[45]

This "one year" program is in reality the first year of a multiyear program.[46] Therefore, any additional groundwater pumping necessary to 'make-up' the water supply deficit created from losing up to 200,000 acre feet to the program should be analyzed.

RMC-28 6. Finding #9: The second sentence of this finding raises two concerns. First, it appears to conflict with Finding #7 insofar as it states there will not be substantial depletions in groundwater or interference with groundwater recharge. The Preferred Alternative will result in intensified groundwater pumping due to the loss of water to the Friant unit. Under the recent circumstances of the Delta "biological opinions" it is highly unlikely any of the water released to the San Joaquin River can be returned to any of the Friant Service area and hence contribute to evapotranspiration or usable groundwater. The Interim Flow project proposes to use water that ordinarily would have gone to Friant conjunctive use Districts. At an applied rate of about 3 acre-feet per acre to satisfy crop demand and percolate water, the impact reduces the ability to irrigate 25,000 acres of crop land and the attendant deep percolation. In addition, increased pumping may result in subsidence – a permanent impact to aquifer storage, groundwater recharge and possibly permanent facilities. That same stored water could have contributed to deep groundwater by the normal flow pattern of moving east to west from the Friant Unit conjunctive use members into the trough of the Valley and under overlying clay strata, creating upward pressure. It is the loss of recharge combined with over extraction and hence loss of that pressure that causes overlying subsidence when those same clay strata collapse from lack of support.

The second concern is the phrase: ".....a decrease in deliveries to CVP." It is unclear what is meant by this phrase. It is not expected that CVP deliveries will decrease to any CVP water users except the Friant Unit contractors. This Finding needs to be clarified as to the meaning of this statement and who, exactly, will be losing water.

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[45] On July 13, 2009, during the comment period to this EA/IS, Reclamation posted a Federal Register notice of intent to prepare an EIS/EIR together with DWR and to hold scoping meetings to "evaluate the effects of the proposed Mendota Pool Bypass sand Reach 2B Channel Improvement Project (Proposed Action) under the San Joaquin River Restoration Program..." 74 Fed.Reg. 132 at 333458, July 13, 2009.

[46] Id.; See also the Settlement and P.L. 111-11, the San Joaquin River Restoration Settlement Act.

The EA/IS does not address the impacts of the most recent NOAA Fisheries "biological opinions." The project will deplete the water available to meet the water deficiencies of senior water rights holders created by the BO's this next year and in future. The significant impacts to both east and west side water surface and groundwater supplies, including significant impacts to increased groundwater pumping induced subsidence, need to be mitigated through a carefully crafted Friant allocation and operating procedure. For example, if water year 2010 commences at the same state of hydrology that the CVP and SWP started 2009, but with the new BO for salmon in place, then the Exchange Contractors' April 1 analysis using the USBR 90 exceedence hydrology indicates that a call of up to 500,000 acre-feet will need to be made on Friant to meet demands created by the new BO's. There is no analysis in the EA/IS of this impact or any other range of impacts that will result if hydrology is at all adverse.

RMC-29

7. Finding 10: The EA/IS has identified the use of a "detour plan" to move traffic around or away from roads impacts by the SJRRP. Depending on routing, there are likely to be significant adverse impacts if traffic is routed through private lands that are under active cultivation. Most lands parallel to the San Joaquin River are private property. There has been neither disclosure of the detour plan nor an analysis of impacts to local traffic, land use, air quality, noise impacts, impacts on species of concern, etc.

RMC-30

8. Finding # 14: "Enhanced use of the San Joaquin River by boaters (canoes and kayakers)" in stretch 2A through 4 is a significant concern to the property owners in those stretches of the River. The EA/IS needs to recognize uncontrolled and illegal access fosters negligent and criminal activities ranging from simple property crimes such as vandalism, to illegal waste disposal to hazardous wastes disposal. Fishing is not permitted except at very limited locations. The EA/IS needs to specifically identify such locations by milepost or other conventional methods of demarcation and recognize all other uses on or near private property could result in unintended consequences and unmitigated third party impacts. Recent examples included unauthorized entrance to river segments during flood flows where two people drowned. Also, when the river is "opened" up to public access, the private farm roads become emergency access routes—which is not a compatible use due to inaccessibility and the stability of river banks for heavy equipment. For example, a decomposed body found in Columbia Canal brought out 3 Fresno County Sheriffs plus the Fire Engine and support crew to Fresno county side. The fire truck got stuck in the sand on the river levee and had to be pulled out with large tractors.

- "This reach can support informal recreation uses, including fishing from shore; however this activity is not encouraged by adjacent landowners and ***involves*** trespassing on private property." (***emphasis added)***.

Further, during harvest or field spraying, if there are people on the property it is likely they will be either exposed to spraying or may come into contact with harvesting equipment, which would be quite dangerous both to the unauthorized entrant and the equipment operator.

RMC-31 9. Finding 17: Socioeconomic impacts are likely to result from the Proposed Action as a result of loss of crop lands and related economic loss due to decreased production and likely decreases in employment associated with loss of productive farmlands. Socioeconomic impacts are also likely to occur if recreationalists interfere with agricultural uses of land adjacent to the river due to trespassing, vandalism and interference with cultural activities. The Proposed Action will result in construction as evidenced by the terms of the temporary entry permits that will allow for construction of monitoring wells. It is further our understanding that Reclamation is negotiating a contract with the USGS for extensive well-drilling that is to start almost immediately.

RMC-32 10. Finding 19: The report contends that the impacts from this Proposed Alternative will not disproportionately impact minority communities. Yet, this finding is contrary to the contentions of several minority communities within the area of effect that have recently been conducting protest marches regarding the inaction by the government to address the loss of water for their communities. Adding to long term overdraft of this portion of the Valley is a significant concern to minority communities whose livelihoods are depend upon the agricultural productivity of the region. Any significant loss of farmland due to flooding, high groundwater, loss of water for irrigation or a taking to build levees and other Project-related facilities (See Settlement for discussion of facilities to be constructed.) will adversely and disproportionately impact minority communities.

C. Comments on the MND

RMC-33 The comments to the FONSI are incorporated into the response to the MND as though fully set forth herein. Further, like the failure of the federal project proponents to timely prepare environmental documentation, DWR and DFG knew in 2006 that they was intending to actively

participate in the SJRRP. On September 13, 2006 NRDC filed a "Notice of Filing of Memorandum of Understanding Between Settling Parties and State of California" (MOU). DWR, DFG and other local, state and federal agencies entered into the MOU with the Department of the Interior, the Natural Resources Defense Council and others, in which they agreed to be bound to commitments made in the MOU. The MOU recites that the State has "pledged cooperation and the financial resources of the State to help it [Settlement] succeed." Far from being simply a MOU that expresses intent, but not commitment, this agreement binds the local, State and federal agencies to the actions set forth in the MOU.[47] Among DWR's and DFG's commitments were planning of implementatiof the Settlement, and to aide in the development of the SJRRP through financial commitments, construction activities, channel modifications, and other actions, all without first having conducted an analysis pursuant to CEQA to determine the environmental effects those commitments would have. Inasmuch as the MOU was a binding agreement, these pledges amounted to an irretrievable commitment of resources. In fact, since the MOU was executed, the State has pledged additional sums of money towards the SJRRP.

III. Specific Comments on the EA/IS

A. Section 1

RMC-34 Section 1.3.3, First two paragraphs, Lines 6-29: In order to avoid significant impacts to the operation of the Exchange Contract and Purchase Contract, a new allocation process needs to be developed for Friant that recognizes up to 500,000 acre-feet deficits in the ability to meet Exchange Contract demands via the Delta Mendota Canal due to the most recent NOAA Fisheries "biological opinions". (BO's) Existing channel capacity must be reserved to supply such water to the Mendota Pool in order to meet the deficits. (See Sec. 10004 (j) of the Act)

RMC-35 Section 1.4.2, Lines 32-33: There are no reports of steelhead on the San Joaquin River upstream of the Merced River. If in fact steelhead is attracted as far upstream as the Hills Ferry barrier, the barrier will have to be redesigned to prevent passage of

[47] Section D.10of the MOU states: "Each signatory to the MOU certifies that he or she is authorized to execute this MOU and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without further act, approval, or authorization of such Party." (underscore added)

steelhead. Further, if steelhead do get passed the barrier and are not salvaged, Reclamation will have to address passage issues at Sack Dam and address screening criteria. The EA/IS does not analyze this impact.

B. Section 2 – Description of Alternatives
Section 2.1 - No-Action Alternative

RMC-36

The No-Action Alternative does not adequately analyze or recognize that USBR will release water from Friant Dam through Reaches 1 and 2 to the Mendota Pool at least 50% of years due to the most recent BO's.

Section 2.2- Proposed Action

RMC-37

Page 2-5, Lines 3-4: What is the threshold of significance to determine "potential material adverse impacts from groundwater seepage"? How will these impacts be identified?

RMC-38

Page 2-7, Figure 2-9: The comparison of wet year NAA total flows vs. Estimated Maximum Non-flood flows under the proposed action is misleading. The comparison needs to also include total Proposed Action flows on the figures to provide readers with a valid comparison.

RMC-39

Page 2-9, Lines 1-30: The Proposed Action fails to adequately define the specific actions, facility operations, agreements, and permits required for recapture of Interim Flow releases and the environmental impacts that will result. The different locations and facilities that may be utilized for recapture will each have associated impacts. Further, the EA/IS fails to discuss what priority Reclamation and DWR believe the recapture water will be entitled to, if any. Pursuant to Sections 10004(f), (g) and (j) of the Act, there must not be adverse impacts on the contract and related rights of those entities that have contracts with the CVP. In addition, any recapture on behalf of the Friant water users must be in accordance with state law, including decisions of the State Water Resources Control Board (Act, Section 10006(b))

RMC-40

Page 2-12, Line 12: The EA/IS fails to analyze/evaluate how Interim Flows will be evaluated for recirculation. As a water transfer, recapture of this water will have a lower priority than all other CVP contract deliveries. The inability to recapture this water has been assumed to be of little or no impact due to increased groundwater pumping. However, no analysis of the increased groundwater pumping has been conducted, which is of particular importance in this overdrafted area.