Attachment A-1

Interim Flows Project - Water Year 2011

Final Supplemental Environmental Assessment

Information and Attachments Submitted with the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition Comment Letter

September 2010

Gasdick, Alicia E

From: Gasdick, Alicia E
Sent: Thursday, June 24, 2010 9:35 AM
To: 'Berliner, Thomas M.'; Jon D. Rubin
Cc: Phillips, Jason R; Banonis, Michelle; Gidding, Margaret A; InterimFlows@restoresjr.net
Subject: RE: San Joaquin River Restoration Program Draft Environmental Document

Mr. Rubin and Mr. Berliner,

Thank you for your e-mails. Reclamation has received the San Luis & Delta-Mendota Water Authority's and the San Joaquin River Exchange Contractors Water Authority's requests to extend the public comment period on the Draft Water Year 2011 Interim Flows Project Supplemental Environmental Assessment. We have evaluated your requests in light of the Interim Flows schedule and feel that extending the comment period until August 6, 2010, may jeopardize our ability to complete the final document and obtain all of the necessary permits and approvals prior to the October 1 flow releases.

We will extend the public comment period for the document for 14 days. Comments will now be due by close of business on July 23, 2010.

Please let me know if you have any questions or concerns.

Ali

Alicia Gasdick
San Joaquin River Restoration Program
Bureau of Reclamation
Phone: 916-978-5464
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From: Berliner, Thomas M. [mailto:TMBerliner@duanemorris.com]
Sent: Wednesday, June 23, 2010 9:55 AM
To: Jon D. Rubin
Cc: Gasdick, Alicia E
Subject: Re: San Joaquin River Restoration Program Draft Environmental Document

Ali. Jon is correct. We'd appreciate the same extension. We confirmed with Vicky Whitney that this wld not delay issuance of the permit.

Tom

Please excuse typos.
Via iPhone.

On Jun 23, 2010, at 9:47 AM, "Jon D. Rubin" <jrubin@diepenbrock.com> wrote:

> Ms. Gasdick,

The San Joaquin River Exchange Contractors make the same request as the San Luis & Delta-Mendota Water Authority. I have copies an attorney, Mr. Thomas Berliner, who represents the Exchange Contractors. He can confirm my representation, if needed.

Jon D. Rubin @ diepenbrock harrison

From: Jon D. Rubin
Sent: Wednesday, June 23, 2010 9:06 AM
To: 'agasdick@usbr.gov'
Subject: San Joaquin River Restoration Program Draft Environmental Document

Ms. Gasdick,

I write to confirm the verbal request I made to you on behalf of the San Luis & Delta-Mendota Water Authority. Specifically, I asked that the United States Bureau of Reclamation extend the comment period for the Draft Supplemental Environmental Assessment and Proposed Findings of of No Significant Impact for the San Joaquin River Restoration Program's Water Year 2011 Interim Flows Project, the notice for which Reclamation issued on or about June 10, 2010 (). The Authority requests that it have until August 6, 2010 to submit comments.

Given the existing comment period closes on July 9, 2010, I would appreciate a response as soon as possible.

Thank you.

Jon D. Rubin
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Attachment 1

SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY
CCID • CCC
FCWD • SLCC

Consisting of 240,000 acres on the Westside of the San Joaquin Valley

August 31, 2009

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Via Email – VWHITNEY@waterboards.ca.gov
Division of Water Rights
State Water Resources Control Board
Attn: Ms. Victoria Whitney
1001 "I" Street, 14th Floor
Sacramento, CA 95812-2000

RE: ***U.S. Bureau of Reclamation Petitions for Temporary Transfer of Water, Permit Nos. 11885, 11886, 11887***

Dear Ms. Whitney:

The San Joaquin River Exchange Contractors Water Authority, a joint powers authority and the Central California Irrigation District, an irrigation district, the San Luis Canal Company a mutual water company, the Firebaugh Canal Water District, a California Water District and the Columbia Canal Company, a mutual water company, hereinafter referred to collectively as the Exchange Contractors, each of whom individually and jointly submit the following protest to the above referenced petitions.

As an initial matter, while this protest raises significant legal issues that highlight the deficiencies in the petitions submitted by the Bureau of Reclamation (USBR or Bureau), the Exchange Contractors and the members thereof are prepared to withdraw their protest, for this proposed transfer only and with no prejudice to raising similar issues with respect to future proposed transfers, if USBR will provide various assurances and enter into appropriate agreements with the Exchange Contractors and if these terms are included as part of the order issued by the Water Board regarding the above referenced petitions. These assurances and appropriate agreements include:

1. **Seepage monitoring and mitigation plan.** No water shall be authorized for release pursuant to the Section 1707 petition below the Mendota Pool until such time as a comprehensive seepage monitoring and mitigation plan has been implemented. Implementation of the plan must include installation of a network of monitoring wells and related equipment on public and private lands, as necessary, through every reach of the San Joaquin River above the confluence of the Merced River that USBR desires to have covered by the 1707 petition. The seepage monitoring and mitigation plan will be

subject to review and approval by the Deputy Director for the Division of Water Rights (Deputy Director).

2. **Fish screens, fish bypass facilities, fish salvage facilities and related operations.** Prior to release of flows that will reach the confluence of the San Joaquin River with the Merced River, USBR shall complete an analysis of the likely Federal costs of any fish screens, fish bypass facilities, fish salvage facilities and related operations on the San Joaquin River at a location at the upstream end of the Mendota Pool and upstream of the Merced River confluence (in the area generally where the Hills Ferry barrier is currently operated), which pursuant to Section 10004(h) the San Joaquin River Restoration Settlement Act (SJRRSA), must be completed prior to the initiation of any flows. The Settlement[1] and SJRRSA direct the USBR to design and install the necessary bypass around the Mendota Pool to ensure that the fishery does not enter the pool. Restoration hydrograph flows carrying out-migrating juvenile and returning adult salmon or steelhead will be directed through the Pool bypass instead of through the Pool. The USBR will construct a new inlet facility to deliver San Joaquin River flood flows in excess of the restoration hydrographs and the Exchange Contractors water rights water into the pool. USBR will agree to install a fish screen or similarly effective facility or device at the proposed new inlet to the Mendota Pool unless scientific data establishes that no such facility or device is necessary. USBR shall consult with the Nation Marine Fisheries Service and the Department of Fish & Game regarding any such facility or device.

3. **Facility Use Agreements.** Prior to release of flows below the Mendota Pool, USBR shall enter into coordinated operations and use agreements with the Central California Irrigation District, San Luis Canal Company, San Joaquin River Exchange Contractors Water Authority, San Luis & Delta-Mendota Water Authority and the Lower San Joaquin Levee District regarding operation of the Mendota Dam, Sack Dam and the existing levees in and around the Mendota Pool, Such agreement shall be subject to the approval of the Deputy Director.

4. **Private Property Access.** In order to implement the seepage monitoring and mitigation plan, USBR shall enter into Temporary Entry Permits (TEP) for geotechnical studies with all landowners upon whose land the USBR intends to locate monitoring wells and/or related equipment. The TEP shall be in generally the same form as that negotiated by USBR and the San Joaquin River Resource Management Coalition (RMC).

[1] The Settlement is found at: http://fwua.org/sjr/settlementdocsnexhibits.pdf. The Settlement is hereby incorporated by reference. The SWRCB is requested to take judicial notice of the Settlement.

5. **Flow levels.** USBR shall not release flows pursuant to the petition that will cause material harm to landowners along the San Joaquin River. The USBR shall enter into an agreement with the Exchange Contractors and the RMC regarding criteria for the increase and decrease of flows above baseline non-damaging flows, based upon information acquired from the monitoring wells and seepage plan such that flows will reduced or halted, as necessary, prior to the occurrence of any material harm (i.e. "triggers" for adjusting flows). Such agreement shall be subject to the approval of the Deputy Director.

6. **Water supply assurance.** Prior to the initiation of spring 2010 flows pursuant to the petitions, USBR shall prepare and publish a water supply operations plan that will ensure it can meet the water rights of the Exchange Contractors through releases from San Luis Reservoir and/or Millerton Reservoir. Such water supply operations plan shall be subject to the approval of the Deputy Director.

I. BACKGROUND

On June 4, 2009, the U.S. Bureau of Reclamation (USBR) filed with the State Water Resources Control Board (SWRCB) three Petitions for Temporary Transfer of Water/Water Rights (Petitions) for the purpose of implementing the "Water Year 2010 Interim Flow Project," as part of the San Joaquin River Restoration Project (SJRRP). The State Water Resources Control Board (SWRCB) gave notice of the Petitions on July 30, 2009.

The SWRCB may approve a petition for a temporary transfer of water if the SWRCB finds that the transfer would involve the amount of water that would have been "consumptively used" or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses. (Water Code §§ 1725, 1726, 1727.) "Consumptively used" means the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.

The Petitions also rely on Water Code Section 1707, which provides that any person entitled to the use of water may petition the SWRCB for a change in the use of water "for purposes of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation . . ." provided the change does not, among other things, "unreasonably affect any legal user of water."

The Exchange Contractors is a joint powers authority comprised of four water entities that irrigate 240,000 acres of prime agricultural land in the San Joaquin Valley. Member agencies are located along the San Joaquin River directly downstream from Friant Dam to the confluence of the Merced River. The four agency members include the Central California

Irrigation District, Columbia Canal Company, Firebaugh Canal Water District, and San Luis Canal Company.

The Exchange Contractors' lands are directly downstream of Friant Dam and abut a majority of the San Joaquin River where the fish restoration program referenced in the Petitions will be implemented. In addition, its water supply facilities and the levees that protect affected lands are located in this stretch of the river and will be impacted by the operations required for the transfer.

The proposed transfer arises out of a settlement agreement which created the SJRRP and which obligates the USBR to release water from Friant Dam in order to protect downstream fisheries. The bulk of this water will come from a reduction of water supplies to the Friant Division contracting entities which receive water from the USBR through their contracts entitling them to water from the Central Valley Project.

While the Exchange Contractors receive water from the Central Valley Project (CVP), by virtue of their "Exchange Contract" and "Purchase Contract" with USBR, pursuant to these agreements, the Exchange Contractors permit the utilization of their senior water rights water through the Friant facilities by the Bureau of their sources of water from the San Joaquin River in exchange for the delivery of an equal amount and supply from the CVP via the Delta-Mendota Canal. The development of the Exchange Contract and Purchase Contract enabled the development of the CVP by the USBR, including the construction and operation of Friant Dam. In the event that the USBR is unable to meet its contractual obligations to the Exchange Contractors, the Exchange Contractors are entitled to resort to their senior water rights and receive a flow of water down the San Joaquin River.

II. GENERAL OBJECTIONS AND CONCERNS

A. Improper Reliance on Temporary Transfer Authority and Procedure. The Petitions seek approval of a "temporary" one year transfer, but the SJRRP settlement contemplated and called for one continuous program of flows, commencing with Interim Flows, and once construction is complete, Restoration Flows. The USBR therefore should have petitioned the SWRCB for a permanent change in use of water for the entire SJRRP, and not piecemealed or segmented the "project" into a one year, temporary transfer.

This is not a situation where future transfers are an option, possibility or even a likely event. Instead, the USBR already knows that it will transfer significant quantities of water each and every year in the future as part of the SJRRP Restoration Flow program. The Bureau's intent and legal obligation as a result of the SJRRSA is that the flows in future years also be protected under Section 1707 of the Water Code and it knows that if the water is subject to recapture, that the water will go to CVP contractors, most likely the Friant

Division. The SWRCB should therefore review not just the "temporary" effects and impacts of the transfer, but the long term impacts on fish and wildlife, and the potential injury to other water right holders, resulting from the entire authorized and contemplated Restoration Flow program. Reviewing and approving just one year of the Restoration Flow program, in isolation, violates the intent and express language of Section 1725.

The SWRCB has previously expressed "concern" over a petition for a short term transfer without the long term effects of related, prior transfers ever having been thoroughly evaluated and the same rationale should apply to future transfers. (*In the Matter of Permits 15026, 15027, and 15030 on Applications 5632, 15204, and 15574 of Yuba County Water Agency*, 1989 Cal. ENV LEXIS 41 (October 19, 1989).)

USBR also should not have petitioned just for a short term transfer of water based on the substantial quantity of water involved in the transfer. USBR proposes to transfer up to 384,000 acre-feet of water. The transfer of such a significant quantity of water requires more in depth review and analysis than is appropriate through a short term transfer petition. The transfer of such a significant quantity of water further cannot be reviewed or considered in isolation, without consideration of similar transfers in successive years through the Restoration Flow program and without consideration of the long term impacts of the overall SJRRP.

Temporary transfers of water are exempt from the requirements of CEQA. (See Water Code § 1729.) USBR, however, has already attempted to review the transfer of water pursuant to CEQA and NEPA through an Environmental Assessment (EA) and Initial Study (IS). The USBR, in fact, frequently refers to and relies on the EA/IS in the documents supporting the requested temporary water transfer. The preparation of such environmental documents constitutes further evidence that the transfer is not just a short term, temporary transfer, but part of a larger, long term program that requires more detailed and comprehensive review, including review of environmental impacts pursuant to CEQA and NEPA.

B. Lack of Support for No Injury Claim. The USBR has failed to provide sufficient information and explanation to support its claim that the alleged temporary transfer of water will not injure any legal user of water. The Petitions instead only contain unsupported conclusions regarding an alleged lack of injury to others, by claiming that "necessary deliveries" of water will be made to other right holders, including, presumably, the Exchange Contractors.

Those vague unsupported assurances do not satisfy the requirement, pursuant to Water Code Sections 1707 and 1725, that a water transfer will not "injure any legal user of water." There are no details, for example, as to how the USBR will be able to deliver or to ensure the

delivery of water to other right holders and contracting parties, including the Exchange Contractors, that would otherwise be delivered, in the absence of the transfer.

Certainly the release, or transfer, of up to 384,000 af of water into the San Joaquin River will have impacts on the water supply and operations of those entities, including the Exchange Contractors, that would have otherwise received the water proposed for transfer. It is inconceivable that the petition does not review and discuss replacement sources and supplies other water users will have to utilize to replace the transferred water. Without any discussion of replacement sources and supplies, there is no way to assess whether the transfer will cause injury to other water users or the environment.

The failure to provide information regarding water supply impacts violates Water Code Section 1727, which provides that a transferor must demonstrate that a proposed temporary change would not injure any legal user of water, including "through significant changes in water quantity, water quality, timing of diversion and use, consumptive use of the water, or reduction in return flows." The Petitions fail to account for and describe these factors in any detail.

Pursuant to Water Code Section 1727(c), the USBR has the burden of establishing that the proposed short term transfer will not injure any legal user of water and will not unreasonably affect fish, wildlife, or other instream beneficial uses. Section 1727(b) further states that the petitioner must establish these elements, including the "no injury" requirement, by "a preponderance of the evidence." The USBR's failure to introduce any evidence or information regarding the impact of the transfer on other legal users of water, as well as on fish, wildlife and instream beneficial uses, necessitates rejection of the Petitions.

The failure to provide information regarding the prevention of harm to other water users is particularly glaring and problematic because the settlement agreement that established the basis for the SJRRP and the "Interim Flows" expressly provides that one of the primary goals of the settlement "is to reduce or avoid adverse water supply impacts" to all of the contractors that may result from the Interim Flows and Restoration Flows. The Petitions fail to account for or even acknowledge this goal, and accordingly fail to establish that the temporary transfer will achieve this goal or otherwise reduce or avoid injury and adverse water supply impacts. The Petitions specifically fail to describe how the USBR will ensure that the Exchange Contractors will receive sufficient water from the USBR, despite the implementation of the Interim Flow program.

C. Physical, Practical Harm Resulting from Transfer. In addition to adversely impacting other right holders, the release or transfer of up to 384,000 acre feet of water into the San Joaquin River will or likely could cause actual physical injury and harm to other right holders, including the Exchange Contractors. Most significantly, the addition of such substantial flows into the river could cause flooding, seepage, erosion, loss of farmland, loss of access to properties, and related physical damage to land along the river.

For example, the San Joaquin River holds to a defined channel in its upper reaches, but in other areas historically it would spread into many "braided" channels as it reached the flat valley floor. The flows called for in the proposed transfer are exponentially greater than the existing capacity of many reaches on the river. If the river floods in these lower reaches areas it will severely impact the families that live and farm along this stretch.[2]

The SWRCB has considered the physical effects of proposed transfers on stream channels in reviewing petitions for a temporary transfer of water. In Order No. WR 2009-0003, for example, the SWRCB imposed terms and conditions on a transferor" to ensure that other legal users of water are not injured by potential water level and water quality impacts" arising out of a requested temporary transfer. (*In the Matter of Licenses 1405 & 1572 (Applications 2948 & 2952), Petitions for Temporary Urgency Changes*, 2009 Cal. ENV LEXIS 11 (February 5, 2009).) It is additionally well established in California that physical damage to land, even if caused by the government as part of a valid program or policy, constitutes damage or "injury" to the land owners. (*See e.g., Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 260, in which the court stated that when "there has been some physical disturbance of a right . . . which the owner of a parcel of land enjoys in connection with his property . . . [a]ny definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value, is a damage in the constitutional sense.")

At the very least, the petition should propose measures and programs to mitigate and prevent damage to the downstream properties and water rights holders, and should address potential inverse condemnation, trespass, nuisance and related property damage claims that could arise as a result of the proposed transfer.

D. Insufficient Showing of Availability of Water. The petition contains insufficient information about the source of the 384,000 acre feet of water proposed for transfer, how that water is or will be available for transfer, and whether and how the "transferees" will either reduce consumptive use of water in that amount, or alternatively how they will make up or replace the transferred water.

[2] See comments of the San Joaquin River Resource Management Coalition (RMC) attached hereto for more detail in impacts to Reaches 2-4.

As indicated previously, the SWRCB can not approve a petition for a short term transfer of water pursuant to Section 1725 unless it finds that the transfer will involve only the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change. The petition does not address or explain this requirement sufficiently, as the petition does not provide information about the present diversion and use of the water proposed for the short term transfer. The petition specifically does not describe or quantify the use of the 384,000 acre feet of water, absent the transfer.

The SWRCB has previously explained that "Section 1725 limits the amount of water that can be transferred to the amount that otherwise would have consumptively used or stored; in other words, the amount of water authorized to be appropriated under the water right permit that actually would have been removed from use in the downstream water supply." (*In the Matter of Permit 16482 on Application 17512 by California Department of Water Resources*, 2005 Cal. ENV LEXIS 104 (June 29, 2005).) The USBR has failed to provide this information, failed to explain how and why it will be able to transfer the 384,000 acre feet of water, or otherwise explain or justify the requested transfer.

The SWRCB should not approve the proposed transfer unless USBR can demonstrate, by a "preponderance of the evidence," that sufficient water will still be available to meet the requirements of downstream water users and other water right holders, notwithstanding the transfer. In Order No. WR 90-8, the SWRCB explained that it would only approve a temporary transfer of water provided that the transferor could demonstrate that it could still "meet the full demands within its service area under its contracts." (*In the Matter of Permit 15026 on Application 5632 of Yuba County Water Agency*, 1990 Cal. ENV LEXIS 11 (May 17, 1990).) In that proceeding, the SWRCB further explained that it would not approve the requested temporary transfer unless, "to ensure that adequate water is available for all current uses of the water," the petitioner must "show that it will have more water available because of reduced demand or because of unanticipated inflow." (*Id.*)

The USBR has not provided such information, or made any similar assurances regarding the availability of water.

E. Groundwater Impacts. The proposed transfer further appears to violate Water code Sections 1707 and 1725 because water users other than the USBR will have to increase groundwater pumping to replace the significant quantity of water subject to the proposed transfer.

The petition fails, however, to provide any explanation or details regarding the effect of the transfer on groundwater, wells and pumping in the affected regions. The USBR

specifically fails to provide information or necessary details regarding wells that will or might be used to replace or make up for the transferred water. The Petitions otherwise fail to identify the location, number, extent and pumping history of wells that might be utilized or affected by the transfer, as well as groundwater levels, overdraft or safe yield conditions, banking operations, subsidence, seepage or any other details regarding groundwater conditions.

As discussed in more detail below, Water Code 1732 specifically requires that before a transfer can be approved, the transferring party must identify the area from which the water will be taken and provide evidence that no additional groundwater will be pumped to make up for the shortage caused by the transfer. The Petitions do not provide this required information; in fact, the Petitions instead indicate that the transfer is likely to have the opposite effect, as it appears that groundwater *will* have to be pumped to make up for shortages caused by the transfer.

F. 1707 Concerns. The USBR has not complied with the requirements of Water Code Section 1707, which authorizes the transfer of existing consumptive water rights to instream flows for environmental purposes. Absent compliance with this statute, diversion and appropriation of water for instream environmental purpose is prohibited. (*See Fullerton v. State Water Resources Control Board* (1979) 90 Cal.App.3d 590.)

The Petitions specifically fail to provide required information and facts which demonstrate that the proposed change in use (1) will not increase the amount of water the transferor is entitled to use, (2) will not unreasonably affect any legal user of water, and (3) otherwise meets the applicable requirements of the Water Code regarding water transfers.

G. Miscellaneous Concerns.

(1) The Petitions contain insufficient information about the nature, source and extent of the water rights involved in the temporary transfer and therefore are so vague and uncertain as to not provide adequate notice of the proposal. It is not clear from the Petitions who holds permits or pre-1914 rights related to the transferred water, how and where the water transferred has been used, and the overall quantity of water associated with such rights. The Petitions represent as discussed hereafter that only stored water within Millerton Reservoir will be used for the transfer water yet stored water is defined by SWRCB regulations as water which has been diverted to and maintained in storage for in excess of 30 days before being utilized. The Bureau petitions do not explain that the Exchange Contractors pre 1914 water rights are the oldest and first waters arriving at Friant Dam and so long as the Exchange Contractors are being supplied water from the DMC waters subject to those rights are diverted by the Bureau for its Friant contractors use or storage and only then is storage water accumulated pursuant to the authority of Water Code Section 1706. The absence of an accounting methodology attributing inflow to first the oldest rights and thence

to junior rights held by the Bureau and the absence of an explanation as to how interim flows can be attributed to stored water unless storage is actually depleted render the request vague and ambiguous. The petitions only generally describe the current uses of the water subject to the transfer, without any detail or description. Absent such information and details, it is impossible to properly assess the impact of the transfer on other legal users of water, as well as on fish and wildlife.

(2) As indicated above, the USBR, throughout the Petitions, frequently refers to and relies on the EA/IS for the proposed transfer. The USBR, however, has failed to provide or attach a copy of the EA/IS along with the Petitions. The USBR has therefore failed to comply with the notice requirements of Water Code Section 1726, in that it failed to serve necessary parties with copies of all documents necessary to and supporting the petition for temporary transfer of water.

(3) In addition, the time to provide comments to the EA/IS has already expired, so the USBR has further violated Water Code Section 1726, by effectively failing to give parties 30 days to comment on the Petition and the supporting documentation.

H. CVPIA Restrictions. The proposed transfer must also comply with the provisions of the CVPIA, Section 3405(a). No showing has been made that the transfer will not exceed the 20 percent threshold set forth under Section 3405(a) and therefore the transfers are subject to the criteria set forth therein. Among those criteria are that no transfer may have an adverse impact on the ability of USBR to delver water to its contractors, including the Exchange Contractors, due to limitations on conveyance capacity. USBR must demonstrate that the proposed transfer will not impact its ability to meet the conveyance capacity requirements of the Exchange Contractors. (Sec. 3405(a)(1)(H).

III. WATER RIGHTS COMMENTS

A. Lack of Legal Access to Facilities. The USBR does not have legal access to the points of rediversion at Mendota Dam or other locations under the jurisdiction of member agencies of the Exchange Contractors which are sought to be added to the Bureau's appropriative rights. Unless USBR enters into an access and use agreement, these entities will be harmed as their water operations are likely to be substantially impacted. The SWRCB regulations require proof of access. (23 CCR Sections 775-777)

The USBR does not have the right of condemnation to use the Mendota Dam and many of the points of rediversion. 23 CCR Sections 775 through 777 state that the SWRCB should not move forward to notice the protest period unless the applicant has shown that it can acquire the right to utilize the facilities sought for points of rediversion and those facilities utilized in its proposed operations.

The SJRRSA (§10005) permits the Secretary if the Interior to acquire interests from "willing sellers." Section 10005(b)(2) of the SJRRSA, which cites to the 1937 Act only includes eminent domain powers for irrigation, flood and power projects, not for fish and wildlife purposes. In any case, the USBR has no agreements for use of any of the facilities it will need to implement the proposed transfer. Among the agreements that are necessary include the use of the Mendota Pool, operated by the Central California Irrigation District (CCID), facilities owned and operated by the Firebaugh Canal Water District (FCWD), facilities owned and operated by the Columbia Canal Company (CCC), the Sack Dam, owned and operated by the San Luis Canal Company (SLCC), and the Arroyo Canal, also operated by the SLCC.

The Water Board's regulations state that an application should be rejected and not processed if public agency approval has not been obtained. (23 CCR Section 776[3]) There is no public agency approval of use of public-agency-owned Mendota Dam, nor any of the SLCC or FCWD facilities. Given the late date and the fact that USBR has not even attempted to negotiate these agreements, it appears that to obtain these agreements within the time remaining is not possible. Hence the provisions of 23 CCR Sec. 776 are applicable. Further, SLCC and CCC are mutual water companies. SLCC is by easement and contract permitted to refuse wheeling of more than specified quantities of water to wildlife refuges and the USBR has no agreement with SLCC regarding use of their privately owned facilities. CCC has no licensing agreement with the USBR and has not been approached regarding use of their facilities.

The use of the Mendota Dam and the impacts of additional head and operating difficulties has not yet been discussed or resolved. Similar problems exist at Sack Dam where USBR would have to back water up in order to obtain a flow over the dam and such pooling would cause flooding to the lands at the upstream end of the pool. The Petitions filed with the Board by the USBR do not explain how authority to utilize these facilities and points of rediversion or control is proposed to be acquired, thereby establishing yet another ground for not granting the Petitions to Transfer and 1707 Petition.

B. The Transfer Petition is Not Necessary. In all likelihood, USBR will only be releasing water from Friant Dam to the Mendota Pool, despite contentions to the contrary in the Petition. If such is the case, water sent down the San Joaquin River and diverted by the

[3] 23 CCR Sec. 776 provides: Where Public Agency Permission or Approval Is Required: If the proposed project will require a permit, license, or approval from another public agency or officer and it become evident that regardless of the action taken by the board, such permit, license, or approval could not be secured from the proper agency, the application will be rejected.

Exchange Contractors does not need a transfer petition. The Transfer Petition should thus be denied. If, on the other hand USBR is proposing a transfer of water that is to be used on the Refuges and which water is truly stored water (water stored for more than 30 days in Friant and by which Friant storage is reduced to supply), then the transfer should be narrowly prescribed to fit this circumstance, dependent of course on the USBR securing all necessary agreements with the affected entities, e.g. SLCC.

C. Protection of Exchange Contractor's Water Supply. Harm will occur to the Exchange Contractors unless the USBR adopts a 90% exceedance program for releases from Friant Dam to meet Interim Flows, and each Spring files the plan with the SWRCB, and the Plan demonstrates it is feasible to meet all Exchange Contractor requirements from San Luis Reservoir and Friant Dam together. The plan must reserve water from Friant direct diversion inflows and storage to accomplish this plan and the plan for Interim Flows. Only in this way the Exchange Contractors' exchange contract rights and water rights will be protected.

D. Damage to Water User Facilities. Harm is likely to occur to legal users of water in terms of stressing and potentially causing damage to Mendota Dam. Mendota Dam has been noted by the California Division of Dam Safety to have substantial stability and underflow concerns. Should Mendota Dam fail or water levels be required to be lowered to reduce pressure upon the Dam, a substantial area or irrigated acreage could be denied water service and substantial areas of crops could be damaged or lost. Further, seepage below and aroung the foundations of Mendota Dam and Sack Dam is increased in probability by instances in which the facilities are surcharged by additional water flows from Interim Flows. If a lack of coordination of flows occurs, surcharging becomes more probable.[4]

E. Groundwater Impacts. Water Code 1732 requires that before a transfer can be approved, the transferring party must identify the area from which the water will be taken (USBR Contractor) and provide evidence that no additional groundwater will be pumped to make up for the shortage caused by the transfer. It is evident from comments submitted by the Friant contractors, and even questions raised by the Water Board, in response to the EA/IS issued by USBR and the Department of Water Resources (comments attached as Exhibits 3 and 4), that the USBR has failed to establish that no additional groundwater will be pumped as a result of this transfer. In fact, it is inconceivable that in excess of 300,000 acre feet of water could be transferred from the Friant Division and that no additional groundwater pumping will occur.

[4] A more complete statement of the problems at Mendota Pool is set forth in Appendix 1, hereto.

Water Code Section 1745.10 states that the USBR as transferor may not permit or provide for replacement of the transferred surface water by increased groundwater pumping. The Friant contractors who are giving this water up must be identified and must agree that no increased amount of groundwater will be pumped within their District. (Water Code § 1732.) The USBR has not submitted those contracts and measures to control groundwater pumping quantities to before transfer levels in specified relinquishing Friant contractors. Until it does the application should not be accepted.

F. SJRRSA Violations. The SJRRSA requires (1) a design, cost estimate and ability to fund the fish screen on the Mendota Pool Bypass facility before Interim Flows start, and (2) that the Hills Ferry fish barrier that prevents upriver migration be functioning to protect unintentional upstream salmon migration if Interim Flows are to reach the Merced River. The failure to adhere to the provisions of federal law result in harm to legal users of water. The Petitions of the Bureau of Reclamation by the terms of the SJRRSA must demonstrate that the applicant has provided for the costs of both the fish protection facilities to be constructed for the Mendota Pool Bypass structure and provided for the maintenance, inspection and upgrades prior to Interim Flows taking place. (SJRRA Section l0004(h))

G. Water Quality Impacts. If water flows downstream of Sack Dam, it will have adverse water quality impacts, because of the configuration of diversions from the Mendota Pool and the quantities of water being diverted. The DMC water typically has an E.C. of above 0.7 because CCC diverts the Friant releases. The Bureau, who continues to fail to provide for a drainage system as required by the San Luis Act for more than 45 years, now seeks to provide for salinity laden Delta diversions to be placed directly into the San Joaquin River without coordination with the salinity regulations and demands of the SWRCB and CV Regional Board. The Bureau's petitions should include and specify how the additional salinity added directly in this fashion during Interim and long term flows will be mitigated. Without such specification harm other legal users of water. The Bureau specify how it will mitigate for this additional salinity under the MAA (Drainage Mitigation Plan of the Regional Board) or avoid these impacts or indemnify others for the imposition of additional requirements by the additional quantities of salt being discharged intentionally as part of the SJRRP. The USBR has not acquired discharge permits for salinity under the TMDL for salt and boron at Vemalis, nor has it taken responsibility for salinity discharged by the Refuges each of which provides for cumulative impacts which must be examined and which have not been either described, proposed to be mitigated or explained away as insignificant.

H. Water Accounting Has Not Been Provided. The Petition states that only stored water at Friant will be utilized. The Petition should not be accepted until the water accounting issues at Friant Dam are clarified:

(1) The Exchange Contractors pre-1914 water rights are generally the oldest right being used by the USBR at Friant Dam. The Exchange Contractors have not joined in the transfer request. Therefore, the first approximately 3,000 cfs of inflow must be accounted for as not being used for Interim Flows. This means until the diversion down the Madera and Friant Canal are more than 3,000, the direct diversion right water is not available to transfer under the USBR's post-1914 rights.

(2) Generally, "stored water" means water stored for more than 30 days. The USBR is obviously intending that inflow be not subject to the customary SWRCB rule treating the first water in as the first water released. USBR must clarify whether it is asking the SWRCB to approve the transfer of natural flow water not diverted or stored but passed through as "stored water"? Is every fish flow release now to be subject to "transfer" as "stored water"? How is the USBR proposing to measure stored water? Is it to be based upon the reservoir losing the amount of storage over 30 days? The Petitions cannot be accepted until this is clear to avoid unnecessary protests.

IV. THE ENVIRONMENTAL ASSESSMENT AND INITIAL STATEMENT THAT PURPORTEDLY SUPPORT THE PETITION ARE DEFECTIVE

The Environmental Assessment and Initial Statement (EA/IS) are legally deficient for several reasons. Enclosed with this protest and incorporated herein as though fully set forth, are comments submitted by the RMC and the Exchange Contractors to Reclamation and DWR during the pending environmental review phase of the EA/IS. (See Exhibits 1 and 2) While the comments are too lengthy to be set forth herein in their entirety, some brief statements are in order.

A. The Settlement requires the development of a flow program that commences with years of Interim Flows, followed by full Restoration Flows. (See Settlement, Sections 9, 13, 15 and 16) The first year Interim Flows are not a separate project or action under the Settlement, but rather are an integral step required to ascertain the impacts that will result from the subsequent years' Interim Flows and Restoration Flows. The first year's Interim Flows are a necessary part of the overall Interim Flow, Restoration Flow and Water Management Program. Each year's flows are part of an entire program, are subject to recapture as part of the Water Management Program and are not separable or of utility in and of themselves. Contrary to the assertion in the EA/IS, there is no provision for a single year of Interim Flows unrelated to the following years' flows or the Water Management Program. The Settlement will not terminate due to impacts discovered during the Interim Flow period. Therefore, the attempt to segment of the first year's Interim Flows from the other years' flows is a misrepresentation and inappropriate.

B. The Interim Flows are in amounts above what has historically been released for the last fifty or so years in order to evaluate the impacts of the flows moving through portions of a natural system that has been shielded from flow by a constructed "by-pass" system. On occasion during wet years, flows have reached lower portions of the San Joaquin River between Friant Dam and the Merced River (Reaches 1-5) and impacts have occurred to land near the proposed Interim Flow route. However, the Proposed Action is substantially different from the intermittent flood flows that have occurred historically. Therefore, a major focus of the Settlement and the Act was to ascertain what impacts would occur downstream to lands adjacent to the River and what actions would be necessary to mitigate those impacts. The EA/IS characterizes the Interim Flows as being substantially similar to historical flow conditions. This is incorrect and results in understating the significant impacts that will result from the initiation of Interim Flows. There are impacts in the first year of flow releases and those impacts will be compounded by continuous releases of water as the riparian areas will not have the opportunity to "recover' as they would have during historical flood conditions during which flows would occur and then the river would recede to permit recovery of the adjacent lands.

C. Unlike other typical pilot programs where environmental impacts are truly *de minimis*, in this instance there are likely to be significant and long lasting environmental impacts due to flooding and seepage that would destroy property and cause the loss of crops. Even a one year flood event or high groundwater situation will cause significant impacts. While the EA/IS has characterized the impacts as either not significant or capable of being mitigated to the point where there will be no negative impacts, insufficient mitigation measures have been proposed to eliminate the impacts that are likely to occur.

D. Several Reaches along the San Joaquin River will be adversely impacted and the riparian water users injured as flows reach the levels identified by the EA/IS and the Petition, as seepage impacts will occur on lands adjacent to the San Joaquin River.

E. The Exchange Contractors are entitled to delivery of 840,000 acre feet per year from Reclamation. If Reclamation cannot meet its obligation to deliver this volume of water from the Delta, via San Luis Reservoir and the Delta-Mendota Canal, it must release water from behind Friant Dam. This water will flow down the San Joaquin River for diversion by the Exchange Contractors at Mendota Pool and elsewhere. If channel capacity is being infringed upon by the flows identified in the Petition, there will be competition for channel capacity in order to provide the Exchange Contractors with their water rights. Reclamation must agree and the Board should so order that restoration flows will be discontinued to the extent necessary in order to meet the senior rights of the Exchange Contractors.

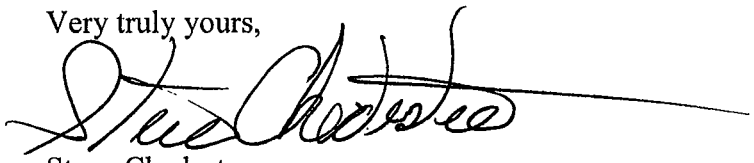
As a result of Biological Opinions for Delta smelt and salmon, the historical pattern of delivery to the Exchange Contractors is no longer applicable. In 2009, Reclamation was

within a few thousand acre feet of having to deliver water from Friant Dam. In the future, it is expected that the incidence of deliveries from Friant Dam to the Exchange Contractors could be as high as 40 percent of the years. Channel capacity must be reserved to meet this demand.

V. CONCLUSION

The petition indicates that the transfer will involve a significant quantity of water, and will involve water presently used and stored within four counties (Madera, Fresno, Tulare and Kern) in California. Despite the significance of the proposed transfer, USBR has attempted to use a limited, expedited process for the approval of the transfer. The process is practically and legally not appropriate for a transfer of such magnitude, and is contrary to the purpose and intent of the water transfer statute.

Very truly yours,



Steve Chedester,
Executive Director

cc: San Joaquin River Exchange Contractors Water Authority Board Members
U.S. Bureau of Reclamation, Mr. Donald Glaser, Regional Director
U.S. Bureau of Reclamation, Mr. Jason Phillips, SJRRP Project Manager
Friant Water Users Authority, Mr. Ron Jacobsma, General Manager
Natural Resources Defense Council, Mr. Hamilton Candee
Westlands Water District, Mr. Tom Birmingham, General Manager
San Luis & Delta-Mendota Water Authority, Mr. Dan Nelson, Manager-Secretary
Modesto Irrigation District, Mr. Allen Short, General Manager

APPENDIX 1

MENDOTA POOL IMPACTS

Mendota Pool Operations

The operation of the Mendota Pool (Pool) is a cooperative effort by and between diverters in the Pool, and the San Luis & Delta-Mendota Water Authority. The San Luis and Delta Mendota Water Authority (SL&DMWA), under contract with the Unites States Bureau of Reclamation (USBR), operates the Delta-Mendota Canal (DMC) and related facilities such as the O'Neill Pumping plant at the O'Neill Forebay and the Jones Pumping Plant located in Tracy. Each diverter from the Pool reports daily diversions to the SL&DMWA and USBR. The Exchange Contractor members report daily changes in diversions to the Exchange Contractor water master who in turn reports to the SL&DMWA and/or USBR.

Mendota Pool Demands vs. Supply:

There are about 3,200 cfs of summertime diversions (Demand) within the pool, (counting San Luis Canal Company, (SLCC) whose diversion is located downstream of the pool), while the DMC currently has the capacity to deliver approximately 3,000 to 3,200 cfs (Supply)to the Pool. In addition, wells controlled by the Mendota Pool Group (MPG) are pumped, in accordance with operating rules, into the Pool as additional supply for credit within Federal Agriculture Water Service areas.

The SL&DMWA, USBR, and major diverters in the Pool (Agencies) have limited experience in meeting irrigation and wildlife demands when flood flows are being released from Pine Flat or Friant and being routed to or through the Pool. The limited experience poses a problem, which is that the experience during flood flows is not a comparable circumstance as being contemplated for Restoration flows. Flood flows, which are erratic and unpredictable, generally occur during wet periods when irrigation demands are very low. The Agencies generally maintain a lower Pool elevation during these erratic events to avoid potential flooding problems around the Pool and potential over-topping of the Mendota Dam maximum high water elevation.

As noted elsewhere, presently there is an estimated capacity to safely convey about 1,300 cfs of San Joaquin River Water into the Pool. This flow rate estimate might be high and might be affected by the level of the Pool on any given day. When flows are present from Friant, the Pool elevation is generally held lower to provide safe operating freeboard. Diverters such as James and Tranquility Irrigation Districts can have difficulty getting their water during these times since we are actually trying to push water backwards up the Fresno Slough to their headworks. (See also Subsidence effect on Mendota Pool operations.) Friant water usually does not make it past the Pool since the diversion demands (though low) normally exceed flood flow rates. Excess flows above 1300 are diverted into the Chowchilla Bypass.

Less frequently, flows are present in the Pool from Pine Flat. For reference, the first 4750 cfs released from Pine Flat is routed north through the Pool. During this type of operation CCID will typically have many of the weir boards out of Mendota Dam, making it difficult to make consistent deliveries to all of the diverters in the Pool due to fluctuating Pool water elevations. The flows from Pine Flat usually goes to maximum or very high rates very quickly, therefore we

don't have much experience passing lower flows (flows between 600 cfs and 4500 cfs), other than flows released to SLCC for irrigation and wildlife, and what the seepage and other impacts will be.

Subsidence Affects on Mendota Pool and San Joaquin River Operations:

The following explains why the Mendota Pool must be held at near maximum to make deliveries to Mendota Pool diverters. There is virtually no operational freeboard in the Pool, as nearly all of the privately owned levees (est 50 miles) are barely high enough to contain the routinely released water and are subject to failure and interruption of servic, since the Mendota Dam must be held near its maximum Division of Dam Safety high water mark to make water deliveries.

Attached is a map showing equal lines of land surface subsidence in the areas within and/or adjacent to the San Luis Unit of the CVP. (See Appendix 2) The map is to provide the basis of for understanding why Mendota Pool elevations are held at the maximum to make deliveries to diverters in the Pool. It also partially explains why the capacity of the Chowchilla Bypass (built in the early 1960's) and the San Joaquin River channel downstream of the Pool are greatly diminished from their original design/rated capacities (performed in the 1960's).

From 1926 to 1970, the Mendota Dam subsided about 8 feet. In fact the Mendota Dam subsided more than any other facility along the San Joaquin River or Fresno Slough. The subsidence has caused a hydraulic hole in the river system at the dam. Over the same period Sack Dam only subsided about 1 foot, meaning that we lost about 7 feet of head through Reach 3, significantly reducing River conveyance capacity. In addition, the land near the headworks of James and Tranquility Irrigation Districts only subsided about 4 feet from 1926 to 1970, meaning that Tranquility is 3 feet higher relative to the Mendota Dam.

The Mendota Dam was designed and built in the 1920's and a staff gauge was installed on the upstream side to track and control water surface elevations in the Pool. The staff gauge is actually referred to in the Exchange Contract. The Exchange Contract specifies what the operation range the Mendota Pool shall be held at, and uses the staff gauge as the reference point. The range of operation is specified to be between 12.5 feet and 14.5 feet, with 14.5 being the maximum that the Division of Dam Safety will allow. However, due to the differential subsidence referenced above, the Pool can be held at not less than about 14.1 to meet the USBR other upstream delivery obligations in the Pool.

The effects of subsidence on the Mendota Dam have been significant. Increased pressure across the Dam caused piping under the floor and failure in the 1940's. The floor was extended up and down stream, and the cutoff walls were deepened. The facility nearly failed similarly in 1997 when a boil was observed late in the irrigation season in the water just downstream. The structure was de-watered and grout was injected in huge voids under the floor. Voids were found again in 2004 and grout was again injected to preserve the facility.

The inability to precisely control or even predict restoration flow levels into the Pool will increase occurrences of water level fluctuation and high water on Mendota Dam adding potential risk of failure to the facility.

Operation of the Mendota Dam:

The Mendota Dam was originally built with twenty, 20 foot wide, weir board bays. The facility was retrofitted with six, 48" x 48" Calco sluice gates sometime after 1940. Electric operators were installed on the two center gates in the 1980's and those gates can be operated remotely using the CCID's SCADA system. The sluice gates have an approximate capacity of 240 cfs to 250 cfs each.

The 2 automated center sluice gates are operated most frequently. A typical summer operation would have one manually operated sluice gate fully open (for the first 250 cfs) with the 2 automated sluice gates operated daily to meet delivery demands to SLCC.

Only very infrequently, and during flood flow events above 600 cfs are the other sluice gates operated. For operational safety, CCID usually begins pulling a few rows of weir boards from the dam when flood flows through the dam are predicted at above around 1200 cfs.

During very high flows through the dam (4500 cfs in 2006) all the boards are out of the dam and there is virtually no control other the water surface elevation in the pool. This is problematic when irrigation demands exist from the pool.

CCID makes changes to the flow settings though the Mendota Dam once per day. The change is based on the daily demand telephoned in from SLCC. The Exchange Contractors' water master reports any changes to flows through the dam to the SL&DMWA or USBR every morning. The flow through the Mendota Dam is accounted for as a demand by the SL&DMWA when calculating the needed flows from the DMC to meet Pool demands. The once per day changes at the Dam are a potential limiting factor on Restoration Flows. Especially since the Mendota Pool is held at maximum elevation to meet irrigation demands, any unexpected flow changes due to Restoration Flows could cause excess water surface elevations, leading to Pool levee or Mendota Dam failures.

A reliable procedure needs to be worked out between the USBR, SL&DMWA, the Exchange Contractors water master, and CCID for predicting flows into the Pool and ordering and executing additional releases though the Mendota Dam. The procedure needs to be in place to limit the potential for flooding or damage to the Mendota Dam. An appropriate agreement needs to be executed assigning the risks of operating the facilities to the USBR. The agreement needs to address the additional risks of flooding in the Pool and downstream of the Pool where seepage and flooding impacts occur to adjacent landowners when flows above the baseline irrigation and wildlife deliveries occur.

APPENDIX 2

MENDOTA POOL SUBSIDENCE MAP

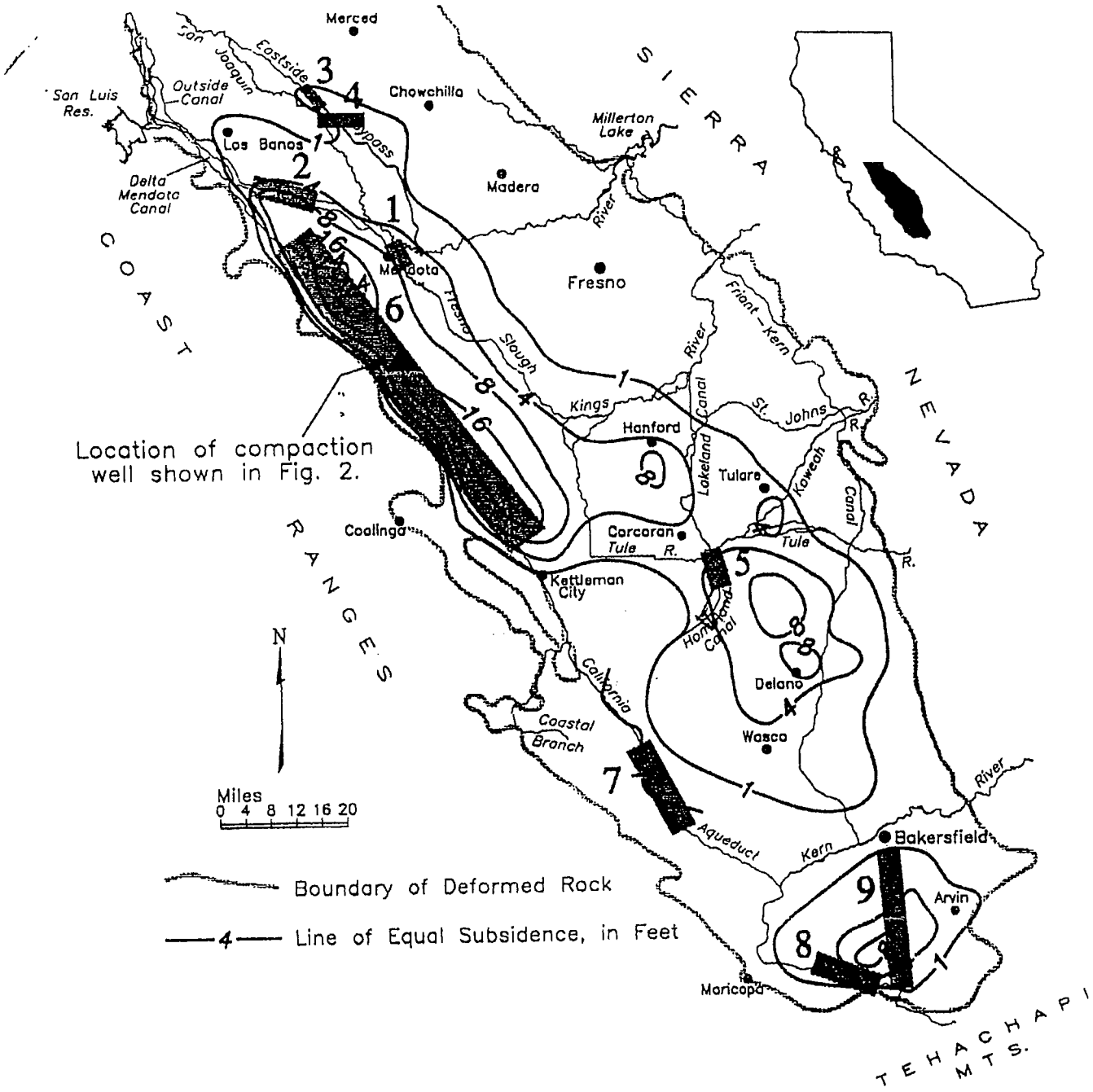


Figure 1. Land Subsidence 1926–70 and Outlines of Areas of Detailed Studies of Land Subsidence
(Modified from U.S. Geological Survey Professional Papers)

EXHIBIT 1

COMMENTS OF THE RMC

RMC

San Joaquin River
Resource Management Coalition

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July 20, 2009

Mr. Jason Phillips
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InterimFlows@restoresjr.net

Mr. Kevin Faulkenberry
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Department of Water Resources
3374 E. Shields Avenue
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RE: ***Comments on the Draft Environmental Assessment/Proposed Finding of No Significant Impact Under NEPA and Notice of Availability and Intent to Adopt an Initial Study/Draft Mitigated Negative Declaration Under CEQA for the Water Year 2010 Interim Flows Project, Dated June 3, 2009, Submitted By the San Joaquin River Resource Management Coalition, San Joaquin River Exchange Contractors Water Authority, and Respective Members***

Dear Mr. Phillips and Mr. Faulkenberry:

The following comments are submitted by and on behalf of the San Joaquin River Resource Management Coalition (RMC), San Joaquin River

Exchange Contractors Water Authority (Exchange Contractors), and their respective members identified in the footnote no. 1.[1],[2] All of these persons/entities have hereby participated in this process and have exhausted their administrative remedies. For convenience only, and not to prejudice the rights or standing of any individual commenter, the commenting parties are referred to herein as the RMC. Questions regarding these comments should be directed to Mr. Steve Chedester, Executive Director, Exchange Contractors or Ms. Mari Martin, RMC.[3]

The RMC appreciates the efforts and cooperation of the Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) regarding the development of measures to mitigate the impacts of the proposed project on the agencies and landowners along the San Joaquin River downstream of Friant Dam. The RMC also looks forward to working cooperatively

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[1] RMC members include: Aliso Water District, Andrew Farms, Inc. (Chester Andrew), Basila Farms, LLC (Jon Basila), Bob Brandi, J&M Britton (John Britton), Building Ind. Assoc. SJV (Mike Prandini), Robert Brewer, Daniel Burns, Elizabeth Burns, Butts Ranches (Carolyn Butts), Chris & Michelle Cardella, Manuel & Cecilia Cardoza, Central California Irrigation District, Clayton Bonnley, Brad Coburn, John & Marie Coelho, Albert Coderniz, Columbia Canal Company, David Cory, MK Crow & Sons (Richard Crow), DT Lock Ranch, Inc., Robert Edminister, Rick Elrod, Steven Emmert, Farmers Water District, Firebaugh Canal Water District, John & Kathy Foppe, John Gamboni, Ray & Maria Giampaoli, Giffen Ranch (Steve & Price Giffen), Gravelly Ford Water District, Clay Groefsema, Gunner Ranch, Gustine Drainage District, Hammonds Ranch, Inc. (Mike Stearns), Harman & Sons, Laurance & Peggy Harman, Merry Alice Harman, Richard Harman, Houk, Inc., E.W. & M.B. Hostetler, D.R. Houk & Co., Gilbert Housley, Paul Hunger, Jr., Jensen Ranches, Bert Johnson, Ray Knight, Janice Labar, Robert R. Labar, Laura LaSalvia, Maurice Ledford, Phillip & Judy Lehman, Jim Linneman, Frank Lima, Laurance & Margaret Locke, Frank Long, Dan McNamara, Madera County Farm Bureau, Madera Irrigation District, Eyvonne Malm, Jeff Mancebo, Gary & Mari Martin, Merced County Farm Bureau, Mumby Farms, Inc. (Stanley Mumby), Nickel Family, LLC (James Nickel), Jerry O'Banion, O'Banion Ranches, Kevin Olsen, Main Stone Corp. (Pierre Perret), Pikalok Farming (Kelley Jo Locke), Gary Pirtle, Keith & Lori Porter, Peter Raffo, William Rice, Gravelly Ford Ranch (Ann Robinson), Root Creek Water District, San Joaquin River Association, Inc., San Joaquin River Exchange Contractors Water Authority, SanLuis Canal Company, Frank & Alice Saviez, Joe & Sharon Sequeira, Donald & Lynn Skinner, Sol Development Association (Al Solis), Spain Air, Inc. (Randy Spain), Stevinson Water District, Teixeira & Sons, The Water Agency, Inc., Preston & Ellen Thompson, Jack Threlkeld, Turner Island Water District, Wolfsen Land & Cattle Co., Joe Vajretti, Dorcas Van Atta, Bill Ward (BB Limited), Anne Willis (4-W Ranch), Nancy & Gary Wride, Don Wright, and Yosemite Farm Credit

Exchange Contractor members include: Central California Irrigation District, Columbia Canal Company, Firebaugh Canal Water District, and San Luis Canal Company

[2] You will have received letters from various individuals and interests that support these comments. Each of those individuals/entities have also participated in this process and have exhausted their administrative remedy.

[3] Mr. Chedester may be reached at 209-827-8616 or 'schedester@sjrecwa.net'. Ms. Martin may be reached at 559-659-2536 or cotnlady@inreach.com.

with Reclamation, DWR and the Settling Parties, to ensure that the San Joaquin River Restoration Project (SJRRP) is implemented in a manner that meets the needs of all stakeholders.

The comments set forth in this letter are submitted in furtherance of the cooperative relationship that has been developed and is expected to continue. The RMC believes that comprehensive environmental documentation and implementation of the required mitigation measures are essential to the success of the SJRRP and that the environmental process adhere to the standards established under NEPA, CEQA and the San Joaquin River Restoration Settlement Act (Act).

The comments are organized with general overarching comments set forth in the first section, and section-specific comments set forth in the second section.

I. General Comments

These general comments are limited to what the RMC believes are the issues of most importance to its membership, particularly with regard to the impacts on the landowners and the environment of the San Joaquin River that will be used to transport the "interim flows." The RMC does not propose to comment on issues such as the impacts of the loss of the "interim flow" water to the Friant-Kern service areas and those environments. Similarly, we do not offer any comments on areas receiving water downstream of the confluence with the Merced River.

In the instant case the "project" is described as the temporary "change [to] Friant Dam operations in Water Year 2010 (WY 2010) (October 1, 2009, to September 30, 2010) to release Interim Flows from Friant Dam into the San Joaquin River and potentially downstream as far as the Sacramento-San Joaquin Delta (Delta). The Interim Flows would be recaptured by existing water diversion facilities along the San Joaquin River and/or in the Delta for agricultural, municipal and industrial, or fish and wildlife uses." (See Finding of No Significant Impact (FONSI), p. 2) The purpose of the Proposed Action is identified in this EA/IS as being the Proposed Action identified in the Stipulation of Settlement (Settlement) in *NRDC, et al. v. Rodgers, et al.* and "to implement the provisions of the Settlement pertaining to WY 2010 and to collect relevant data to guide future releases of Interim Flows and Restoration Flows under the SJRRP." (FONSI, p.2)

Comment 1: The Settlement was entered into in September 2006. By its terms it envisions one continuous program of flows, commencing with Interim Flows and once construction is complete, Restoration Flows. (See Settlement, Sections 9, 13 and 15) The Water Management

Program is an integral part of the Interim and Restoration Flow Program as it applies in every year that flows are released. (See Settlement, Section 16) To date, no environmental review has been conducted of the Settlement. In June, 2008, Reclamation issued the Initial Program Alternatives Report (IPAR), which, at page 3 sets forth a timeline for environmental review actions to analyze the impacts of the SJRRP. The IPAR timeline properly identified a programmatic environmental impact statement to be completed on a timely basis prior to release of Interim Flows. As of June 2008, Reclamation was already well aware of the fact that the legislation they were seeking related to the Settlement had not yet been enacted by Congress and that as a result, certain timelines under the Settlement could not be met. In fact, the Settlement recognized that just such an eventuality could occur and provided a remedy for such a delay. (See Settlement, Sections 23-27) Nowhere was it stated that Reclamation or DWR would seek to start the restoration related flows prior to completing appropriate environmental review; nor could it as such a statement would have been a clear violation of NEPA and CEQA. In fact, the Settlement and the Act state specifically that the Secretary of the interior (Secretary) must comply with NEPA and other laws and the Settlement provides that the Secretary is to "expeditiously complete applicable environmental documentation and consultations as may be necessary to effectuate the purposes of this Settlement." (See Settlement, Section 28) Given that the Settlement was entered into some three years ago, there has been ample time to complete the PEIS/PEIR. In actuality, for several reasons it would have been more appropriate to conduct programmatic analysis prior to the introduction of legislation in Congress seeking to authorize actions and appropriate funds to implement the Settlement. At this point, Reclamation should formally acknowledge the delay in SJRRP implementation caused by the delay to get legislation enacted, seek concurrence from the other Settling Parties, and return to the timeline set forth in the IPAR that provides for issuance of a programmatic environmental impact analyses addressing the Settlement prior to issuing project specific analyses that address discrete actions under the Settlement, including the first year of Interim Flows.

Comment 2: The project description is inconsistent with the Settlement and the Act. The Settlement requires the development of a flow program that commences with years of Interim Flows, followed by full Restoration Flows. (See Settlement, Sections 9, 13, 15 and 16) The first year Interim Flows are required to ascertain the impacts that will result from the subsequent years' Interim Flows and Restoration Flows. These Interim Flows are an integral and necessary part of the overall Interim Flow, Restoration Flow and Water Management Program. Each year's flows are part of an entire program, are subject to recapture as part of the Water Management Program and are not separable or of utility in and of themselves. Contrary to the

assertion in the EA/IS, there is no provision for a single year of Interim Flows unrelated to the following years' flows or the Water Management Program, or that the Settlement would terminate due to impacts discovered during the Interim Flow period. Therefore, the segmenting of the first year's Interim Flows from the other flows is inappropriate.

Comment 3:

a. The Proposed Action includes the release of "Interim Flows" (water) down the San Joaquin River as a necessary first step to the longer-term project to attempt to restore the River for anadromous (salmon) fisheries. The proposed flows are in amounts above what has historically been released for the last fifty or so years in order to evaluate the impacts of the flows moving through portions of a natural system that has been shielded from flow by a constructed "by-pass" system. On occasion during wet years, flows have reached lower portions of the San Joaquin River between Friant Dam and the Merced River (Reaches 1-5) and impacts have occurred to land near the proposed Interim Flow route (in addition to impacts in Reach 4B). However, the Proposed Action is substantially different from the intermittent flood flows that have occurred historically. Therefore, a major focus of the Settlement and the Act was to ascertain what impacts would occur downstream to lands adjacent to the River and what actions would be necessary to mitigate those impacts. The EA/IS characterizes the Interim Flows as being substantially similar to historical flow conditions. This is incorrect and results in understating the significant impacts that will result from the initiation of Interim Flows. There are impacts in the first year of flow releases and those impacts will be compounded by continuous releases of water as the riparian areas will not have the opportunity to "recover" as they would have during historical flood conditions during which flows would occur and then the river would recede to permit recovery of the adjacent lands.

b. Another analysis that will be necessary will be to study those actions that will be necessary to protect the salmon that will be planted in the river in the hopes that a viable population of salmon may be restored. The restoration of flows to the River is for the benefit of the fishery resources and actions related to existing water operations will have to be isolated from the reintroduced fisheries to the extent possible. To the extent other fisheries will be impacted by the restoration program, whether protected species or not, impacts on those fisheries must be examined as well. The EA/IS is silent as to any impacts to existing fisheries that may occur.

c. It appears that the Project, as designed, does not have sufficient and necessary prior empirical and field-test data to present a rational assessment of the impacts of the project to either the resources or natural environment in much of the proposed project area. Field testing has not been implemented, and the EA/IS has not used previously collected data from wet years, soil surveys and other geotechnical investigations in a fashion that could be used to assess impacts or mitigate those impacts as part of the Proposed Action.

Comment 4:

a. Unlike other typical pilot programs where environmental impacts are truly *de minimis*, in this instance there are likely to be significant and long lasting environmental impacts due to flooding and seepage that would destroy property and cause the loss of crops. Even a one year flood event or high groundwater situation will cause significant impacts. While the EA/IS has characterized the impacts as either not significant or capable of being mitigated to the point where there will be no negative impacts, insufficient mitigation measures have been proposed to eliminate the impacts that are likely to occur.

b. We note that while the mitigated negative declaration (MND), calls for mitigation, no such mitigation is required by the FONSI. Under the Act, the Secretary must not only abide by the NEPA requirements, but must also mitigate the impacts that the NEPA process identifies. We do note that Appendix D to the EA/IS sets forth the monitoring and management plan for seepage. The FONSI should make implementation of the Seepage Monitoring and Management Plan a mandatory condition consistent with Section 10004(d) of the Act.

Comment 5: There are several issues that need to be addressed in the environmental process that have not been included in this EA/IS.

a. Reclamation will have to design the flow release program to meet the needs of the Project as well as to be able to potentially release significant flows to meet its contractual commitments to downstream senior water rights holders, including the "Exchange Contractors," due to the possible inability of the Central Valley Project to

deliver water from the Delta during the spring time-period. During WY 2009, Reclamation was within a few thousand acre feet of storage in San Luis Reservoir from being required to release water from Friant Dam to meet downstream needs. But for a very unusual rainfall late in the spring, releases would have been necessary. Based on current Delta conditions, primarily due to regulatory constraints, there is a likelihood that senior rights-holders will have to rely on Friant for a portion of their water.

b. Related to Comment 5(a) above, the EA/IS does not address the impacts of the most recent NOAA Fisheries "biological opinions." These BOs will further decrease the amount of water that can be pumped at the Delta, thereby further straining available storage in San Luis Reservoir. Since the SJRRP will reconnect the San Joaquin River to the Delta system, under the scope of the new BOs, anadromous species protection will require a broader suite of environmental mitigation measures, including retrofit of unscreened diversions, especially if there is a listing followed by an unexpected breakthrough of fall run salmon into the main-stem San Joaquin River above the Merced River confluence.

c. The potential inverse condemnation of numerous agricultural properties by seepage is not adequately addressed. For example, the crops involved (especially permanent crops that have not been adequately documented), based on various increasing flow regimes, could be irreversibly damaged at a substantial cost. Seepage could also create new ecological services that require additional protection, especially if habitat for endangered species is re-created and found to harbor said species. Also, the project environmental document incorrectly finds that important farmland will not be impacted. Based on RMC landowner information that we compiled, any flows above the amount historically and currently released by the Mendota Pool will lead to inundation and inverse condemnation of numerous properties adjacent to the River in Reaches 2a to 5. (See compilation attached as Attachment 1.) The EA/IS should consider the location and map the potential loss of these important farmlands (by inundation or construction, if any) as required by the Division of Land Protection of the CA Department of Conservation. This potential loss also carries an impact to the local economy. The project document needs to identify a salient method of quantifying the farmland loss in regional dollars.

d. The Project description does not include adequate discussion as to how the Project proposes to integrate the proposed new flows with existing water operations and activities. For instance, Mendota Dam is operated by the Central California Irrigation District (CCID) in cooperation with the San Luis & Delta-Mendota Water Authority (Authority) and the various users around the Mendota Pool. The addition to Mendota Pool operations of Friant Dam water will further complicate an already complex coordination process. The EA/IS needs to address the potential impacts of such a process and the potential impacts on the environment. For example, failure to operate Mendota Dam and/or adjust Delta-Mendota Canal flows into the Mendota Pool properly could contribute to a failure to provide adequate water service to over 300,000 acres of agricultural lands, or levee breaching or failure, and/or flooding of land adjacent to the pool, or jeopardize the structural integrity of the Mendota Dam. In the waterfowl season, such a failure could adversely impact the Mendota Wildlife Refuge, and the approximately 100,000 acres of State and Federal wildlife areas, and private grassland wildlife areas which receive service from the Mendota Pool.

An agreement must be entered into with each of CCID, as operator of the Mendota Dam; the Authority, as operator of the Delta Mendota Canal; and San Luis Canal Company (SLCC), as operator of Sack Dam, regarding operations, maintenance, repair, replacement, and liability issues. If these agreements would change River operations of facility operations such that there would be a significant environmental effect, those agreements must be reviewed pursuant to applicable environmental laws. Such an analysis is likely properly set forth in the PEIS/PEIR, which again highlights the timing issue previously discussed as operation of those facilities, in a manner that could well be different than historic operations, will commence with the onset of Interim Flows.

e. Other omissions from the EA/IS that could benefit from clarification include the following:

1) The EA/IS does not describe how relevant data concerning flows, temperatures, fish needs, and seepage losses, recirculation, and recapture and reuse will be collected, quality controlled, documented, or available to the public for review.

2) The proposed action should clearly define the specific flow actions, facility operations, agreements, and permits required for routing and recapture of "interim flow" releases.

3) The groundwater seepage monitoring and management plan should include additional actions to quickly identify potential seepage areas of concern. To some extent the use of aerial reconnaissance flights and photography may help identify seepage areas, but even that technique may only identify damage that has already occurred.

4) It appears no shallow groundwater modeling or quantitative analysis was conducted to evaluate the potential for seepage impacts along the river.

5) We suggest overlaying timing of river releases with cropping patterns on land adjacent to the river to assess potential high risk areas and develop pro-active mitigation strategies and procedures.

6) There has been no effort to identify existing monitoring wells or even production wells that might be used to assess the incidence of rising groundwater tables as a result of the Proposed Action. These wells have long been used successfully to assess groundwater conditions and could be used by Reclamation as part of this program.

7) The Mendota Pool is dewatered every other year in order to perform an inspection and maintenance required by CCID and the State of California, Division of Dam Safety. The EA/IS does not analyze the additional maintenance needed on Mendota Dam in order to convey the restoration flows or explain how flows will be curtailed sufficiently in the future to permit necessary maintenance.

II. Specific Comments on the FONSI and MND

A. Legal Deficiencies with the FONSI.

The primary deficiency with the EA is that it reaches a result that defies logic. A FONSI is not warranted. The SJRRP is expected to last at least until 2026 and possibly in perpetuity. Yet, the FONSI would have the public and decisionmakers believe that all that is happening is that Reclamation is engaging in a one year flow release program to study the affects on the San Joaquin River of an increase in flows from Friant Dam. This contention ignores the point of 18 years of litigation, a Settlement and related legislation that makes hundreds of millions of dollars available to address fishery problems and water replacement actions on the San Joaquin River. The FONSI would have one believe that the effects of this program, at least in its first

year are insignificant. Reclamation has misinterpreted what constitutes a significant effect on the environment.

The CEQ regulations specify that which constitutes a "significant" effect on the environment, 40 C.F.R. § 1508.27. The regulations explain the factors an agency must consider in determining if a project's potential effects are "significant," an analysis that requires "considerations of both context and intensity." *Id.* "Context" refers to the location and interests that would be affected by the proposed action. *Id.* at § 1508.27(a). "Intensity" refers to "the severity of the impact." *Id.* at § 1508.27(b). In considering intensity, an agency should consider up to ten factors that shed light on the "significance" of a project, including: the effect on public health and safety; the **unique characteristics of the geographic area; the degree to which the effects on the quality of the human environment are likely to be highly controversial**; the degree to which the possible **effects are highly uncertain or involve unknown risks**; the degree to which the action may establish precedent; whether the action will have cumulative effects; the degree to which the action may adversely affect scientific, cultural, or historical resources, and the **possible impacts on an endangered or threatened species.** *Id.* at §§ 1508.27(b)(2)-(10) (emphasis added).

The agency itself is to ensure that the scope of an EIS is proper. 40 C.F.R. §§ 1502.4; 1508.25. CEQ regulations note that agencies are to prepare EISs on "broad actions" so that they are "timed to coincide with meaningful points in agency planning and decisionmaking," that when preparing statements on such broad actions, agencies may find it useful to evaluate the proposal(s) geographically, generically, or by stage of technical development, and that, as appropriate, agencies shall employ "scoping," "tiering," and other methods "to relate broad and narrow actions and to avoid duplication and delay." 40 C.F.R. §§ 1502.4 (b)-(d). CEQ regulations provide that a "programmatic EIS" should be prepared when federal actions are connected, cumulative, or similar, such that their environmental effects are best considered in a single impact statement. 40 C.F.R. § 1508.25. Finally, the decision whether to prepare a programmatic EIS – as opposed to a project-specific EIS – is committed to the agency's discretion.[4]

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[4] *See Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 374 n.73 (D.C. Cir. 1981) ("Even when the proposal is one of a series of closely related proposals, the decision whether to prepare a programmatic impact statement is committed to the agency's discretion.").

Even though an EA need not "conform to all the requirements of an EIS," it must be "sufficient to establish the reasonableness of [the] decision" not to prepare an EIS.[5] An EA "[s]hall include brief discussions of the need for the proposal . . . [and] the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). An EA "must in some circumstances include an analysis of the cumulative impacts of a project. . . . An EA may be deficient if it fails to include a cumulative impact analysis . . . ."[6]

Regardless of the preparation of an EA, an EIS "*must* be prepared if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.'"[7] If an agency finds an EIS is not required and issues a FONSI, it must provide a "convincing statement of reasons" to explain its decision.[8] An agency cannot rely on mere "conclusory assertions that an activity will have only an insignificant impact on the environment"[9] but rather, the agency must demonstrate that it took the requisite "hard look" at the potential environmental impacts of a project.[10] Thus, in *Alaska Wilderness League v. Kempthorne*,[11] the U.S. Court of Appeals for the 9th Circuit found that the Minerals Management Service (MMS) violated NEPA by failing to take the required "hard look" at the impacts of an oil company's sea exploration proposal on bowhead whales and Inupiat subsistence activities, because MMS did not provide a "convincing statement of reasons" to justify its decision not to complete an EIS.

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5 *See Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008) (*citing Foundation for North American Wild Sheep*, 681 F.2d 1172, 1178 n.29 (9th Cir. 1982); 40 C.F.R. § 1508.9(a)(1)).

6 *Id.* (*citing Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir. 2002)). *See also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004); *Kern v. United States BLM*, 284 F.3d 1062, 1076-78 (9th Cir. 2002).

7 *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

8 *Blue Mountains*, 161 F.3d at 1212; *see also* 40 C.F.R. §§ 1501.4(e), 1508.13.

9 *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) ("*Ocean Advocates*").

10 *Blue Mountains*, 161 F.3d at 1212; *Ocean Advocates*, 402 F.3d at 864; *Kern v. United States BLM*, 284 F.3d 1062, 1066-67 (9th Cir. 2002).

11 548 F.3d 815 (9th Cir. 2008).

An action may be considered "significant" enough to warrant an EIS if only one of the factors enumerated at 40 C.F.R. 1508.27 is met.[12] For example, the degree of controversy or the degree of uncertainty "may be sufficient to require preparation of an EIS in appropriate circumstances."[13]

In *Center for Biological Diversity v. National Highway Traffic Safety Administration*,[14] the U.S. Court of Appeals for the 9th Circuit found that NHTSA's FONSI, which was based on its EA, was "arbitrary and capricious" because it did not "provide a statement of reasons for a finding of no significant impact, much less a convincing statement of reasons"... because the EA "shunted aside [significant questions] with merely conclusory statements, failed to directly address[] substantial questions, and most importantly, provide[d] no foundation" for the inference it relied on in its finding of no significant impact.[15] "NHTSA makes vague and conclusory statements unaccompanied by supporting data, and the EA do[es] not constitute a 'hard look' at the environmental consequences of the action as required by NEPA."[16]

Here, the FONSI ignores the fact that a PEIS is currently being prepared for the entirety of the SJRRP, including we presume the Interim Flow program commencing in year one. The FONSI simply concludes that the first year's flows are a standalone project without any analysis to support this conclusion. It is difficult to rationalize such an approach with the history of the litigation the resulted in the SJRRP, the terms of the Settlement that was entered into or the legislation that took years to enact in order to implement what NRDC and others have termed an "historic agreement."

From the outset of planning for the SJRRP, Reclamation has stated it would prepare a PEIS, followed by project specific EISs. That is the correct approach. The fact that the enactment of

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[12] *Ocean Advocates*, 361 F.3d at 1125.

[13] *National Parks*, 241 F.3d at 731.

[14] *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172 (9th Cir. 2008).

[15] *Id.* at 1223 (*citing Foundation for North American Wild Sheep*, 681 F.2d at 1179 (9th Cir. 1982)) (internal quotation marks omitted).

[16] *Id.* at 1223-24 (*citing Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006)) (internal quotation marks omitted).

legislation caused the timeline for implementation to slip is not a basis for rushing or truncating environmental review. The PEIS is the proper vehicle by which to commence environmetal review of this large scale project.

The U.S. Supreme Court has had occasion to provide guidance as to when a PEIS is appropriate. For instance, in *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976), the Supreme Court noted that NEPA "may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time" and that "[b]y requiring an impact statement Congress intended to assure such consideration during the development of a proposal . . . ."[17] In determining whether a comprehensive statement – that is, a "programmatic EIS" – is necessary, the Court considers "the extent of the interrelationship among proposed actions and practical considerations of feasibility."[18] In an early and influential NEPA case, the U.S. Court of Appeals for the D.C. Circuit explained:

> A programmatic EIS reflects the broad environmental consequences attendant upon a wide-ranging federal program. The thesis underlying programmatic EISs is that a systematic program is likely to generate disparate yet related impacts. This relationship is expressed in terms of "cumulation" of impacts or "synergy" among impacts that are caused by or associated with various aspects of one big Federal action. Whereas the programmatic EIS looks ahead and assimilates "broad issues" relevant to one program design, the site-specific EIS addresses more particularized considerations arising once the overall program reaches the "second tier," or implementation stage of its development. In evaluating a comprehensive program design an agency administrator benefits from a programmatic EIS which indubitably "promote(s) better decisionmaking."[19]

The court suggested two questions that would be "helpful" in reviewing a federal agency's decision whether or not to prepare a programmatic EIS: "(1) Could the programmatic EIS be sufficiently forward looking to contribute to the [agency's] basic planning of the overall

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[17] *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (*citing* 42 U.S.C. § 4332(2)(C)).

[18] *Id.* at 412.

[19] *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888 (D.C. Cir. 1981) (internal citations omitted).

program? and, (2) Does the [agency] purport to 'segment' the overall program, thereby unreasonably constricting the scope of . . . environmental evaluation?"[20] Thus, a programmatic EIS should be prepared if it can be forward-looking and if its absence will obstruct environmental review.[21] This obstruction of environmental review appears to be what will result if the EA/IS that has been issued is allowed to proceed.

In *Piedmont Envtl. Council v. FERC,*[22] the recent Fourth Circuit decision regarding transmission line siting, the court cited *National Wildlife Federation*, and proceeded to discuss the specific CEQ regulations that call for a programmatic EIS when federal actions are connected, cumulative, or similar:

> "First, actions are connected if they "[a]utomatically trigger other actions which may require environmental impact statements." ... Actions are also connected if they (1) "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or (2) "are interdependent parts of a larger action and depend on the larger action for their justification." ...
> ..."Third, similar actions are those, "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together."[23]

The CEQ regulations provide that a "programmatic EIS" should be prepared when federal actions are connected, cumulative, or similar, such that their environmental effects are best considered in a single impact statement. As the D.C. Circuit noted in national Wildlife Federation, a "systematic program" such as the SJRRP "is likely to generate disparate yet related impacts. This relationship is expressed in terms of 'cumulation' of impacts or 'synergy' among impacts that are caused by or associated with various aspects of one big Federal action." The SJRRP Settlement envisions a multi-step process involving connected, cumulative, *and* similar actions that constitutes a "major federal action" requiring a programmatic EIS pursuant

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[20] *Id.* at 889.

[21] *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (DC Cir. 1985).

[22] *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009) (reversing FERC's interpretation of a provision of the Energy Policy Act of 2005 establishing National Interest Electric Corridors).

[23] *Id.* at 316-17 (citing *Nat'l Wildlife Fed'n v. Appalachian Regional Comm'n*, 677 F.2d 883 (D.C. Cir. 1981) and 40 C.F.R. § 1508.25).

to NEPA because such an EIS would be (1) forward looking, and (2) its absence would obstruct comprehensive environmental review.

Furthermore, "tiering" would be appropriate in this multi-year, multi-party, multi-project proceeding. CEQ regulations themselves indicate that it would be appropriate "when the sequence of statements or analyses is...[from] an environmental impact statement on a specific action *at an early stage"* such as at the point of the SJRRP Settlement, "to a supplement ... or a subsequent statement or analysis at a later stage" upon later flow years, because tiering "helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." Tiering recognizes the reality that the completion of certain projects "involves many separate sub-projects and will take many years"[24] such as the implementation of the entirety of the actions to be conducted pursuant to the SJRRP Settlement.

The fact that there is a Settlement with timelines specified does not give rise to a basis to avoid appropriate environmental review. The Settlement provides for slippage in the implementation schedule. (See Settlement, Paras. 23-27) In fact, Reclamation should have finished environmental review, at least at the programmatic level, some time ago, given that the Settlement was entered in to in 2006. NEPA regulations provide that all environmental analyses required by NEPA must be conducted at "the earliest possible time." 40 C.F.R. § 1501.2. An agency shall commence preparation of an EIS "as close as possible to the time the agency is developing or is presented with a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared *early enough* so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5 (internal citations omitted, emphasis added). And finally, for projects directly undertaken by Federal agencies, the EIS "shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary." 40 C.F.R. § 1502.5(a).

For purposes of an EIS, a "proposal" "exists at that stage in the development of an action when an agency subject to the Act *has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal* and the effects can be meaningfully

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[24] *Nevada v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006).

evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. 1508.23.

In 2000, the U.S. Court of Appeals for the Ninth Circuit noted that "[compliance] with NEPA's procedures is not an end unto itself. Rather, as the Supreme Court has explained, it is through NEPA's 'action forcing' procedures that 'the sweeping policy goals announced in § 101 of NEPA are . . . realized.' NEPA and the CEQ regulations implementing NEPA are intended to ensure that environmental considerations are *'infused into the ongoing programs and actions of the Federal Government.'*"[25] It is precisely this "infusion" that justifies considering a comprehensive settlement agreement – **especially one that is conditioned on legislation (*see* 42 § U.S.C. 4332(2)(c))** – a "major federal action" subject to NEPA requirements.

In *Westlands Water Dist. v. United States*,[26] the court addressed water rights and the Central Valley Project Improvement Act (CVPIA), in the context of "major federal actions" requiring an EIS: **"That a new law was required is itself evidence of major federal action for which an EIS is required."**[27] The court went on to discuss the Bureau of Reclamation's arguments regarding a biological opinion under the Endangered Species Act (ESA): "Under 40 C.F.R. § 1508.18(b)(2), *an activity is a federal action if it 'guides,' rather than binds, the use of federal resources.* CVP water is a federal resource. ... Taking the facts alleged in the plaintiffs' complaints as true, the biological opinion is part of a systematic and connected set of agency decisions which result in the commitment of substantial federal resources for a statutory program, which resulted in reallocation of over 225,000 acre feet of CVP water under the ESA for salmon protection with the environmental impacts alleged. *This is NEPA major federal action.*"[28]

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[25] *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562 (9th Cir. 2000) (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989)).

[26] *Westlands Water Dist. v. United States*, 850 F. Supp. 1388 (E.D. Ca. 1994). The San Joaquin River Exchange Water Contractors were a plaintiff in this case.

[27] *Id.* at 1415 (*citing* NEPA at 42 U.S.C. § 4332(2)(c) and *Andrus v. Sierra Club*, 442 U.S. 347, 357-60 (1979) (stating approval of CEQ's guideline requiring EIS for "a bill or legislative proposal to Congress")).

[28] *Id.* at 1422 (emphasis added).

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

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

B. Legal Deficiencies with the MND:

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

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

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

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

32 *Id.* at 1145.

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

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

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

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

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

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

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

[34] Id. at 688.

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

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

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

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

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

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

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

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

[37] Id. at 136

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Comments on Specific Proposed Actions:

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

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

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

D. Findings in FONSI:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Comments on the MND

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

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

III. Specific Comments on the EA/IS

A. Section 1

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

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

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

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

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

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

Section 2.2- Proposed Action

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

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

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

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

Section 2.2.1 – Settlement Flow Schedules

Page 2-17, Line 13: How will flexible flow periods be analyzed and implemented? The operators of the system such as SLCC, CCID and the SL&DMWA need to be included in the planning and implementation process in order to have a successful program.

Section 2.2.2 - Flow Considerations by Reach

The Interim Flows (and later Restoration flows and implementation measures, i.e. facilities, riparian alterations) will alter the stream geometry such that the flow path will flood or strand diversion facilities for riparian water users. No analysis has been conducted as to how these changes will be mitigated?

Page 2-18, Lines 14-16: The document needs to delineate how decisions shall be made to reduce flows to eliminate seepage impacts. (Act, Secs. 10004(d) and (h)

Page 2-18, Line 15: The word "may" needs to be changed to "will."

Page 2-18, Line 28: The EA/IS does not analyze the increase in the frequency and magnitude of additional O&M activities and associated costs. The ea/is must identify and analyze the agreements and or other mechanisms necessary to mitigate for these cost impacts.

Page 2-21, Line 5: The capacity of Reach 2 at 1,300 cubic feet per second (cfs) was effective in 2006. That capacity needs to be resurveyed to confirm it is still accurate because during 2006 flood flows were being managed to minimize seepage. At 1300 cfs over 200 acres were flooded in 2006 despite actions to minimize seepage. In addition, aquatic growth since 2006 has likely impeded flow in this area because the invasive aquatic species program was ceased by the California Department of Boating and Waterways.

Page 2-22, Line 23: In Reach 3 any flows above the exiting 800 cfs baseline has seepage and flooding impacts to particular parcels. Flows at 4500 cfs will have severe impacts.

Section 2.2.3 - Additional Implementation Considerations

Page 2-27, Line 6: The EA/IS needs to list and analyze the required implementation agreements.

Page 2-27, Line 19: add the words "owns and" in first sentence after San Luis Canal Company.

Page 2-27, Lines 26-37: The EA/IS states that the 2008 Smelt BO and the 2009 Salmon BO operations were not considered. By failing to consider the affects of the BOs, the potential impacts on 2010 operations will be understated both as to the Friant long-term contractors, the Exchange Contractors and other CVP contractors if flows are required to meet the water rights from Friant Dam.

Section 2.2.5 – Seepage Monitoring and Management Plan

Page 2-30, Line 24: The document must define procedures that will be in place to allow the Secretary to make timely decisions regarding when to reduce flow releases to prevent seepage impacts.

Page 2-30, Line 29: The process needs to clearly define how groundwater depth information will be used to identify a threat that could affect agricultural production. Once a threat has been identified, how will information be used to prevent short and long-term impacts?

Section 2.2.6 – Flow Monitoring

Page 2-13, Line 18: All flow measurement stations must be installed and in operation prior to release of interim flows.

C. Section 3

Pg.3-26, DWR: Table 3-5 relies on data from 2002 regarding plant communities and land cover in the restoration area. Further, the table identifies a data gap for over 7000 acres within the restoration area. Use of 2002 data is inadequate, as it does not (1) account for the spread of invasive species that occurred during the flood flows of 2006 and (2) fails to identify approximately 13% of the acreage. The project proponents have the responsibility to collect the data necessary to make informed decisions.

Pg. 3-27 28, Agriculture: The EA/IS does not properly assess the impacts from species that will be planted or re-established in riparian corridors. Some species can cause problems for production crop species. For example, some almond orchards are infested with Botryosphaeria canker hosted by the Cottonwood trees lining the river. The almond trees in the orchard in the path of the prevailing winds (SW) have died due to

the disease infecting the pruning injuries. This has been verified by lab testing at UC Davis Kearny Ag Station, Themis J. Michailides, Plant Pathologist, UC KAC (see quoted statement below).

"Michailides, Themis J." <THEMIS@uckac.edu>
Date: Sat, 28 Feb 2009 00:28:07 -0800

"Please let Gary know that the samples I collected the other day during my visit to his orchard had Botryosphaeria, the pathogen causing band canker on almond. In fact, the cottonwood, the willow, and the fig shoots I collected had Botryosphaeria. The blackberry did not. I think the Botryoshaeria from these hosts is moving into the almonds, and this alone can explain why the disease is more common at the side of the riparian area (east) than the west side of the orchard. We can be back later to record the degration of the disease if more shows up this spring and summer."

Section 3.3.2 Existing Land Uses, Reach 3.

Page 3-10, lines 15-19: The statement that annual crops account for "nearly all ag land use" is not correct. There has been a recent trend towards permanent crops. All data for crops in all reaches needs to reviewed and updated in order to properly evaluate impacts.

Section 3.5.2 - Reach 4b

Page 3-33, Lines 31-42: The report mischaracterizes the reason that flows are no longer conveyed in Reach 4B as because "the Sand Slough Control Structure diverts all flows into the bypass system." The gates at the control structure are kept closed by the lower San Joaquin Levee District because there is no longer any conveyance capacity in Reach 4B due to the dense growth within the channel and very small (24" diameter) road crossings. Simply opening the gates and sending any water into Reach 4B will create significant seepage, flooding and salt contamination of a wide corridor of adjacent land within 4B.

Page 3-Lines 34-36: An increase in flows may have an adverse impact on listed species. Construction of improvements could also impact species. Some species such as San Joaquin Kit Fox (dens) or California Salamander habitat could be inundated. Also, the seepage induced elevated groundwater elevation could drown out trees, shrubs and grasses which provide habitat for protected species.

Section 3.8.3 - Salts

Page 3-47, Lines 6, 7, 8: This section miss-characterizes how salt is managed within the plan area. A careful understanding of salt sources and management practices will be necessary by Reach in order to implement a program without impacts. It is essential that the SJRRP coordinate with existing salt management efforts that are in existence, such as the upper San Joaquin River salt TMDL and CV-SALTS. In addition, the report fails to document even the existing data on water quality within the existing channels, document water quality goals that are necessary and sufficient for fish, or analyze whether the proposed flow regimes are sufficient to achieve those goals by themselves.

Section 3.8.4 - Geology & Soils

Page 3-51, Lines 13-15: A statement is made that some lands between the river and the canals protected by dikes for flows up to 4500 cfs. Reach 3 conditions vary substantially and inundation of some fields occurs at any flow above the 800 cfs base flow level. At 4500 cfs a substantial number of fields were flooded such that only a minimum number of fields are protected by dikes at 4500 cfs. All of these fields need to be systematically identified and a mitigation plan developed to allow Interim Flows to be released to this Reach.

Section 3.11 - Hydrology and Water Quality

Page 3-63, Table 3-18: Historic Average Flows: The use of average flows for Reaches 1-5, etc. is an improper basis for analysis. Use of average flows masks the actual impact from the release of program flows to these Reaches. For example, the tabulation of the average flows at the head of Reach 4A is misleading. Reach 4A is dry nearly all the time, unless there are flood flows present from the Kings River, which are very infrequent. The base- line flow that should be considered for evaluating impacts to surrounding lands should be 0 cfs most of the time. The base line is not 1000 cfs in April (as shown in the chart) which is evidently achieved by averaging 4 years of 0 cfs flow with one year where 4000 cfs was present for a short duration.

Page 3-65, Lines 2-3: The text states "the estimated existing capacity [of Reach 4B] is less that 100 cfs throughout the sub-reach." The EA/IS frequently uses this misleading

technique of making a general statement to imply that it is broadly applicable. See for example Page 3-51, Lines 13-15. The capacity of Reach 4B is essentially 0 cfs and the analysis must proceed on that basis. The capacity issue in 4B must be treated consistently and accurately throughout the EA/IS. It is defined differently in various areas. (e.g. Page 2-23, Lines 12-14)

Section 3.11.2: Surface Water Quality

Page 3-69, Lines 4-5: The EA/IS fails to analyze the additional restrictions that may be placed on agricultural drainers to the San Joaquin River as a result of the implementation of the SJRRP. Impacts of new restrictions that may result from the SJRRP and mitigation of those restrictions need to be identified and analyzed.

Page 3-75, Lines 15-21: The use of groundwater level conditions based on 2005 conditions is inappropriate. The EA/IS must use current data on groundwater conditions due to heavy groundwater pumping during the drought.

Section 3.11.3 – Seepage and Water Logging:

Page 3-77, Lines 5-6: There are numerous parcels adjacent to Reaches 2, 3, 4 and 5 where any flows present in the river above the present irrigation/wildlife delivery flow levels are impacted by seepage and or water logging. Attachment 1 presents a list of parcels where landowners have identified these types of impacts.
Page 3-77, Line 20: In Reach 2A it is the experience of the adjoining landowners and the Levee District that Reach 2A begins to experience horizontal seepage through flood control levees as soon as water levels reach the inside levee toe.

Section 3.11.4 – Flood Management

Page 3-80, Lines 3-4: This bullet should address specific operations of Sack Dam to allow the project proponents and the public to evaluate potential impacts of the proposed action.

Section 3.15 Transportation and Traffic

Page 3-99, Lines 8-9: Add Merced County