SAN LUIS UNIT

FINAL ENVIRONMENTAL ASSESSMENT

INTERIM CONTRACT RENEWAL 2010-2013

Appendix G
Public Comment Letters Received

February 2010

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January 29, 2010

Ms. Rain Healer
U.S. Bureau of Reclamation
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RE: Comments of The Bay Institute and NRDC on Draft Environmental Assessment (EA) and Draft Findings of No Significant Impact (FONSI) for the San Luis Unit interim renewal contracts (Central Valley Project, California)

Dear Ms. Healer:

The Bay Institute ("TBI") and the Natural Resources Defense Council ("NRDC") hereby submit comments on the above-referenced NEPA documents regarding the proposed new Interim Renewal Contracts for the San Luis Unit of the CVP. The proposed contracts make no attempt to deal with the dramatically changed circumstances surrounding Delta exports to Westlands and other San Luis Unit contractors, and the NEPA documents largely ignore the increased environmental impacts that two more years of diversions under these contracts will cause. Because the Draft EA and seven Draft FONSIs do not comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and because a full environmental impact statement is required by NEPA, the draft documents are legally inadequate and must be withdrawn. At a time when the Administration is keenly aware of the legal risks and the obvious unsustainability of these outmoded export contracts, the public needs environmental reviews that accurately disclose the impacts of the new proposed contracts and new water quantity terms that reflect the realities of 2010, not 1963.

Over the last decade, TBI and NRDC have submitted numerous comments to the Bureau regarding proposed interim and long-term water service renewal contracts for the San Luis Unit (SLU) and other divisions of the CVP. Because the issues and flaws identified in those earlier comments are largely repeated in these new documents, we incorporate several of our earlier comment letters herein by reference. *See* Appendix Exhibits 7-10. We also incorporate and attach our original comment letters from 2000 and 2001 regarding the draft contract terms and draft EAs prepared on long term renewal contracts for the DMC and other CVP Units, *see* Appendix Exhibits 5-6, as well as the EPA's 2005 and other comments on the Draft EIS for renewal of the San Luis Unit long-term contracts and related draft NEPA documents, *see* Appendix Exhibits 1-3, and the comments provided to the Bureau by other federal agencies and private parties, *see* Appendix Exhibits 4, 11-12. We are disappointed that the Bureau continues to ignore its legal obligations under the CVPIA and other state and federal laws to incorporate meaningful reforms in these new contracts and accurate analysis of their impacts in the associated environmental reviews. For the next two years, massive commitments of CVP water supplies will depend on these SLU water service contracts. The comments we raised previously about earlier versions of the renewal contracts remain of concern today. Rather than repeat our earlier comments verbatim, the comments below simply highlight the most glaring errors and omissions in the Draft EA and Draft FONSIs and we incorporate numerous previous comments by reference to address the remaining issues more completely.

The recent rulings in various Delta and CVP water cases have highlighted the fact that conditions in the Delta and its watershed have changed significantly since the existing SLU contracts were executed. As the courts and various federal agencies have repeatedly recognized, the present operation of the CVP causes substantial and increasing harm, such that simply extending the same terms and water quantities of current export contracts for another 26 months will inevitably create significant new impacts. Given the statements already made by SLU contractors about their ability to reduce contract quantities in the future and exist on smaller CVP contract amounts, as well as Interior's own admissions about the economic and environmental advantages of substantial land retirement in the SLU, any interim agreement to provide water to the San Luis Unit contractors must include a reduction in the maximum amount to be delivered that is significantly less than the existing contract totals. Under applicable federal and state law, any needs analysis or equivalent "beneficial use" analysis for the proposed action should also consider the needs of the Bay-Delta estuary and the reasonableness of continued irrigation of lands with severe drainage impairments and not simply the water supply demands of agriculture in the SLU.

I. The Bureau Must Prepare an Environmental Impact Statement on the Proposed Interim Contract Renewals

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") on "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The purpose of this mandatory requirement is to ensure that detailed information concerning potential environmental impacts is made available to

agency decisionmakers and the public before the agency makes a decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Under NEPA's procedures, an agency may prepare an EA in order to decide whether the environmental impacts of a proposed agency action are significant enough to warrant preparation of an EIS. 40 C.F.R. §§ 1501.4(b), (c). An EA must "provide sufficient evidence and analysis for determining whether to prepare an [EIS] . . . ." 40 C.F.R. § 1508.9(a)(1). The Ninth Circuit has specifically cautioned that "[i]f an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotation marks omitted), *cert. denied*, 527 U.S. 1003 (1999). To successfully challenge an agency decision not to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. So long as the plaintiff raises "substantial questions whether a project *may* have a significant effect on the environment," an EIS must be prepared. *Id.* (emphasis added, internal quotation marks omitted).

The draft interim renewal contracts proposed by the Bureau are virtually certain to have a significant effect on the environment if they are executed. Collectively they authorize the diversion of over a million acre-feet of water each year from the natural environment to primarily agricultural water users in the Central Valley, for use in irrigated agriculture that itself has significant environmental impacts. As the U.S. Fish and Wildlife Service recognized in its biological opinion regarding the continued operation and maintenance of the Central Valley Project, the Central Valley Project has caused numerous adverse environmental consequences, including harm to fish and wildlife from water diversion, impoundment, pumping, and conveyance; from habitat conversion; from the effects of agricultural drainwater; and from urbanization. These effects constitute effects of CVP water service contracts, since they are consequences of the provision of water under these contracts. *See* 40 C.F.R. § 1508.8 ("effects" includes indirect as well as direct effects). Previous litigation regarding the CVP has produced substantial additional evidence of the adverse environmental consequences of the status quo operation of the CVP. Because these effects on the environment are significant, they and other effects of the Bureau's decision to continue diverting over a million of acre-feet of water from the natural environment for delivery to farms and cities must be analyzed in an EIS.

Any doubt about the Bureau's obligation to perform a full EIS is resolved by consideration of the factors that agencies are required to consider in determining whether a proposed action merits an EIS. Among other applicable factors, continued diversion and delivery pursuant to the proposed interim contracts "affects public health," 40 C.F.R. § 1508.27(b)(2), by leading to water pollution from agricultural drainwater; the area to be served is in "proximity" to "prime farmlands," "wetlands," and "ecologically critical areas," *id.* § 1508.27(b)(3); the effects of the water diversions, impoundments, and deliveries "are likely to be highly controversial," *id.* § 1508.27(b)(4); and the proposed contracts are likely to have "cumulatively significant impacts," *id.* § 1508.27(b)(7), in light of the environmental effects from CVP operations to date and the well-established adverse effects of CVP activities on threatened and endangered species.

The Bureau cannot escape its duty to analyze these effects in an EIS by arguing that it exercises no discretion in choosing to enter into interim contracts. As described in greater detail below, the text of the CVPIA clearly establishes that the decision to enter into interim water service contracts pending the completion of an EIS and the negotiation of long-term water service contracts is discretionary. The Bureau's decision to divert and deliver water to Westlands and the other SLU contractors pursuant to interim water service contracts constitutes a discretionary decision for the purposes of NEPA.

II. The Environmental Assessment Fails To Meet the Requirements of NEPA

Even if an EIS were not clearly required here, the EA prepared by the Bureau is so inadequate as to violate NEPA on its own.

Most notably, the range of alternatives considered in the EA is too narrow to satisfy NEPA's requirement that the Bureau "study, develop, and describe appropriate alternatives . . . ." 42 U.S.C. § 4332(2)(E). This consideration of alternatives is "the heart" of the NEPA analysis. 40 C.F.R. § 1502.14. "Informed and meaningful consideration of alternatives . . . is . . . an integral part of the statutory scheme," *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), and courts have not hesitated to overturn EAs that omit consideration of reasonable and feasible alternatives. *See, e.g.*, *People ex rel. Van De Kamp v. Marsh*, 687 F. Supp. 495, 499 (N.D. Cal. 1988); *Sierra Club v. Watkins*, 808 F. Supp. 852, 870-75 (D.D.C. 1991).

The Draft EA here considers only one alternative to execution of the proposed interim contracts: execution of interim contracts whose terms are based upon the Preferred Alternative described in the Bureau's CVPIA PEIS. As the Draft EA notes, the only significant difference between the two alternatives is that, under the No Action Alternative, the interim contracts would include tiered pricing. In nearly all other respects, the two alternatives are the same or similar.

The Draft EAs ignores a number of reasonable alternatives, and in doing so misleads the public as to the potential environmental consequences associated with the Bureau's exercise of its discretionary authority.

For example, under the law the Bureau must consider a true no action alternative, which in the case of a discretionary renewal would mean not entering into these interim water service contracts. The Draft EA and Draft FONSIs misrepresent the requirements of the CVPIA in suggesting that the Bureau is required by statute to enter into interim contracts. To the contrary, the CVPIA, § 3404(c), notably distinguishes between long-term contracts and interim contracts and provides that the Secretary *may* enter into interim contracts. The discretionary nature of this statutory language could not be clearer. While it may well be appropriate to execute a very short interim renewal (while the Bureau prepares a more adequate NEPA document) solely to preserve the right to continued water deliveries, there is no basis for perpetuating the exaggerated water

quantity terms during such interim period, pretending that such an option is mandated by CVPIA, and locking in all other terms of the prior contracts.

The Draft EA also fails to consider alternatives that would decrease water quantities under contract or increase the cost of water to full market rates. As has been previously stated to the Bureau, *see, e.g.*, Dec. 7, 2000 Comments on Environmental Assessments on Long-Term Contract Renewal and Jan. 9, 2001 NRDC Comments on CVP Renewal Contracts, the Bureau must consider alternatives that would change the contract quantities to a level that matches the actual level of deliveries in recent, normal water years[1] or a level that would leave a meaningfully larger amount of water in the environment, as well as alternatives that would increase the cost of the water to full market rates or to some price above the minimum that would encourage fuller consideration and incorporation of prudent and responsible water conservation measures. *See* Reclamation Reform Act of 1982, § 210(a), 43 U.S.C. § 390jj(a).

By considering only two nearly identical alternatives and ignoring numerous other reasonable alternatives, the Draft EA in no way satisfies NEPA. We have little doubt that the federal courts would agree that the Draft EA's consideration of alternatives is utterly insufficient.

The Draft EA and Draft FONSIs are deficient in other respects as well. For example, the necessary ESA consultations for the interim contract renewals have not been completed, and the Bureau's attempt to complete its NEPA review before basic ESA information is available undermines the public's ability to fully evaluate the impacts of these new contracts. Likewise, the Draft EA is based on a wholly inadequate water needs analysis that fails to account for

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[1] According to the Bureau of Reclamation, in an average water year, allocations are approximately 65% for agricultural water service contractors south of the Delta. USBR, Testimony to Congress, March 31, 2009, *available at* http://www.usbr.gov/newsroom/testimony/detail.cfm?RecordID=1345. Since 2000, SWP has delivered on average 69% of contractual allocations. NRDC, Analysis of DWR, December 2009, State Water Project Allocations, 1968 to Present, *available at* http://www.water.ca.gov/news/newsreleases/2009/12012009allocationyears.doc. For purposes of crop insurance, the USDA requires using an average of 55% of CVP contract amounts and 53% of SWP Table A amounts as the baseline for the amount of water a producer can expect under normal conditions for purposes of calculating crop losses and insurance claims. USDA, Risk Management Agency, Informational Memorandum IS-09-008, June 4, 2009, *available at* http://www.rma.usda.gov/bulletins/info/2009/is-09-008.pdf.

According to the Congressional testimony of Martin McIntyre, "Prior to Biologic Opinions (B.O.s) rendered in the past two years, south of Delta CVP allocations averaged 65 percent. Current hydrologic modeling forecasts a decline of average annual allocations to 35 percent as a consequence of the recent smelt and salmon B.O." Testimony of Martin McIntyre to the Senate Subcommittee on Water and Power, Nov. 5, 2009, *available at* http://energy.senate.gov/public/_files/McIntyreS1759Testimony110509.pdf.

anticipated future conditions, such as agricultural drainage changes, land retirement, water use efficiencies, and water marketing.

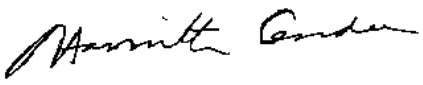
In short, the EA both fails to consider a reasonable range of alternatives and its analysis of the considered alternatives is unreasonable and inadequate. It must, accordingly, be withdrawn.

III. Conclusion

Notwithstanding repeated efforts by both private parties and the EPA to bring the Bureau's environmental analysis of the CVP water contracts into compliance with NEPA, *see, e.g.*, Jan. 25, 2005 EPA Comments on the Draft Environmental Impact Statement (DEIS) for Renewal of Long-Term Contracts for San Luis Unit Contractors (CEQ # 040565) (attached hereto as Appendix Exhibit 3 and incorporated by reference), the deficiencies described above have been a longstanding feature of the Bureau's management of the CVP. We urge the Bureau to withdraw its Draft EA and Draft FONSIs and reissue more complete and legally supportable documents that adequately evaluate the significant environmental impacts cited above and the impacts discussed in our previous comment letters.

Thank you for considering our comments.

Sincerely,



Hamilton Candee
P. Casey Pitts
Counsel to NRDC and The Bay Institute

Cc: Commissioner Michael Connor
Regional Director Donald Glaser
Carolyn Yale, US EPA
Gary Bobker, The Bay Institute
Kate Poole, Doug Obegi, NRDC
Trent Orr, Earthjustice
Antonio Rossmann, Rossmann and Moore
Jonas Minton, Planning and Conservation League
Ryan Alexander, Taxpayers for Common Sense

APPENDIX

Federal Comments and Analyses

1) December 8, 2000 Letter from Deanna Wieman, Deputy Director, Cross Media Division, United States Environmental Protection Agency regarding Proposed Long Term Contracts and Associated Environmental Assessments

2) January 23, 2004 Letter from Lisa Hanf, Federal Activities Office, United States Environmental Protection Agency regarding 2004 Renewal of Interim Water Service Contracts Supplemental Draft Environmental Assessment (SEA)

3) January 25, 2005 Letter from Wayne Nastri, Regional Administrator, United States Environmental Protection Agency regarding EPA Comments on the Draft Environmental Impact Statement (DEIS) for Renewal of Long Term Contracts for San Luis Unit Contractors (CEQ# 040565)

4) August 20, 2007 Letter from Susan P. Jones, Sacramento Fish and Wildlife Office, United States Department of the Interior regarding San Luis Unit Interim CVP Water Service Contract Renewal for the Period January 1, 2008 through February 29, 2011

NRDC / Bay Institute Comments and Analyses

5) December 7, 2000 Letter from Drew Caputo and Hamilton Candee to Al Candish, Bureau of Reclamation

6) January 9, 2001 Letter from Drew Caputo and Hamilton Candee regarding Comments on Proposed CVP Long Term Renewal Contracts for Friant, Hidden, Buchanan, Cross-Valley, Feather River and Delta-Mendota Canal Units

7) January 21, 2005 Letter from Hamilton Candee regarding NRDC - TBI Comments on Draft EIS for San Luis Unit Renewal Contracts

8) August 4, 2005 Letter from Hamilton Candee regarding Comments on Proposed CVP Long-Term Water Service Renewal Contract for Westlands Water District

9) September 14, 2005 Letter from Hamilton Candee regarding Additional Comments on Draft Renewal Contract for Westlands Water District

10) April 17, 2006 Letter from Hamilton Candee regarding Final NRDC – TBI Comments on Long-Term Water Service Renewal Contract for Westlands Water District

Other Comments and Analyses

11) May 3, 2004 Letter from Jill Lancelot, President, Taxpayers for Common Sense and John Berthoud, President, National Taxpayers Union to Secretary Gale Norton, United States Department of the Interior

12) August 5, 2005 Letter from Steve Ellis, Vice President of Programs, Taxpayers for Common Sense to Richard Stevenson, United States Bureau of Reclamation

1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
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Al Candlish
Bureau of Reclamation
2800 Cottage Way
Sacramento, California 95825

December 8, 2000

Bill Luce
Bureau of Reclamation
South-Central California Area Office
1243 N. Street
Fresno, CA. 93721

RE: Proposed Long Term Contracts and Associated Environmental Assessments

Gentlemen:

This letter responds to your concurrent requests for comments on several draft long term Central Valley Project water contracts and the associated Environmental Assessments that analyze the environmental effects of those draft contracts as part of the Bureau's compliance with the National Environmental Policy Act (NEPA).

As you know, EPA has had a long institutional interest in these renewal contracts. In 1989, EPA made a rare formal referral of these contracts to the Council on Environmental Quality when the Department of the Interior proposed signing long term renewals without any environmental review. After passage of the Central Valley Project Improvement Act (CVPIA) in 1992, our office has worked closely with Interior as it has implemented the many complicated provisions of that Act, including those calling for the CVPIA Programmatic Environmental Impact Statement (PEIS). The PEIS has been a massive undertaking, and it serves as the foundation of NEPA compliance for these contracts as well as other provisions of the CVPIA.

EPA filed detailed formal scoping comments when Interior began the process of negotiating the long term renewal contracts. In that many of our earlier comments are still relevant to the proposed contracts and Environmental Assessments, we are attaching a copy of our scoping comments to this letter. In this comment letter, we will only briefly discuss the following issues:

NEPA Issues

Interior proposes to rely on Environmental Assessments for most of its environmental review at the CVP "unit" level. As indicated in our scoping letter, EPA is concerned that unit-level Environmental Impact Statements (EISs) should be prepared, tiering off of the PEIS, rather than relying on Environmental Assessments. We appreciate that the Environmental Assessments are substantial, but believe that the complicated nature of the issues raised in the contracts would benefit from the full public disclosure and full public comment provisions that are part of the Environmental Impact Statement process. We are also concerned that the Environmental Assessments do not articulate a clear rationale or standard for differentiating between those units that will prepare EISs (American River and San Luis) and those relying on only Environmental Assessments.

EPA is also concerned that the Environmental Assessments have been prepared in advance of the execution of the Record of Decision on the PEIS. As second-tier NEPA documents, the Environmental Assessments would benefit from the certainty of decisions being evaluated in the first-tier document (the PEIS), as those decisions directly affect the range of alternatives and range of potential effects that must be evaluated at the CVP unit level.

Finally, EPA is concerned that the analysis in the Environmental Assessments does not fully take into account the site-specific circumstances in the different CVP units. These Environmental Assessments differ primarily in the analysis of pricing alternatives, but do not evaluate different potential effects on, for example, groundwater overdraft or water quality impacts of contract alternatives.

EPA recommends that Interior reevaluate its overall NEPA compliance approach when it completes its Record of Decision on the PEIS, which we understand will be in the immediate future. At that time, Interior should reconsider its rationale for deciding between Environmental Assessments and Environmental Impact Statements at the unit level, and reconsider whether some or all of these Environmental Assessments should be revised and released as Environmental Impact Statements.

Contract Issues

EPA has reviewed representative proposed contracts, as well as the standard form of contract. We recognize that individual contracts are the result of multiple party negotiations, and that each contract can be and has been tailored somewhat to account for local conditions. Our comments are therefore limited to the major issues raised by long term contracts. In our view, those major issues are as follows:

1. **Contract quantities**. EPA has frequently expressed its concern that the contract quantities included in the current long term contracts do not accurately reflect the delivery capability of the CVP, especially after regulatory actions under the Clean Water Act, the CVPIA and the Endangered Species Act are considered. In some years, virtually all CVP contractors receive all the water called for in the current contracts. However, in many years - and for some

districts, in most years - the CVP is unable to deliver the entire amount of water called for in the current contracts. In other words, the current contracts "overcommit" the CVP. The analysis in the PEIS suggests that this problem will become more acute in the future, as senior water rights holders upstream develop their water supplies. See PEIS, Figures IV-79 and IV-80 and accompanying text.

EPA recognizes that this contract quantity issue does not affect all CVP contractors uniformly, and that it is primarily a problem on the west side of the San Joaquin Valley. Calling this a "problem" is not intended to be any kind of value judgement on those particular districts and, in fact, EPA acknowledges that many of these water-short contractors are leaders both in water use efficiency and in addressing water quality issues. Nevertheless, the complex combination of California water rights, contracts, and plumbing creates a situation where certain CVP units and CVP contractors consistently bear the shortages in CVP delivery capabilities.

EPA is concerned that this "overcommitment" of CVP supplies has the potential to adversely affect Interior's ability to effectively assist in addressing California water needs and environmental needs. The Bureau and Interior will not be able to continue their strong leadership role in CALFED and other broad-based efforts if they are contractually biased by unrealistic water delivery targets.

In its contract negotiations with west side contractors, Interior has attempted to deal with this contract quantity issue directly by dividing contractual quantities into "base" amounts and "supplemental" amounts. See, for example, the draft Broadview Water District contract, at Section 3(a). We strongly support this approach to the contract renewals. We suggest that Interior develop a consistent process for determining, on a contract by contract basis, the proper allocations of "base" and "supplemental" quantities. We believe the "base" amount should reflect recent historical realities but also factor in the anticipated future limitations on CVP supplies noted and evaluated in the PEIS.

Although we are supportive of Interior's approach to the contract quantity issue, we are concerned about proposed contract language that arguably requires the Secretary to pursue additional water supply for these contracts. See Section 19(c). We appreciate that this is only a statement of intent, but it raises the same concerns noted above about maintaining Interior's objectivity in the broader debate over California water resources. Further, this language is premature under the CVPIA. The CVPIA required Interior to develop alternatives for least cost yield enhancement, but reserved for Congress the decision about whether to pursue those yield enhancement options and which options to pursue. See CVPIA Section 3408(j).

2. **Right to Renew**. Since our initial involvement in these contracts in 1989, EPA has argued that long term water service contracts are not and should not be permanent entitlements, but rather that they should be subject to review at the end of each contract period to reevaluate water supply and environmental conditions in a rapidly changing state. The CVPIA made a similar conclusion when it retained for the Secretary the discretion as to whether to renew these contracts at the end of the first long term renewal. See CVPIA Section 3404(c).

Given its historical position, EPA is generally supportive of the contract renewal provisions in proposed contract Section 2(b). In particular, we support the strong statement in Section 2(b)(3) requiring that any subsequent renewal must include a reevaluation of the contract in light of conditions at that time.

At the same time, however, we believe that the provisions of Section 2(b)(2) should be clarified or supplemented. Section 2(b)(2) enshrines a concept that first arose during the stakeholder discussions referred to as the Garamendi Process. The concept is that contractors can "earn" a second renewal by meeting certain requirements of water conservation, water measurement, etc. EPA supports this approach theoretically, but believes that the requirements described in proposed contract Section 2(b)(2) do not provide clear objectives or standards for "earning" a second renewal. In particular, we believe that the contract needs to define, either in Section 2 or in Section 26, the "definite water conservation objectives" that must be met. Deferring this definition to a later time is inappropriate given that the contractual agreement for renewal is being made now. In addition, we believe that renewal should be conditioned on compliance with water quality improvements required under the state and/or federal clean water acts.

3. **Tiered Pricing**. EPA has frequently expressed its support for the concept of tiered pricing as a mechanism for encouraging economically-efficient water uses in both the agricultural and urban sectors. The CVPIA requirements for tiered pricing were an expression of similar support for this idea. EPA appreciates that implementing tiered pricing in the real world is difficult, given the vastly different circumstances of different districts and the different approaches to managing water supplies in different hydrologies. Nevertheless, we are concerned that the new interpretation of tiered-pricing as applying to the combined "base" and "supplemental" contract amount has the net impact of eliminating the effect of tiered pricing in many districts. This is, once again, a problem caused primarily by unrealistic contract quantities, but it seriously limits the usefulness of the tiered-pricing tool. We recommend that Interior reconsider this issue, and perhaps develop more carefully tailored, district or unit level approaches to tiered pricing that can effectuate the intended purposes of the tiered pricing mechanism.

Conclusion

EPA wishes to acknowledge the significant efforts made by Interior staff over the past several years in developing an approach to long term CVP contracts that is fair to the districts involved and implements the reforms envisioned by the CVPIA. We stand ready to offer our support on working through issues raised in our comments or on other issues raised during the comment period. If you have any questions about these comments, please call Laura Fujii at (415)744-1601 or Carolyn Yale at (415)744-2016.

Yours truly,

Deanna Wieman
Deputy Director
Cross Media Division

cc: Lester Snow
David Nawi
Janice Schneider

2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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75 Hawthorne Street
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January 23, 2004

Frank Michny
Regional Environmental Officer
Bureau of Reclamation
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Subject: 2004 Renewal of Interim Water Service Contracts Supplemental Draft Environmental Assessment (SEA)

Dear Mr. Michny:

The Environmental Protection Agency (EPA) has reviewed the Draft Supplemental Environmental Assessment for the 2004 Renewal of Interim Water Service Contracts through February 29, 2006 - Central Valley Project, California. Our review is pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act. Our detailed comments are enclosed.

EPA provided comments on the 1994 draft guidelines for interim renewal of long-term CVP contracts and on the 1994 EA for interim renewal of 67 CVP water service contracts, and the 2002 EA for interim renewal of 42 CVP water service contracts. In that many of our earlier comments are still relevant to the proposed contracts and current SEA, these letters are hereby incorporated by reference. A copy of our 2002 letter is attached.

EPA continues to have the following concerns:

-the current overcommitment of water resources and imbalance between water supply and demand;

-a reevalutation of the alternatives eliminated from further analysis;

-and the environmental consequences of the proposed action as they relate to indirect and cumulative impacts.

The current management of the contract water supplies constitutes an irretrievable commitment of resources which should be fully evaluated pursuant to NEPA. The present SEA is the fifth "roll-over" since 1994. Section 3404(c) of Central Valley Project Interim Agreement (CVPIA) states that the interim period may not exceed three years and that successive interim periods may not exceed two years prior to execution of new long-term contracts. Therefore, EPA urges Reclamation to pursue execution of long-term contracts based on a sound NEPA process, supporting an environmentally-responsive contract design.

EPA acknowledges the significant efforts made by Reclamation staff over the past several years in developing an approach to CVP contracts that is fair to the districts involved and implements the reforms envisioned by the CVPIA. We continue to offer our support on working through the issues raised in our comments or on other issues raised during the comment period. If you have questions, please contact Summer Allen, the lead reviewer for this project, at 415-972-3847.

Sincerely,

Lisa B. Hanf, Manager
Federal Activities Office

Main ID# 002218
Enclosures:
EPA Comments on 2002 Interim Renewal EA

cc: Donna Tegelman, BOR, MP-400
Gary Stern, National Marine Fisheries Service, Santa Rosa
Michael Aceituno, National Marine Fisheries Service, Sacramento
US Army Corps of Engineers, San Francisco & Sacramento
Pat Port, Department of the Interior
Wayne White and David Wright, US Fish and Wildlife Service
Jim White, Department of Fish and Game
Victoria Whitney, State Water Resources Control Board
Mary Nichols, California Resources Agency
Patrick Wright, CALFED

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January 4, 2002

Frank Michny
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Dear Mr. Michny:

The Environmental Protection Agency (EPA) has reviewed the **Draft Supplemental Environmental Assessment for the 2002 Renewal of Interim Water Service Contracts through February 29, 2004 - Central Valley Project, California.** Our review is pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act.

The Bureau of Reclamation (Bureau) proposes to execute 42 interim renewal water service contracts for up to two years between March 1, 2002 and February 29, 2004. Execution of interim contracts is needed to continue delivery of Central Valley Project (CVP) water until long-term contracts can be executed.

The renewal of interim water service contracts was first evaluated in a 1994 environmental assessment (EA) with supplemental EAs (SEAs) issued in 1998, 2000, and 2001 for subsequent interim renewals (i.e., "roll-overs"). The current SEA is tiered to these previous EAs and relies on the evaluation of environmental consequences provided in the 2000 and 2001 SEAs. The proposed interim contracts include the same terms as those executed in 1994, and renewed in 1998, 2000, and 2001. If long-term contracts are not executed by March 1, 2003, a one-year extension of these interim contracts (March 1, 2003 through February 29, 2004) may be executed. Prior to a second year extension, the Bureau will determine if additional NEPA analysis is necessary.

As you know, EPA has had a long institutional interest in the Bureau's renewal of interim and long-term contracts. We provided comments on the 1994 draft guidelines for interim renewal of long-term CVP contracts and on the 1994 EA for interim renewal of 67 CVP water service contracts. In that many of our earlier comments are still relevant to the proposed contracts and current SEA, these letters are hereby incorporated by reference. Copies are attached.

EPA continues to be concerned that the "roll-overs" of the interim contracts have compromised the Bureau's NEPA process for the following reasons:

- The present SEA is the fourth "roll-over" since 1994. In effect, many of these interim renewal contracts have been continued for 7 years. The current renewal would extend these interim renewal contracts to a period of 10 years. Therefore, the premise that the contracts are of a limited duration with minor environmental impacts, is no longer valid.

- The status quo perpetuates and aggravates environmental degradation and constitutes an irretrievable commitment of resources which should be fully evaluated pursuant to NEPA. We note that the Central Valley Project Improvement Act Programmatic Environmental Impact Statement did not evaluate water quality impacts at any level, nor did it evaluate other environmental impacts at the district level. We continue to believe there is a compelling need for detailed evaluation of long-term and cumulative impacts of district-level water quality, groundwater, and water supply reliability effects of the continuing action.

We urge the Bureau to stop continual "roll-overs" of the interim contracts and to pursue execution of long-term contracts based on a sound NEPA process which informs environmentally responsive contract design. To do so would be in the best interests of California, the public, and sound water supply management. We believe an adequate NEPA process for district-level contracts should include evaluation of the long-term and cumulative impacts of the status quo and continual roll-over of interim renewal contracts. We also urge the Bureau to create strong incentives to move contractors from interim renewal contracts to long-term contracts. We consider these NEPA compliance issues to be significant and we will work with you to resolve our concerns to avoid elevation of these issues.

EPA wishes to acknowledge the significant efforts made by Bureau staff over the past several years in developing an approach to CVP contracts that is fair to the districts involved and implements the reforms envisioned by the CVPIA. Our detailed comments (attached) discuss a number of issues which we believe should be considered in the environmental documentation for interim renewal of water service contracts. We stand ready to offer our support on working through the issues raised in our comments or on other issues raised during the comment period. If you have any questions about these comments, please call Lisa Hanf at (415) 972-3854 or Laura Fujii at (415) 972-3852.

Yours truly,

Joshua Baylson,
Acting Deputy Director
Cross Media Division

Attachments: Detailed comments (3 pages)
EPA Comments on 1994 Draft Guidelines for Interim Renewal of CVP Contracts
EPA Comments on 1994 Interim Renewal EA

MI002218
Filename: interimcvpcontracts.wpd

cc: Donna Tegelman, BOR, MP-400
Gary Stern, National Marine Fisheries Service, Santa Rosa
Michael Aceituno, National Marine Fisheries Service, Sacramento
US Army Corps of Engineers, San Francisco & Sacramento
Pat Port, Department of the Interior
Wayne White and David Wright, US Fish and Wildlife Service
Jim White, Department of Fish and Game
Victoria Whitney, State Water Resources Control Board
Mary Nichols, California Resources Agency
Patrick Wright, CALFED

DETAILED COMMENTS

Impact of No Action (Status Quo)

The 1994 Environmental Assessment (EA) and subsequent Supplemental Environmental Assessments (SEAs) measure impacts of the proposed action relative to the status quo scenario, or "no action." However, the Bureau has failed to place the status quo in the context of historical biological resource losses or actual on-the-ground environmental conditions associated with CVP water delivery (e.g., reduced flows in the San Joaquin River). Thus, the conclusion that there are no significant impacts since the proposed action represents a continuation of the existing action is flawed.

Recommendation:

We urge the Bureau to evaluate potential impacts of the continuing action in comparison to existing environmental conditions and trends. As we have stated before, "no action" does not equate with "no impact." Therefore, the Bureau should determine whether the continuation of the action will contribute to a declining, stable, or improving environmental condition.

Environmental Consequences

An underlying assumption of the SEA appears to be that there are no changes in land use, canal maintenance procedures, cropping patterns, or other agricultural and irrigation practices because the contracts are of a limited duration, represent a continuation of existing conditions, and will not provide for additional water supplies that could lead to shifts in agricultural practices or land use (draft Finding Of No Significant Impacts (FONSI), pg. 3). However, changes in existing conditions have occurred which could affect agricultural practices. These changes should be taken into account.

Recommendations:

We recommend the Bureau reevaluate the assumption of no change in agricultural or irrigation practices that occur with market and other economic shifts, regulatory reform, and environmental dynamics. In examining the incremental impacts of roll-overs, the Bureau should consider the cumulative impacts from changed agricultural conditions. Conditions to consider include changes in herbicide use for aquatic plant control in irrigation canals, the increased focus on invasive species control, new air quality standards (e.g., PM2.5), new water quality actions (e.g., California Regional Water Quality Control Board waste discharge requirements), and projected growth and development within the Central Valley.

The 2000 SEA (pg. 3-4) states that the Bureau has undertaken a number of commitments to monitor and address any impacts from the previous interim contracts. We urge the Bureau to include the most recent monitoring results in the final environmental documentation.

Alternatives

1. It appears that Alternative 2, as presented in the 2000 SEA, is no longer being evaluated as an alternative. Therefore, only Alternative 1, the No Action alternative, is considered in the 2001 and 2002 SEAs (2002 SEA, pg. 2-2).

Recommendation:

Given the fact that many of the interim contracts have been in place for 7 years and may be continued into the indefinite future, we strongly believe the Bureau should consider evaluation of other reasonable alternatives as required by NEPA [40 CFR Section 1502.14(a) and (c)].

2. As presented in the 2000 SEA, Alternative 2 would specify water quantities using two water supply categories. The first, more reliable water category, would be the quantity of water that would be reasonably likely to be available during a year for delivery and would be the "contract total." The second category of water would be any additional water that may be delivered to contractors in excess of the first category of water.

EPA has frequently expressed our concern that the contract quantities included in the current contracts do not accurately reflect the delivery capability of the CVP, especially after regulatory actions under the Clean Water Act, the CVPIA and the Endangered Species Act are considered. In many years -- and for some districts, in most years -- the CVP is unable to deliver the entire amount of water called for in the current contracts. EPA is concerned that this "over commitment" of CVP supplies has the potential to adversely affect the Bureau's ability to effectively assist in addressing California water and environmental needs.

Recommendation:

We urge the Bureau to consider including the dual water category approach in their interim contract renewals, especially since these contracts may continue into the indefinite future. We suggest that the Bureau develop a consistent process for determining, on a contract by contract basis, the proper allocations of "base" and "supplemental" quantities. We believe the "base" amount should reflect recent historical realities but also factor in the anticipated future limitations on CVP supplies noted and evaluated in the CVPIA Programmatic EIS.

3. Alternative 2 also included the concept of tiered water pricing for the first category of water (contract total) where the first 80 percent of the contract total would be priced at the contract rate. Subsequent 10 percent increments would be priced at higher rates. The second category of water would be priced at the full cost rate.

Recommendation:

EPA has often expressed our support for the concept of tiered pricing as a mechanism for encouraging economically efficient water uses in both the agricultural and urban sectors. EPA appreciates that implementing tiered pricing in the real world is difficult, given the vastly different circumstances of irrigation districts and the various approaches to managing water supplies in diverse hydrologies. Nevertheless, we urge the Bureau to reconsider including tiered water pricing in interim renewal contracts and to develop carefully tailored, district or unit level approaches to tiered pricing.

General Comments

1. We recommend the Bureau clearly state in the environmental documentation the most realistic schedule for execution of long-term contract renewals. We ask that the Bureau confirm that interim contract renewals will not be continued into the indefinite future. We also strongly urge the Bureau to include language in each interim contract stating a specific schedule and date for finalizing and executing the long-term contract.

2. We are concerned that NEPA review of the major environmental issues involved in water delivery under these contracts is being carried out in an increasingly fragmented way through different NEPA processes. We urge the Bureau to more explicitly articulate (a) how the various long-term contract EISs (e.g., American River Unit) will tier from the CVPIA PEIS, (b) how these interim contract SEAs will tier from the CVPIA PEIS (now that there is a final Record Of Decision on the PEIS), and (c) how the many local efforts, such as the San Luis Drain EIS and the Westside Integrated Resource Plan (WIRP), will tier from the CVPIA PEIS and relate to the various contract renewal evaluations.

3. The final environmental documentation should include updated information on the status of current water transfers and assignments; implementation of CVPIA requirements of Section 3405, as already incorporated into the interim contract provisions (e.g., installation of water measurement devices, conservation plans, meeting water quality standards, payment provisions); US Fish and Wildlife and National Marine Fisheries Service concurrence letters on meeting Endangered Species Act requirements; and status of Interim Contracts Renewal Biological Opinion commitments.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

OFFICE OF THE
REGIONAL ADMINISTRATOR

January 25, 2005

Kirk C. Rodgers, Regional Director
U.S. Bureau of Reclamation
Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825-1898

Subject: EPA Comments on the Draft Environmental Impact Statement (DEIS) for Renewal of Long Term Contracts for San Luis Unit Contractors (CEQ# 040565)

Dear Mr. Rodgers:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act. Our detailed comments are enclosed in Attachment A. EPA has rated this DEIS as 3 - Inadequate Information (see enclosed "Summary of Rating Definitions" in Attachment B).

We recognize that this DEIS tiers from the Central Valley Project Improvement Act (CVPIA) PEIS; however, the necessary project-specific analyses that were deferred at the programmatic stage are not provided in this document. Based on our review of this document and our extensive involvement in the CVPIA PEIS and the CALFED Bay Delta Program, we have concluded that the environmental analysis is inadequate. This rating indicates EPA's belief that the DEIS should be formally revised to provide the identified additional information, data, and analyses, and made available for public comment in a Revised or Supplemental DEIS. On the basis of the potential significant impacts involved, this proposal is a candidate for referral to CEQ under Section 309 of the Clean Air Act. We believe there is sufficient time for the DEIS to be formally revised or supplemented without delaying the contract renewals as the earliest of these contracts expires on December 31, 2007.

We have worked extensively with the Bureau of Reclamation (Reclamation) since 1988 on the renewal of Central Valley Project (CVP) long-term water supply contracts. Over these years, EPA has consistently urged Reclamation to undertake a rigorous analysis of alternatives for contract renewals in order to reduce environmental impacts, consistent with the CVPIA and the CALFED Bay Delta program.

We have identified the following deficiencies with the information and analysis in the DEIS:

1) The DEIS does not evaluate the environmental impacts of full delivery of contract quantities.

The proposed action enables full delivery of contract quantities each year, amounting to almost 1.4 million acre feet per year for a period of up to 40 years. However, the DEIS relies on analyses in the PEIS and Operations Criteria and Plan (OCAP) to determine environmental effects and these documents evaluate the delivery of far lower water quantities. The DEIS assumes the continuation of current conditions, which equal average annual deliveries of approximately 50 to 60 percent of the full contract amount. Information in other Reclamation documents indicates that it is reasonably foreseeable that there will be higher annual deliveries especially in future years. It is critical that the Revised or Supplemental DEIS include a complete analysis of the impacts of full contract deliveries. We raised a similar issue in our December 15, 2004 comments on the Draft Environmental Assessment for the Renewal of the Long-Term Contracts for the Delta Mendota Canal.

2) The existing conditions and the environmental impacts of the future "no action" condition are not fully evaluated or disclosed.

The future "no action" condition is assumed to be identical to the existing condition despite evidence and statements throughout the DEIS that water quality is increasingly degraded and agricultural lands are being retired due to this degradation. Without accurate information on existing and future environmental conditions, the impacts of the proposed federal action and the no action alternative could be significantly underestimated.

3) The DEIS does not address the impacts of water deliveries under the contracts and drainage service on water quality.

The DEIS does not fully evaluate the direct, indirect and cumulative impacts to water quality attributable to project activities. This is significant because the project area includes waters that are listed as impaired pursuant to the Clean Water Act Section 303(d). In part, the impairments are associated with the area's long-standing drainage problems. Additionally, the DEIS does not analyze future drainage service, which may change water supply needs and management. Reclamation is preparing a separate plan

for drainage service (the San Luis Feature Re-evaluation) that may alter the irrigation land base, surface-groundwater management practices, water supply requirements of water users, and quality of surface water and groundwater. However, these effects are not reflected in the evaluation of proposed contract renewals and the DEIS assumes that existing drainage management would continue even though changes may be necessary.

Water supply conditions in California have changed significantly in the 40 years since these contracts were originally signed. Water quality and beneficial uses have been adversely affected. We recommend that a Revised or Supplemental DEIS be prepared that evaluates the impacts of full contract deliveries, the future "no action" condition, and impacts to water quality and supply. Once these impacts are fully analyzed, Reclamation may need to consider additional alternatives or contract provisions to directly address sustainable water use in the Central Valley. While we recognize that the preparation of a Revised or Supplemental DEIS may extend the NEPA process, this would provide for a much stronger document and would be achievable in the time frame of the current contracts.

We appreciate the opportunity to review this DEIS and offer our assistance and technical expertise to your office as you proceed in addressing these complex issues. We are available to meet with you to discuss our comments. My staff is also available to review a Preliminary Revised or Supplemental EIS, or provide feedback on technical reports if that would be helpful as you proceed. Please send two copies of any future NEPA document to the address above (Mail Code: CMD-2) at the same time it is officially filed with EPA Headquarters. If you have any questions, please call me at (415) 947-8702 or Enrique Manzanilla, Director of the Cross Media Division at (415) 972-3843, or have your staff contact Summer Allen at (415) 972-3847.

Sincerely,

Wayne Nastri
Regional Administrator

Main ID# 4477
Enclosures:
Attachment A: EPA's Detailed Comments
Attachment B: Summary of Rating Definitions

cc: Arthur Baggett, State Water Resources Control Board
Mike Chrisman, California Secretary for Resources
Ken Landau, Central Valley Regional Water Quality Control Board
Lester Snow, California Department of Water Resources
Steve Thompson, U.S. Fish and Wildlife Service
Patrick Wright, California Bay Delta Authority
Anne Miller, EPA, Office of Federal Activities
Joe Thompson, Bureau of Reclamation

ATTACHMENT A:
EPA DETAILED COMMENTS FOR THE DEIS RENEWAL OF LONG-TERM CONTRACTS FOR SAN LUIS UNIT CONTRACTORS, CA, JANUARY 24, 2005

Scope of Analysis

Evaluation of the Proposed Federal Action

The proposed federal action enables full delivery of the contract quantities each year for the contract term. However, the Draft Environmental Impact Statement (DEIS) does not evaluate the impacts of full delivery of contract quantities. Instead, the DEIS relies on analyses in the Central Valley Project Implementation Act (CVPIA) Programmatic EIS (PEIS) and Operations Criteria and Plan (OCAP) which represent substantially lower water deliveries on average. Based on the PEIS preferred alternative, San Luis Unit Agricultural and Municipal and Industrial (M&I) contractors might expect full deliveries in only 15 percent and 40 percent of years, respectively. The OCAP Biological Evaluation, which addresses impacts to listed species under current conditions, assumes full deliveries to agricultural contractors in 50 percent of years, and full deliveries to M&I contractors between 60 and 70 percent of years.

To determine water delivery amounts, the DEIS assumes the continuation of "existing conditions," and that the preferred alternative from the CVPIA PEIS will occur. In either case, these delivery amounts are less than full contract deliveries. Other Reclamation documents and plans suggest that over the term of these contracts, the average annual deliveries will increase. For example, Reclamation's rate setting process assumes that project annual deliveries for the San Luis Unit will rise from an average of 60 percent of contract amounts in 2001-2005 to an average of 100 percent of contract amounts in 2026-2030 (Reclamation Mid-Pacific website, rate setting documents, Schedule A-12A, at page 25, note 9). Actions planned by the CALFED Program, such as the South Delta Improvements and additional water storage, are anticipated to improve water supply reliability as well. However, the potential environmental effects associated with increased delivery amounts have not been analyzed in the DEIS.

The DEIS states that deliveries averaged 92 percent of contract amounts in 1991, but declined to around 50 percent in the later 1990s due to changes in the "regulatory baseline described in the CALFED Bay-Delta Record of Decision" (p. 1-7). We are concerned that changes to that regulatory regime by the State Water Resources Control Board or the National Oceanic and Atmospheric Administration (NOAA) Fisheries, for example, could allow substantially increased deliveries under these contracts without further action or NEPA review on the part of Reclamation.

Recommendations:
The Revised or Supplemental EIS should include an analysis of the environmental impacts of full contract deliveries, as permitted under these contracts. If that scenario is not reasonably foreseeable, the basis for assuming less than full contract delivery should be clarified. In particular, the analysis of full, reliable contract deliveries should include

the following: changes to irrigated land base; trends in groundwater quality and levels with implementation of drainage management; and quality of applied irrigation water, given the salt loads in Delta water.

Evaluation of the No Action Alternative

The DEIS equates conditions under the future No Action Alternative with the Preferred Alternative of the Central Valley Project Implementation Act (CVPIA) (p. 2-13) and concludes that future conditions under the No Action Alternative will be the same as the existing condition baseline. There are two major problems with the DEIS approach.

First, the DEIS does not adequately evaluate the environmental degradation that characterizes the existing conditions. The DEIS assumes the continued use of groundwater as a supply substitute (p. 3.9-5) while acknowledging that pumping has caused depressions to form and that every subbasin is experiencing some overdraft (p. 3.8-3). Agricultural use of groundwater is impaired due to naturally and artificially elevated total dissolved solids (TDS) in the groundwater (p. 3.8-4). The DEIS does not fully analyze the existing groundwater quality conditions that are in decline (pp 3.2-11 and p. 3.8-8) and therefore understates the effects, including cumulative effects, that may occur as a result of the implementation of the No Action Alternative or the Action Alternatives.

Second, the DEIS is inconsistent in its analysis of the No Action Alternative and existing conditions. For example, the DEIS states that the western and southern portions of the San Joaquin Valley produce agricultural drainage with high levels of salt as well as potentially toxic trace elements such as arsenic, boron, molybdenum, and selenium (p. 3.7-3). The DEIS also concludes that under the No Action Alternative, there would be continued degradation of groundwater quality with respect to salt buildup in the water (p. 3.2-11). It notes that continuation of current practices and conditions seriously threaten the sustainability of farmland (3.7-3) and that the limited supplies of fresh water, in combination with saline groundwater, result in salt buildup (p. 3.7-3). Despite these statements, the DEIS concludes that the No Action Alternative would "not result in any alteration to surface water quality" and "would not lead to further degradation in water quality" (3.9-15).

These problems in characterizing the existing conditions and future conditions under the No Action Alternative carry through in the evaluation of the other alternatives. For example, the DEIS concludes that since the two action alternatives are similar in their terms to the No Action Alternative, there would be no alteration to surface water quality. With this conclusion, the DEIS mischaracterizes the environmental impacts of both the No Action and the Action Alternatives. Each alternative will have impacts on water quality. The full analysis of environmental impacts resulting from the No Action Alternative should provide a point of comparison among alternatives. Especially in the context of water quality, "No action" is not synonymous with "no impacts," nor is it the same as "existing conditions."

Recommendations:
The Revised or Supplemental DEIS should include an accurate description of the No Action Alternative and report existing trends of water quality degradation. This description should be consistent with the description provided for the CVPIA PEIS Preferred Alternative. The Revised or Supplemental DEIS should also provide an accurate description of the existing conditions, focusing on surface water quality and groundwater quality. If Reclamation continues to assume that environmental conditions do not change in the future, these assumptions should be supported with data, analysis, and appropriate forecasts.

Tiering to the CVPIA PEIS

The San Luis Canal Unit DEIS is "tiered" to the CVPIA PEIS. Agencies "are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision...." (40 CFR Part 1502.20). However, this site-specific DEIS does not provide the necessary site-specific analyses that it should, but paraphrases relevant portions of the programmatic CVPIA PEIS and programmatic OCAP Biological Assessment. In contrast, the Sacramento River Settlement Contractors DEIS (October 2004) tiered from the same programmatic documents, but augmented the programmatic analyses with site-specific evaluations. We note that neither the CVPIA PEIS nor the DEIS includes an in-depth cumulative impact analysis, making it difficult to determine long-term impacts associated with the project.

Moreover, although this document is tiered to the CVPIA PEIS, the contract periods for the San Luis Unit extend beyond the timeframe addressed in the PEIS. The CVPIA PEIS period of analysis extends to 2025, whereas the 40-year time frame for M&I contracts ends in 2045 and the 25-year time frame for Agricultural contracts ends in 2030. The DEIS should provide the data to close this gap in the analysis between the tiered documents.

Recommendations:
The Revised or Supplemental DEIS should include the site-specific information and analyses not included in the programmatic documents. The Revised or Supplemental DEIS should disclose future conditions and evaluate the potential impacts of the CVPIA PEIS Preferred Alternative from 2025 to 2045, as the No Action Alternative.

In order to provide the additional information needed in this site-specific document, the Revised or Supplemental DEIS should also document the status of ESA consultation with U.S. Fish and Wildlife Service (FWS) for the San Luis Unit contract renewals and the related CVP OCAP. The National Oceanic and Atmospheric Administration-Fisheries Biological Opinion on the OCAP should also be included. Similarly, ongoing efforts of the Interagency Mitigation Working Group for the San Luis Drainage Feature Re-evaluation regarding impacts to wildlife, which may be outside of ESA consultation processes, should be incorporated into mitigation and monitoring plans and described in the Revised or Supplemental DEIS.

Water Quality Impacts of the Proposed Action

The project area includes portions of both the San Joaquin River Basin and the Tulare Lake Basin. The San Joaquin River is listed as impaired under Clean Water Act (CWA) Section 303(d). Existing water quality problems in the project area are well-documented.[1] Although municipal point sources may contribute to some of these water quality problems, the primary sources affecting the project area include agricultural drainage and reduced flows. Surface agriculture discharges account for 26 percent (280,000 tons) of the mean annual salt load to the Lower San Joaquin River and subsurface agricultural drainage represents the most concentrated source of salt and boron in the watershed (San Joaquin Water Quality Control Plan, 2004).[2]

The DEIS does not adequately evaluate the available information concerning water quality impacts and drainage problems affecting the project area and nearby hydrologically affected areas. The CVPIA PEIS did not address these region-specific resources and impacts. We recognize that this DEIS provides an analysis of groundwater; however, it does not address the impacts of water diversion and use on water quality, aquatic resources, and downstream uses. In particular, it presents no critical information on the quality of applied surface waters and associated aquatic resources that could be affected by San Luis Unit districts irrigation drainage.

The proposed action may exacerbate mobilization of pollutants and movement (through shallow groundwater) into areas where there could be fish and wildlife exposure. These potential impacts are not addressed in the DEIS. Some sources of selenium in soils from the San Luis Unit are mobilized by irrigation and storm run-off (1990 Drainage Management Plan for the West San Joaquin Valley, California, Fig. 6, p. 28). The highest concentrations of salts and selenium in shallow groundwater are located downslope (Fig. 2.5, Drainage Feature Reevaluation Preliminary Alternatives Report, Dec. 2001). There is evidence that subsurface drainage flow comes, in part, from Westlands Water District and other water districts upgradient of the northerly districts with high selenium/TDS concentrations (Plan Formulation Report Addendum, July 2004).

The DEIS does not address the proposed action's consistency with the Central Valley Regional Water Quality Control Board actions to address water quality impairments in the San Joaquin River or the potential implications for water contractors (p. 3.2-7). For example, the discussion of the Grasslands Bypass Project does not reference the criteria for meeting total maximum daily loads (TMDLs) (p. 3.7-3; 3.10-19). Although the Westlands Water District does not discharge to surface waters, the Grasslands Bypass Project (which includes Panoche and Pacheco Districts) discharges tile water that empties into Mud Slough. Mud Slough is also

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[1]The San Joaquin River is impaired for electrical conductivity (salinity), boron, mercury, DDT, and other pesticides. Many related tributaries have also been listed for unknown toxicity, salinity, and selenium.

[2]More information regarding salt loading from agricultural drainage is available at: <http://www.waterboards.ca.gov/centralvalley/programs/tmdl/salt_boron/appendix1.pdf>

impaired for selenium (DEIS, p. 3.12-5). While the Grasslands Bypass Project is discussed in the DEIS, the applicable water quality standards and progress towards meeting these standards are not disclosed.

We also note that many of the San Luis Unit contractors experience water quality-associated problems with agricultural drainage (Drainage Feature Re-evaluation, Plan Formulation Report (PFR) Addendum (July 2004)). However, the DEIS does not address the associated environmental impacts of agricultural drainage, land being taken out of production, and water quality degradation. The San Luis Unit is in an area where drainage problems have impaired sustainable agricultural production. The PFR Addendum concludes that by 2050, the shallow groundwater area needing drainage is expected to be 335,000 acres (over half the irrigated land base in the Unit). The PFR Addendum presents revised alternatives which include substantial land retirement and estimates that the Drainage Feature Re-evaluation EIS (which is under development) will evaluate retiring up to 308,000 acres. The PFR Addendum also suggests that surface and groundwater supplies, would be altered under a drainage service program. Regardless of the drainage plan that is implemented, the agricultural land base, water supply needs, and water management may change, affecting the proposed action. The San Luis Unit contracts should incorporate drainage service solutions that meet the objectives of the Drainage Feature Re-evaluation. The DEIS does not discuss whether the renewed contracts would be adjusted if the agricultural land base and water requirements change.

Lastly, the DEIS does not address whether continuing the current practices of managing agricultural drainage will have adverse impacts on groundwater and surface water quality, and beneficial uses including fish and wildlife, potential drinking water supplies, and agriculture. The PFR Addendum acknowledges that there are drainage flows (uncontrolled seepage into deep drains, tailwater, and storm run-off) that "could reach the adjacent wildlife refuges on the San Joaquin River, resulting in adverse effects to water quality and wildlife" (p. 3-19).

Recommendations:

The Revised or Supplemental DEIS should include an updated and detailed analysis of water quality conditions and San Joaquin River impairments. The impact analysis should include water quality data and program information to address impairments, including the selenium TMDL and irrigated land waivers. The Revised or Supplemental DEIS should provide updated information on the salt/boron Basin Plan Amendment for the northern portions of the San Luis Unit. It should clearly explain the surface and groundwater nexus between the Westlands Water District and northern districts. We also recommend that the Revised or Supplemental DEIS specifically address the San Luis Unit's role in groundwater accretions and discharges of pollutants into wetland channels and the San Joaquin River.

The Revised or Supplemental DEIS should include the recent history of federal-state drainage programs, beginning with the San Joaquin Valley Drainage Program, 1990 (Management Plan for Agricultural Drainage and Related Problems on the Westside San Joaquin Valley, Final Report). The Revised or Supplemental DEIS should explain how

the contractors in the northern portion of the San Luis Unit have altered their water management or land use practices as a result of the Grassland Bypass Project to achieve water quality goals.

Reclamation should consider incorporating drainage planning for the San Luis Unit, which is currently being conducted as a separate NEPA process (i.e., the Drainage Feature Re-evaluation DEIS) in the Revised or Supplemental DEIS. The Drainage Feature Re-evaluation is scheduled to be completed before the current contracts expire. If this is not feasible, Reclamation should incorporate alternatives and impact analysis in a Revised or Supplemental DEIS to address reasonably foreseeable changes in environmental conditions that would occur with drainage plans. At least one alternative should assume an outer range of permanent land retirement being considered in the Drainage Feature Re-evaluation (308,000 acres), which would result in a reduced irrigated land base. (Drainage Feature Re-evaluation, Plan Formulation Report Addendum, July 2004, p. E-11) The DEIS should disclose the agricultural water supply requirements for this alternative and associated water quality impacts.[3]

The Revised or Supplemental DEIS should describe the role of San Luis Unit water, agricultural drainage and return flows, and conveyance facilities in the management of the San Luis National Wildlife Refuge, the Mendota Wildlife Management Area, and the North Grasslands Wildlife Management Area. Water quality conditions and any pollutants of concern in the refuges and wetlands (including the private wetlands in the Grasslands) should be incorporated into the information on page 3.10-5. Due to unsustainable drainage conditions, the resulting loss of agricultural lands and fish and wildlife impairments should be discussed.

Needs Assessment

The needs analysis in the DEIS (Appendix H) used to establish future demands for water supply is not supported by information reflecting anticipated future conditions, such as agricultural drainage, water use efficiencies, and water marketing. For example, drainage problems in the San Luis Unit and other factors may reduce agricultural water demands. The water needs analysis assumes that land would remain in production although increasing salt balance problems are forcing some lands out of production. Either with a drainage service program, or with the status quo (no comprehensive program), the irrigated land base and surface-ground water management regime are likely to change. Assuming the continuation of existing conditions, up to 300,000 acres of land within the agricultural service area may become unusable. We note that the Westlands Water District is proposing to retire 200,000 acres to address chronic water shortages (p. 3.2-9). However, the needs assessment shows expansion of the land base from approximately 600,000 acres (1989) to 691,000 acres (2025).

[3]The DEIS assumes that if lands are retired the contract water supply would not be changed (p. 3.8-8). In contrast, the PFR Addendum refers to Drainage Re-evaluation alternatives to examine retention of water for other uses, such as fish and wildlife (p. 3-5, Table 3.1).

Further, the agricultural water demands calculated for the Unit are inconsistent with the analyses being developed by the State Department of Water Resources (DWR) for the State Water Plan. These analyses project a future trend of substantially declining agricultural water demand in the Central Valley, particularly the San Joaquin River Basin (briefings by DWR to the Bulletin 160 State Water Plan Advisory Committee on October 14, 2004, and to the CALFED Agency Coordination Team on October 26, 2004).[4] The CVP analysis appears to project increasing deliveries for agricultural use during the same time period (Reclamation Mid-Pacific Region website, rate setting documents).

The calculation of CVP supply needs may also be overstated because the water needs analysis does not reflect recent conditions in the districts with respect to use of other supply options, such as transfers and assignments, and conservation practices. Appendix H shows that many of the districts used 1989 data to represent existing water use and sources. This precedes both CVPIA and changes in regulatory conditions which have prompted use of alternative practices, such as transfers. Therefore, analyses for districts that have engaged in additional transfers are inaccurate. We note that significant portions of the San Luis Unit water may be transferred. Also, the Westlands Water District proposes to acquire Broadview Water District lands and water supply. (Reclamation Mid-Pacific Region website, rate setting documents).

Recommendations:
The Revised or Supplemental DEIS should clearly explain the basis of the water needs assessment, including assumptions regarding drainage management, surface and groundwater management, crop patterns and water use efficiency practices. It should include a description of the influence of urban development and transfers of water to urban use on specific irrigation districts. It should also describe how conservation, transfers, and other alternatives to CVP supplies are factored into agricultural and urban water needs. The assumptions underlying the projected expansion of the agricultural land base (2025) should be explicitly stated.

Modifications to Alternatives

Given that the impacts of the proposed federal action would likely be substantial if fully analyzed, Reclamation may need to consider revising the alternatives in the DEIS or analyzing additional alternatives that would allow for sustainable conjunctive use of CVP water or include a discussion of means to mitigate adverse environmental impacts (40 CFR Part 1502.16(h)). Modified or new alternatives should reflect reasonable future actions to address the drainage problems inherent with the existing condition. Possible future actions to address drainage problems include land retirement as well as environmental protection through water conservation and environmental restoration. We note that a reduction in contract quantities may be needed to account for the land that is forced into retirement due to environmental degradation.

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[4] Additional information on the water demand trends is available at the State Water Plan website: http://www.waterplan.water.ca.gov/landwateruse/wateruse/wuoverview.htm.

The earliest of these contracts (Westlands Water District) does not expire until December 31, 2007. Information from the Drainage Feature Re-evaluation DEIS (currently being prepared), as well as the ESA consultation on these contracts, should be incorporated into revised alternatives or more flexible contract provisions which include mitigation for project impacts. The DEIS notes that reductions in contract quantities are not required for Reclamation to implement the CVPIA. However, a full analysis of restoration and mitigation requirements, as well as a more comprehensive needs analysis, may raise questions about the quantities of water that should be appropriately subject to long-term contracts.

Recommendations:
The Revised or Supplemental EIS should include modified alternatives that:

- Coordinate the timing of the DEIS with drainage plan development. The drainage plan should precede and inform decisions on contract renewals. If this is not possible, the DEIS should be consistent with elements of drainage planning which would affect land base, water management, and water supply and explain how contract commitments can be adjusted to accommodate for these changes. Contract provisions should allow flexibility to incorporate elements of the drainage plan implementation and should commit to doing so.

- Include the following features: full contract deliveries; reduced water demand in the event of a high level of land retirement (e.g., the 308,000-acre limit set by the Drainage Plan).

- Include specific conservation provisions to promote water conservation and environmental protection. EPA recently recommended that a conservation alternative be considered in the Delta-Mendota Canal NEPA process (December 15, 2004 letter to Joe Thompson). EPA supports the evaluation of a conservation alternative, even if this alternative is outside the scope of Reclamation's statutory authority (see CEQ's 40 Most Asked Questions, 2A).

- Incorporate the full range of water supply and demand management options available to contractors in addition to CVP supplies such as water transfers, adjustments of contract terms (i.e., "reopener clauses"), project repayment, farm gate measuring devices, and environmental monitoring.

- Articulate conservation and environmental restoration goals such as water quality standards and provide commitments to these in the contract provisions. Water quality limitations on water transferred into the Valley should be considered as well as strengthened shortage provisions that will allow increased flexibility to meet the established restoration and water quality goals.

- Incorporate monitoring and reporting of the quality of surface and groundwater and drainage flows affected by San Luis Unit water use.

- Consider incentives for water conservation, such as more aggressive pricing mechanisms (including lowered pricing tiers and volumetric pricing) that will be able to be implemented in most years.

- Consider more aggressive land retirement and incorporate strategies that would avoid further impairment to the aquatic ecosystem and provide high quality water for refuges, wetlands, and the San Joaquin River. These strategies should allow for adaptive management to changing conditions such as population, land use, and climate conditions. We note that FWS recommends land retirement that is not based solely on groundwater considerations to reduce habitat fragmentation and its effects on listed species (FWS's Recovery Plan for Upland Species on the San Joaquin Valley, 1998). Therefore, retirement of large contiguous blocks of land that are protected through a conservation easement and managed for conservation should be considered. This alternative should also provide opportunities to enhance environmental water supplies, including allocating water previously used on retired lands to other needs, such as environmental restoration.

4

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Sacramento Fish and Wildlife Office
2800 Cottage Way, Room W-2605
Sacramento, California 95825-1846

In reply refer to:
1-1-07-I-1405

AUG 20 2007

Memorandum

To: Chief, Resource Management Division, U.S. Bureau of Reclamation, South Central California Area Office, Fresno, California (Attn.: Kathy Wood)

From: Susan P. Jones
Field Supervisor, Sacramento Fish and Wildlife Office, Sacramento, California

Subject: San Luis Unit Interim CVP Water Service Contract Renewal for the Period January 1, 2008 through February 29, 2011

This memorandum is in response to your July 17, 2007, memorandum (Memo) requesting initiation of formal consultation pursuant to section 7(a) of the Endangered Species Act of 1973 (ESA), for the execution of 26-month Interim Water Service Contracts on behalf of the Bureau of Reclamation (Reclamation) and seven Central Valley Project (CVP) co-applicants: the California Department of Fish and Game (DFG), the cities of Avenal, Coalinga and Huron, Panoche Water District (Panoche), San Luis Water District (San Luis), and Westlands Water District (Westlands). We received your memorandum on July 18, 2007. The action includes the interim renewal of water service contracts in the San Luis Unit (SLU) of the CVP involving three agricultural and municipal & industrial (M&I) contracts (e.g., Westlands, Panoche, and San Luis Water Districts), and M&I contracts (cities of Avenal, Coalinga, and Huron and to DFG). The current Westlands contract expires at the end of this year (2007). The other San Luis Unit contracts expire at the end of 2008. The renewal terms of the contracts are described in the initiation memo as: Westlands interim contract would expire in 2010, the remaining SLU contracts would expire in 2011.

Reclamation has requested initiation of formal consultation under the ESA based on the information provided for the SLU long term contract renewal (LTCR) consultation (2004 Biological Assessment, two responses to insufficiency memoranda, and additional information generated by the Endangered Species Recovery Program). The proposed action is the execution of Interim water service contracts in the amount of 1,385,590 acre-feet (af) for SLU contractors that provides for delivery of "a maximum quantity of water subject to hydrological and regulatory constraints for the full contract periods", as described in Reclamations September 2005 Memo and attachments. The Service finds there are still substantive questions regarding

the description of the action to be considered and a description of the specific area that may be affected by SLU Interim Contract renewals that warrant further discussion with and clarification from our Regional Solicitors before we can proceed with the initiation of consultation on this project. We therefore, are not commencing initiation of formal consultation at this time but will proceed informally until these issues are resolved.

Your Memo notes, that, "Reclamation has determined, in consultation with the contractors and with the U.S. Fish & Wildlife Service, that the proposed action may adversely affect species listed under the Endangered Species Act..." This differs from the conclusion in the September 14, 2004 Biological Assessment for SLU LTCR (BA), which concluded that renewal of the SLU Interim water service contracts is not likely to adversely affect (NLAA) listed plants or wildlife, and would not result in changes to or alterations of habitat used by listed species either known to occur or with the potential to occur in the SLU service area. We do not concur with Reclamations NLAA determination in the SLU LTCR BA and believe SLU Interim Contract renewals could result in adverse effects to listed species. The SLU LTCR BA bases the NLAA determination on the assumption that the environmental baseline for listed and proposed species and designated critical habitat potentially occurring within the action area would not change with the implementation of the proposed action of renewing the long-term water service and repayment contracts between Reclamation and the eight SLU contractors (page 95 of BA).

Consultation on reauthorization of ongoing actions is one of the more complex areas of section 7 consultation. Our approach to baseline in water contract consultations is that the environmental baseline represents environmental conditions/species' status prior to the renewal of the contract; impacts of future water deliveries are not part of the environmental baseline. The effects of the action on the protected species present in the action area (San Joaquin kit fox (*Vulpes macrotis mutica*, Federal status: endangered), California least tern (*Sterna antillarum* [= *albifrons*] *browni*, Federal status: endangered), Giant garter snake (*Thamnophis gigas*, Federal status: threatened), Blunt-nosed leopard lizard (*Gambelia silus*, Federal status: threatened), California Jewelflower (*Caulanthus californicus*; Federal status: endangered), San Joaquin Wooly-threads (*Monolopia (=Lembertia) congdonii*; Federal status: endangered)) are determined based on the effects of water deliveries over the Interim contract period, including continuation of any ongoing actions. In short, we view them as effects from a proposed Federal action that have not undergone section 7 consultation. We therefore intend to address the effects of future implementation of Interim contracts, including the effects of interrelated and interdependent actions, as effects of the Federal action, not as part of the environmental baseline. The jeopardy analysis will compare the environmental baseline that exists at the time of the Federal action to the adverse effects of the Federal action projected into the future, starting at the time the Federal action is taken, including the effects of interrelated and interdependent actions.

Outstanding Issues Affecting the Base Conditions

The following information, issues, and questions need to be resolved before the environmental baseline conditions for the listed San Joaquin kit fox and giant garter snake can be established.

The renewal of San Luis Unit contracts for an interim 26 month period also raises a number of questions on how we can proceed in light of other interrelated unresolved issues (e.g., OCAP, water quality, and drainage) without receiving clarification from our respective Counsels.

There are also several outstanding issues with respect to drainage which are unresolved:

1. First, for all the agricultural districts except Westlands, the Service completed a biological opinion in 2001 on a program for drainage management in those (and some other) districts called the Grassland Bypass Project (GBP BO). The time period covered in that opinion was September 2001 through December 2009. Due to incomplete implementation of terms and conditions of the GBP BO and to potential effects to giant garter snake not addressed in the 2001 BO, the Service has recommended that reinitiation of this consultation is warranted. Reclamation needs to clearly define and analyze the effects of drainage management on giant garter snake and kit fox from 2008 through 2011 for the northern SLU districts. What drainage management will occur, and what effects will those specific measures have on giant garter snake and kit fox.

2. On March 16, 2006 we completed a biological opinion (BO) of the effects on listed species of Reclamations San Luis Drainage Feature Reevaluation (SLDFR) proposed plan to manage, treat and dispose drainage from the San Luis Unit agricultural districts. The species being evaluated for both projects are virtually identical. Since that time, the Service has learned that several of the assumptions that we predicated our BO and Fish and Wildlife Coordination Act Report (CAR) upon have not proven to be true; and much of the mitigation and contingency planning for SLDFR for our consultations was deferred to the Feasibility Planning phase (which is currently ongoing). Reclamation has not consulted with FWS on mitigation or contingency planning since the FEIS went public in May 2006. In addition; the Service has found new information on high concentrations of mercury in drainwater in the project area (which was not considered a constituent of concern in the NEPA/ESA for San Luis Drainage and was also not evaluated in the EIS/BA for the long term contracts). Again Reclamation needs to clearly define and analyze the effects of drainage management, including the effects of mercury, on giant garter snake and kit fox from 2008 through 2011 for the SLU districts.

3. The draft interim contracts include the following language with respect to water quality effects of these contract renewals, "The Contractor shall be responsible for compliance with all State and Federal water quality standards applicable to surface and subsurface agricultural drainage discharges generated through the use of Federal or Contractor facilities or Project Water provided by the Contractor within the Contractor's Service Area." In the initiation materials for SLU long term contract renewals that Reclamation provided the Service in September 2005, Reclamation noted the following, (Attachment B, page 22) , "As the contracts contain the requirement that the contractors comply with all applicable laws regarding water quality there is no reason to presume that those laws will be violated. As described in the September 13, 2004 BA all of the water quality objectives in the area are being met, and therefore there is no anticipated effects from the minimal groundwater movements that might be expected to occur in the area. This information is the best available information and is the basis of Reclamation's assessment of continued

deliveries of up to full contract quantities within the range of deliveries and frequencies described in the OCAP studies." Unfortunately, this is not an accurate assessment of the effects of these contract renewals to downstream surface water quality. Water quality standards for the Grassland Wetland Supply Channels have been exceeded numerous times since the Grassland Bypass Project EIS/EIR was completed in 2001. The Central Valley Regional Water Quality Control Board (RWQCB) established and EPA approved a 2 µg/L monthly mean selenium water quality objective for the Grassland Wetland Channels (RWQCB 1996). The RWQCB established total maximum daily loads (TMDL) to meet the monthly selenium water quality objective for the Grasslands supply channels and Salt Slough (RWQCB 2000). Failure to meet those TMDL resulted in the State Water Resources Control Board (SWRCB) listing of the Grassland wetland supply channels and Mendota Pool as impaired for selenium on their triennial review of the California 303(d) list of impaired water bodies with an approved TMDL that was not being met. Further, the SWRCB also issued a Cease and Desist order against Reclamation and DWR with respect to failure to comply with the salinity standards at Vernalis and the south Delta. Reclamation has since filed litigation protesting that Cease and Desist order, arguing that the salt in the lower San Joaquin River (LSJR) is largely out of their control. But the RWQCB has clearly identified the source of salt loading in the San Joaquin River as largely coming from west-side CVP irrigation (San Luis Unit and DMC), "The Grassland Sub-area contains some of most salt-affected lands in the LSJR watershed. This sub-area is also the largest contributor of salt to the LSJR (approximately 37% of the LSJR's mean annual salt load)." How do we proceed with Interim contract renewals when we know that compliance with State and Federal water quality standards has not been met, and exceedences of some of these standards are associated with water deliveries to SLU contractors? Reclamation in the materials they have provided to the Service for long term contract renewals to date, has not yet adequately addressed the effects this issue will have on giant garter snake and kit fox from 2008 through 2011 for the SLU districts.

Other Outstanding Issues Related to Interim Contract Renewal

1. How can we (FWS and Reclamation) proceed with a 26 month interim contract renewal, when the Federal Courts have effectively invalidated our OCAP biological opinion for delta smelt? Reclamation notes that, "Reclamation is currently reconsulting with Service on the OCAP, and will continue to comply with the current OCAP BO, any successor BO's, any court rulings, and other regulatory determinations and documents relevant to OCAP."

2. Relevant Conservation Measures: We have not yet received information regarding the status of Encroachment Mitigation (a requirement of the State Water Board with respect to Reclamation's water right permit for CVP) including information on how Reclamation will comply with mitigation requirement for Westlands WD encroachment by 2010. It is likely that insufficient acreage is available to meet the mitigation requirement, and Reclamation and the Service is not aware of any recent substantial progress on acquisitions. These acres, and their location is crucial to the survival of the kit fox, and we need to understand Reclamation's specific plan to meet this obligation in order to properly characterize the environmental baseline for this consultation. Further, in the material provided for SLU long term contract renewals,

Reclamation assumed that no new lands would be brought into agricultural production or other undeveloped, non-urban land would not be converted to urban uses. It is unclear how such a commitment would be enforced or which entity or agency would be responsible for such enforcement. What would the consequences be if this commitment was breached? We do have a letter from the San Luis WD that commits to not delivering water to areas for M&I development unless Reclamation has provided ESA clearance. That commitment should be included in the project description for this consultation.

Conclusion

The Service finds there are still substantive questions regarding the SLU long term contract renewals that warrant further discussion with and clarification from our Regional Solicitors before we can proceed with the initiation of consultation on this project. We therefore, are not commencing initiation of consultation at this time. We look forward to continuing to work with you on this project. If you have any questions or concerns about these comments please contact Michael Welsh or Joy Winckel of my staff at the letterhead address or at (916) 414-6600.

5

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 7, 2000

Bureau of Reclamation
Attention: Mr. Al Candlish
2800 Cottage Way
Sacramento, CA 95825-1898

Dear Mr. Candlish:

On the behalf of its more than 400,000 members, the Natural Resources Defense Council ("NRDC") hereby files its comments on the draft environmental assessments ("EAs") on long-term renewal of Central Valley Project water service contracts prepared by the Bureau of Reclamation ("the Bureau").

We are deeply disappointed by the Bureau's inadequate attempts to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., in its proposed long-term renewal of CVP contracts. First, we strongly object to the Bureau's failure to prepare an environmental impact statement on these proposed agency actions that would have significant, far-reaching and fundamental effects. Second, the EAs themselves fail to meet the requirements of NEPA and cannot possibly support a finding of no significant impact by the Bureau. We urge the Bureau in the strongest possible terms to prepare NEPA documentation on long-term contract renewal which comports with the law, as these EAs emphatically do not.

I. The Bureau Must Prepare an Environmental Impact Statement on the Proposed Long-Term Contract Renewals.

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The purpose of this mandatory requirement is to ensure that detailed information concerning potential environmental impacts is made available to agency decisionmakers and the public before the agency makes a decision. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Under NEPA's procedures, an agency may prepare an EA in order to decide whether the environmental impacts of a proposed agency action are significant

enough to warrant preparation of an EIS. 40 C.F.R. § 1501.4(b), (c). An EA must "provide sufficient evidence and analysis for determining whether to prepare an [EIS] ..." 40 C.F.R. § 1508.9(a)(1). The U.S. Court of Appeals for the Ninth Circuit has specifically cautioned that "[i]f an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotation marks omitted), cert. denied, 527 U.S. 1003 (1999). To successfully challenge an agency decision not to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. So long as the plaintiff raises "substantial questions whether a project may have a significant effect on the environment," an EIS must be prepared. Id. (emphasis added, internal quotation marks omitted).

The long-term renewal contracts proposed by the Bureau are virtually certain to have a significant effect on the environment if they are executed. Collectively they cause the diversion of millions of acre-feet of water each year from the natural environment to (primarily) agricultural water users in the Central Valley, for use (primarily) in irrigated agriculture that itself has significant environmental impacts. The Bureau simply cannot, consistent with NEPA, allow these environmental impacts to escape full analysis in an EIS on long-term contract renewals.

A. There is Ample Evidence That Long-Term Renewal Contracts Would Have Significant Environmental Effects.

The Bureau has failed to meet its duty under governing Ninth Circuit precedent to supply a convincing statement of reasons why the execution of long-term renewal contracts would have insignificant environmental effects. By contrast, there is ample reason to believe that executing contracts for delivery of millions of acre-feet of water annually for an effective duration of 50 years would have a significant impact on the environment.

The U.S. Fish and Wildlife Service has recently completed a biological opinion on, among other things, the continued operation and maintenance of the Central Valley Project ("CVP"). U.S. Fish and Wildlife Service, Biological Opinion on Implementation of the CVPIA and Continued Operation of the CVP (November 2000).[1] This biological opinion describes in some detail the adverse environmental consequences that have been caused by the Central Valley Project, consequences that include harm to fish and wildlife from actions such

[1] We incorporate by reference this biological opinion in these comments. We also incorporate the documents referenced in that biological opinion, including the prior biological opinions on the Central Valley Project listed in section 1 of the November 2000 biological opinion.

as water diversion, impoundment, pumping and conveyance; from habitat conversion; from the effects of agricultural drainwater; and from urbanization. All of these effects constitute effects of CVP water service contracts, since they are the consequences of the provision of water under these contracts. See 40 C.F.R. § 1508.8 (defining effects required to be analyzed under NEPA to include indirect as well as direct effects). Because these effects on the environment are significant, they and other effects of signing long-term renewal contracts for the provision of CVP water must be analyzed in an EIS.

Other evidence of significant environmental effects from long-term water service contracts include the evidence submitted by the plaintiffs in NRDC v. Patterson, No. Civ. S-88-1658 LKK (E.D. Cal.), which we also incorporate in these comments by reference. The main point here is an obvious one: Through the proposed contracts, the Bureau is proposing to commit to the diversion of millions of acre-feet of water from the natural environment and to the delivery of that water to farms and cities for a nominal period of 25 years and an effective period of 50 years (given the right of renewal contained in the contracts). Activities of this scale and type cannot help but have significant environmental impacts, particularly in light of the significant impacts that have occurred to date under the current and previous CVP water service contracts. Moreover, the scale and duration of the activities that would be committed to under the proposed contracts threaten to cause a deterioration in the current state of the environment, as the environmental effects of the activities mandated under the proposed contracts are added to the environmental harm that has been caused to date under the current and previous contracts. For all these reasons, the Bureau must prepare an EIS on long-term contract renewal.

B. NEPA's Regulations Make Clear That an EIS Must Be Prepared Here.

NEPA's implementing regulations list a variety of factors that federal agencies are required to consider in determining whether a proposed action may significantly affect the environment and hence must be the subject of an EIS. 40 C.F.R. § 1508.27. While the Bureau has failed to undertake an adequate evaluation of these factors here, nearly all of the factors (any one of which is sufficient to require preparation of an EIS) are satisfied in the case of the proposed long-term contracts. For example:

- Water pollution from agricultural drainwater, which is triggered and would be made possible by the delivery of water under the proposed contracts, "affects public health" in a substantial way. See 40 C.F.R. § 1508.27(b)(2).

- The area to be served under the proposed contracts is in "proximity" to "prime farmlands," "wetlands" (including riparian wetlands), and "ecologically critical areas" (such as the Sacramento-San Joaquin Delta). See id. at 1508.27(b)(3).
- The effects of the water diversions, impoundments and deliveries required under the proposed contracts, and the consequences of the irrigated agriculture made possible by deliveries pursuant to the contracts, "are likely to be highly controversial." See id. at 1508.27(b)(4).
- The "possible effects" of the activities and actions made possible by the proposed contracts "are highly uncertain or involve unique or unknown risks," especially in light of the lengthy duration of the contracts. See id. at § 1508.27(b)(5).
- Since numerous CVP contractors are not prepared to sign long-term renewal contracts at the present time and will negotiate such contracts in the future, executing the proposed contracts would "establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." See id. at § 1508.27(b)(6).
- In light of the environmental effects that have occurred from CVP operations to date, and in light of the long duration of the proposed contracts (during which many additional actions will necessarily be taken), the proposed contracts are related to other actions with "cumulatively significant impacts." See id. at § 1508.27(b)(7).
- In light of the well-established adverse effects of CVP activities on threatened and endangered species and their habitat, as shown by the biological opinions cited previously in this letter, the proposed contracts "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." See id. at § 1508.27(b)(8).

The evidence in favor of an EIS being required here is overwhelming – particularly since "the threshold for requiring an EIS is quite low." NRDC v. Duvall, 777 F. Supp. 1533, 1538 (E.D. Cal. 1991). In that same case, Chief Judge Emeritus Karlton further held that:

> only in those obvious circumstances where no effect on the environment is possible, will an EA be sufficient for the environmental review required by NEPA. Under such circumstances, the conclusion reached must be close to self-evident ...

Id. We urge the Bureau in the strongest terms to prepare the required EIS on the proposed long-term contract renewals, in order to comply with the requirements of NEPA.

II. The Environmental Assessments Fail to Meet the Requirements of NEPA.

Even if an EIS were not clearly required here, the EAs prepared by the Bureau are so inadequate as to violate NEPA on their own. They fall far short of the analysis that is necessary to meet NEPA's requirements and to support a finding of no significant impact.

A. The EAs Fail to Consider a Reasonable Range of Alternatives.

NEPA's implementing regulations call analysis of alternatives "the heart of the environmental impact statement," 40 C.F.R. § 1502.14, and they specifically require an alternatives analysis within an EA, id. at § 1508.9. The statute itself specifically requires federal agencies to:

> study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning available uses of resources.

42 U.S.C. § 4332(2)(E). Because the Bureau's EAs on long-term contract renewals look only at a narrow range of alternatives and fail to evaluate numerous reasonable alternatives, the EAs violate NEPA.

The caselaw makes clear that an adequate alternatives analysis is an essential element of an EA, in order to allow the decisionmaker and the public to compare the environmental consequences of the proposed action with the environmental effects of other options for accomplishing the agency's purpose. In a leading NEPA case in which it overturned an EA for failure to consider alternatives adequately, the Ninth Circuit pointedly held that "[i]nformed and meaningful consideration of alternatives ... is ... an integral part of the statutory scheme." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989). To meet NEPA's requirements an EA must consider a reasonable range of alternatives, and courts have not hesitated to overturn EAs that omit consideration of a reasonable and feasible alternative. See People ex rel. Van de Kamp v. Marsh, 687 F. Supp. 495, 499 (N.D. Cal. 1988); Sierra Club v. Watkins, 808 F. Supp. 852, 870-75 (D.D.C. 1991).

Each of the contract-renewal EAs considers only two alternatives, in addition to the no-action alternative. Given the scope and importance of the proposed agency action under review, this small number of alternatives is by itself a violation of NEPA's requirement to consider a reasonable range of alternatives. What makes matters worse is the similarity

between the alternatives that the EAs do consider. For example, each of the alternatives, the two action alternatives and the no-action alternative, specify exactly the same quantities of water under contract. The similarities between the alternatives, though, do not stop with water quantity. The summary tables that compare the alternatives repeatedly use the phrases "Same as NAA [No Action Alternative]," "Similar to NAA" and "minor changes" to describe the components of the alternatives. See, e.g., Draft Friant Division Long-Term Contract Renewal Environmental Assessment ("Friant EA"), at Table DA-1.[2] See also id. at 3-57 ("The impacts of EA Alternative 1 are assumed to be identical to the impacts to [sic] the NAA because the water supply and pricing scenarios are identical in both alternatives. The only differences in the alternatives are administrative."), 3-58 ("the NAA and Alternative 1 are assumed to have the same environmental consequences because of their similarities and the fact that the only differences are contractual arrangements among the parties to the contracts").

In addition to considering too few alternatives that are too similar to each other, the EAs reject or ignore several obvious and reasonable alternatives. These unexamined or rejected reasonable alternatives include:

- Alternatives that decrease the water quantities under contract. Each of the alternatives in the EAs contains the exact same water quantities that are currently under contract. It plainly is reasonable for the Bureau to consider and evaluate the option of changing those quantities. The Bureau should consider changing the contract quantities to (a) a level that matches the actual level of deliveries in recent, normal water years, and (b) a level that would leave a meaningfully larger amount of water in the environment compared with current use, so that the EAs can illustrate the choices and consequences between consumptive and nonconsumptive uses of water. The EAs' rejection of the alternative of reducing water quantities, see, e.g., Delta-Mendota Canal Unit Environmental Assessment, Long-Term Contract Renewal, at 2-9, ignores the fact that such an alternative is reasonable and accords with the purpose and need for the agency action under evaluation. See also 40 C.F.R. § 1502.14(a) (agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives").
- An alternative that increases the cost of water to full market rates. Each of the action alternatives in the EAs charges the minimum price for water under the contract. The Bureau should evaluate at least one alternative that prices water at the level the water

[2] The EAs are all very similar. Thus, each of the comments contained in this letter applies equally to each of the EAs. Each citation to a specific EA is intended as an illustration and in no way suggests that the comment is restricted to that particular EA.

would receive on the open market.[3] At a minimum, the Bureau must consider price increases that would "encourage the full consideration and incorporation of prudent and responsible water conservation measures." Reclamation Reform Act of 1982, Sec. 210(a), 43 U.S.C. 390jj(a).

- An alternative that does not give the contractor a specific right to renew the contract. (While it is possible that there is no right of renewal contained in Alternative 2, the EAs do not make this clear and do not analyze the environmental consequences of this difference, if it does exist in the alternative.)
- Alternatives that affirmatively mandate or encourage increased water conservation by water users, through (a) aggressive, prescriptive requirements for water conservation and (b) through financial incentives for water conservation.

Each of the above reasonable alternatives can and should be analyzed and considered for contracts in each of the CVP divisions. In addition, for contracts in each individual division the Bureau should consider at least one strongly environmentally protective alternative that is tailored to the leading environmental problem relating to the operation of that division. So, for example, the Bureau's NEPA analysis for long-term renewal contracts for the Friant Division should consider at least one alternative that conditions the provision of water service on effective restoration of the San Joaquin River and/or creates specific incentives in the contract for restoration of the river.[4] As a further example, the NEPA analysis for the Delta-Mendota Canal Unit should consider at least one alternative that conditions the provision of water service on discrete improvements in protection and restoration of the Sacramento-San Joaquin Delta and/or creates specific incentives in the contract for such increased environmental protection and restoration of the Delta.

The EAs prepared by the Bureau fail to evaluate a reasonable range of alternatives and hence violate NEPA. We urge the Bureau to prepare NEPA documentation for long-term contract renewals that meets NEPA's requirements for alternatives analysis and that, at a minimum, fully analyzes the alternatives described above.

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[3] The Bureau clearly has discretion to consider higher prices. See, e.g., Reclamation Project Act of 1939, sec. 9(e), 43 U.S.C. 495h(e) (rates shall be "at least sufficient to cover an appropriate share of the annual operation and maintenance cost..."); Reclamation Reform Act of 1982, sec. 208(a), 43 U.S.C. 390hh(a) ("the price...shall be at least sufficient to recover all operation and maintenance charges..."); see also NRDC v. Houston, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (Bureau has discretion over terms of renewal contracts, including price and quantity).

[4] The Friant EA fails to conduct an adequate analysis of the effect of the proposed contracts on the San Joaquin River and on restoration of the river.

B. The EAs Fail to Disclose and Analyze Adequately the Environmental Impacts of the Proposed Action.

NEPA's implementing regulations require that an EA "provide sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a). For the reasons discussed above, the EAs fail to discuss and analyze adequately the environmental effects of long-term contract renewals. Courts have not hesitated to overturn EAs that fail to contain an adequate discussion of the environmental consequences of a proposed agency action, e.g., Foundation on Economic Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1985), and the EAs prepared by the Bureau here deserve that same fate.

The discussion and analysis of environmental impact contained in the EAs is cursory and inadequate, and it falls far short of NEPA's requirements. As an example, the discussion of water-quality impacts contained in the Friant EA shows the cursory and conclusory "analysis" contained in all of the EAs. First, the analysis is breathtakingly brief, occupying a single page with considerable space between the short paragraphs – a plainly inadequate treatment in light of the great importance of water quality to public health and the environment. Friant EA at 3-34. Second, the analysis essentially says that there will be no change in water quality impacts under the No Action Alternative and Alternative 1 – without describing in any meaningful way what the qualitative impacts of existing water quality is on human health and the environment and why those impacts will not change for better or for worse. Id. The six-sentence analysis of the effect of Alternative 2 appears to say that this alternative would cause some changes, but the EA fails to describe what those changes would mean for human health and environment. Id.

This plainly inadequate discussion of environmental impacts is, sadly, far from an isolated example. For example, the same document's discussion of fishery impacts occupies approximately a page and a half and concludes (with no analysis), for the no-action alternative and for Alternative 1, that there would be "no impacts to fishery resources" – a conclusion based apparently on the logic that no changes in environmental impacts from the current effects equals no environmental impacts at all. Id. at 3-48. On the next page, the EA presents the amazing , thoroughly unsupported statement that "Alternative 1 and 2 have little or no effect on surface water quantities and flows," id. at 3-49, despite the fact that both alternatives would result in the diversion and delivery to irrigated agriculture of more than a million acre-feet of water each year for 25 or 50 years. Elsewhere in the same document, the Bureau presents the astonishing and unsupported statement that "Alternative 1 is assumed to have similar effects to the NAA. Therefore, there are no impacts to biological resources under this alternative." Id. at 3-76.

In addition to failing to disclose or to analyze adequately the environmental effects of the proposed contracts, the EAs impermissibly restrict the timeframe of their analyses. None of the study periods extends forward more than 25 years, e.g., Friant EA at 1-4, despite the fact that each of the contracts contains an easily satisfied conditional right of renewal that means that the likely and effective duration of these contracts would be 50 years. By failing to analyze the environmental effects of the contracts in the likely event that they are renewed under the right of renewal contained in the contracts, the Bureau has violated NEPA.

We urge the Bureau to prepare NEPA documentation that adequately discloses and analyzes the environmental effects of the contracts over the full lifetime of the contracts, including the renewal period, as the draft EAs do not.

C. The EAs Fail to Analyze Cumulative Impacts Adequately.

These proposed long-term renewal contracts do not exist in a vacuum but instead add to more than half a century of environmental impacts from the construction, operation and maintenance of the CVP. The fact that these contracts would operate for at least a quarter century, and likely then would be renewed for another quarter century, means that their environmental effects will also be added to additional actions that will take place over the next 50 years. These facts make an adequate analysis of cumulative impacts especially important for these proposed contracts.

The Ninth Circuit has made clear that NEPA mandates "a useful analysis of the cumulative impacts of past, present and future projects." Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 810 (9th Cir. 1999). That Court has further directed that "[d]etail is required in describing the cumulative effects of a proposed action with other proposed actions." Id. The very cursory cumulative-effects discussions contained in the EAs plainly fail to meet these standards of adequacy.

The cumulative-effects discussions contained in the EAs are cursory, unanalytic, unenlightening, and often illogical. Here, in full, is the Friant EA's cumulative effects "analysis" of the proposed contracts' cumulative effects on surface water:

> The cumulative effects of all foreseeable projects will be to place additional demands on the available water supply. Also, the restoration projects may result in additional flows in local rivers for habitat restoration. Implementation of Alternative 1 or 2 will not influence the cumulative effects of other projects to surface water resources.

Friant EA, at 3-12. In addition to being almost entirely uninformative, this three-sentence discussion asks more questions than it answers. What are the foreseeable projects, and what are their additional demands likely to be? What impact would the proposed contracts have on the opportunities to restore the San Joaquin River? What other cumulative impacts might occur over the life of the project? How is it possible to conclude that the diversion of more than a million acre-feet of water every year, for 25 or 50 years, "will not influence cumulative effects" on surface water?

The Ninth Circuit has not hesitated to reject cumulative-impact statements that are "too general and one-sided to meet the NEPA requirements" and that fail to provide the "useful analysis" mandated by the caselaw. Muckleshoot, 177 F.3d at 811. The inadequate cumulative effects discussions contained in the contract renewals EAs fail these tests and deserve rejection here.

III. Conclusion.

The contract-renewals EAs prepared by the Bureau fall well short of NEPA's established requirements. We urge the Bureau to prepare NEPA documentation on the proposed contracting actions which complies with all requirements of the law.

Sincerely,

Drew Caputo
Senior Attorney

Hamilton Candee
Senior Attorney

cc: Hon. David Hayes, Deputy Secretary of the Interior
Hon. John Leshy, Solicitor
Hon. George Frampton, Chairman, CEQ

6

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

Via Facsimile and Federal Express

January 9, 2001

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RE: Comments on Proposed CVP Long Term Renewal Contracts for Friant, Hidden, Buchanan, Cross-Valley, Feather River and Delta-Mendota Canal Units

Gentlemen:

On behalf of the Natural Resources Defense Council (NRDC) and our more than 400,000 members, including over 80,000 in California, we submit the following comments on the Bureau's proposed long term renewal contracts for delivery of water from the Central Valley Project.

As we explain below and as is reflected in the attached materials, the proposed renewal contracts are a threat to California's environment and constitute misguided federal policy. Moreover, the contracts and their supporting environmental documentation have numerous legal deficiencies. Specifically the proposed contracts and their supporting Environmental Assessments and other environmental documents violate *inter alia* the Administrative Procedure Act (APA), the Central Valley Project Improvement Act (CVPIA), the Reclamation Reform Act (RRA), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the California Environmental Quality Act (CEQA). Accordingly, we urge the Bureau to withdraw all of the proposed renewal contracts and reinitiate negotiations after adequate environmental review and consultation have been completed. Absent action to address these deficiencies, we will have no choice but to challenge these contracts in court, as occurred with the last round of defective CVP long term renewal contracts. See NRDC v. Houston, 146 F.3d 1118 (9th Cir. 1998), cert. denied, 119 S. Ct. 1754 (1999) (rescinding long-term CVP contracts).

As we will discuss, the substance of the proposed contracts have numerous defects which run contrary to the public interest, including the goals and requirements of CALFED, the CVPIA, RRA, and the APA. There include defects in provisions relating to water quantity, pricing, right of renewal, administrative review, water conservation, endangered species compliance and public participation. In addition, the environmental compliance is inadequate. We attach herewith and incorporate by reference NRDC's prior comments on the EAs supporting these contracts, as well as the comments of the US Environmental Protection Agency. We also refer you to the 1989 findings and complete record of the President's Council on Environmental Quality, which advised former President Bush that the renewal of long term CVP contracts requires a full environmental impact statement (EIS) in order to comply with NEPA. See 54 Fed. Reg. 28477 (July 6, 1989). The reliance on inadequate EAs for these new long term renewal contracts in the face of the EPA and CEQ findings that full EISs are required further undermines the Administration's proposal to execute these flawed contracts.

Quantity and Price

While there are numerous defects flowing through these lengthy contracts, at the onset we wish to focus on two of the most central flaws, i.e. the failure to implement meaningful reforms in the quantity and pricing terms of the new contracts. With regard to water quantities, we believe it was widely assumed by government officials, water users, the conservation community, elected officials, and others that after the CVPIA was passed and a new round of long term CVP contracts were contemplated, the outdated and unrealistic quantity terms of the old 1940s and 1950s CVP contracts would be significantly reduced. Such a reduction is also clearly required by the reasonable and beneficial use requirements of federal and state law. Therefore, the decision by the Bureau of Reclamation to roll over all previous maximum water quantity terms, regardless of the Bureau's ability to provide such water quantities, is a fundamental policy mistake and an illegal agency action.

The decisions of the federal courts since the enactment of the CVPIA make clear that the Bureau can and should reduce prior water quantities when renewing water contracts. See, for example, NRDC v. Patterson, Order of January 16, 1997 at 27, in which Judge Karlton invalidated the previous CVP renewal contracts citing O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995): "O'Neill held that the CVPIA, by modifying priority of water users, can change contractual obligations under pre-existing long-term water delivery contracts. 50 F.3d at 686." The court further held: "The ESA clearly commands the Bureau to use its discretion to insure that the contracts would be renewed in such a manner as to protect endangered species." Order of January 16, 1997 at 27 (citations omitted). Judge Karlton's ruling was affirmed by a unanimous panel of the US Court of Appeals in NRDC v. Houston, which upheld the Court's voiding of the 14 contracts. Yet

the new contracts allow for all water diverted at Friant Dam to be used for irrigation with none released for the environment; they make no other reallocations of water for protection of endangered species or other environmental purposes; they fail to change CVP dam operations to meet state law requirements, such as Fish and Game Code §5937; they include various directives to Bureau officials to maximize water diversions to meet contractor demands; and they generally fail to ensure that the environmental goals of CVPIA and ESA will be carried out. In fact, it is our understanding that despite the courts' invalidation of previous CVP contracts for lack of ESA consultation and the conduct of new contract negotiations over the past year, the National Marine Fisheries Service and the Bureau did not commence formal consultation on these new long term renewal contracts until this month, even though final decisions on the contracts are expected imminently.

The defects in the quantity terms are part of a larger problem in that the contracts fail to make adequate provision for environmental protection generally. For example, nothing in the contracts for the Friant Division provides for restoration of the San Joaquin River or for compliance with the statutory requirement, under section 5937 of the California Fish and Game Code, that fish be maintained in good condition below Friant Dam. Given the demonstrable harm the CVP has caused to the San Joaquin River and the Bureau's failure to date to correct that harm, the notion of executing new 25 year contracts that make no mention of restoring the River is inappropriate and contrary to the purposes of CVPIA and other environmental laws. Similarly, the Friant contracts fail to make clear that the terms of the contracts are subject to the pending court case that invalidated the prior Friant contracts and will govern future operations of the Friant Division as it affects the River. Similar problems exist with the other proposed contracts, which fail to ensure that existing standards under the ESA, CVPIA, Clean Water Act, state water law, and the CALFED process will be met and implemented as part of the new contract commitments. For example, the contracts for Delta-Mendota Canal contractors and other Delta export contractors fail to provide in any specific way for protection and restoration of the Sacramento-San Joaquin Delta. Indeed, the Bureau has not shown that it has considered the potential impacts of the proposed Delta export contracts on protection and restoration of the environment generally and of the Delta specifically. The Bureau's failure to provide for adequate environmental protection in the contracts, or even to adequately consider and evaluate the environmental effects of the proposed contracts, means that the Bureau cannot legally execute the proposed contracts.

The failure to address these environmental requirements in renegotiating CVP water quantities is underscored by the Bureau's failure to change the quantity terms to meet the requirements of the reasonable and beneficial use requirements of state and federal law. The courts have made clear that the definition of what is reasonable and beneficial must change over time to meet evolving and competing needs. A mechanical roll over of all pre-existing quantity totals from 40 or more years ago hardly meets this requirement.

Cursory reviews of water districts' asserted "water needs" also do not meet the test of reasonable and beneficial use under federal reclamation law or state water law, and cannot justify renewing the old totals as the new contract totals in all new CVP contracts. The Bureau has failed to demonstrate that an adequate review of reasonable and beneficial use has been conducted and accordingly, its decision to commit the identical quantity total for virtually all contractors for another 25 years is arbitrary, capricious and contrary to decades of federal reclamation law.

Similarly, the Bureau's decision to set water prices at the lowest possible level and to perpetuate federal taxpayer subsidies for the maximum possible time flies in the face of federal reclamation law and applicable court decisions. As we discuss below, the Bureau has failed to demonstrate that the repayment requirements of federal reclamation law will be met in light of the inflated contract totals. In addition, the Bureau has failed to set prices as required under reclamation law so as to ensure increased water conservation, as provided by the RRA.

Federal reclamation law establishes certain parameters within which the Secretary must set water rates.[1] However, the Secretary is not required to minimize contractor expenses when setting maximum O&M charges; in determining what types of charges to include within O&M costs; in setting rates to recover capital costs; or in allocating project costs between reimbursable and non-reimbursable purposes. The Secretary must establish the rates to ensure prompt and adequate repayment, full cost recovery and encouragement of additional conservation. The Secretary has failed to do this in these contracts, has referenced the current ratesetting document in the contracts in an apparent effort to prevent future administrations from setting adequate rates, and in any event has failed to

[1] Section 9(e) of the Reclamation Project Act of 1939 requires that the Secretary charge Central Valley Project irrigation water contractors a rate that "in the Secretary's Judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost.. . " of the project. 43 U.S.C. § 495h(e) (emphasis added).` Section 9(e) thus requires a minimum O&M charge -- it must be adequate to cover a district's "appropriate share" of the project's O&M costs. Moreover, in the Reclamation Reform Act of 1982 (the "RRA"), Congress declared that the price of irrigation water "shall be at least sufficient to recover all operation and maintenance charges which the district is obligated to pay to the United States." 43 U.S.C. § 390hh(a) (emphasis added). The RRA also requires the Bureau annually to "modify the price of irrigation water . . . as necessary to reflect any changes in such costs by amending the district's contract accordingly." Id. § 390hh(b). In 1986, Congress enacted § 106 of Public Law 99-546. Section 106 requires that every new or amended CVP contract include provisions to ensure that the contractor repays any deficit in its O&M charges, plus interest on any unpaid O&M charges from October 1, 1985 onward. The Bureau has failed to demonstrate compliance with these requirements.

demonstrate that the rates that will be charged under the new contracts will be sufficient to meet the legal obligations under reclamation law, including the 1986 Act and the 1982 Act.

The plain language of Section 9(e) of the 1939 Act gives the Secretary authority to set higher O&M charges than currently employed in the contracts and under the ratesetting policy. The Ninth Circuit has recently confirmed this interpretation of Section 9(e): The statute sets a standard for minimum charges by requiring that the charges produce sufficient revenues to cover project operation and maintenance costs but not a maximum. Flint v. U.S., 906 F.2d 471, 475-76 (9th Cir. 1990).[2]
Furthermore, Section 210 of the Reclamation Reform Act requires the Secretary to use his authority, including his pricing authority in water contracts, to "encourage full consideration and incorporation of prudent and responsible water conservation measures" that "are shown to be economically feasible." 43 U.S.C. § 390jj(a). Read together, the case law and RRA Section 210 clearly direct the Secretary to include charges and raise rates as needed to encourage conservation. They also make clear that O&M rates should include, for example, charges necessary to ensure the project is operated effectively and efficiently (this could include such charges as needed to cover the cost of a revolving fund providing loans to farmers to acquire conservation equipment or to hire water conservation advisers). Despite the plain language of Section 9(e), section 210, and the Ninth Circuit's decision in Flint, the Bureau has failed to set O&M rates high enough to

[2] In Flint, the plaintiffs argued unsuccessfully that the Bureau was charging too much for the use of artificially stored groundwater in Section 9(e) contracts. Indeed, the Department of Interior itself has, on prior occasions, recognized that reclamation law sets no upper limit to the Secretary's ability to set O&M rates. For example, a 1974 Memorandum from an Assistant Solicitor to the Commissioner of Reclamation relied on the language of Section 9(c)(2) to support the conclusion that the Secretary was not limited in the rates to be charged for water for industrial use: In order to promote more efficient use of water for industrial purposes, the Secretary has authority to fix water rates for municipal and industrial uses of water at amounts greater than necessary to return construction costs plus interest and annual operation, maintenance and replacement costs because section 9(c)(2) of the Reclamation Project Act of 1939 authorizes the Secretary to determine such chargeable construction costs as he deems proper and provides for the setting of 'such rates as in the Secretary's judgment will produce revenues at least sufficient to cover' operation and maintenance costs. Memorandum of Assistant Solicitor London to Commissioner of Reclamation, September 27, 1974, paraphrased in Federal Reclamation and Related Laws Annotated, Supplement I, at 5133 1988) (emphasis in the original). The Solicitor's office thus recognized that Section 9(c)(2), identical in relevant part to Section 9(e), gives the Secretary the authority to set O&M rates that encourage more efficient use of water.

include the appropriate range of operating costs and to ensure increased conservation efforts as required by the RRA.[3]

Reclamation law requires the Bureau to recover all applicable capital or "fixed" costs. The CVP repayment deadline in federal reclamation law, including the 1986 COA legislation, means that the capital repayment components of the new 25 year contracts are required to ensure complete repayment of the project's massive unpaid debt. These contracts fail to meet this requirement. In the past, one device the Bureau has used to reduce water prices at the expense of capital repayment has been to estimate capital repayment components based on inflated delivery forecasts that are keyed to contract totals. The Bureau's decision to abandon its original position on the new renewal contracts and return the "contract totals" to the old 1940s and 1950s inflated maximums, invites a return of this illegal practice. The Bureau has failed to demonstrate that annual repayment by contractors will be sufficiently tied to actual deliveries to ensure adequate project repayment by the statutory deadlines, in violation of the APA and federal reclamation law.

The Bureau's flawed approach to pricing in the proposed contracts is exacerbated by the Bureau's last minute reversal on CVPIA tiered pricing and its capitulation to the demands of CVP contractors that they be shielded from any serious tiered pricing. Originally the Bureau declared that it would divide water quantities between reliable supplies and other, rarely available supplemental supplies, but that the tiered pricing of CVPIA would be applied to the total amount of reliable supply. After political pressure from industry lobbyists, and without any opportunity for public review and comment, this sound policy was abandoned and reversed, to the detriment of the taxpayers and the environment. Now, the Bureau's proposed contracts apply tiered pricing to an imaginary supply, a "contract total" based on a California of the 1940s and 1950s with a fraction of its current population and none of its endangered species obligations and other environmental requirements. As a result, tiered pricing will rarely if ever take effect for numerous water users, contrary to the intent and requirements of the CVPIA.

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[3] Based upon the reasoning of the United States Supreme Court, the Secretary clearly has the authority to include within the O&M rate charges such as incentives for conservation measures, environmental mitigation costs, and conservation investments. See Nampa & Meridian Irrigation Dist. v. Bond, 268 U.S. 50 (1925); see also U.S. v. Fort Belknap Irrigation Dist., 197 F. Supp. 812 (D. Mont. 1961) (citing Nampa as the controlling case on what constitutes operation and maintenance costs)." Under Nampa, the Secretary has authority to include in O&M rates a charge for overcoming "injurious consequences" of the CVP, such as, inter alia, the costs necessary to remedy the project's detrimental impacts on the environment. Nowhere has the Bureau demonstrated adequate basis for excluding these important costs within its new contract rates.

The only attempt by Interior to justify this sudden reversal in CVPIA implementation is reference to a short memo by the Congressional Research Service dated November 14, 2000. However, this memo is essentially irrelevant because it compares the application of tiered pricing to contract amounts vs. the delivered amount, rather than between two potential contract amounts as envisioned by Interior, i.e. a reliable supply vs. a maximum supplemental supply that is only available in the rarest of years.

In implementing a complex statute like the CVPIA, the courts have made clear that an agency must carry out the intent of the law. The intent of the tiered pricing section of CVPIA was to *apply different prices to water actually delivered.* This intent is clear because tiered pricing was intended to have an actual impact on water use (i.e. encourage conservation and/or transfers) and to provide a source of revenue to the CVPIA restoration fund. The CRS memo simply ignores the overriding purposes of the statute.

Even to the extent the Bureau believes it has discretion in carrying out this provision, under section 210 of the 1982 RRA, that discretion must be exercised to promote maximum efficiency in water use, which includes applying pricing tiers to reliable water supplies. The CRS memo fails to address this issue of the RRA's mandate, and instead creates the impression that Interior did not have the authority to apply tiered pricing to reliable water supplies as opposed to imaginary water supplies. When one considers the RRA and CVPIA together, along with applicable case law, it is clear that the CRS analysis does nothing to undermine Interior's original position on applying tiered pricing to reliable base supplies, and if anything, provides further argument that the quantity terms in the contracts must be reduced to meet the intent of CVPIA.

Additional Specific Comments on all the proposed contracts (based on the proposed long term renewal contract between the US and Arvin-Edison Water Storage District as sample contract, except as otherwise specified):

Seventh Recital: The finding that the US has completed "the PEIS and all other appropriate environmental review necessary" to long term contract renewal is unsupported by the record. First, the ESA, the CVPIA, implementing regulations, and applicable court decisions require formal consultation and preparation of adequate biological assessments and biological opinions on CVP renewal contracts and those have not been completed by the relevant agencies. Moreover, even if the environmental documentation can be hastily completed before execution of the proposed contracts, the Bureau's failure to consider the environmental analysis in the course of formulating the contracts constitutes a violation of law.

Second, adequate documentation under CEQA has not been prepared and distributed as required. Third, the PEIS still has not yet been finalized and in any event does not address the full term, scope or impacts of the proposed renewal contracts and is otherwise

insufficient to support the proposed long term renewal contracts. Finally, the draft EAs circulated in support of the proposed renewal contracts violate NEPA and its implementing regulations and are inadequate to support long term contract renewals, as previously found by the CEQ and EPA.

Ninth Recital: The finding that all contractors have fulfilled all of their obligations under the existing contracts appears to be unsupported by the record. There are dozens of contractor obligations in each of the existing Interim Renewal Contracts and the Bureau has failed to demonstrate that each such obligation has been complied with. Among other things, the requirements of complying with applicable biological opinions, implementing effective water conservation plans, and obeying applicable environmental laws have produced different actions by different agencies and cannot support a sweeping generic finding of compliance. At a minimum, a finding is needed by the Bureau supported by a written record that allows the affected public an opportunity to review and comment on this proposed finding. The Bureau has not made the case that all of the dozens of contractors seeking renewal of their contracts are in full compliance.

Tenth Recital: The Bureau proposes to make a finding as to all contractors and as to all pre-existing water quantity terms that every drop of water has been or will be put to reasonable and beneficial use, legal terms with specific meaning under federal reclamation law and state water law. As we have said previously, the record is inadequate to support such a finding and in fact it appears the Bureau has failed to apply the correct standard of reasonable and beneficial use, having granted water quantity amounts to contractors far exceeding what can be reliably provided without harm to the environment, yet making no reduction in the contracts to meet such environmental priorities.

Article 1(b): the definition of "charges" implies that the contract allows only for minimal payments required by Federal Reclamation law without any consideration by the Bureau of increasing charges for water to meet environmental or water conservation requirements. While we believe the requirements of Federal Reclamation law include altering prices sufficient to ensure adequate conservation of water, reduction of agricultural drainage, prompt repayment of capital, and vigorous protection of the environment, the Bureau's present interpretations exclude most such bases for price changes and therefore this definition potentially excludes important grounds for future changes in water prices. At a minimum, the Bureau has failed to demonstrate that such environmental requirements and conservation purposes will be met by the pricing regime of the new contracts, while apparently locking in inadequate pricing through its other contract provisions.

Article 1(e): As we stated above, the definition of "contract total" was changed late in the negotiation process to undermine the implementation of the CVPIA's tiered pricing

provisions as originally envisioned by Bureau negotiators. Under the new proposed definition, even speculative quantity amounts that may never be delivered or can only be delivered in the rarest of years, qualify as part of the "contract" amount and therefore dilute the impact of tiered pricing into a meaningless gesture that rarely applies to actual deliveries for many contractors. By including all supplemental and Class II water quantities in the "contract total" as used in the tiered pricing provisions, the contract underscores the inappropriateness of the quantity terms and the inadequacy of the tiered pricing provisions. The Bureau's handling of these interconnected provisions are arbitrary, capricious and contrary to law.

Article 2: The contract attempts to repeal one of the central reforms in the CVPIA by requiring today, in 2001, that the US government in 2025 must renew this contract, for another 25 years, subject to a few inadequate conditions. This mandatory renewal is bizarre and misguided federal policy, contrary to the spirit and intent of the CVPIA, and inconsistent with other sections of the contract. Its inclusion also renders inadequate the NEPA documentation for these contracts, including the PEIS under CVPIA, and would severely weaken the negotiating ability of future administrations seeking to ensure sound use of California's water resources. Finally, the attempt to carve out additional guarantees for M&I contractors, including potential 40 year contracts and ongoing renewal rights for eternity, is also unwise and illegal, including the idea that a mixed contract that includes irrigation water can somehow defy the 25 year limit on renewal contracts. The provision allowing conversion to section 9(d) contracts has far reaching potential environmental effects that have not been adequately analyzed. Moreover, when combined with the attempted renewal rights discussed above, it appears that this section 9(d) conversion section is inconsistent with the mandatory repayment deadlines in the 1986 COA legislation and other reclamation law.

Even if it were legal and proper for the Bureau to award a right of renewal in the proposed contracts, we strongly object to the Bureau's failure to condition the renewal right on the achievement of the crucial environmental-protection challenges facing the CVP. Assuming arguendo that a contractual right of renewal is legal and proper, any such right for Friant Division contractors should be conditioned upon restoration of the San Joaquin River during the term of the proposed contracts. Similarly, any right of renewal for Delta export contractors and other CVP contractors should be conditioned on adequate restoration of the Sacramento-San Joaquin Delta during the next 25 years.

Article 3(f): This subsection of the water quantity section allows for even more water to be provided to CVP contractors beyond the inflated maximums of the base, supplemental, class I and II, and other supply categories. The existence of this section underscores the fact that contractors have the opportunity and ability to get additional water beyond their reliable contract base supplies without having the "contract total" specify a higher inflated amount and creating some sort of government obligation to provide such inflated

amounts. Moreover, the only meaningful restraint in the contract on providing these additional supplies are potential effects to other contractors, reinforcing the contract's failure to fully protect environmental interests and needs in allocating the CVP's water supplies.

Article 3(j): The requirement that the Bureau must take steps to protect CVP water rights, although modified by the requirement of reasonableness, nevertheless invites potential for disputes about whether the Bureau is promising by contract to have the Justice Department resist or contest environmental claims to provide necessary flows for the protection of fish and wildlife, regardless of the government's own analysis of the validity of those environmental claims. This should be clarified as not requiring in any way government interference with the proper protection of fish and wildlife and other public trust values.

Article 7: In the past there has been some difficulty in implementing environmental restoration measures involving water exchanges where the Bureau collects pre-payment for water even though that water is actually redirected to the environment and replacement water is purchased for the original contractor. Ideally the money paid by the contractor in this instance should be available to offset the cost of the replacement water, provided the Bureau's capital, O&M, and other costs are properly covered. We urge the Bureau to make sure that creative measures to help the environment such as voluntary water exchanges can be facilitated within the new terms of the contracts.

Article 7(i) and (j): Subsection (i) provides an open-ended opportunity for the Bureau and the contractors to modify any provision relating to pricing without contract amendment or presumably any other public review. The interests of the public must be protected in any change to CVPIA implementation or contract administration and the Bureau should specify how those public concerns will be addressed. Subsection (j) seems to invite transfers for the purpose of evading tiered pricing, without the Bureau reserving the right to impose tiered pricing if the purpose of the transfer appears to be to get around the higher prices. In addition, the blatant loophole for "uncontrolled seasons" makes a mockery of applying tiered pricing to Class 2 supplies and must be eliminated.

Article 7(k): As we stated above, the Bureau's approach to O&M pricing in this section and its reliance on existing ratesetting documents undermines the purposes of the RRA to encourage greater conservation. The section also grants greater rights of review to contractors than to the affected public of prospective changes, a defect that should be corrected either in the contract or by accompanying documentation and assurances.

Article 8: The Bureau has failed to demonstrate that non-interest bearing O&M deficits are in fact being repaid in a timely manner, and the contract appears to ratify any and all arrangements the contractors may have made without public input or review.

Article 14(b): The Friant contracts reference the pending NRDC litigation that governs this contracting process, but the reference is incomplete and inadequate. The Article should provide at a minimum that "The terms of this Contract are subject to NRDC v. Houston (Snow), No. CIV-S 88-1658-LKK-EM, and any orders therein." Further modification to that provision may be proposed in the future by the parties to that action to ensure that it conforms to the intent of the parties.

Article 18(b): This sweeping and ambiguous provision appears to be an attempt to grant contract-based rights to irrigation customers that trump the procedures of a wide array of other federal laws, such as the ESA and the Clean Water Act, without any detailed assessment of the potential impact of the provision on the environment and the public. The requirement that Bureau legal determinations to protect the public welfare and the environment can only be made if consistent with this contract and after consultation with the contractors turns the law on its head.

We appreciate your consideration of these comments. We urge the Administration to withdraw these flawed proposed contracts and draft environmental documents, to complete proper EISs and ESA consultations, and to reinitiate negotiations on new contracts that comply with law.

Sincerely,

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Senior Attorney

cc: George Frampton, CEQ
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7

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

Via Federal Express

January 21, 2005

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RE: NRDC – TBI Comments on Draft EIS for San Luis Unit Renewal Contracts

Dear Mr. Thompson:

These are comments of the Natural Resources Defense Council (NRDC) and The Bay Institute (TBI) on the Draft Environmental Impact Statement (DEIS) for the proposed long-term Central Valley Project (CVP) water service renewal contracts between the Bureau and the San Luis Unit Contractors (contractors), as noticed by the U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA on December 9, 2004.

There are numerous fundamental errors in the Bureau's approach to these contract renewals and this NEPA process, many of which we have pointed out to you and your Bureau colleagues before. For example, the entire project is based on a flawed OCAP planning process, which includes numerous defects in its compliance with NEPA, CEQA, ESA and CESA. Indeed, the necessary ESA consultations for the San Luis Unit, its interrelated drainage program and these proposed renewal contracts, have not been completed and your attempt to complete your NEPA review and contract review before the basic ESA information is available undermines the public's ability to fully evaluate the impacts of these new contracts. Also, the draft evaluations of water supply, groundwater resources, and reasonable alternatives in this DEIS are all based on flimsy water needs analyses that include groundless findings such as the statement in the Westlands "needs analysis" that the irrigated acreage will dramatically increase over the next 25 years. This assumption directly conflicts with other statements in this DEIS indicating that the Bureau is actively considering a long term drainage plan that could include retirement of up to 200,000 irrigated acres within Westlands.

The Bureau is also attempting to manage its delta exports to DMC, San Luis and Cross Valley Canal contractors in an integrated fashion (in coordination with the State Water Project and their joint Operating Plan (OCAP)), yet it has segmented its analysis of these proposed export programs, and their related environmental impacts (including drainage), into 5 separate NEPA documents. Most baffling of all, the Bureau is engaged in a major reconsideration of its long term alternatives for managing the

enormous drainage problem in the San Luis Unit, including various land retirement alternatives as mentioned above, yet the Bureau has not completed that analysis or decision-making process and is proceeding with the present long term contracting process as if that drainage evaluation will have no effects regardless of the alternative chosen.

In short, the Bureau is acting in an arbitrary and capricious manner that is contrary to law. The draft EIS and the proposed contracts based thereon should be withdrawn and revised to conform to legal requirements. We have numerous specific concerns with the adequacy of the analysis and approach provided in the DEIS, and the proposed contracts it is evaluating, but most of these concerns have already been set out in detail in a series of letters by NRDC and others with regard to prior Interior documents related to CVP contracting and OCAP. Accordingly, rather than repeat those comments here, we attach and incorporate herein by this reference, our three recent letters to you concerning the similarly defective draft NEPA documents for the Delta Mendota Canal Unit Renewal Contracts (letters dated December 14, 16 and 17, 2004), and incorporate by reference each item that was also incorporated by reference in those letters as if fully set out herein. For your convenience, we will re-attach some of the documents cited in those materials, but since those letters were all submitted to you previously and you and your staff already have the complete set of materials in your files we will not burden you with another full set of the complete list of documents. If you have any difficulty locating any document cited in the attached materials, please contact me at (415) 875-6100 or at HCandee@nrdc.org and we will provide you with another copy.

For all of the reasons set out or referenced in these comments and in the materials attached herewith, the DEIS is legally inadequate and must be withdrawn. Thank you for considering our comments.

Sincerely,

Hamilton Candee
Senior Attorney

Enclosures
Cc: Gary Bobker, The Bay Institute

8

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

Via Federal Express
August 4, 2005

Mr. Richard Stevenson
U.S. Bureau of Reclamation
2800 Cottage Way
MP-440
Sacramento, CA 95825

Re: Comments on Proposed CVP Long-Term Water Service Renewal Contract for Westlands Water District

Dear Mr. Stevenson:

These are the comments of the Natural Resources Defense Council ("NRDC") and The Bay Institute ("TBI") regarding the proposed Central Valley Project ("CVP") long-term water service renewal contract for Westlands Water District ("Westlands"), as invited by your notice of June 16, 2005.

We have previously expressed our concerns about numerous provisions of this and similar long term CVP contracts, as have other members of the public including the Hoopa Valley Tribe, Taxpayers for Common Sense, Rep. George Miller and other Members of Congress. Rather than repeat all of those previous concerns here, we refer you to these earlier comments (including our related comments on the draft NEPA documents accompanying the proposed contracts) for additional review and consideration in the context of this new renewal contract, and we attach several of them for your convenience. Below we wish to highlight some of our specific concerns:

1. The proposed contract should be withdrawn, renegotiated and re-released for public comment after the completion of an adequate environmental review process. The Bureau is proceeding with its proposed renewal contracts without having completed all necessary environmental reviews, including an adequate NEPA analysis, an adequate ESA/NEPA/CEQA review of OCAP, and a proper ESA consultation on this and other San Luis Unit contracts. This is resulting in poor policy decisions on behalf of the United States and arbitrary or unauthorized procedures that will render the ultimate contracts legally suspect. Previously we submitted detailed comments, including extensive attachments, to the Bureau offices that are considering the other proposed CVP renewal contracts as part of the NEPA review process. See, e.g., our letters of December 14, 16 and 17, 2004 to Mr. Joe Thompson, US Bureau of Reclamation. We urge you to consider those comments, and all attachments thereto, before proceeding further with the proposed Westlands contract and we incorporate those comments, and

all other NRDC and TBI comments on CVP renewal contracts and associated NEPA documents, herein by this reference.

For example, in our NEPA comments we noted that the Bureau has failed to consider a reasonable range of alternative terms for the proposed contracts, including critical terms affecting water quantity and price. Until such an appropriate range of alternatives is adequately analyzed and considered by the Bureau pursuant to NEPA and its implementing regulations, it is inappropriate for any Bureau decision-makers to reach a final decision on the terms of the proposed contract. Similarly, until the Bureau, the US Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) reopen and revise their Endangered Species Act (ESA) consultations on the impacts of OCAP and the impacts of these actual contracts on listed species and critical habitat (to address numerous deficiencies and omissions), it is irrational and inappropriate for the Bureau to finalize its decision-making process on these contracts. There is ample factual and legal basis for reinitiating the ESA consultations relevant to this contract, including but not limited to the attached materials on the decline of Delta smelt populations, the attached materials on the Inspector General's investigation of the NMFS OCAP opinion, and the attached new Order of the US District Court in NRDC v. Rodgers finding a violation of ESA in the Bureau's consultation on previous CVP renewal contracts in the Friant Unit. This material also further demonstrates the inadequacy of the Bureau's NEPA review of this proposed contract and the need to withdraw this proposed contract until new environmental reviews are completed.

NRDC and TBI have submitted comments to NMFS and FWS on their specific OCAP consultations, which we attach and incorporate by this reference. Among other things, the comments point out that the Bureau has ignored potential changes in water supply due to climate change, and has potentially underestimated its future deliveries for ESA purposes and/or potentially exaggerated its future water deliveries when calculating its capital repayment rates. Until these and other defects addressed in our comments are resolved in reopened consultations and revised biological opinions, it is premature for the Bureau to be locking in specific water quantities for any new contracts, especially the largest contract of all for Westlands.

Also, given the enormous potential effect of the unresolved San Joaquin Valley drainage problem on the proposed San Luis Unit contracts, the Bureau should defer any further action on these long term water commitments until the Bureau makes its decision on its new proposed drainage plan and makes a final selection from among its drainage alternatives. As of this date, the Bureau and the public do not know whether the government will select a drainage solution for the San Luis service area that dramatically reduces the size of Westlands Water District (or its irrigated acreage) or attempts to maintain it with only modest reductions in irrigated acreage. See, e.g., the 2005 draft EIS and the July 2004 Scoping Report on the San Luis Drainage Feature Re-

evaluation. Yet the Bureau has already released an EIS on this proposed 25-year water contract and proposed final contract terms allowing maximum water deliveries into this service area as if some of the drainage alternatives were foreclosed. The Bureau has also separated out its DMC and San Luis NEPA analyses in such a way that prevents proper analysis of the interrelated export contracts, drainage problems and adjoining service areas, including the cumulative effects of the proposed contracts.

In order to ensure thoughtful public policy and increased public confidence in these new significant 25 year contract commitments, the Bureau should first complete adequate ESA consultations on OCAP and on the specific contracts, especially the Westlands contract, conduct a proper EIS on the San Luis renewal contracts that examines all of the environmental impacts and a full range of alternatives (including alternatives that will properly avoid and mitigate impacts), and then renegotiate all the contracts based on this more complete environmental information. Otherwise, it is hard for the public to escape the conclusion that the Bureau is seeking to force its NEPA and ESA reviews to rationalize decisions already made about the terms of the contracts.

2. The Bureau has failed to address concerns raised, and previous comments submitted, by various members of the public on the terms of these contracts.
Considering the many years the Bureau has been working on renewal contracts, and the sweeping reforms and new directives enacted by Congress in the 1992 Central Valley Project Improvement Act (CVPIA), the lack of meaningful improvement in the new proposed contracts as compared to Bureau drafts of 4, 8 and 12 years ago, and even the original contracts of 40 years ago, is staggering. The Bureau's complete disregard for the thoughtful and bi-partisan concerns raised about these major federal water contracts is creating problems for the Bureau, the California environment, the CALFED Bay-Delta process, and the federal taxpayers. As just a sample of some of the many comments and critiques that have been provided yet ignored, we attach a letter from the National Taxpayers' Union, an Op-Ed column from economist Thomas Sowell in the Washington Times, an Op-Ed column from Rep. George Miller (co-author of CVPIA) in the SF Chronicle, and a letter from NRDC from January 9, 2001. We also refer you to the extensive report from the GAO on CVP Contract Renewals from 1991, and the related testimony of the GAO to Congress, that were previously provided to you with our comments on the Sacramento River Division contracts. We request that the Bureau address each of these critiques before reaching a final decision on the terms and execution of this proposed Westlands contract.

Whereas Congress in CVPIA envisioned new long term contracts that would be vehicles of reform, the actual proposed CVP contracts, including the Westlands contract, are simply a return to the Bureau's ancient past, flatly ignoring the many comments and concerns referenced above and the voluminous record of objections and

environmental impacts outlined to the Bureau during this contracting process. Many of these issues NRDC has already addressed in detail in our earlier comments on contracts from January 9, 2001 through 2005 and, rather than repeating those issues here, we simply incorporate those prior NRDC and TBI comments by this reference.

3. The Bureau has failed to make any attempt to use its authority and discretion over water prices in CVP contracts to encourage greater water conservation and efficiency by CVP contractors, contrary to the dictates of the RRA and the goals of Water 2025. The issue of water pricing and conservation incentives was addressed by the administration of President George H.W. Bush during the first round of CVP renewal contracts in the 1980's. Specifically, officials at EPA urged Interior to use its authority – including under Section 210 of the Reclamation Reform Act of 1982 -- to adjust prices to encourage sensible conservation. See 43 U.S.C. 390jj(a) ("The Secretary shall...encourage the full consideration and incorporation of prudent and responsible water conservation measures in the operations of non-Federal recipients of irrigation water from Federal reclamation projects....")

For example, EPA's Regional Administrator testified: "Because water pricing affects water demand and water conservation, the EIS's [on the contracts] should discuss the effects of alternative pricing." (Testimony of Daniel W. McGovern to President's Council on Environmental Quality, April 17, 1989, at page 9.) Similarly, the Acting General Counsel of EPA observed that "price subsidies also result in inefficient allocation and use of irrigation water," citing a study by the Congressional Budget Office. See: Letter of Gerald H. Yamada to George Van Cleve, US Department of Justice, October 30, 1989, supporting EPA's call for a full EIS on new CVP renewal contracts. EPA urged Interior to evaluate how pricing changes could encourage conservation before approving final terms in the new contracts. (Each of these materials was previously provided to the Bureau with our comments on the proposed CVP renewal contracts for the Sacramento River Division, and are incorporated herein by this reference.)

There is no question that federal taxpayers have heavily subsidized the costs of CVP irrigation water for over 50 years. The US Court of Appeals noted in 1990 that the Interior Department had calculated "the average present value of the irrigation subsidy for recipients of water from the Central Valley Project to be $1,850 per acre." *Peterson v. US Department of the Interior*, 899 F.2d 799, 805 (9th Cir. 1990). And critics on all sides have expressed concerns over the effect of this under-valuation of water in the arid west. See, for example, Thomas Sowell, "Subsidies Are All Wet," Washington Times, March 19, 2004 ("a shortage is a sign that somebody is keeping the price artificially lower than it would be if supply and demand were allowed to operate freely. That is precisely why there is a water shortage in the western states.")

More recently, the Department of the Interior itself has called for greater conservation and efficiency throughout the western states as part of a new overall strategy to avoid future conflicts over water and meet future competing needs. *Water 2025: Preventing Crises and Conflict in the West*, US Department of the Interior, May 2003. This goal has been endorsed by prior California governors, various state water plans, and the CALFED Program as well. Yet, once again, in 2004 and 2005, the Bureau has released dozens of new long-term contracts that include absurdly low water prices, guaranteed to encourage maximum diversions rather than maximum efficiency, and making no effort at all to encourage conservation through more progressive and appropriate pricing structures. The disproportionate distribution of these lavish subsidies to some of the richest farming corporations in the Valley has been extensively documented by the Environmental Working Group in a series of three reports, and we request that the Bureau read and consider the findings and recommendations of the EWG report before taking final action on these proposed contracts. See www.ewg.org. We have enclosed copies of some of these reports, all of which we incorporate herein by reference.

We urge the Bureau to immediately hold a series of public workshops or hearings on the subject of water pricing and water use efficiency, to disclose the Bureau's internal determinations about future repayment rates, current "ability to pay" determinations, and anticipated drainage costs *to be repaid under this contract*, and to re-write the pricing terms of all of the above contracts, including this Westlands contract, to carry out the goals and requirements of the RRA, CVPIA and CALFED program.

4. The Bureau has failed to reexamine and renegotiate water quantity terms as required by law. With regard to water quantity, we have already pointed out to the Bureau in previous comments on these contracts and on other Units of the CVP that the Bureau is failing to comply with the federal and state requirements to ensure reasonable and beneficial use of any CVP water under contract, as well as failing to consider a reasonable range of alternatives in its associated NEPA review. The Bureau has both the authority and a clear obligation to reduce the total water quantities in the proposed renewal contracts. The Bureau itself has long since concluded that it has this power, and properly so, *see NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998). In fact, in the Sacramento Valley, the Bureau has reduced the quantity term of more than one CVP renewal contract – yet in the drainage areas of the San Joaquin Valley, where the lack of reasonable use of water is most blatant, the Bureau is rolling over quantity terms as if it is 1960 again. As the Ninth Circuit has repeatedly held, these contracts are subject to federal and state environmental laws as well as federal reclamation law and state water law. Given the competing needs for water in this state in general and in the Delta in particular, the excessive current contract quantities in the CVP long term contracts may not be renewed. We attach and incorporate a number of materials addressing these points, including excerpts of NRDC's brief in the *Rodgers* litigation on the need to modify the contracts to ensure reasonable and beneficial use.

The Bureau's response to such concerns has been to make a cursory "needs assessment" and then roll over virtually all the existing quantity terms in CVP contracts. However, by limiting the inquiry to the *contractors'* needs, the Bureau ignores a separate but equally critical part of the reasonable and beneficial use inquiry: the needs of other water users and other water uses, including instream uses. As then-Circuit Judge Anthony Kennedy explained in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 853 (9th Cir. 1983), "the use cannot be 'unreasonable' considering alternative uses of the water." See also Cal. Water Code sections 1243; 1257. The Bureau's complete failure to make this critical determination, while simultaneously failing to meet the requirements of the CVPIA's fish doubling requirements and other environmental mandates, renders the Bureau's proposed decision as to the quantity terms of its proposed renewal contracts, including the Westlands contract, arbitrary and capricious and contrary to law.

For all of the above reasons and the reasons set out in the attached materials and the materials previously submitted by NRDC and TBI on the DEIS on San Luis Unit renewal contracts and proposed renewal contracts in other CVP units, we urge the Bureau to withdraw the proposed contract and renegotiate the terms after completing the analyses and environmental reviews discussed above. Thank you for considering these comments and all of the attachments included with this letter and references cited herein.

Sincerely,

Hamilton Candee
Senior Attorney

Enclosures
Cc: Gary Bobker, The Bay Institute

9

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

Via Federal Express

September 14, 2005

Richard Stevenson
U.S. Bureau of Reclamation
2800 Cottage Way, MP-440
Sacramento, CA 95825

Re: Additional Comments on Draft Renewal Contract for Westlands Water District

Dear Mr. Stevenson:

Pursuant to the Bureau's Notice dated August 5, 2005, we submit the following Additional Comments on the proposed Long-Term Water Service Contract for Westlands Water District. These comments supplement the earlier comments dated August 4, 2005 submitted by NRDC and The Bay Institute.

1. The final decision on the terms of the 25 year Westlands contract cannot be made in isolation of the final resolution of the San Luis Unit drainage problem. We attach and incorporate by reference NRDC's several recent comment letters on the Draft EIS on the Drainage Feature Evaluation, and request that your final Record on this draft Contract include the entire Record on that Draft EIS given the close connection and interdependent nature of the two federal decision-making processes. We also incorporate by reference Drainage Without a Drain, which provides an alternative to the options under review in the Drainage DEIS, along with the comments of EPA and USGS.

2. The Bureau should reconsider this draft contract, and reopen it for public comment, after the completion of the ESA consultation on this contract and on the San Luis Unit Drainage DEIS. The impacts are interconnected and until the Bureau has completed these ESA reviews, including the effect of expansion lands, transferred water, contract reassignments, etc, it is inappropriate to reach a final decision on terms for the contract. In addition, until the Bureau, FWS and NMFS correct the defects identified by the US District Court in the *NRDC v. Rodgers* order dated July 28, 2005 regarding ESA consultations on the Friant contracts, there is little point in finalizing another round of defective contract renewal ESA consultations.

3. The Bureau should reconsider this draft contract, and reopen it for public comment, after it completes the process of finalizing the M&I Water Shortage Policy. Few

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districts will be as affected by a new policy on ag vs. urban water shortages in the CVP than the vast Westlands district, yet the Bureau is proposing to push ahead to finalize this 25 year contract before issuing a final decision (and final environmental reviews) on the shortage policy. This will undermine informed Bureau decision-making and informed public review of the proposed contract terms.

4. In our last comment letter, dated August 4, 2005, we referred to a few documents that we were unable to attach at that time. We are attaching those missing documents to this letter for your convenience and incorporate each of them by reference.

Thank you for considering our comments.

Sincerely,

Hamilton Candee
Senior Attorney

Enclosures

10

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

VIA EMAIL AND FACSIMILE TRANSMISSION

April 17, 2006

Mr. Richard Stevenson
U.S. Bureau of Reclamation
2800 Cottage Way, MP-440
Sacramento CA 95825

RE: Final NRDC – TBI Comments on Long-Term Water Service Renewal Contract for Westlands Water District

Dear Mr. Stevenson:

These are comments of the Natural Resources Defense Council ("NRDC") and The Bay Institute ("TBI") on the Proposed Long-Term Renewal Contract between the United States Bureau of Reclamation ("Bureau") and Westlands Water District ("Westlands"), as invited by the Bureau's Notice of February 16, 2006. As you know, NRDC and TBI have submitted numerous earlier comment letters relevant to this proposed renewal contract, including but not limited to:

1. Our letters of August 4, 2005 and September 14, 2005 on an earlier version of this contract.
2. Our email message of September 15, 2005 providing Supplemental Comments on the contract and enclosing recent correspondence related to the Drainage EIS.
3. Our numerous letters and submittals relating to the NEPA reviews of this contract, other San Luis Unit contracts, and other Delta export contracts such as the DMC renewal contracts, as well as our numerous letters and submittals relating to the NEPA reviews of the Bureau's interrelated Drainage Feature Evaluation (drainage EIS).
4. Our comment letters on other CVP delta export contracts, including but not limited to the DMC and other San Luis Unit contracts.

We will not repeat those various points here but instead incorporate each of them by reference as if fully set out herein.

For all of the reasons set out in those prior comments, as well as the additional points provided below, we request that the Bureau withdraw the proposed Westlands renewal contract and the draft EIS on this contract, initiate a new final NEPA process that properly integrates the necessary NEPA analysis on the Drainage Feature Evaluation

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with the necessary NEPA analysis on the San Luis Unit renewal contracts, and after proper NEPA and ESA analyses are completed, issue a revised contract that modifies the terms to comply with the requirements of federal and state law.

Additional comments on the proposed Westlands contract:

1. It appears that the Bureau has significantly changed the proposed action from renewal of a 1.150 million acre foot contract to a new contract for 1.188 million acre feet. The difference of over 38,000 acre feet, which is more water than a number of CVP districts receive in an entire year, will have a significant environmental effect, exceeds any existing contract entitlement for Westlands, and has not received adequate public notice nor adequate environmental review under NEPA, ESA and other applicable laws.[1]
2. To the extent that the Bureau attempts to justify the additional 38,000 acre feet as a "contract assignment," it appears to be an attempt to evade numerous provisions of the CVPIA, the primary law that governs the CVP and these renewal contracts. Under that landmark 1992 law, the Bureau has certain options for allocating new CVP water to a district such as Westlands, primarily (a) issue a new water contract when the requirements of Section 3404 and 3406 are met; or (b) authorize a transfer of water from an existing CVP contractor to a different CVP contractor pursuant to Section 3405. Each of these sections has numerous important conditions and the apparent attempt by the Bureau and Westlands to move more water to Westlands without complying with any of these sections runs counter to the purposes and provisions of CVPIA. Yet the Bureau is under a clear mandate in Section 3404 to administer *all* CVP renewal contracts in conformance with the purposes and provisions of CVPIA, so the defects in this alternative approach are especially problematic. Moreover, the Bureau cannot demonstrate that it has made a serious "reasonable and beneficial use" analysis of Westlands water use and the Westlands contract and properly determined that additional CVP water service is appropriate for this drainage-plagued district of a few hundred farms. Indeed, as we have pointed out in our earlier comments and in our recent brief in *NRDC v. Rodgers* that has previously been submitted to you, the Bureau continues to ignore the clear

[1] The basis for this increase in the contract quantity term is not adequately accounted for. As the Bureau knows, a California appeals court recently affirmed the State Water Resources Control Board's decision in D-1641 to *not* include all of the lands within the Westlands service area within the authorized place of use for the Bureau's CVP permit. *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 820 (2006). The Bureau has failed to address why this affirmed limitation in the authorized place of use for CVP water in Westlands has not resulted in a *decrease* in the contract quantity term for Westlands, let alone adequately explained the need for an *increase*.

requirements of federal and state law in carrying out its beneficial use mandate, relying instead on a flimsy and incomplete "water needs analysis" that cannot lawfully authorize additional exports to Westlands.

3. The new provision in Article 3(a) purporting to defer to a later date determinations of the effect of land retirement is wholly inadequate to meet the Bureau's obligations under federal and state law. First, the provision purports to limit the Secretary's "reopener" authority to just Interior-sponsored land retirement and only in Westlands. Yet clearly there is other land retirement underway, both in Westlands and outside of Westlands, so this provision is on its face insufficient. Second, the Bureau is on the verge of announcing its long term drainage solution and is actively considering a land retirement program of over 290,000 acres, a program to be implemented during the course of this new renewal contract. It is arbitrary and capricious at best to lock in an inflated water quantity term this spring in a new 25 year contract while the same agency is simultaneously finalizing its own long term plan to potentially retire a massive amount of Westlands' irrigation land due to the clear drainage problems in the District. There are separate provisions of Reclamation law, Bureau regulations, and other federal laws dealing with land classification, water quality compliance and waste and unreasonable use that require the Bureau to evaluate the effect of drainage problems and potential drainage solutions before executing this contract, not after the fact.[2]
4. In addition to the harmful effect of applying CVP water to the impacted lands inside Westlands, there is the equally important effect of exporting this CVP water out of the ecologically sensitive San Francisco Bay-Delta estuary – an issue that the Bureau also fails to analyze adequately. The listed Delta smelt and other Delta fish species are experiencing unprecedented declines, a problem the Bureau claims to be concerned about, yet the Bureau is proposing to execute a 25 year contract for even more export water for its largest South of Delta contractor. Similarly, the Commerce Department's Inspector General and the CALFED Science Panel have each issued reports raising major concerns about the effects of ongoing CVP operations on various listed salmon species, concerns that have not yet been addressed by the CVP. This new contract is clearly the largest new CVP contract to be proposed since those damning reports were issued yet nowhere has the Bureau's NEPA analysis considered a

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[2] *See, e.g.,* Memorandum from Ass't Field Supervisor, USFWS, to Chief, Resources Mgt. Div., USBR Re: Request for Additional Information to Initiate Formal Section 7 ESA consultation on Execution of Long-Term Water Service Contract Renewals between the United States and Eight Water Service Constractors of the CVP's San Luis Unit (Nov. 22, 2004) (attached hereto); *see also* Declaration of Terry F. Young in Opposition to Motion for Preliminary Injunction (April 7, 1994), in *Westlands Water District v. United States*, No. CV-F-93-5327 OWW/SSH (attached hereto).

reduced contract alternative to address this massive environmental problem or even to evaluate the reasonableness of alternative proposed uses of this Delta water. This failure violates various provisions of federal and state law.[3]

5. The decision to maintain the inflated quantity term in the proposed Westlands contract is even more suspect given Interior's own admissions in its NEPA and ESA documents that only about 60% of that total can be provided by the CVP in an average year. Yet retaining this inflated quantity term clearly benefits the subsidized landowners and water users of Westlands in numerous ways, such as making it extremely unlikely that the tiered pricing provisions of CVPIA will ever take effect in Westlands (under the Bureau's skewed interpretation of those provisions), and encouraging landowners to claim hardship or worse when their full quantity doesn't show up (see, for example, *Orff v. United States* where landowners claimed that failure to receive full deliveries due to compliance with environmental laws was a "taking" and a "breach of contract", and *O'Neill v. United States,* 50 F.3d 677 (9th Cir. 1995), where Westlands made similar arguments).[4] Finally, the Bureau's past use of the full quantity terms to establish its future water rates has had the effect of lowering water prices to CVP water users, as if the existing subsidies being lavished on Westlands have not been enough. See www.ewg.org for a series of reports on taxpayer subsidies to Westlands and other CVP contractors.[5] For all of the reasons cited above and in our previous materials, the quantity term of the Westlands contract must be reduced and the NEPA documents must be revised to fully analyze a reduced quantity alternative.

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[3] *See, e.g., In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 34 Cal. Rptr. 3d 696 (2005).

[4] For another more recent example, in *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006), Westlands relied on its contract quantity term to challenge the Bureau's authority to add fish and wildlife enhancement as an authorized purpose of use under the Bureau's permits, arguing that such use would operate to the injury of the "legal user" of the water. By over-promising an exorbitant amount of water in its CVP contract, the Bureau merely perpetuates these types of arguments and unrealistic expectations.

[5] The US EPA sought to raise concerns about the pricing provisions of the new CVP renewal contracts in 2004, but was apparently silenced by top Interior officials. *See, e.g.,* Email from Diane Buzzard, on behalf of Jason Peltier, to "ClubFed Representatives" (11/16/2004), copy attached, expressing Mr. Peltier's request that EPA not finalize its draft letter until meeting with Interior and other federal agencies. We understand a final version of the letter was never issued. This very direct role of Mr. Peltier in supervising the contract renewal process is at odds with Interior's version of his role in a recent New York Times article. *See* New York Times, "For Thirsty Farmers, Old Friends at Interior Dept.", March 3, 2006 (copy attached).

6. In addition, for the reasons stated in our earlier comment letters, and the materials cited therein or attached thereto, the pricing terms, the future renewal provisions, and other key terms of the proposed contract must be reanalyzed under NEPA and substantially modified in a new proposed renewal contract.

Thank you for considering our comments. As we have previously indicated to Bureau staff, we believe the public comment period on this proposed contract and its associated NEPA materials should be immediately reopened until the Bureau issues the final EIS and a final ROD to address the long term drainage problem in Westlands and other San Luis Unit service areas.

Sincerely,

Hamilton Candee
Senior Attorney

Cc: Gary Bobker, The Bay Institute

Enc (by email only)

11

Taxpayers for Common Sense
National Taxpayers Union

May 3, 2004

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

Dear Secretary Norton:

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

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

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

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

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

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

Sincerely,

Jill Lancelot
President
Taxpayers for Common Sense

John Berthoud
President
National Taxpayers Union

12

Mr. Richard Stevenson
Bureau of Reclamation
2800 Cottage Way, MP-440
Sacramento CA 95825

August 5, 2005

Dear Mr. Stevenson,

Taxpayers for Common Sense, a national nonprofit budget watchdog, is writing to comment on the proposed Central Valley Project Long-Term Water Service Renewal Contract for Westlands Water District. Over the last five years, TCS has frequently expressed our concern over the way in which the Bureau of Reclamation is renewing Central Valley Project water service contracts. To date, the Bureau has renewed these contracts in a fiscally irresponsible way that ties the hands of both California and federal taxpayers for decades to come. It is clear that any attempt to reform the Bureau's water pricing policies must start with Westlands, which receives more than a quarter of Central Valley Project water.[i]

TCS opposes the proposed contract, which will only aggravate the gross mismanagement of federally subsidized water, discourage water conservation, and perpetuate the serious overallocation of California's limited water resources. As it stands, the terms of the contract render the reforms of the Central Valley Project Improvement Act of 1992 virtually meaningless. We strongly urge the Bureau to amend the contract to ensure that, at a minimum, the CVPIA is accurately and legally implemented.

Westlands Contract Perpetuates Wasteful Federal Subsidy
The Central Valley Project has cost federal taxpayers millions of dollars by selling water to farmers at artificially low prices. According to the Environmental Working Group, this subsidy is worth at least $416 million per year. Moreover, the vast majority of these subsidies are supporting large agri-businesses, not the small family farmers that the Bureau of Reclamation was originally charged with helping. Westlands is the top subsidy recipient in the Central Valley, receiving a subsidy of $23.9 million in 2002 alone.[ii]

The proposed Westlands contract sets irrigation water prices at $19.06 per acre-foot (AF) from the Delta-Mendota Canal and $31.63 per AF from the San Luis Canal (non-tiered rate). Comparing this to what residents of San Francisco ($560/acre foot) or Houston ($900 acre foot), or even other Californian agricultural users pay ($120/acre foot in the Central Coast), the low rates of Westlands Water District represent an unfair give-away

of federal water. Indeed, according to the contract, the "full-cost" rate is at least $43.32 per AF from the Delta-Mendota Canal and $55.20 from the San Luis Canal. The full-cost rate reflects operation and maintenance costs, capital costs, and some interest on capital costs. Thus the federal taxpayer is picking up the tab on the additional costs needed to finance the Central Valley Project.

Contract Fails to Allow Meaningful Review

Although the contract ostensibly only provides irrigation water for 25 years, as required by the Central Valley Project Improvement Act, it is effectively good for 50 years because of the provision in the contract that virtually guarantees that the irrigation water portion of the contract can be renewed for another 25 years (municipal and industrial users can renew their contract for an additional 40 years).

In recognition of the constantly evolving needs of California's diverse set of water users, it is unwise to simply guarantee contract renewal without clear accountability provisions on the part of the water contractor, a rigorous public review process, and thorough analysis of California's water needs in the future. This contract will prevent the Bureau from being able to adjust supplies to correspond to differing needs and priorities. In addition, this provision increases the burden on federal taxpayers. As the demand for water in California grows, the gap between market rates and the subsidized rate will continue to widen, increasing taxpayer costs. TCS urges that the contract be amended so that the Bureau must undertake the same contract renewal process that it is carrying now, including the public comment period, in 25 years, as required by the Central Valley Project Improvement Act.

Contract Avoids Pricing Reform

As discussed above, the Westlands Water District is receiving massive federal subsidies because of the failure to charge irrigators a rate that would allow them to repay their portion of CVP costs on time. By continually undervaluing and subsidizing irrigation water, the Bureau ensures its waste. In many instances, water contractors are paying bargain basement rates for federal water and then selling it at a premium to other water users. TCS generally supports water marketing. However, we cannot agree with allowing water contractors to profiteer with federal water supplies.

A step towards reforming this subsidization was taken in the Central Valley Project Improvement Act of 1992, which mandates tiered water pricing that starts when water consumption exceeds 80% of the annual contract maximum. However, the proposed contract circumvents even this relatively modest reform by renewing Westland's right to 1,150,000 acre-feet of water, the same amount as in its previous contract. (This amount may even increase to as much as 1,188,490 acre-feet before the contract is executed). According to the contract, in the last 5 years, Westlands received an average of 66% of its allotment. This means that, except in exceptionally wet years, farmers escape from the tiered pricing scheme of the Central Valley Project Improvement Act.

In addition to harming federal taxpayers, inflated promises of water and large subsidies will increase pressure for new dam projects. Such promises will continue a vicious cycle

of the federal government promising unreachable amounts of water at cheap prices to CVP contractors and then federal taxpayers being forced to fund massive new water projects to try to meet these demands.

Taxpayers for Common Sense advocates reducing the amount of water promised to Westlands in order to ensure that the CVPIA's tiered pricing scheme will be implemented. Moreover, irrigators must be charged for more than the "Cost of Service" rate if they are to repay their share of the CVP by 2030, as required by law. As of 2002, irrigators had paid off only 11% of the cost allocated to them.[iii] Charging higher rates to irrigators would ensure wise use of precious water resources in California, and allow the investment in the Central Valley Project to be paid back by the farmers who benefit from it, rather than federal taxpayers. Unless water subsidies are reduced, the antiquated water pricing policies that have encouraged sustained overconsumption and inefficiency since the late 1930s will continue at the expense of environmental and other beneficial water uses.

Contract Fails to Incorporate Land Retirement

Westlands is involved in negotiations with the Bureau of Reclamation that could involve retiring a large fraction (up to almost half) of Westlands farmland in order to solve the area's toxic drainage problem. The contract should stipulate that the amount of water promised in the Westlands contract will be reduced by an amount proportional to the acreage of land retired.

A terrible precedent was set in 2002 by the settlement of *Sumner Peck Ranch Inc. v. Bureau of Reclamation*, in which certain Westlands lands were retired but Westlands farmers were allowed to keep their entire allotment of CVP water. This deal, which comes at the expense of federal taxpayers, could only be described as allowing Westlands farmers to "have their cake and eat it too." If the Bureau continues to promise much more water than is actually required to irrigate Westlands, it will allow the District's evasion of the Central Valley Project Improvement Act's tiered pricing scheme to continue. Further, allowing Westlands to retain water rights on retired lands will only perpetuate current drainage problems in other areas and provide an opportunity for the District to sell its excess water at inflated prices to other users.

TCS believes the proposed contract does not represent the interests of federal taxpayers. Instead it provides extremely favorable conditions to water service contractors while failing to ensure essential taxpayer protections, as promised in the Central Valley Project Improvement Act of 1992. The contract should be amended to reflect realistic water delivery amounts at far less subsidized prices.

Sincerely,

Vice President of Programs
Taxpayers for Common Sense

651 Pennsylvania Ave, SE
Washington, DC 20003

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[i] Environmental Working Group, *California Water Subsidies*, 2004, available at http://www.ewg.org/reports/watersubsidies/, last visited on August 5, 2005.
[ii] Ibid.
[iii] Ibid.

California Sportfishing
Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

January 29, 2010

Rain Healer
South Central California Area Office
U.S. Bureau of Reclamation
1243 N St
Fresno, CA 93721

Subject: Comments on Draft EA/FONSI on San Luis Interim Contract Renewal

Dear Ms. Healer:

The California Water Impact Network and the California Sportfishing Protection Alliance submit these comments on the Draft Environmental Assessment (DEA) and Draft Finding of No Significant Impact (FONSI) on the San Luis Interim Contract Renewal.

We find the environmental documentation to be grossly inadequate, and part of a larger fragmented and failed approach to resolve water quality, water supply and drainage problems associated with the San Luis Unit of the Central Valley Project. The analysis fails to disclose significant impacts and cannot support a FONSI. An Environmental Impact Statement EIS) must be prepared.

The DEA and proposed FONSI do not meet the legal requirements of the National Environmental Policy Act (NEPA) for the following reasons, which are discussed at length in the attached detailed comments:

- The Purpose and Need is unclear and nowhere in the document is there a rationale or schedule for completion of NEPA for long-term contract renewal.
- The No Action Alternative is incorrectly portrayed as renewal of the interim contracts instead of non-renewal of the contracts.
- The Proposed Action to renew the interim contracts at full quantities is the only alternative considered and it is nearly identical to the No Action Alternative; therefore there is no meaningful disclosure of impacts from renewal vs. non-renewal. An adequate range of alternatives must consider reduced contract quantities.
- The Study Area is unlawfully narrowed to exclude analysis of impacts to the sources of water such as the Delta, the Sacramento, Trinity and American rivers.
- The cumulative impacts analysis does not adequately address cumulative effects over time, especially as it relates to selenium bioaccumulation, and the negative economic and environmental impacts of application of water to seleniferous soils of the San Luis Unit of the CVP.

- Despite completion of the Programmatic EIS for the Central Valley Project Improvement Act (CVPIA PEIS), the DEA does not adequately address site specific impacts of the Proposed Action. The DEA did not fill the gaps that the CVPIA PEIS left.
- Biological Opinions from both the National Marine Fisheries Service and the U.S. Fish and Wildlife Service should be included as part of the DEA in order for full disclosure of impacts and mitigation measures.
- Contract terms to include repayment of costs for the Trinity River Restoration Program pursuant to CVPIA Section 3406(b)(23) as well as protections for Trinity River tribal and fishery interests should have been included in the Proposed Action.

We hereby incorporate by reference, the letter by Friends of the River, Planning and Conservation League, the Sierra Club and Friends of Trinity River on this topic.

Thank you for your consideration of our comments. We urge you to reject the proposed Finding of No Significant Impact and instead prepare an Environmental Impact Statement.

Respectfully submitted,

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Attachment: Detailed comments

cc: Ken Salazar Interior Secretary
David Hayes, Deputy Interior Secretary
Don Glaser, Regional Director BOR
Dan Nelson, San Luis Delta-Mendota Water Authority
Alexis Strauss, USEPA

Charles Hoppin, Chairman SWRCB
Karl Longley, Chairman CVRWQCB
Rod McGinnis, NMFS
Ren Lohoefener, USFWS
Lester Snow, Resources Agency
John McCamman, Department of Fish and Game
Mark Madison, City of Stockton
Rudy Schnagl, CVRWQCB
Hoopa Valley Tribal Council
Yurok Tribal Council
Interested parties

DETAILED COMMENTS

1. The Purpose and Need is unclear and nowhere in the document is there a rationale or schedule for completion of NEPA for long-term contract renewal.

The project appears to be just an interim renewal of Westlands contracts and Broadview's contracts. Continually renewing interim contracts thwarts CVPIA by obfuscating the changes in the place of use of this federal water--diversions to Kern County, diversions from SWP contractors both into and out of the district, which adds complexity to assessing the full range of impacts both in the short term and cumulatively. For example the long term impact of using the Broadview contract water on drainage problem lands in Westlands was not analyzed in the Broadview EA. Changes in the CVP/SWP places of use, water transfers and the pumping western San Joaquin groundwater for delivery south also have impacts that were not considered nor analyzed. There is no rationale given for the fact that the EIS for San Luis Unit long term contracts has not been completed. There is no schedule given for completion of that NEPA process.

2. The No Action Alternative is incorrectly portrayed as renewal of the interim contracts instead of non-renewal of the contracts.

The No-Action Alternative heading under this DEIS is an inaccuracy, a No Action Alternative is meant to be that no action is taken by the lead agency. A No Action Alternative means exactly that, if there was no action, then the contracts would expire, and thus the No Action Alternative should have been the environmental effects of not continuing delivery of CVP water to the contractors compared to renewing the contracts.

As a “status quo” alternative, it is not viable, and must be revised to demonstrate a true “No-Action” alternative under NEPA. A true No-Action alternative provides a baseline for the action to be considered as if nothing happened for the decision-maker. To renew short term contracts is taking an action. This type of No-Action alternative put forth by the DEA does not allow for proper analysis of environmental impacts. Non-renewal of contracts and reduced contract amounts should also be considered feasible and analyzed under NEPA, instead of written off by Reclamation as “Alternatives Considered but Eliminated”, in order to develop a full range of feasible alternatives whether or not an agency can perform them or not.

The DEA No Action Alternative assumes renewal of the interim contracts with the same amount of water and for the same terms and conditions as the status quo. However, the Proposed Action also assumes the same contract quantity and largely the same terms and conditions as the status quo. Therefore, how could it be that the Proposed Action in the DEA is *both* different from the No Action Alternative *and* merely a perpetuation of the status quo? No Action should assume that the contracts are not renewed.

By making the No Action and Proposed Action the same, it is virtually impossible to evaluate alternatives and disclose impacts to the Proposed Action. This is no accident and is a pattern that Reclamation has used in all of its environmental documents related to CVP contract renewals.

3. The Proposed Action to renew the interim contracts at full quantities is the only alternative considered and therefore there is no meaningful disclosure of impacts from renewal vs. non-renewal. An adequate range of alternatives must consider reduced contract quantities.

No other alternatives were considered other than contract renewal at full amounts and similar contract terms and conditions to No Action. The Water Needs Analysis for Westlands Water District fails to consider reduced contract quantities, despite the retirement of 194,000 acres selected in the Preferred Alternative for the San Luis Drainage Feature Re-evaluation, as well as the additional water supply from the "contract assignment" of 36,688 AF from the drainage impaired lands of Widren, Mercy Springs, Broadview and Centinella water districts.

While NEPA doesn't prescribe a specific number of alternatives, the failure to include a more than one alternative is clearly not in compliance with NEPA. The DEA intentionally fails to disclose impacts and necessary mitigation measures through such a narrow range of alternatives.

The amounts of water presumed under each alternative represent substantially more water than recent San Luis Unit historic average deliveries. Westlands' combined/assigned contracts amount to 1,186,688 AF/year, according to the DEA. In recent years, a sixty percent contract rate of delivery would be considered a good year.

In September 2008, the State Water Resources Control Board reported to the Delta Vision Blue Ribbon Task Force that while the Central Valley watershed of California has an average annual runoff of 29 million acre-feet, the face value of water rights granted by the state to appropriative water right holders amounted to 245 million acre-feet.[1] This means that for every acre-foot of real water in the Central Valley watershed, 8.4 acre-feet of water on paper has been promised by the state where only 1 acre-foot may actually be diverted.

Given the huge discrepancy between water availability and water rights in California, the continuing salinization of farm lands and aquifers in Westlands, and the reliability of land retirement to solve drainage problems, a reasonable alternative would consider a reduction in the contract amounts for Westlands as a result of land retirement.

[1] http://deltavision.ca.gov/BlueRibbonTaskForce/Oct2008/Respnose_from_SWRCB.pdf

4. The Study Area is unlawfully narrowed to exclude analysis of impacts to the sources of water such as the Delta, the Sacramento, Trinity and American rivers.

The source of water for the San Luis Unit contractors is the Trinity River, Sacramento River, American River and the Delta. By narrowing the study area to just the San Luis Unit, impacts to the areas of origin are not disclosed. Significant impacts occur to the source water bodies as a result of CVP diversions to the San Luis Unit. Reduced and unnatural flow regimes, temperature impacts, entrainment of fish, impaired water quality, damage to Indian Trust Assets and blockage of fish passage are but a few of those impacts.

A true NEPA analysis with an appropriate No Action Alternative and expanded study area would disclose both benefits and impacts from renewal and non-renewal of these interim contracts at full and reduced amounts. However, the DEA is conspicuously silent in regard to such useful analyses.

5. The cumulative impacts analysis does not adequately address cumulative effects over time, especially as it relates to selenium bioaccumulation, and the negative economic and environmental impacts of application of water to seleniferous soils of the San Luis Unit of the CVP.

It is C-WIN's contention that full renewal of CVP water contracts to junior water contractors such as Westlands who are farming drainage-problem lands in the western San Joaquin Valley is a Wasteful and Unreasonable use of water per Article X, Section 2 of the California Constitution and Water Code Section 100.

The DEA, through faulty alternative formulation, completely fails to disclose the ongoing contamination of the aquifers of the Tulare and San Joaquin basins by selenium, salt, boron, molybdenum, mercury and other harmful constituents as a result of irrigation of soils in the San Luis Unit.

The SWRCB, in D-1641, (page 83), found *"… that the actions of the CVP are the principal cause of the salinity concentrations exceeding the objectives at Vernalis. The salinity problem at Vernalis is the result of saline discharges to the river, principally from irrigated agriculture, combined with low flows in the river due to upstream water development. The source of much of the saline discharge to the San Joaquin River is from lands on the west side of the San Joaquin Valley which are irrigated with water provided from the Delta by the CVP, primarily through the Delta-Mendota Canal and the San Luis Unit."*

Based on the estimate on reassigning the Broadview Water Contract Assignment Environmental Assessment[2], the cessation of irrigation for 9,200 acres of drainage problems lands would result in a reduction in 1,500 pounds of selenium,

[2] Table 4-1, page 4-2, Reclamation 2004

17,000 tons of salt and 52,000 pounds boron loading to the Grasslands Bypass Project annually. It can be inferred that an equivalent amount of water that was formerly provided to Broadview transferred to drainage problem lands in Westlands will create a similar amount of contaminated drainage water created containing selenium, salt, and boron. The only difference is that it likely drains into the semi-confined or confined aquifers underlying Westlands, as well as indirectly to the Grasslands Bypass Project through regional hydraulic pressures.

The DEA fails to disclose that the water assigned from Broadview, Widren, Mercy Springs and Centinella considered for renewal would increase contaminated drainage water originating in Westlands, thereby increasing the need for drainage service. It makes little sense to transfer/assign water from one waterlogged district to another, yet the DEA completely fails to acknowledge this fact.

Since the San Joaquin River is already listed as an impaired water body on the 303(d) list for boron, selenium and electrical conductivity, this should be considered a significant undisclosed impact. While Westlands does not discharge directly to the San Joaquin River, irrigation of drainage problem lands there creates hydraulic pressure downslope, as stated by the State Water Resources Control Board in Water Right Decision 1641[3] (p 82-83):

"The subsurface drainage problem is region-wide. The total acreage of lands impacted by rising water tables and increasing salinity is approximately 1 million acres. (SWRCB 147, p. 21.) The drainage problem may not be caused entirely by the farmer from whose lands the drainage water is discharged. In the western San Joaquin Valley, the salts originate from the application of irrigation water and from soil minerals, which dissolve as water flows through the soil. The salts are stored in groundwater. As more water is applied, hydraulic pressures increase, water moves downgradient, and salt-laden waters are discharged through existing drainage systems and directly to the river as groundwater accretion. (SJREC 5a.) Drainage found in a farmer's field may originate upslope and may not have risen into the tile drains on the downslope farmer's land but for the pressures caused by upslope irrigation. (SJREC 5a, pp. 27-29.)"

Numerous government studies identify the high economic and environmental cost of continuing to irrigate these lands, and that the only reliable solution to reverse the drainage problem is to halt irrigation of these lands. The National Economic Development Benefit/Cost Summary for the San Luis Drainage Feature Re-Evaluation disclosed that the alternative with the least amount of land retirement (In-Valley Groundwater Quality Land Retirement) had a negative benefit/cost summary amounting to $15.603 million/year in 2050 dollars, or a negative $780.15 million over the 50 year

[3] http://waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf Accessed January 27, 2010.

life of the project.[4] Conversely, the alternative with the greatest amount of land retirement (In Valley Drainage Impaired Land Retirement) had a positive benefit/cost summary of $3.643 million/year in 2050 dollars, or a positive $182.15 million over the 50 year life of the project.

The U.S. Geological Survey has been clear that any solution to drainage problems must include land retirement. In relation to the San Luis Feature Re-Evaluation and subsequent settlement negotiations convened by Senator Feinstein, the USGS has stated that "*Land retirement is a key strategy to reduce drainage because it can effectively reduce drainage to zero if all drainage-impaired lands are retired."* [5] USGS goes on to state that "*The treatment sequence of reverse osmosis, selenium bio-treatment and enhanced solar evaporation is unprecedented and untested at the scale needed to meet plan requirements.*"

Reclamation's CVPIA land retirement program has demonstrated that there can be a rapid reduction in shallow groundwater from cessation of irrigation. The Bureau of Reclamation's 2001 Annual Report on CVPIA Land Retirement stated that groundwater elevations declined an average of 4 feet between August 1999 and October 2001. The report stated further that *"The area of the site underlain by a shallow water table within 7 feet of the land surface decreased from 600 acres (30% of the site) to 34 acres (less than 2% of the site) during the time period from October 1999 to October 2001."* [6]

The Feasibility Report for the San Luis Drainage Feature Re-evaluation recommended significant increases in subsidies for San Luis Unit contractors in order to implement the Preferred Alternative, which was not the alternative with maximum land retirement.[7]

USGS identified that the aquifers of the western San Joaquin Valley contain so much selenium that even if the San Luis Drain were built with an annual discharge of 43,500 pounds of selenium/year with no new additions of selenium (cessation of irrigation), it would still take 63 to 304 years to eliminate the accumulated selenium from the aquifers.[8]

The USGS also shows graphically in Professional Paper 1646, the huge salt imbalance in the San Joaquin River which amounts to approximately 2,300 tons of salt per day.[9] Ultimately, many of the lands in Westlands and in the region will become sterile alkali land unless widespread land retirement is implemented. Agriculture will no longer be an option, even dry land farming.

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[4] http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=2240 Table N-10, p N-17
[5] http://pubs.usgs.gov/of/2008/1210/of2008-1210.pdf p 2, accessed 1/27/2010
[6] http://www.usbr.gov/mp/cvpia/3408h/data_rpts_links/index.html accessed 1/27/2010
[7] Feasibility Report for the San Luis Drainage Feature Re-evaluation, p xxvii. http://www.usbr.gov/mp/sccao/sld/docs/sldfr_report/index.html accessed 1/27/2010
[8] USGS Professional Paper 1646, p 1 http://pubs.usgs.gov/pp/p1646/pdf/pp1646.pdf
[9] USGS Professional Paper 1646, p 106, Figure A5 http://pubs.usgs.gov/pp/p1646/pdf/pp1646.pdf

The Pacific Institute's Report on Agricultural Water Conservation[10] (Exhibit 3V) identified that retirement of 1.3 million acres of drainage problem lands in the western San Joaquin Valley would lead to water savings of 3.9 million AF, "*while also reducing cleanup costs and minimizing the social and environmental impacts associated with polluted surface and groundwater."*

Based on the above information, an alternative which would eliminate drainage problem areas from receiving water transfers in order to minimize the amount of salt, selenium and boron discharged to the underlying aquifers could be considered a benefit to the environment and the economy. The DEA utterly fails to disclose and evaluate such an alternative, nor does it properly evaluate the cumulative impacts of continued irrigation of these toxic soils.

6. Despite completion of the Programmatic EIS for the Central Valley Project Improvement Act (CVPIA PEIS), the DEA does not adequately address site specific impacts of the Proposed Action. The DEA did not fill the gaps that the CVPIA PEIS left.

We do not write to challenge the analysis in the Programmatic Environmental Impact Statement for the Central Valley Project Improvement Act. However, for the reasons stated in this letter, even after layering the DEA on top of the CVPIA PEIS, the Bureau has failed to conduct adequate site specific analyses to determine whether renewal of the San Luis contracts would significantly affect the environment. A programmatic document does not provide a complete basis for site-specific decisions. This document does not either and is grossly deficient for the reasons stated in this letter.

7.Biological Opinions from both the National Marine Fisheries Service and the U.S. Fish and Wildlife Service should be included as part of the DEA in order for full disclosure of impacts and mitigation measures.

The DEA includes deferred mitigation that has yet to be disclosed to the public because the Biological Opinions by the U.S. Fish and Wildlife Service and National Marine Fisheries Service have still not been released. In particular, mitigation measures for impacts to wildlife are not fully disclosed. NEPA requires full disclosure of mitigation measures in the DEA, yet that information is not available. Reclamation appears to be making the same mistake it made in the Trinity River litigation in failing to disclose required mitigation measures contained in Biological Opinions, some of which may have inherent significant impacts.

Additionally, Reclamation appears to be failing to request consultation under the Endangered Species Act from the National Marine Fisheries Service. While Westlands does not drain directly into the San Joaquin River and its tributaries, the massive application of irrigation water, as noted above section 5 above, creates upslope

[10] http://www.pacinst.org/reports/more_with_less_delta/more_with_less.pdf p 7, pp1

hydraulic pressure which ultimately results in discharges to the San Joaquin River through the Grasslands Bypass Project and elsewhere. As noted by the prominent selenium/salmonid scientist, Dennis Lemly, the Grasslands Bypass Project results in a 50% mortality to juvenile steelhead and salmon in the San Joaquin River.[11] A consultation for Central Valley steelhead and salmon should be included as part of this Proposed Action.

8. Contract terms to include repayment of costs for the Trinity River Restoration Program pursuant to CVPIA Section 3406(b)(23) as well as protections for Trinity River tribal and fishery interests should have been included in the Proposed Action.

The contracts should include express text pursuant to the 1955 Trinity River Act, the 1979 Krulitz solicitor's opinion and section 3406(b)(23) and section 3404(c)(2) of the CVPIA requiring the contractors to pay for Trinity restoration as a cost of service in order to protect the Indian Trust Assets of the Hoopa Valley and Yurok tribes. This has repeatedly been requested by the Hoopa Valley Tribe and others, yet it was not even considered as an alternative to be included for analysis.

The relationship between the Trinity River and the irrigation of the San Luis Unit and Delta Mendota Canal Unit is strong, albeit conveniently forgotten by many. The Trinity River Division of the CVP is integrally linked to development of CVP water to contracts south of the Delta, as shown in Trinity County's Exhibit 17[12] to the 1998 Bay-Delta Water Rights Hearings. Trinity County's Exhibit 17 from the 1998 State Water Resources Control Board hearings on D-1641 shows the 1959 expansion of the CVP service area within the San Luis Unit associated with the Bureau of Reclamation's 7 state water permits to store and divert Trinity River water which included most of Westlands and particularly the soils with highest selenium concentrations. The expanded CVP service area also includes many of the areas that Westlands has identified as having high groundwater that are desirable for land retirement, including Broadview Water District.

Both the House (H.R. Rep. No. 602, 84th Cong., 1st sess. 4-5 (1955) and Senate committee reports (S. Rep. No. 1154, 84 Cong., 1st Sess. 5 (1955) for the 1955 Trinity River Act (P.L. 84-386) identify the western San Joaquin Valley as one of the three areas targeted to receive Trinity River water. Westlands signed its contract for CVP water in 1963, the same year that the late President John F. Kennedy dedicated the Trinity River Division (TRD) of the CVP. Westlands actively supported passage of the Trinity River Act of 1955 because it knew that it would receive the lion's share of the TRD's water. Now that it is recognized that these lands should not have been irrigated, the problem areas should be retired with at least consideration that the water to return to the areas of origin and the Delta. A

[11] http://www.c-win.org/webfm_send/9
[12] http://tcrcd.net/exhibita.htm accessed 1/27/2010

land retirement alternative with at least a portion of the water being returned to the areas of origin such as the Trinity, American and Sacramento rivers only makes sense. This will also help fulfill the Interior Secretary's trust obligations to the Hoopa Valley and Yurok tribes, as well as meet the fishery restoration goals for the Trinity River identified in the Trinity River Basin Fish and Wildlife Management Act of 1984, as amended and the Central Valley Project Improvement Act.

The 1955 Trinity River Act gives legal priority to Trinity River in-basin water needs, including those of the two tribes' fishery, over diversions to the Central Valley. See Memorandum from Assistant Regional Solicitor of the Department of the Interior to Regional Director, Bureau, Sacramento, 1-2 (Dec. 6, 1973) (1973 Sol. Op.). This provision limits Interior's authority to divert water for allocation to Central Valley contractors. Rather, Congress *"specifically limited the Secretary's discretion*" regarding TRD operations by requiring priority for Trinity and Klamath in-basin needs.

We hereby request that the Proposed Action include the following language in all CVP contract renewals:

> *"All water deliveries pursuant to this contract are limited by and subordinate to the Secretary's fiduciary duty, referred to in section 3406(b)(23) of the Central Valley Project Improvement Act, to meet instream fishery flow requirements of the Trinity River as specified in the Trinity River Record of Decision (December 2000).*
>
> *All water deliveries pursuant to this contract are limited by and subordinate to terms and conditions 9 and 10 in the Bureau of Reclamation's Trinity River water permits (Permit No.'s 11967, 11968, 11969, 11970, 11971, 11972, and 11973", which require the following:*
>
> *"9. Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users." And*
>
> *"10. This permit shall be subject to the prior rights of the county in which the water sought to be appropriated originates to use such water as may be necessary for the development of the county, as provided in Section 10505 of the Water Code of California."*

Therefore, the proposed contract between WWD and the United States is illegal, since it does not comply with Trinity River Basin legal mandates, reserve as first priority Area/County of origin needs, as well as Tribal Trust obligations to the Hoopa Valley and Yurok tribes. The contract should be rewritten to explicitly identify those reservations.

An Environmental Impact Statement must be prepared.

HALL ESTILL
ATTORNEYS AT LAW

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January 29, 2010

VIA EMAIL: RHEALER@USBR.GOV

Ms. Rain Healer
U.S. Bureau of Reclamation
1243 N Street
Fresno, CA 93721

Re: **Draft Environmental Assessment and Finding of No Significant Impact for the San Luis Unit Water Service Interim Renewal Contracts**

Dear Ms. Healer:

These comments on the referenced documents are submitted on behalf of the Hoopa Valley Tribe. The Tribe is directly affected by the contracts that are the subject of the Draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) under consideration.

The Tribe has resided since time immemorial on the Trinity River and relied on its fishery which is essential to its culture, religion and economy. The irrigation of the west side of the San Joaquin Valley was made possible in major part by the Trinity River Division of the Central Valley Project. See H.R. Rept. No. 602, 84th Cong., 1st Sess. 4 (May 19, 1955). The Tribe has vested property rights in the fishery resources of the Trinity River that have been affirmed judicially, legislatively and administratively.

The Bureau of Reclamation impounds waters of the Trinity River in the Central Valley Project's (CVP) Trinity Division and exports them to the Central Valley in major part for use on the lands of contractors whose contracts are the subject of the draft EA and FONSI. The Bureau of Reclamation is subject to an explicit and unique federal trust responsibility to the Tribe's fishery that was confirmed by the Central Valley Project Improvement Act (CVPIA), Pub. L. 102-575 §3406(b)(23). The CVP's diversions of Trinity River water are subject to basin of origin protections established in the legislation authorizing the Trinity Division, Pub. L. 84-386. The Tribe's rights have been and are directly and adversely affected by those diversions. See Pub. L. 98-541 (October 24, 1984), as amended. The Tribe's rights are further recognized in a December 19, 2000, Trinity River Mainstem Fishery Restoration Record of Decision (ROD). The ROD was adopted by the Secretary with the concurrence of the Hoopa Valley Tribe to restore the Tribe's damaged fishery. By letter of July 10, 2008, to the Chairman of the Tribe, the Office of the Secretary of the Interior established the Tribe as a stakeholder with interests in and affected by the use of CVP water by the contractors who would benefit by the pending Interim Renewal Contracts.

The Tribe submitted comments to the Bureau's Sacramento office on interim contract renewal on February 14, 2008. That letter is attached and sets forth detailed comments on contracts held by some of the same contractors whose contracts are subject to the pending EA and FONSI. The comments in the February 14, 2008, are incorporated herein by reference.

The Draft EA addresses Indian Trust Assets at page 36, stating that:

> ITA are legal interests in property held in trust by the United States for federally-recognized Indian tribes or individual Indians. An Indian trust has three components: (1) the trustee, (2) the beneficiary, and (3) the trust asset. ITA can include land, minerals, federally-reserved hunting and fishing rights, federally-reserved water rights, and in-stream flows associated with trust land. Beneficiaries of the Indian trust relationship are federally-recognized Indian tribes with trust land; the United States is the trustee. By definition, ITA cannot be sold, leased, or otherwise encumbered without approval of the United States. The characterization and application of the United States trust relationship have been defined by case law that interprets Congressional acts, executive orders, and historic treaty provisions.
>
> The Proposed Action would not affect ITA because there are none located in the Proposed Project area. The nearest ITA is the Santa Rosa Rancheria, which is approximately six miles east of the Proposed Action area.

Correspondingly, the draft FONSI proposes to draw the following conclusion about ITA:

> No physical changes to existing facilities are proposed and no new facilities are proposed. Continued delivery of CVP water to the contractors listed in Table 1 under an interim renewal contract will not affect any Indian Trust Assets because existing rights will not be affected.

The conclusions of the draft EA and FONSI are in conflict with the facts and the law and should be revised. The Tribe's fishing and associated water rights in the Trinity River are Indian Trust Assets. The most recent statement from the Department of the Interior about the status of the Tribe's property rights as Indian Trust Assets was on January 26, 2010. In a letter of that date to tribal Chairman Leonard Masten, Associate Deputy Secretary Laura Davis stated that

> Interior takes seriously its trust responsibility to the [Hoopa Valley] Tribe and the direction from Congress to restore the fishery resources of the Trinity River based in part on that duty. Interior also agrees that the Tribe has relatively senior water rights in the basin to support its reserved fishing rights, although the full extent and scope of these rights have not been quantified by adjudication or settlement. As of this time, the flows called for by Congress in section 3406(b)(23) of the 1992 Central Valley Project Improvement Act (P.L. 102-575) and then established in the 2000 ROD

> with the Tribe's concurrence essentially determined by statute the water necessary in the Trinity River. As noted in your letter, the tribe's fishing and associated water rights--along with those of other basin Tribes collectively--have generally been the subject of prior departmental memoranda and Federal court cases.

We note that it is irrelevant to the environmental review that the Tribe's reservation is not in the vicinity of the Proposed Action Area. The water to which the Tribe has a right and whose use is essential to its fishery resources is being delivered and will continue to be delivered pursuant to the proposed federal action from the vicinity of the reservation to the contractors' area by CVP facilities that divert water from the Tribe's watershed.

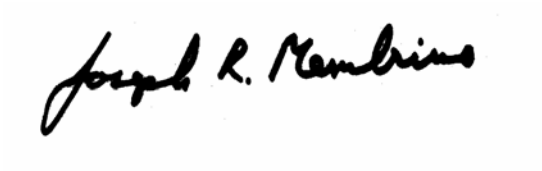
In addition, the ongoing delivery of CVP water to the contractors in the absence fulfilling their statutory obligation to pay the cost of fishery restoration is affecting the Tribe. At the time the ROD was adopted in 2000 and since then, the Department has recognized that the flows allocated to the Trinity fishery from the Trinity Division will be effective for fishery restoration only if they are accompanied by adequate funding to carry out habitat restoration and related science and monitoring activities. As recently as 2007, the Secretary and the Tribe jointly identified a funding need of $16.4 million annually (October 2007 price levels) for restoration through completion of construction and $11 million (October 2007 price levels) annually thereafter. Underscoring the Tribe's concern is the persistent efforts of the contractors to challenge the ROD and oppose measures that would ensure that they fulfill their funding responsibility. See Westlands Water District v. U. S. Dept. of the Interior, 376 F.3d 853 (9th Cir. 2004) and Testimony of Ara Azhderian, Water Policy Administrator, San Luis & Delta-Mendota Water Authority Regarding H.R. 2733, Trinity River Restoration Fund Act of 2007, September 18, 2007.

CVPIA directed the Secretary to make the cost an operation and maintenance expenditure to be reimbursed by the CVP contractors. Section 3406(b)(23). The full cost of Trinity restoration has not been paid and the fishery remains in decline. Unless the contracts are amended to enforce that obligation, the adverse impact on Indian Trust Assets will continue.

In conclusion, continuing the status quo perpetuates the adverse impacts on the Tribe's assets. Set forth in the attachment is a detailed description of the legal obligation the Secretary to enforce the contractors' payment responsibilities. The attachment also includes proposed specific provisions that the Tribe requests be included in the pending interim contracts.

Your attention to these comments is appreciated.

Very truly yours,



Joseph R. Membrino

JRM:gln

Attachment

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Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

P.O. Box 1348 • HOOPA, CALIFORNIA 95546 • Phone 625-4211 • Fax 625-4594

Clifford Lyle Marshall, Sr.
Chairman

February 14, 2008

By Facsimile: 916-978-5292
and Email: lbarbre@mp.usbr.gov

Ms. Leslie Barbre
U.S. Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Re: Hoopa Valley Tribe Comments -- Two-year interim renewal CVP Contracts

Dear Ms. Barbre:

Pursuant to the Bureau of Reclamation's (Reclamation) December 14, 2007, notice, the Hoopa Valley Tribe (Tribe) submits the following comments on the referenced contracts, which Reclamation proposes to renew pursuant to the Central Valley Project Improvement Act (CVPIA).[1]

Introduction

The Tribe submits these comments in the interest of protecting its vested rights in the Trinity River fishery, which are recognized in the program established for Trinity River restoration pursuant to the CVPIA, as well as other laws, judicial decisions, and administrative actions pertaining to the Trinity River. Reclamation's notice states that there are 17 Central Valley Project (CVP) contractors affected by this renewal procedure.[2] These comments are addressed to all of those contracts and focus on the limitations on diversions of Trinity River water to the Central Valley and cost accounting issues and their related impacts on the CVPIA's environmental restoration mandates,

[1] Public Law 102-575 Title XXXIV, 106 Stat. 4600, October 30, 1992.

[2] They are: County of Tulare, County of Fresno, Hills Valley Water District, Kern Tulare Water District, Rag Gulch Water District, Pixley Irrigation District, Tri-Valley Water District, Lower Tule River Irrigation District, City of Tracy (2 contracts), Pajaro Valley Water Management Agency, Santa Clara Valley Water District, Westlands Water District Distribution District 1, Westlands Water District Distribution District 1 (3 contracts), and Westlands Water District Distribution District 2 (1 contract).

particularly Trinity River fishery restoration.[3] The comments conclude with recommended text for inclusion in the contracts.

Background of the Trinity River Division of the CVP

The Act of August 12, 1955, Public Law 84-386, 69 Stat. 719 (1955 Act) authorized construction and operation of the CVP's Trinity River Division (TRD). The TRD is the only source of water that is imported to the Central Valley. In its natural course, the Trinity River is a tributary of the Klamath River, which empties into the Pacific Ocean. Because the TRD is a trans-basin diversion facility, Congress was specially attentive to the interests of the Klamath-Trinity basin. Accordingly, although section 2 of the 1955 Act requires integration of the TRD with existing and future units of the CVP to "effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available," that instruction is subject to two distinct provisos.

> *Provided* That the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months of July through November . . . unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish and wildlife and propagation thereof . . . : *Provided further,* That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

The first proviso qualifies the integration of the TRD into the CVP with a direction to the Secretary to determine needed releases from the TRD to the Trinity River for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. The second proviso provides that "not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." The State of California issued a number of permits associated with the TRD in 1959.[4] Among the conditions established by the state in the permits was Condition 8[5] that applied to the first proviso and Condition 9[6] that applied to the second proviso of the 1955 Act.

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[3] This is not the first time the Tribe has raised issues with CVP contract renewals. On November 19, 2003, the Tribe filed an administrative appeal with the Commissioner of Reclamation regarding certain long-term CVP contracts. That appeal remains pending. The Tribe has also commented on various CVP contract renewals on thirteen other occasions between 2004 and 2006.

[4] State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959).

[5] Condition 8. "Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;

October 1 through October 31	200 cfs

Limitations on operation of the Trinity River Division

The Solicitor explained the significance of the 1955 Act's provisos in a memorandum opinion from the Solicitor to the Assistant Secretary, Land and Water Resources (1979 Opinion). In that opinion, the Solicitor explained that the TRD's authorization in the 1955 Act created an exception to the general integration of CVP functions:

> On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

1979 Opinion at 3-4. Thus, the 1979 Opinion clarifies that the 1955 Act does not require management of the TRD to maximize benefits to the Central Valley. Rather, it states that the provisos in section 2 establish a priority for in-basin uses of TRD water over diversions to the Central Valley.

The Solicitor's analysis is consistent with general rules of statutory analysis. The Supreme Court describes the role of the proviso in legislation as follows:

> The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached. Minis v. United States, 15 Pet. 423, 525. Although it is sometimes misused to introduce independent pieces of legislation. Georgia Railroad & Banking Co. v. Smith, 128 U.S. 174, 181; White v. United States, 191 U.S. 545, 551. Here, however, the proviso is plainly employed in its primary character.

Cox v. Hart, 260 U.S. 427, 435 (1922).

November 1 through November 30 250 cfs
December 1 through December 31 200 cfs
January 1 through September 30 150 cfs
Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule."

[6] Condition 9. "Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users."

In the parlance of Cox v. Hart, the "substantive enactment" in section 2 of the 1955 Act is the instruction that the TRD be integrated into the CVP. The provisos except from that instruction the water that Congress allocated in the two provisos for the instream fishery needs of the Trinity River fishery and the mandate to release water from the TRD and make it available to Humboldt County and downstream water users.

The second proviso is not an exception, limitation, or some other qualification on the first proviso in section 2 of the 1955 Act. The case law uniformly concludes that provisos are "generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause." Wayman v. Southard, 23 U.S. 1, 30 (1825) The object of the two provisos in the 1955 Act is to except from the integration instruction in the "enacting clause" any use of water for the Trinity River mainstem fishery and water made available to Humboldt County and downstream water users.

As the Court in Cox v. Hart, supra, observed, a proviso is sometimes used to introduce independent pieces of legislation:

> It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.

Id. at 181.

This may indeed have been what occurred in the legislative process leading to the enactment of the second proviso. By way of background the House version of the TRD authorization, H.R. 4663, was reported out of the Committee on Interior and Insular Affairs on May 19, 1955. House Report No. 602, 84th Cong., 1st Sess. Section 2, as approved by the Committee contained only the first proviso regarding releases for fish and wildlife. Report No. 602 at 6. Thereafter the bill went to the Rules Committee which issued Report No. 732 on June 7, 1955. The text of the rule is reported at page 7961 of the Congressional Record on June 9, 1955. In the debate on H.R. 4663 pursuant to the rule, Congressman Ellsworth made the following statement at page 7962 of the Congressional Record:

> When this bill was brought before the Rules Committee there was also a question regarding the protection of another area of California. . . .
>
> [I]t is also my understanding that another amendment will be offered by the committee which will probably satisfy the

> opposition to the bill by another Representative from California. As I understand it, this amendment will be offered to assure to Humboldt County, Calif., an additional 50,000 acre-feet of water from the rivers concerned, which should properly take care of the neighboring area.

The addition of the Humboldt County proviso thus occurred later in the legislative process and after the fishery water provision had been fully considered. The Humboldt County proviso is independent of, and for an entirely different purpose than, the Trinity mainstem fishery water supply.[7] Accordingly, the two provisos are exceptions to the integration instruction in the 1955 Act and the second proviso is not an exception to the first.

The Secretary's authority under the first proviso of the 1955 Act was implemented on two occasions after operation of the TRD began in 1964. In each case, TRD releases to the Trinity River were successively increased above the statutory minimum. The first increase was in 1981, and the second was in 1991. See Trinity River Flow Evaluation-Final Report, (TRFE) Appendices B and C (June 1999). Neither of those actions proved to be adequate for the needs of the Trinity River fishery. They were intended principally to provide water to enable studies to occur of the long term needs of the fishery. In fact, the releases under those secretarial actions did little more than simulate severe, drought-like conditions.

CVPIA -- Trinity River Restoration and CVP Contract Reform Directives

The CVPIA fundamentally changed federal policy pertaining to CVP operations, water deliveries, and the payment obligations of CVP contractors. Among other things, the CVPIA:

> (1) established fish and wildlife restoration as a coequal CVP purpose with irrigation and other uses;
>
> (2) established restoration mandates and timelines for fulfilling that purpose;
>
> (3) required contracts for CVP water to incorporate that policy;
>
> (4) assigned, in substantial measure, the cost of restoration programs to CVP water and power contractors; and

[7] In addition, the State permit condition explicitly requires the annual release from the TRD of at least 50,000 acre-feet of TRD water to be made available to Humboldt County and downstream water users. That permit condition governs the conduct of the Bureau's operation of the CVP. The permit condition has been in place since 1959 and has never been challenged by the Bureau in any administrative or judicial proceeding.

> (5) required the Secretary to incorporate those changes in the law--and the contractors' acceptance of them--in new, interim, and long-term CVP contracts.

The Secretary used the authority of the 1955 Act a third time in concert with the authority of section 3406(b)(23) of the CVPIA, which requires restoration of the Trinity River "in order to meet federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe and to meet the fishery restoration goals of" previously enacted legislation.[8] That action is memorialized in the Trinity River Mainstem Fishery Restoration record of decision (ROD), which was adopted by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe on December 19, 2000.

Section 3404 of the CVPIA interrupted the ordinary course of CVP contract renewals by prohibiting any new contracts and limiting renewed, long-term contracts to interim terms of three years, initially, with successive two-year terms, until environmental reviews had been completed. This would enable long-term contracts to be modified to incorporate terms required to advance the CVPIA's environmental restoration purposes based on information secured by the Secretary from the environmental reviews.

Section 3404(c)(1) of the CVPIA provides that "interim renewal contracts shall be modified to comply with existing law, including provisions of this title." Identical language to this is included in section 3404(c)(2) of the CVPIA, which applies to long-term CVP contract renewals:

> Upon renewal of any long-term repayment or water service contract providing for the delivery of water from the Central Valley Project, the Secretary shall incorporate all requirements imposed by existing law, including provisions of this title, within such renewed contracts. The Secretary shall also administer all existing, new, and renewed contracts in conformance with the requirements and goals of this title.

Congress' care in extending the modification requirement to interim as well as long-term contract renewals is understandable in view of the severely degraded environmental conditions with respect to fish, wildlife, and water quality that are directly attributable to the construction and operation of the CVP. For example, the original intent of the 1955 Act to condition the TRD's operation on the preservation and propagation of fish and wildlife had run up against the reality of the need to restore fish populations that had declined by 80% following completion of the TRD.[9] By the time of the CVPIA's enactment in 1992, those degraded conditions were well known and there was an immediate need for remedial action. Accordingly, at the core of the CVPIA is an urgent call for change in CVP water use and the way CVP water is paid for. The following

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[8] Public Law 98-541, 98 Stat. 2721 (October 24, 1984), which was amended and extended by Public Law 102-143, 110 Stat. 1338 (May 15, 1996).

[9] See Section 1.4, Trinity River Mainstem Fishery Restoration Final Environmental Impact Statement/Report (October 2000).

excerpts (with emphasis added) from the CVPIA are evidence of Congress' commitment to a timely response to an urgent environmental need.

> "In order to encourage early renewal of project water contracts and facilitate timely implementation of this title . . ." (section 3404(c)(3));
>
> "The Secretary, immediately upon enactment of this title" shall undertake 23 environmental restoration actions" (section 3406(b));
>
> "develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002 . . ." (section 3406(b)(1));
>
> "upon enactment of this title dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title . . ." (section 3406(b)(2));
>
> "by September 30, 1996, the Secretary, after consultation with the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study . . ." (section 3406(b)(23)(A)).

CVP contractors sharply reacted against the CVPIA. Many contractors whose interim contracts are the subject of these comments, as well as others, sued to prevent the implementation of the CVPIA. They even invoked environmental laws to prevent timely implementation of the CVPIA's environmental remediation measures. The courts rejected their claims. [10]

Trinity River Restoration Costs Reimbursable by CVP Contractors

Section 3406(b)(23) states that the costs of implementing the Trinity River ROD "shall be reimbursable as operation and maintenance expenditures pursuant to existing law." This is the only provision in the CVPIA that specifically makes a restoration activity reimbursable as an operation and maintenance (O&M) cost.[11] However, as discussed below, Reclamation has not assessed CVP contractors for the full costs--as O&M

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[10] In one case, the 9th Circuit Court of Appeals, citing the CVPIA's urgency, rejected their claim that National Environmental Policy Act (NEPA) compliance was required before restoration flows could be released from CVP. The court said the CVPIA's mandates with respect to timing of implementation precluded that. Westlands Water District v. Natural Resources Defense Council, 43 F. 3d 457 (9th Cir. 1994). In Westlands Water District v. Dept. of Interior, 376 F. 3d 853 (9th Cir. 2004), the contractors again sought to use environmental laws (NEPA and the Endangered Species Act (ESA)) against implementation of the Trinity River Restoration program. They failed. In its opinion, the court observed that the Trinity restoration program was unlawfully long over due. See also, O'Neill v. United States, 50 F. 3d 667 (9th Cir. 1995), in which the court held that CVP contract deliveries are subject to the limitations required by the ESA.

[11] Section 3406(b)(23) also is the only provision of the CVPIA that addresses a federal trust responsibility to an Indian tribe.

expenses pursuant to CVPIA section 3406(b)(23) or otherwise--of Trinity River restoration.[12] Nor has the Bureau of Reclamation sought appropriation of approximately $15 million in funds on hand in the CVPIA Restoration Fund to mitigate the chronic under funding of Trinity River restoration.

In a January 25, 2008 letter (January 25 letter)[13], the Acting Regional Director of Reclamation's Mid-Pacific Region stated that "all contractor obligations for CVPIA activities are being met as part of their Restoration Fund payments." January 25 letter at page 4. That is not correct. Section 3407(a) of the CVPIA states expressly that "[a]mounts deposited shall be credited as offsetting collections." Furthermore, section 3407(b) (with emphasis added) states:

> Any funds paid into the Restoration Fund by Central Valley Project water and power contractors and which are also used to pay for the projects and facilities set forth in section 3406(b), shall act as an offset against any water and power contractor cost share obligations that are otherwise provide for in this title.

Increased operation and maintenance (O&M) charges associated with implementation of section 3406(b)(23)'s Trinity River restoration program are "cost share obligations that are otherwise provided for" in the CVPIA. Any Restoration Fund payment made by contractors is an offset against--not a limitation on--the obligation to reimburse created by section 3406(b)(23).[14]

Consistent with this erroneous view of the CVPIA, Reclamation has repeatedly refused or failed to include in interim or long-term contract renewals provisions required by the CVPIA affecting the restoration of the fishery resources that the United States holds in trust for the Hoopa Valley Tribe. Reclamation's interim renewal contracts and long term contracts do not identify Trinity River restoration as a reimbursable O&M cost. The Bureau's rate setting policies similarly exclude this payment obligation as a component of the O&M rate.[15]

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[12] In response to an inquiry from Senator Dianne Feinstein, the Secretary, in consultation with the Hoopa Valley Tribe, determined on February 26, 2007, that the annual costs of Trinity River restoration (2007 price levels) were approximately $16.4 million through 2012 and approximately $11.0 million thereafter.

[13] Letter to Danny Jordan, Director of Commerce, Hoopa Valley Tribe from Michael R. Finnegan, Acting Regional Director, Bureau of Reclamation (MP-400, WTR-4.13) (January 25, 2008).

[14] Also on page 4, the January 25 letter, acknowledges that section 3407(b) provides "for offsets against water and power CVPIA cost-sharing obligations . . . [and] . . . that the CVPIA does not limit reimbursability obligations of costs associated with the implementation of 3406(b)(23)." But then the January 25 letter goes on to address only situation in which the contractors overpay and get a credit for the overpayment. It does not address explicitly the obligation to make up shortfalls in Trinity River restoration funding, particularly in the context where the program requiring funding has been judicially held to be unlawfully long overdue." Westlands Water District v. Dept. of Interior, supra, 376 F. 3d at 878.

[15] See "Central Valley Project, Schedule of Irrigation Operation and Maintenance (O&M) Costs by Facility and/or Component for FY 2006, 2008 Irrigation Water Rates" Schedule B-6, at pages 1 and 4, which identifies storage as the only O&M cost component associated with the Trinity River division. http://www.usbr.gov/mp/cvpwaterrates/ratebooks/irrigation/2008/index.html

The lack of specificity about reimbursable obligations in the interim contracts has had real and substantial financial impacts on CVPIA implementation and accountability for the funds owed the federal treasury by CVP contractors. In the January 25 letter, the Acting Regional Director of Reclamation's Mid-Pacific region dismissed section 3406(b)(23)'s specific reference to restoration costs as CVP O&M expenditures required to be collected by Reclamation. He stated in response to the Tribe's inquiry in this regard that the express reference to collecting restoration costs as an O&M expenditure had no specific meaning: "the language specifying reimbursability varies from section to section" of the CVPIA (January 25 letter, page 3). This interpretation renders the last sentence of section 3406(b)(23) meaningless, contrary to well-established statutory construction principles.[16]

The January 25 letter acknowledged that Reclamation has received $6.2 million in funds appropriated to the Fish and Wildlife Service which it has used for Trinity River restoration but has not accounted for as reimbursable by CVP contractors as required by section 3406(b)(23).[17] Failure to account for the $6.2 million appears to be one aspect of a much larger problem. Below is a table that identifies the federal funds that have been appropriated for Trinity River restoration and the funds that the Bureau of Reclamation has identified as reimbursable to the federal treasury by CVP contractors.

Trinity River Restoration Appropriations Fiscal Year 1998-2007

	W&RR and CVP RF	US FWS	Total
Millions of Dollars appropriated	87.850*	6.2**	94.050
ECO Rept. (FY 93 - FY 06) 3406(b)(23) 100% Reimbursable	36.496***		
Not Accounted for as Reimbursable	57.554		
ECO Rept. CVP-Wide Contractor Credit	37.600		
Net CVP Contractor Credit Adjusted for Unpaid Obligation to U.S. Treasury	(19.954)		
Information sources	* Annual Bureau of Reclamation Budget Justifications. ** January 25, 2008, letter to Hoopa Valley Tribe from Mid-Pacific Region Director of Commerce. *** CVPIA Expenditures, Credits, and Offsets (ECO) Rept. FY 93-FY 06. (Note: January 25 letter attaches 2005 ECO Report.)		

[16] Doe v. Chao, 540 U.S. 614, 630-631 (2004) ("It is `a cardinal principle of statutory construction' that `a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citations omitted).

[17] The January 25 letter (page 4) states that the "issue" of not accounting for the Fish and Wildlife Service appropriation as reimbursable in the ECO Report "is currently under review."

The ECO Report states that all federal funds appropriated for Trinity River restoration are "100%" reimbursable, which is consistent with the statement in CVPIA section 3406(b)(23) that Trinity River restoration costs "shall be reimbursable as operation and maintenance expenditures pursuant to existing law." However, Reclamation's FY 93 - FY 06 ECO Report excludes not just that $6.2 million of Fish and Wildlife Service appropriations. Instead, of the $90,050,000 appropriated for Trinity River restoration, only $36,496,000 is accounted for as "100% reimbursable." This leaves $57,553,863 appropriated for Trinity River restoration unaccounted for. The exclusion of $57,553,863 effectively discounts the "100%" reimbursement obligation by approximately 60%. The effect is to shift that obligation from CVP contractors to the federal taxpayer.

Furthermore, what Reclamation's latest (i.e. FY 93 -FY 06) ECO Report states is a $37,599,863 credit to the CVP contractors' account appears instead to be a $19,954,000 deficit. This swing of $57,553,863 from credit to deficit results from examination of just one line item (Trinity River Restoration "Remove/Replace Bridges (b)(23)") in the ECO report.

In addition, appropriations for Trinity River restoration from 1993 through 1997 are not included in this analysis because the data were not accessible. However, restoration activities did take place during that period, including scientific activities associated with temperature control, spawning and rearing, geomorphology, salmonid temperature control, ramping, and adaptive management monitoring. In a May 22, 1998, opinion[18] on the then pending Trinity River Flow Evaluation Study, the Solicitor concluded that all of those restoration activities were covered by section 3406(b)(23) of the CVPIA. Accordingly, the deficit in the above table of Trinity River restoration accounting likely is understated. Whether discrepancies exist for other line items in Reclamation's ECO Report is unknown.

An outgrowth of the foregoing financial impacts has been conduct by Reclamation's staff on the Trinity River Restoration program that has deviated from the scientific foundation on which the ROD is based. On January 8, 2008, the Hoopa Valley Tribal Council adopted a resolution rejecting a major project of the Trinity River channel rehabilitation component of the ROD because under funding had led to design and construction decisions that will cause the site to fail in its restoration purpose.[19] The Tribe's conclusion is based on data and analyses developed by the restoration program. In other words, the proof that the channel rehabilitation site would fail not only was well-known to Reclamation, but also had been produced by Trinity River restoration program scientists.

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[18] Memorandum to the Secretary from the Solicitor, Subject: Trinity River Flow Evaluation Study (May 22, 1998).

[19] Resolution No. 08-02 "Evaluation of the Vitzhum Gulch (Indian Creek) Rehabilitation Site Required to be Developed Pursuant to the Record of D for Trinity River Mainstem Fishery Restoration."

Request for Reform of Interim Contracts to Comply with CVPIA

Based on the foregoing, the Tribe requests that the interim contracts pending approval be amended to incorporate the following provisions and limitations, or text having the same effect:

> All water deliveries pursuant to this contract are limited by and subordinate to: (1) the Secretary's fiduciary duty, referred to in section 3406(b)(23) of the Central Valley Project Improvement Act, to meet in stream fishery flow requirements of the Trinity River as specified in the Trinity River Mainstem Fishery Restoration record of decision, which was adopted by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe on December 19, 2000 (Trinity River record of decision); (2) the Contract between the United States and Humboldt County dated June 19, 1959; (3) Conditions 8 and 9 in State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959); and the decision in Westlands Water Dist. v. U.S. Dept. of Int., 376 F.3d 853 (9th Cir. 2004).
>
> The Contractor acknowledges and accepts its obligation, in concert with other CVP beneficiaries, to pay as a fixed annual component of O&M charges all costs of implementing the Trinity River record of decision. This obligation includes the costs of:
>
> 1) flow management for geomorphic and riparian processes
>
> 2) channel and watershed rehabilitation
>
> 3) low management for temperature and habitat
>
> 4) fine and coarse sediment management
>
> 5) adaptive management and monitoring.
>
> This obligation shall continue for the duration of this contract and any renewals thereof.

We request that the foregoing provisions be included as well in all contracts subject to section 3404 of the CVPIA.

Conclusion

Your consideration of these comments is appreciated. If you have any questions please contact us.

Sincerely,

David Jordan for
Clifford Lyle Marshall
Chairman

cc: Secretary of the Interior
Solicitor
Deputy Director, OMB, Steven S. McMillin
Hon. Dianne Feinstein
Hon. Barbara Boxer
Hon. Mike Thompson
Energy and Natural Resources Committee
Attn: Chairman Jeff Bingaman
Ranking Member Pete V. Domenici
Indian Affairs Committee
Attn: Chairman Byron L. Dorgan
Ranking Member Lisa Murkowski
Natural Resources Committee
Attn: Chairman Nick J. Rahall, II
Ranking Member Don Young
Native American Caucus Co-Chairmen
Attn: Hon. Dale Kildee
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January 29, 2010

VIA EMAIL
rhealer@usbr.gov

Ms. Rain Healer
South Central California Area Office
U.S. Bureau of Reclamation
1243 N St
Fresno, CA 93721

Re: Comments on San Luis Interim Contract Renewal Draft EA/FONSI

Dear Ms. Healer:

On behalf of North Coast Rivers Alliance, we respectfully submit the following comments on the San Luis Interim Contract Renewal Draft Environmental Assessment ("EA") and Draft Finding of No Significant Impact ("FONSI"). We believe the EA and FONSI to be deficient and request that an Environmental Impact Statement be prepared, as required by the National Environmental Policy Act ("NEPA"), for the following reasons:

1. The Purpose and Need for the San Luis Interim Contract Renewal ("Project") is unclear. The EA does not explain why it has become necessary in some cases to execute *eleven or twelve* "interim" contracts. Nor does the EA estimate when a long-term contract will be executed.

2. The alternatives analysis is inadequate. The No Action Alternative was based on a misinterpretation of the Central Valley Project Improvement Act ("CVPIA"), and should have considered non-renewal of the contracts, in accordance with the expressly discretionary terms of the CVPIA. Moreover, alternatives proposing a reduced quantity of water deliveries were improperly eliminated from further consideration. Overall, the EA compares the environmental effects of two virtually identical actions, making a mockery of NEPA's informational purpose.

3. The study area is unduly narrow, restricting consideration of the Project's impacts, and the EA does not explain why this choice was made.

4. The EA fails to adequately assess the impacts of renewing the contracts. Specifically, the discussion of water and biological resource impacts ignores that contract renewal will foreseeably lead to groundwater pollution and harm to plants and animals.

5. The cumulative impact assessment has no analysis whatsoever. This is particularly egregious because many of the EA's findings of no significant impact are predicated on the idea that there will be no impact due to the brief length of the "short interim period." But most of the contracts are on their twelfth renewal, and the EA makes no attempt to ascertain the long-term environmental impacts that may result from an extended series of "short interim period[s]."

6. This Draft EA, by its own terms, is not yet final. "This draft EA will not be finalized until the Section 7 consultation [with USFWS] is complete," (EA, p.26) but consultation is ongoing. Therefore, a Supplemental EA will have to be prepared when consultation is complete, in order to allow public comment on the entire document.

Thank you for considering our comments on this important matter.

Very truly yours,

/s/ Stephan C. Volker

Stephan C. Volker
Attorney for North Coast Rivers Alliance

Attachment: Detailed comments

DETAILED COMMENTS

1. The Purpose of and Need for this Project Is Unclear.

The Purpose and Need section provides scant information about why this particular Project is actually needed. It explains why water is needed in the Central Valley, but not why it must be delivered pursuant to *these* "interim" contracts. Most of the contracts proposed to be renewed "are currently in their eleventh interim renewal contract and the proposed renewal would be the twelfth." EA, p. 6. Because each renewal is for two years (except for an initial 3-year interim renewal), this means that *six of the eleven contracts have already been renewed for an "interim" period of 23 years!* The EA does not explain why such a lengthy interim period has become necessary. Nor does it estimate when a long-term renewal will occur. The EA obfuscates the justifications for the Project by failing to discuss why "interim" renewals are required. Accordingly, it fails to satisfy NEPA.

2. The Alternatives Discussion is Woefully Inadequate.

A. The EA misinterprets the Bureau's authority under the CVPIA and accordingly improperly assumes that the contracts will be renewed, even under the No Action Alternative.

The EA's *No Action* Alternative improperly assumes that the Bureau of Reclamation ("Bureau") *will* take an action – renewing the interim contracts. The stated reason is that "[n]on-renewal of existing contracts is considered infeasible" because "Reclamation has no discretion not to renew existing water service contracts" under section 3404(c) of the CVPIA. EA, at 9. This is a misreading of the Bureau's authority under the CVPIA, which expressly permits the Bureau *not* to execute an *interim* contract.[1] Accordingly, the EA should have considered non-

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[1]Section 3404(c) of the CVPIA reads, in pertinent part, as follows:

(c) Renewal of Existing Long-Term Contracts.--Notwithstanding the provisions of the Act of July 2, 1956 (70 Stat. 483), *the Secretary shall, upon request, renew any existing long-term* repayment or *water service contract* for the delivery of water from the Central Valley Project *for a period of 25 years and may renew such contracts for successive periods of up to 25 years* each.

(1) No such renewals shall be authorized until appropriate environmental review, including the preparation of the environmental impact statement required in section 3409 of this title, has been completed. *Contracts which expire prior to the*

renewal of the contracts as the No-Action alternative, in order to provide the Bureau with information about the environmental consequences of exercising the discretion expressly granted to it.

The EA relies upon the first set of italicized language (*supra* n. 1) for the proposition that "the Secretary **shall** . . . renew any existing long-term . . . contract" and therefore it has no discretion not to execute an interim renewal of the contracts. EA, p. 9 (emphasis in original). But this is not the relevant language. The pertinent part of section 3404(c) is in subsection (1), which says that "[c]ontracts which expire . . . **may** be renewed for an interim period. . . ." (Emphasis added.) Congress clearly knew the difference between the mandatory shall and the permissive may, as reflected by the fact that the statute says that the Secretary "shall" execute a first long-term renewal, but only "may" execute "successive" long-term renewals. Because the statute only says that the Bureau "may" issue interim renewals of expired contracts, *the Bureau has discretion not to renew the contracts*. Therefore, the No Action Alternative should have considered the environmental impacts of not renewing the contracts, and its failure to do so violates NEPA.

Furthermore, even assuming contrary to law that the CVPIA did *not* give the Bureau discretion not to renew the contracts, this would not be a sufficient reason to dismiss non-renewal as an alternative. NEPA is intended to "inform [all] three branches of government." *Rhode Island Committee on Energy v. Gen. Svcs. Admin.,* 397 F.Supp. 2d 41, 56 n.19 (D.C.R.I. 1975). Accordingly, "even if an alternative requires 'legislative action', this fact 'does not automatically justify excluding it from an EIS.'" *Methow Valley Citizens Council v. Regional Forester,* 833 F.2d 810, 815 (9th Cir. 1987) (quoting *City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986)).[2] Even if the Bureau *were* required to renew the contracts, analyzing the impact of not

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> *completion of the environmental impact statement required by section 3409 may be renewed for an interim period not to exceed three years in length, and for successive interim periods of not more than two years in length,* until the environmental impact statement required by section 3409 has been finally completed, at which time such interim renewal contracts shall be eligible for long-term renewal as provided above. . . .

(Emphasis added.)

[2]*Methow Valley* was "reversed only in part" by the Supreme Court at 490 U.S. 332. *Methow Valley Citizens Council v. Regional Forester,* 879 F.2d 705, 706 (9th Cir. 1989). "The Supreme Court . . . did not address the portion of the Ninth Circuit decision dealing with alternatives; thus, that aspect of the Circuit court's decision remains good law." Remy, *et al.*,

renewing them would help inform Congress about the environmental consequences of the CVPIA. For both of these reasons, the No Impact Alternative should have been *non-renewal* of the contracts.

B. The EA fails to consider a reasonable range of alternatives.

"[C]ourts require consideration of a reasonable range of alternatives in environmental assessments as well as in impact statements." Mandelker, *NEPA Law and Litigation*, § 10:30. The EA fails to consider a reasonable range of alternatives. In fact, the only alternative considered was the No Action Alternative, and the only difference between the alternative and the Proposed Action is that the No Action Alternative includes "tiered pricing," which the EA repeatedly states would not make any difference as to the Project's impacts. *E.g.*, EA, pp. 21, 25, 32. Essentially, no alternatives at all were considered. A proper range of alternatives would have considered a reduction in contract water deliveries, particularly since more water is promised under the contract than has been delivered recently. *See* EA, p. 14. Considering the impacts of a reduced-delivery alternative would allow the EA to give a more realistic estimate of the environmental impacts of *using* all of the water entitled under the current contracts. In other words, the EA's failure to consider the environmental impacts of *using* the amount of water *entitled* vis-a-vis the amount of water *actually delivered* prevents the EA from providing a realistic assessment of the Project's actual impacts. A proper range of alternatives would have included both options. The EA's improperly limited range of alternatives fails to satisfy NEPA.

3. The Study Area is Unduly Narrow

The EA's consideration of environmental impacts is limited solely to the service areas of the San Luis Unit contractors. EA, p. 11. That is to say, the EA does not consider the environmental impacts of water deliveries on the water *sources* – such as the American, Trinity, and Sacramento Rivers, and the Delta – all of which are outside of the Study Area. It also fails to analyze the impacts of the Project on the Santa Rosa Rancheria, solely because the Rancheria is located six miles east of the Study Area. EA, p. 36. By narrowly defining the study area, the EA unlawfully fails to disclose all of the Project's impacts, some of which will occur outside of the Study Area. This PEIS from which this EA was tiered "did not analyze site specific impacts of contract renewal." EA, p. 2. As such, the Study Area must be expanded so as to encompass all areas potentially affected by the Project's site specific impacts, including source areas. A failure to do so would violate NEPA.

Guide to CEQA, p. 1028 n. 78 (11th ed. 2007).

Furthermore, no explanation is given regarding the Study Area's boundaries. Please also provide an explanation as to why the Study Area's boundaries were drawn in this limited fashion.

4. The EA's Analysis of Water and Biological Resources Impacts is Deficient.

NEPA requires agencies to take a "hard look" at the potential environmental consequences of their actions. *Kern v. U.S. Bureau of Land Management,* 284 F.3d 1062, 1066 (9th Cir. 2002). Thus, "mere[] . . . asserti[ons] that an activity . . . will have an insignificant effect" do not satisfy NEPA; instead, agencies must "supply a *convincing statement of reasons* why potential effects are insignificant." *Alaska Center for Environment v. U.S. Forest Serv.,* 189 F.3d 851, 859 (9th Cir. 1999) (emphasis added) ("*Alaska Center*"). An EIS is required if there are "'*substantial questions* whether a project *may* have a significant effect' on the environment." *Blue Mountains Biodiversity Proj. v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir. 1998) (citation omitted; emphasis added) ("*Blue Mountains*").

"'[G]eneral statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided.'" *Blue Mountains, supra,* 161 F.3d at 1213 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.,* 137 F.3d 1372, 1380 (9th Cir. 1998)). The EA fails to affirmatively demonstrate that the Project's impacts will be insignificant, as discussed more fully below. Therefore, the EA does not comply with NEPA, and an EIS must be prepared.

A. <u>The analysis of Water Resources impacts is inadequate.</u>

The EA fails to actually consider what effects the Project will have on already-compromised water resources. The EA acknowledges, under the heading "Impacts of Agriculture on Groundwater," that over the past 40 years, "salt and selenium concentrations in groundwater" have increased in the area, "as a result of imported irrigation water." EA, p. 20. Salt and selenium contamination is especially prevalent "[i]n low-lying areas of the valley." *Id.* Moreover, "[s]ignificant portions of the groundwater in the San Luis Unit exceed the California Regional Water Quality Control Board's recommended [total dissolved solids] concentration. Calcium, magnesium, sodium, bicarbonates, selecium, sulfates, and chlorides are all present in significant quantities as well." *Id.* The EA further acknowledges that the presence of many of these latter chemicals is the result of agricultural operations. *Id.* at 26.

Yet the entirety of the EA's discussion of whether the Project may contribute to these water quality problems is as follows: "Much of the San Luis Unit is drainage impacted, so high efficiency irrigation is [already] implemented as a mechanism for reducing deep percolation and subsurface drainage production. [¶¶] Reclamation does not anticipate that the No Action

Alternative[3] would cause any changes . . . in the quantity, quality, or discharge or drainage emanating from or within the San Luis Unit. . . ." *Id.* at 21-22. This conclusion is a "mere[]. . . asserti[on]" that has no support whatsoever. *Alaska Center,* 189 F.3d at 859. There is no estimate or discussion of how widely high efficiency irrigation is used, or how effective it is at "reducing deep percolation." Instead, the Bureau simply "does not anticipate" any changes to water quality. This does not constitute a "hard look" at the project's impacts on water quality. Because there are "substantial questions" about whether the Project – and the agricultural operations it enables – "may" have a significant effect on water resources, and because the EA cannot in any way be deemed to include "a *convincing statement of reasons* why potential" water resources "effects are insignificant," an EIS must be prepared. *Blue Mountains,* 161 F.3d at 1212; *Alaska Center,* 189 F.3d at 859.

B. The analysis of Biological Resources impacts is inadequate.

The analysis of impacts to biological resources is perfunctory at best. The EA fails to explain its conclusions in this area. For example, the EA acknowledges that an ongoing shift toward orchard crops (from row crops) means that the No Action Alternative "would adversely affect[]" "species . . . preferring row crops." EA, p. 25. But the EA inexplicably concludes that "over the short interim period, these changes are not likely to be substantial." *Id.* The EA contains no attempt to quantify or otherwise assess the actual impacts on species preferring row crops. Again, "general statements about 'possible' effects . . . do not constitute" the required "hard look" at environmental impacts in an EA unless the agency provides an explanation as to why "more definitive information could not be provided." *Blue Mountains, supra,* 161 F.3d at 1213. Here the Bureau states that impacts are "not likely to be substantial," but it fails to explain why a more definitive statement could not have been given. Thus, an EIS must be prepared.

5. The Cumulative Impact Analysis is Stunningly Deficient.

After defining "cumulative impact," the EA proceeds with its discussion of the same, which reads, in its entirety, as follows:

> To determine whether cumulatively significant impacts are anticipated from the Proposed Action, the incremental effect of the Proposed Action was examined together with impacts from past, present, and reasonably foreseeable future actions in the same geographic area.

[3] The discussion of the Proposed Action's impacts on water resources has no substantive assessment of water *quality* impacts.

> Renewal of 11 interim contracts would not contribute to cumulative changes or impacts to water resources, biological resources, air quality, cultural resources, ITA, land use, socioeconomic resources, environmental justice or global climate change.
>
> Therefore, there would be no cumulative impacts as a result of the Proposed Action.

EA, p. 34. This cumulative impact analysis violates NEPA for two related reasons.

First, it is simply too conclusory. There is no discussion of how the Bureau arrived at its conclusion that "[r]enewal of 11 interim contracts would not contribute to cumulative . . . impacts. . . ." *Id.* In essence, the public is being asked to take the Bureau at its word that it assessed the Project's cumulative impacts with no evidence whatsoever that it actually did so. There is no explanation for any of the cumulative impact findings. At the risk of being repetitious, "mere[] . . . asserti[ons] that an activity . . . will have an insignificant effect" do not satisfy NEPA; instead, agencies must "supply a *convincing statement of reasons* why potential effects are insignificant." *Alaska Center,* 189 F.3d at 859. The cumulative impacts discussion gives no reasons at all for its conclusions, convincing or otherwise. Thus, the EA violates NEPA.

Second, the EA's conclusions about cumulative impacts are at odds with its conclusions in other areas. The EA's repeatedly concludes that various potentially significant effects will not actually be significant due to the brief, two-year "interim" nature of the renewals. EA, pp. 21 (water resources); 25 (biological resources); 30 (land use); 32 (socioeconomic resources); 33 (environmental justice). The fact that impacts are supposedly not significant *because* of the short two-year renewal term obviously raises "substantial questions" as to whether there "may" be significant impacts over a longer period of time. *Blue Mountains,* 161 F.3d at 1212. More than half of the "interim" contracts being renewed are being renewed for the *twelfth* time. EA, p. 6. This raises the even more obvious question of whether the "incremental effects of the Proposed" two-year extension, when added to the 23 years of past renewals,[4] *may* in fact have a "cumulatively significant impact on the environment." EA, p. 34. The EA does not even attempt to address this patent inconsistency. The EA's failure to discuss cumulative impacts makes it impossible to ascertain the long-term environmental consequences of a 23-year series of interim renewals. As such, the EA fails in its informational purpose and violates NEPA.

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[4]Also relevant are potential future renewals, of which the EA makes no mention, even though further interim contracts are clearly "reasonably foreseeable" given (1) the number of past renewals and (2) the fact that the EA does not estimate when a long-term contract will be executed.

6. The EA Fails to Disclose the Mitigation Measures that Will be Imposed as a Result of Consultation with USFWS, And By its Own Terms is Not Yet Final.

The EA relies on the pending results of consultation with USFWS to ensure that the Project will not have any significant impacts. "[C]onsultation . . . ensure[s] that renewal of interim contracts would not result in any significant effect to threatened or endangered species." EA, p.26. In other words, the Bureau is using a "mitigated FONSI" to avoid environmental impacts. "A 'mitigated FONSI is upheld when the mitigation measures significantly compensate for a proposed action's adverse environmental impacts.'" *Oregon Natural Desert Ass'n v. Singleton, 4*7 F.Supp. 2d 1182, 1193. (D. Or. 1998) (citation omitted). "Although mitigation measures need not completely compensate for adverse environmental impacts . . . the agency must analyze mitigation measures in detail and explain how effective the measures would be." *Id.* (citation omitted). "A mere listing of mitigation measures" in an EA "is insufficient to qualify as the reasoned discussion required by NEPA. Instead, mitigation measures should be supported by analytical data. . . ." *Id.* (citation omitted).

The EA violates NEPA because it does not even include the (insufficient) "mere listing of mitigation measures." Instead it simply promises that consultation will eliminate all potential impacts without disclosing the mitigation measures that consultation will produce. In other words,

> The [Bureau's] "mitigated FONSI" is not supported by any analytical data; . . . and it does not reveal how mitigation measures would compensate for the adverse [biological] impacts identified in the . . . EA. [¶] The . . . EA . . . is replete with plans to monitor conditions and develop data in the future, but . . . NEPA requires that the agency develop the data first, and then make a decision, not make a decision and then develop the data.

Id. at 1194. Because the EA does not include the results of consultation with USFWS, it fails to demonstrate that consultation will in fact mitigate "potential effects to species and critical habitats. . ." as promised. EA, p. 35. Indeed, by its own terms, the "draft EA will not be finalized until the Section 7 consultation is complete." The Bureau's attempt to defer inclusion of mitigation measures in the EA until after the public comment period has elapsed violates NEPA. The public must be allowed to comment on the mitigation measures, so that (1) their adequacy can be assessed, and (2) impacts *from* mitigation measures can themselves be

mitigated. If the Bureau does revise the EA to include the results of consultation, a supplemental EA must be prepared, because the results of consultation would constitute both "new . . . information" and "substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c).[5]

For all of these reasons, NCRA urges the Bureau to reject the proposed EA and FONSI and to prepare an EIS.

Thank you for considering our comments on this important matter.

[5]Although "CEQ regulations for supplemental [EISs] do not apply to environmental assessments, . . . the courts apply the same requirements to supplemental [EA] claims that they apply to supplemental [EISs]." *NEPA Law and Litigation, supra,* § 10:49.

January 29, 2010

Rain Healer
South Central California Area Office
U.S. Bureau of Reclamation
1243 N St
Fresno, CA 93721

Subject: Comments on Draft EA/FONSI on San Luis Interim Contract Renewal

Dear Ms. Healer:

The Sierra Club California, Friends of the River and the Planning and Conservation League and submit these comments on the Draft Environmental Assessment (DEA) and the seven Draft Findings of No Significant Impact (FONSI) on the San Luis Interim Contract Renewals. We request a full Environmental Impact Report be completed so the decision makers and the public can:

1. Make an informed decision regarding the impact of approving specific water contract quantities that exceed available supplies;
2. Assess the Bureau of Reclamation's compliance with duties under Federal and State law including the goals and provisions of the 1982 Reclamation Reform Act [RRA] and the1992 Central Valley Project Improvement Act [CVPIA]. Federal and State law require water delivered is beneficially used, encourages conservation, and will not cause further environmental

harm, pollution, or degradation to the waters of the state and other beneficial uses of the land or Public Trust Values.

3. Assess compliance with regulatory actions under the Clean Water Act, the CVPIA, the Migratory Bird Treaty Act, Indian Trust Assets and the Endangered Species Act from renewing contract quantities that do not accurately reflect the delivery capability and water availability of the CVP.

Analysis of the environmental documentation is insufficient to support a finding of no significant impact for the renewal of the San Luis Unit Water Service Interim Renewal Contracts 2010-2013 and it does not meet the legal requirements of the National Environmental Policy Act [NEPA].

Further we find the exclusion from the analysis of the environmental impacts of changes to the contractor' service areas, water transfers and exchanges, contract assignments, Warren Act Contracts and drainage to be arbitrary and capricious because it fails to provide any analysis or information so there can be an informed decision regarding the environmental impacts from these actions. Nor does this meet the standard of providing sufficient information for public review and comment. The reliance on individual environmental assessments or other programmatic decision making documents segments the information and fails to fully disclose the cumulative and the compounding nature of the environmental impacts from these proposed actions and the exaggerated quantities of water in these contract renewals.

Finally this document is tiered to a variety of environmental documents including the CVPIA Programmatic EIS (PEIS). Some of the documents are not complete, some of the documents rely on different baselines than this project, and some documents rely on untested or unproven promises of environmental mitigation or benefit. Use of an environmental assessment instead of an environmental impact statement limits full public disclosure and full public comment provisions that are necessary given the complicated nature of the issues raised in contract renewals including impacts to other water users in the state, pollution, water transfers and use of public wheeling facilities.

The environmental analysis provided does not fully disclose the site-specific circumstances of the San Luis Unit contracts and these specific impacts on the different CVP units. Further the baseline in the various documents is different rendering the analysis of impacts incomplete. Actions taken under this EA that are not consistent with the project description in the various ESA consultations could render the analysis of impacts on the survival and recovery of proposed and listed species invalid for the proposed action. The baseline used for the consultations is different than the baseline under the proposed project. The public is denied the opportunity to fully evaluate the impacts to endangered species because the biological assessments were not included in the document.

The DEA and proposed FONSI do not meet the legal requirements of the National Environmental Policy Act (NEPA). Specifically the document is deficient for the following reasons:

- Insufficient information is provided to make an informed decision of no significant impact.
- Impacts from federal actions associated with the interim contract water delivery were arbitrarily excluded from the analysis, including but not limited to, the impacts from water transfers and exchanges, contract reassignments, discharges of groundwater into the California Aqueduct and changes to the contract service areas or places of use. Most of these actions use the same facilities and deliver water to these contractors.
- The full range of alternatives was not analyzed. Reduced contract deliveries were not considered. The no action alternative is virtually identical to the action alternative.
- The analysis of the impacts from the exaggerated contract quantities promised for delivery do not accurately reflect the delivery capability of the CVP, especially after regulatory actions under the Clean Water Act, the CVPIA and Endangered Species Act are considered. This "over commitment" of CVP supplies has adverse impacts that were not fully disclosed.
- Selection of a narrow study area precluded analysis and information needed to assess the impacts of the proposed action on other CVP contractors, surrounding agricultural lands and impacts to the sources of water such as the Delta, the Sacramento, Trinity and American rivers.
- There is little or no information on the direct, indirect and cumulative impacts of the proposed actions including among other impacts, subsurface drainage pollution mobilization and movement from the irrigation of upslope lands. Subsurface agricultural drainage can contain extremely elevated levels of selenium, salt, boron and other toxic constituents that can migrate and/or adversely affect surrounding domestic wells, downslope agricultural farmlands, and surface waters and associated wetlands receiving drainage inputs, the San Joaquin River and Delta. Selenium is a potent reproductive toxicant to vertebrate species and can readily bioaccumulate to toxic concentrations in the food chain. We are particularly concerned with adverse selenium impacts to salmonids associated with agricultural drainage discharges in the San Joaquin River.

Thank you for your consideration of our comments. We urge you to reject the proposed Finding of No Significant Impact and instead prepare an Environmental Impact Statement.

Respectfully submitted,

Jim Metropulos

Senior Advocate
Sierra Club California

Steve Evans

Conservation Director
Friends of the River

Charlotte Hodde
Water Program Manager
Planning and Conservation League

Attachment: Detailed comments

cc: Nancy Sutley, Chair, Council Environmental Quality
Ken Salazar Interior Secretary
David Hayes, Deputy Interior Secretary
Don Glaser, Regional Director BOR
Dan Nelson, San Luis Delta-Mendota Water Authority
Alexis Strauss, USEPA
Charles Hoppin, Chairman SWRCB
Karl Longley, Chairman CVRWQCB
Rod McGinnis, NMFS
Ren Lohoefener, USFWS
John McCamman, Department of Fish and Game
Lester Snow, Department of Water Resources
Mark Madison, City of Stockton

Rudy Schnagl, CVRWQCB
Interested parties

DETAILED COMMENTS

1. The DEA fails to analyze the ongoing impacts and continued impacts of water deliveries on water quality, soils or other natural resources from water to applied to contaminated soils. Insufficient information is provided to support the conclusion there will be "no effect on surface water supplies or quality" or the conclusion that there will be "no significant effect on groundwater supplies or quality."[Pg.3 FONSI-09-101]

The area affected by the delivery of water under these interim contracts includes waters of the United States (the San Joaquin River and many of the west tributaries, such as Mud and Salt Sloughs and the Grasslands wetland channels) that are listed as impaired pursuant to the Clean Water Act. The 2005 Bureau of Reclamation's DEIS and Supplemental Information for Renewal of Long Term Contracts for San Luis Unit acknowledges that deliveries under these contracts have adversely altered both groundwater flow and quality (pp.3.8-4 and 3.8-6) and that all of the alternatives evaluated in the DEIS, including the no-action alternative (i.e. renewal of the contracts with current terms and conditions) would result in the continuing degradation of water quality in the area.

The DEA does not analyze the irrigation of upslope lands as sources of selenium mobilization into drainage, ground or surface water. Studies since the early 1990's have established that irrigation and associated drainage from the San Luis Unit contribute significantly to the movement of pollutants, particularly selenium, which affect surface and ground water within the region[1]. Selenium in soils from the San Luis Unit are mobilized by irrigation and storm water run-off [see 1990 Drainage Management Plan for the West San Joaquin Valley, California, Figure 6, p.28] with the highest concentrations of salts and selenium located down slope [Figure 2.5 Drainage Feature Reevevaluation Preliminary Alternatives Report, Dec. 2001]

According to EPA water deliveries from these contracts where selenium concentrations exceed water quality standards affect important resources such as the Grassland Ecological Area.[2] Concentrations in some canals have reached levels 20 times the standard protective of aquatic health.[3] EPA goes on to note, "*subsurface drainage flow comes, in part, from the Westlands Water District [Westlands] and other water districts upgradient of the northerly districts*

[1] "A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley," September 1990 [Bureau of Reclamation, Fish and Wildlife Service, US Geological Survey, Ca Dept. of Fish and Game and California Department of Water Resources.
[2] EPA Detailed comments for the DEIS and Supplemental Information for Renewal of Long-Term Contracts for San Luis Unit Contractors, CA, April 17, 2006.
[3] Ibid.

with high selenium/Total Dissolved Solid (TDS) concentrations. There is potential for the water deliveries to exacerbate mobilization of pollutants and movement (through shallow groundwater) into areas where there could be fish and wildlife exposure.[4] Clearly the DEA should have provided information on the San Luis Unit's role in groundwater accretions and discharges of pollutants into wetland channels and the San Joaquin River and identified the impacts to wetlands and wildlife.

There is no information or analysis to support the DEA finding the proposed action "would have no effect on birds protected by the Migratory Bird Treaty Act (16 USC Section 703 et seq.)" [pg 36]. No monitoring data was provided to show there has been no incidental take, harm to eggs, or increased mortality from irrigating these selenium lands. A 2005 EA evaluating a proposed water assignment from Broadview Water District to Pajaro Valley Water District (Broadview EA) does document runoff from Westlands has degraded domestic well fields and contaminated irrigation canals with pollutants.

In addition, the DEA's contention [pg9] that the language in the Section 3404(c) of the CVPIA precludes the Secretary from considering reduced contract quantities as a project alternative is not accurate. The carte blanche elimination of this alternative is not consistent with Secretarial discretion contained in Section 3404 (c) as to whether to renew these contracts at the end of the first long term renewal and nothing in the "shall" of renew that limits the Secretarial discretion regarding amount and requirements to ensure water is put to beneficial use. In addition, the elimination of this alternative fails to consider the requirements of 40 CFR 1502.14 (b) and NEPA's 40 Most Asked Questions, which emphasize the need to evaluate all reasonable alternatives even if they conflict with local or federal law.

The DEA should include both information on the relationships between irrigation in the San Luis Unit [Westlands and northern districts] and ground water movement downslope, in terms of flow and water quality. It should provide information on the delivery of water to the San Luis Unit is adversely altering both groundwater flow and quality and the potential for movement (through shallow groundwater of pollutants (e.g. selenium) to the waters of the San Joaquin River and its tributaries, such as Mud and Salt Sloughs and the Grasslands Channels that are listed as impaired pursuant to the Clean Water Act. Based on this information a full EIS should include mitigation measures, such as monitoring and adaptive tools, farm edge groundwater monitoring, contract provisions, or changes in contract amounts and location of water applied, which will reduce drainage production and selenium mobilization. Such alternatives and mitigation

[4] Ibid. Attachment A. See also EPA comments re The Notice of Intent for Long-term Contract Renewal, Central Valley Project, California, January 8, 1999. And EPA comments re Proposed Long Term Contracts and Associated Environmental Assessments. December 8, 2000.

measures would not, however, address the need for environmental water to mitigate the impacts from the creation of such a nuisance or pollution. These additional mitigation measures are needed to meet state and federal law and Public Trust duty under the Bureau's water rights.

2. The Proposed Action narrowly defines the project and assumes it does not extend to the San Francisco Bay Estuary and Sacramento San Joaquin Delta.

Export water supply from the Delta, which affects key habitat variables such as channel configuration, delta hydraulics, delta inflows and water quality are identified as one of the contributors in the decline of key fish species. The DEA excludes any analysis of these impacts from the proposed action. Further the DEA excludes any analysis of Warren Act contracts, water transfers and exchanges, all of which could increase the diversions from the Delta under the proposed action to renew these contracts at quantities which exceed available supplies.

Additionally the California Regional Water Quality Control Board, September 10, 2005, identified potential Delta impacts from constituents that originate in the San Luis Unit project area. In particular, analyses related to implementation of the salinity/boron TMDL have pollutant loads coming from sub-watersheds such as the Grasslands area, which includes the Northern contract area. Also the proposed action does not provide any information or analysis from the combination of impacts that could result from this action and the recent federal action under the USBOR Grasslands Bypass ROD December 22, 2009 where selenium discharges that do not meet protective aquatic objectives will be discharged into tributaries of the San Joaquin for an additional ten years.

3. **The proposed action does not reflect legal and environmental constraints on water deliveries. The impact of this package of false promises to the financial markets and other CVP contractors is not disclosed.**

Financial Assurances are False. The quantity of the interim contract renewals should be based on existing, developed project supplies. The needs assessment contained in the DEA does not accurately reflect environmental needs, Indian Trust obligations, and Public Trust obligations. In fact the DEA readily admits relying on a 2007 needs assessment is faulty. The DEA states, "the analysis for the Water Needs Assessment did not consider that the CVP's ability to deliver CVP water has been constrained in recent years and may be constrained in the future because of many factors including hydrologic conditions and implementation of federal and state laws". [pg 14]

The proposed action should accurately reflect realistic contract quantities with existing developed water supplies and reasonably foreseeable water availability. Failure to truthfully reflect actual contract amounts can potentially lead to financial market speculation based on unrealistic water contract deliveries. Westlands has already leveraged these federal water contracts to borrow from the financial markets $50 million dollars.[5] Even the DEA suggests retaining these inaccurate water quantities in the contracts provides assurances for investments. [pg10] These false assurances could lead to substantial financial dislocations to bond holders and financial markets.

All contracts should include an honest and full disclosure that water service contracts are not permanent entitlements. The rationale that these false representations provide assurance is misleading. Further the DEA suggests that the Bureau is bound to this charade because of the PEIS for the CVPIA. NEPA compliance and the law require an accurate analysis of the impacts of a proposed project action. The cumulative effects of this exaggeration of water delivery quantities will only become more acute as senior water rights holders upstream develop their water supplies [See PEIS, Figures IV-79 and IV-80 and accompanying text.] Based on Westlands assurances these exaggerated water contracts are being used as collateral claiming the water can be marketed outside of the district boundaries to buyers in Southern California and San Francisco.[6] No analysis or information regarding the environmental impacts of water sales, transfers or exchanges is provided despite the fact numerous transfers are taking place within, outside and into the Westlands.

Environmental Impacts from Exaggerated Water Contract Amounts Are Not Disclosed. The DEA allows for the continued obligation of contract water quantities above the amounts that are currently delivered. No detailed evaluation of the environmental effects caused by the delivery of water above currently delivered amounts is provided. Failure to provide this information leaves out critical impacts of the proposed action and understates the cumulative impacts. For example, the American River Division plays a key role in the operation of the CVP to meet Endangered Species Act [ESA] requirements, water quality regulations, and water supply demands within, and south of the San

[5] Fitch Rates $50MM San Luis & Delta Mendota Water Auth., California Revs 'A'; Outlook Stable © Business Wire 2009-03-05. The Fitch Bonding Agency states, "The inherent value in the district's extensive water entitlements through its role as the contractor with the federally owned CVP is a credit strength."

[6] Ibid. Business Wire 3-5-09. "There is concentration amongst WWD water purchasers. But offsetting this risk somewhat is the value of the cash crops farmed in the district (about $1.3 billion in fiscal 2008) and the absence of alternative/equivalent supplies or infrastructure to deliver water. In addition, WWD potentially has the ability to sell and transfer water rights outside the district should agriculture cease to be economic, as the demand for water in southern California and the San Francisco Bay area by users with connectivity to the CVP is very high."

Francisco Bay-Delta.[7] A detailed analysis of these environmental effects is important because increased diversions from the American and Sacramento Rivers to meet these contract renewal amounts can adversely affect beneficial uses, such as water quality and habitat for threatened and endangered anadromous fishery.

4. **The water contract quantities are arbitrarily fixed and renewed without regard to updated site specific situations and impacts.** This is problemmatic not just because of conveyance limitations, but because the land within Westlands that is eligible to receive CVP water has been reduced due to drainage settlements involving land retirement. The Westlands CVP Service Area boundary in the contract (an exhibit to the Interim contract) and the DEA map for the project area still includes those lands that were retired from irrigation by Interior (by means of non-irrigation covenants). By law and covenants those lands that are no longer eligible to receive CVP water in the Service Area. The service area for the DEA is inaccurate.

This inaccuracy is compounded because the Water Needs Assessment also relied on the inclusion of lands that were retired and not part of the service area. Further compounding the inaccuracy of the project service area are the reallocations of water supplies from surrounding water districts purchased by Westlands to obtain the district water supplies. The Westlands purchase of the Broadview WD in 2005 and the contract supply of 27,000 AF was reallocated from Broadview to Westlands. Thus, Westlands according to the DEA the exaggerated contract amount is 1.15 million plus 27,000 AFY (plus several thousand acre feet that were assigned from Mercy Springs WD and Centinela WD to Westlands) in a district that has retired 40,000+ acres in a settlement with Interior, and an additional 60,000 acres that Westlands acquired and put out of production. The DEA does address the impacts from the reduction in Westlands irrigable acreage by about 1/6th while obtaining an increase in their water allocation (with the Broadview, Mercy Springs and Centinela supply).

5**. Despite completion of the Programmatic EIS for the Central Valley Project Improvement Act (CVPIA PEIS), the DEA does not adequately address site specific impacts of the Proposed Action. The DEA does not fill in the gaps contained in the CVPIA PEIS.**

6. **Given the changes in the CVP operation and specifically the potential increase of water deliveries to selenium soils within the San Luis Unit from exchanges, water transfers, Warren Act contracts or contract assignments along with the proposed changes to the Grasslands Bypass project and the proposed actions contained in this DEA, consultation should be reinitiated**

[7] FEIS for Renewal of Long-Term Municipal and Industrial Service Contracts for the American River Division, Central Valley Project [CVP] (pgs. 4-4 and 4-6)

with USFWS and National Marine Fisheries Service (NMFS) for the proposed action. The baseline of the original consultations has changed. These consultations need to analyze the cumulative effects of this proposed project along with new information regarding the impact of selenium and other contaminants upon the anadromous fishery in the San Joaquin River[8] and wildlife within the Study Area described in the Programmatic Environmental Impact Statement for the CVPIA.

7. **Contract terms to include repayment of costs for the Trinity River Restoration Program pursuant to CVPIA Section 3406(b)(23) should have been included in the Proposed Action**.

8. **We incorporate by reference comments regarding the deficiencies in this DEA and the DFONSIs submitted by C-Win, the California Sportfishing Protection Alliance, The Bay Institute and the North Coast Rivers Alliance**.

[8] C-WIN Letter to Hayes regarding the Dr. Lemly Memo 12-9-09

January 29, 2010

Ms. Rain Healer
United States Bureau of Reclamation
1243 N Street
Fresno, CA 93721

RE: San Luis Unit Water Service Interim Renewal Contracts

Dear Ms. Healer:

Taxpayers for Common Sense (TCS), a national non-partisan budget watchdog organization dedicated to stopping wasteful government spending, officially submits for the record, our comments regarding the San Luis Unit Water Service Interim Renewal Contracts: Draft Environmental Assessment and Finding of No Significant Impact (EA/FONSI) for the following 11 interim renewal contracts: Westlands Water District, City of Tracy, City of Huron, City of Coalinga, City of Avenal, CA Department of Fish and Game.

We are greatly concerned that interim renewal of the contracts in their current form only stands to perpetuate the gross mismanagement of federally subsidized water, discourage water conservation, and inevitably perpetuate the serious over allocation of California's limited water resources. We strongly urge the Bureau of Reclamation to amend the proposed contracts to ensure that the Central Valley Project Improvement Act of 1992 is accurately and legally implemented.

As they are currently written, the contracts will perpetuate the large financial burden the Central Valley Project has placed on taxpayers, and make it virtually impossible for the beneficiaries of the project to repay the outstanding debt still owed the government before the 2030 deadline mandated by the Coordinated Operations Act of 1986.

In order to fully evaluate the economic impacts related to the two-year interim contract renewals for the aforementioned Central Valley Project (CVP) water contractors, TCS urges the Bureau to conduct a comprehensive study possible of these two-year interim contracts renewals. The Central Valley Project Improvement Act (CVPIA) and CALFED signified a commitment by stakeholders to end the era of big subsidies and waste in California water policy. The Bureau of Reclamation must stay true to the spirit of both the CVPIA and CALFED by renewing CVP contracts in a way that represents a responsible vision of future water needs in California.

Central Valley Project contract promises should reflect realistic water delivery amounts at far less subsidized prices.

TCS strongly urges the Bureau to reconsider its decision regarding levels of water promised in its interim and long-term contracts. The Bureau must ensure that contracts do not continue to promise impossible levels of water that the CVP cannot deliver and lock the taxpayer into providing huge subsidies. Specifically, deeper analysis must be given as to how much water should actually be promised to contractors in renewing their contracts. While certain water levels were promised to these contractors in negotiations for their original contracts, the time has come for these promises to be reassessed based on current and future water needs in a rapidly changing water system.

If an additional two-year interim contract period is truly needed (something that should be fully studied prior to implementation), then the Bureau should use that interim period to do the difficult work of reassessing the entire Central Valley Project. Water in the Central Valley Project is vastly over allocated. The federal government cannot continue to make unrealistic promises of water at the expense of all federal taxpayers.

Inflated promises of water and large subsidies will increase pressure for new dam projects and threaten the delicate balance negotiated in the CALFED Record of Decision (ROD). Such promises will continue a vicious cycle of the federal government promising unreachable amounts of water at cheap prices to CVP contractors and then federal taxpayers being forced to build and pay for massive new water projects to try to meet these assurances. Promising water at an incredibly subsidized rate will further remove market pressures to conserve water and lead to the building of massive water projects that water users cannot afford to fund.

If CVP contract renewals promise inflated levels of water, the policy that was intended to encourage the wise use of water (i.e. tiered pricing as mandated by the CVPIA) will be rendered all but meaningless. Under CVPIA, CVP contracts should be written to initiate tiered water pricing when water consumption exceeds 80% of the annual contract maximum. However, the Bureau rarely delivers annual contract maximums, as demonstrated by historical deliveries, thereby making tiered water pricing ineffective. As Bureau of Reclamation continues through the process of contract renewals, we ask that annual contract maximums be reduced to more realistic levels that the CVP will actually be able to achieve.

Long-term CVP contracts are not permanent entitlements. Instead, CVP contracts must receive full review in order to consider the constantly evolving needs of California's diverse set of water users. The Bureau should require CVP contracts to go through a rigorous public review process and include clear accountability provisions on the part of the water contractors before contracts are renewed. California's water needs are constantly in flux and full review of these contracts renewals is the only responsible policy.

TCS strongly urges the Bureau of Reclamation to draft Central Valley Project interim and future contract renewals to ensure that the CVPIA is accurately and legally implemented. Continuing to issue interim contract renewals helps the Bureau of Reclamation avoid making the tough decisions necessary to follow CVPIA. The only way to achieve CVPIA compliance is to conduct a comprehensive and complete study of the full economic impacts of these renewals and renewals of future long-term contracts.

Sincerely,

Ryan Alexander
President