

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

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

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

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

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

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

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

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

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

"In order to encourage early renewal of project water contracts and facilitate timely implementation of this title . . ." (section 3404(c)(3));

"The Secretary, immediately upon enactment of this title" shall undertake 23 environmental restoration actions" (section 3406(b));

"develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002 . . ." (section 3406(b)(1));

"upon enactment of this title dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title . . ." (section 3406(b)(2));

"by September 30, 1996, the Secretary, after consultation with the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study . . ." (section 3406(b)(23)(A)).

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

Trinity River Restoration Costs Reimbursable by CVP Contractors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trinity River Restoration Appropriations Fiscal Year 1998-2007

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

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

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

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

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

In addition, appropriations for Trinity River restoration from 1993 through 1997 are not included in this analysis because the data were not accessible. However, restoration activities did take place during that period, including scientific activities associated with temperature control, spawning and rearing, geomorphology, salmonid temperature control, ramping, and adaptive management monitoring. In a May 22, 1998, opinion¹⁸ on the then pending Trinity River Flow Evaluation Study, the Solicitor concluded that all of those restoration activities were covered by section 3406(b)(23) of the CVPIA. Accordingly, the deficit in the above table of Trinity River restoration accounting likely is understated. Whether discrepancies exist for other line items in Reclamation's ECO Report is unknown.

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

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

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

Request for Reform of Interim Contracts to Comply with CVPIA

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

All water deliveries pursuant to this contract are limited by and subordinate to: (1) the Secretary's fiduciary duty, referred to in section 3406(b)(23) of the Central Valley Project Improvement Act, to meet in stream fishery flow requirements of the Trinity River as specified in the Trinity River Mainstem Fishery Restoration record of decision, which was adopted by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe on December 19, 2000 (Trinity River record of decision); (2) the Contract between the United States and Humboldt County dated June 19, 1959; (3) Conditions 8 and 9 in State Water Permits under Applications Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959); and the decision in Westlands Water Dist. v. U.S. Dept. of Int., 376 F.3d 853 (9th Cir. 2004).

The Contractor acknowledges and accepts its obligation, in concert with other CVP beneficiaries, to pay as a fixed annual component of O&M charges all costs of implementing the Trinity River record of decision. This obligation includes the costs of:

- 1) flow management for geomorphic and riparian processes
- 2) channel and watershed rehabilitation
- 3) low management for temperature and habitat
- 4) fine and coarse sediment management
- 5) adaptive management and monitoring.

This obligation shall continue for the duration of this contract and any renewals thereof.

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

Conclusion

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

Sincerely,


Clifford Lyle Marshall
Chairman

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

Response to Hoopa Valley Tribal Council Comment Letter, January 20, 2012

The comment letter from the Hoopa Valley Tribal Council provided comments on Environmental Assessment (EA)-11-049 *Three Delta Division and Five San Luis Unit Water Service Interim Renewal Contracts 2012-2014* and EA-11-011 *Central Valley Project Cross Valley Contractors Interim Renewal Contracts and Article 5 Exchanges, 2012-2014*. The response to comments provided below is specific to the comments addressing EA-11-049. Reclamation will address the Tribes comments on EA-11-011 in EA-11-011.

Hoopa-1 System-wide effects of implementing fishery restoration on the Trinity River were the subjects of the Final Environmental Impact Statement/Environmental Impact Report for the Trinity River Mainstem Fishery Restoration (Trinity River Final EIS/EIR) and the Central Valley Project Improvement Act (CVPIA) Programmatic Environmental Impact Statement (PEIS). As can be seen from the description of the preferred alternative in the Trinity River Final EIS/EIR and Trinity River Record of Decision (ROD), commitments to protect Trinity River resources have been addressed, and these decisions operationally precede decisions regarding deliveries to the interim renewal contractors.

This comment recommends specific contract content which is beyond the scope of this Environmental Assessment (EA) and does not change the environmental analysis of EA-11-049.

Hoopa-2 The comment letter of February 14, 2008 addressed to Leslie Barbre of Reclamation's Mid-Pacific Region's Sacramento Office from the Hoopa Valley Tribe recommends specific contract content which is beyond the scope of this EA and does not change the environmental analysis of EA-11-049.

Hoopa-3 See Response to Hoopa-1.

Hoopa-4 Page 22 of the Final EA and Page 2 of Finding of No Significant Impact (FONSI) have been revised to clarify that water deliveries under the proposed contracts would not change baseline conditions and would therefore not adversely impact surface water supplies.

EA-11-049 tiers off the CVPIA PEIS to evaluate potential site-specific environmental impacts of renewing the interim water service contracts for the three Delta Division and five San Luis Unit contracts. The CVPIA PEIS provided a programmatic evaluation of the impacts of implementing the CVPIA. Four alternatives, 17 supplemental analyses, the Preferred Alternative, and a No Action Alternative were evaluated in the PEIS. In addition, the PEIS analyzed the region-wide and cumulative impacts of the CVPIA including the renewal of Central Valley Project (CVP) water service contracts. The diversion of water for delivery under the interim contracts is an on-going action and the current conditions of that diversion are analyzed in the PEIS. Water deliveries south of

the Delta are not made until all legal requirements have been met north of the Delta.

This comment recommends specific contract content which is beyond the scope of this EA and does not change the environmental analysis of EA-11-049.

Hoopa-5 See Response to Hoopa-1.

This comment recommends specific contract content which is beyond the scope of this EA and does not change the environmental analysis of EA-11-049.

Hoopa-6 The CVPIA, Public Law 102-575, Section 3406(b)(23), and the December 2000 U.S. Department of the Interior's ROD for the Trinity River Mainstem Fishery Restoration, with the Hoopa Valley Tribe's concurrence, determined the water necessary in the Trinity River to restore fishery resources in order to meet the federal trust responsibility. The Trinity ROD adopts the analysis contained in the Trinity River Final EIS/EIR and selects the Preferred Alternative as the necessary and appropriate action which best meets the statutory and trust obligations of the U.S. Department of the Interior to restore and maintain the Trinity River's anadromous fishery resources.