

June 6, 2020

Bruce Legorburu  
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*Via email* [additional recipients listed below]  
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**Re: Major Inadequacies in Risk Disclosures to Prospective Investors in Evaluating Westlands Water District 2020A and 2020B Revenue Bonds**

[<https://www.fitchratings.com/research/us-public-finance/fitch-rates-san-luis-unit-westland-water-district-revs-at-a-outlook-stable-01-06-2020>]

To Mr. Legorburu, Mr. Linnell, and Fitch Group Staff:

The undersigned organizations are united in awareness of extraordinary economic, environmental and legal risks associated with pending attempts of Westlands Water District (Westlands)—thus far without success in any court of law—to expedite the conversion of its long-term water service contract with the United States Bureau of Reclamation (Bureau) into a permanent repayment contract (“contract conversion”) before complying with numerous requirements of law. The future of the contract at issue, the largest in the Central Valley Project system, will have profound consequences for water users, protected species, ratepayers, and consumers from the Trinity River watershed through the Delta and beyond.

We write out of grave concern that in its above-noted evaluation of Westlands’ proposed revenue bonds, Fitch misreports the likely consequences of still-unresolved legal challenges, and does not address major long-term risks associated with Westlands’ proposed conversion contract. These deficiencies, described below, are in urgent need of correction and further analysis to avoid misleading potential investors and the public.

## Westlands' Unvalidated Contract Conversion is Unenforceable

Although Fitch's evaluation recognizes that Westlands "faces legal challenges to the contract conversion," it drastically understates the consequences of these challenges by uncritically repeating Westlands' self-serving attempts to minimize its legal and related financial problems. Fitch's evaluation includes the following statements, with Westlands itself noted as the key source of information:

- "The district believes, based on written communication with the USBR and prior court decisions, that the district's inability to obtain a validation judgement [*sic.*] does not render the conversion contract void, and that the executed contract between the district and USBR, effective June 1, 2020, will govern the rights and obligations of the U.S. and the district after the effective date."
- "At this time, the district does not anticipate that an adverse ruling would have a material impact on the district's ability to pay principal and interest on the series 2020 bonds. If the court were to not validate the execution of the permanent contract, the district anticipates that CVP water deliveries would continue under a revised contract, subject to renewal under existing federal reclamation laws for at least the duration of the series 2020 bonds."

These statements are not simply wishful thinking on Westlands' part; they are materially misleading. Both the conversion contract and underlying legal requirements establish that in the absence of Westlands obtaining a still-elusive validation judgment, the conversion contract cannot be lawfully enforced. Attached as **Exhibit 1** is Article 47 of Westlands' executed conversion contract, dated February 28, 2020, which provides as follows (emphasis added): "Promptly after the execution of the amended contract, the Contractor (Westlands) will provide to the Contracting Officer (the Bureau of Reclamation) a certified copy of a final decree of a court of competent jurisdiction in the State of California, confirming the proceedings on the part of the Contractor for the authorization and execution of this amended contract. *This amended Contract shall not be binding on the United States until the Contractor secures a final decree.*"

Article 47 clearly indicates that a validation judgment is a necessary precursor to a binding contract. Moreover, the necessity of such a judgment is grounded in a federal law requirement dating back to 1922. (See Act of May 15, 1922, ch 190, § 1, 42 Stat. 511.) This requirement in 43 U.S.C. § 511 requires as follows: "That no contract with an irrigation district under this Act shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid."

Westlands itself, not its critics, initiated the validation action for the contract conversion in Fresno County Superior Court. (*Westlands Water District v. All Persons*, No. 19CEG03887.) Westlands attempted, and failed, to secure a validation judgment prior to its current, and premature, effort to complete the contract conversion and sell revenue bonds based on the unproven assumption it can be lawfully enforced.

Fitch's evaluation should be revised to account for the order of the Fresno County Superior Court attached as **Exhibit 2**, denying Westlands' motion to validate its contract conversion. That order, based on a February 27, 2020 tentative ruling, became final on March 16, 2020. Although several parties have appealed a separate portion of the order pertaining to the timeliness of their answers, the substance of the order remains in place. Among other problems, the Court noted material deficiencies in the converted contract framing the validation action, and found Brown Act violations in Westlands' process for authorizing the contract. Rejecting aggressive efforts by Westlands to expedite validation of the contract conversion, and to portray omitted information as merely technical, the court found Westlands' proposed contract materially deficient. Numerous other legal problems with the proposed violation, including inconsistency with laws protecting the Delta and other water users, remain to be adjudicated.

As presently drafted, the language above from Fitch's evaluation, uncritically relying on Westlands' own statements, leaves numerous unanswered questions. Has Fitch asked Westlands to identify and provide its staff with copies of the referenced written communications with the Bureau of Reclamation and prior court decisions? If so, can these be identified promptly for the undersigned organizations? Has Westlands explained the specific reasons for which Article 47 would be invalidated? Has Fitch conducted any independent legal analysis to determine whether the assertion by Westlands that any such written communications and court decisions could invalidate Article 47?

### **Westlands' Contract Conversion Lacks Any NEPA and ESA Compliance**

Despite requests of numerous organizations and agencies, the Bureau of Reclamation has not completed—indeed, not even initiated—*any* environmental review for Westlands' contract conversion, as required under the National Environmental Policy Act (NEPA). Comment letters sent months ago demanding NEPA compliance have gone unheeded and unanswered. Avoiding this NEPA compliance is a glaring failure, given that completion of the Bureau of Reclamation's obligations related to contract conversion under federal law clearly requires it to exercise discretion necessitating NEPA compliance, and that the Bureau until recently recognized the need for that compliance.

Nor does the 2016 federal law pertaining to contract conversion, the Water Infrastructure Improvements of the Nation Act ("WIIN Act"), Public Law 114-322, in any way supersede longstanding requirements of federal law, such as those in the Central Valley Improvement Act, Title 34, Public Law 102-575, requiring NEPA compliance in connection with renewal of long-term water services contracts. (See, e.g., *id.* at § 3404(c)(1).) And § 3404(c)(2) requires specific repayment obligations be included in any such contract. These are still absent. Ironically, the Bureau continues to recognize the need for NEPA compliance for two-year interim contract extensions, but has provided none before executing a converted contract seeking to extend it in perpetuity. Furthermore, the Bureau similarly has not attempted, much less completed, efforts to comply with the Endangered Species Act for the Westlands contract conversion.

Attached as **Exhibit 3** is the complaint filed on May 20, 2020 in *Center for Biological Diversity, et al. v. United States Bureau of Reclamation* (Eastern District of California, Case 1:20-at-00362, Doc. 1). The complaint challenges the Bureau's failure to comply with NEPA,

and also notes the Bureau's continuing failure to comply with the ESA as it relates to the contract conversion.

### **Further Problems with Westlands' Contract Conversion**

Although Fitch's evaluation acknowledges some of the uncertainty surrounding the contract conversion, it strays far too little from Westlands' own rationalizations, and gives little sense of the actual magnitude of controversy and risk. It would be hard to conceive of a more compromised and dysfunctional public process than that of Westlands and the Bureau in addressing the proposed contract conversion. The contract conversion sought by Westlands is among the most heavily criticized water contract proposals in recent California history. Press reports of the secrecy, unexplained financial changes, and lack of public notification have been extensive.

A small sampling of the press coverage on this subject is instructive. Fitch's evaluation should be revised to reference and summarize these and other articles covering Westlands' contract conversion:

***Interior proposes coveted deal to ex-client of agency head*** Associated Press, Ellen Knickmeyer, November 8, 2019 <https://apnews.com/4527b2b31fcf452f8e6d35afcebc8cf2>

***Interior Secretary Bernhardt's previous job raises questions about a deal for his ex-client***, Los Angeles Times, Michael Hiltzik, Nov. 15, 2019 <https://www.latimes.com/business/story/2019-11-15/interior-secretary-westlands-water-deal>

***California must help kill sleazy Westlands water deal***, Mercury News & East Bay Times Editorial Boards, Nov. 5, 2019

<https://www.mercurynews.com/2019/11/15/editorial-westlands-water-deal-smells-of-politics/>

***Interior Proposes Coveted Deal to Ex-Client of Agency Head*** *The Interior Department is proposing to award a contract for federal water in perpetuity to a powerful water district that used to employ Secretary David Bernhardt as a lobbyist.* US News and Reports, November 7, 2019 <https://www.usnews.com/news/politics/articles/2019-11-07/interior-proposes-coveted-deal-to-ex-client-of-agency-head>

***Westlands Water District gets permanent U.S. contract for massive irrigation deliveries***, Los Angeles Times, Bettina Boxall, Feb. 28, 2020 <https://www.latimes.com/environment/story/2020-02-28/westlands-water-district-gets-permanent-u-s-contract-for-massive-irrigation-deliveries>

***Judge rebuffs bid to lock in Westlands contract switch***, Jeremy P. Jacobs, E&E News, March 19, 2020 <https://www.eenews.net/greenwire/stories/1062646713?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1062646713>

***Hoopa Tribe strikes at Interior's coveted Westlands Water District corporate deal***, NORTH COAST NEWS Tuesday, March 31, 2020. <https://krctv.com/north-coast-news/eureka-local-news/hoopa-tribe-strikes-at-interiors-coveted-westlands-water-district-corporate-deal>

Attached as **Exhibit 4** is a letter to the Bureau signed by the undersigned organizations and numerous others, dated April 27, 2020. The letter identifies formidable problems with the converted contract executed by Westlands and the Bureau on February 28, 2020. Final execution occurred without public negotiations or public release of the final contract and its exhibits, and without responding to, correcting, or even acknowledging, extensive public and agency comments previously submitted to the Bureau criticizing the contract conversion.

Fitch's evaluation should be revised to review and account for the detailed list of problems noted in the April 27, 2020 letter. As the letter notes, the "final" February 28, 2020 converted contract "is riddled with gaps and undisclosed provisions, as detailed in attached comments. Millions of dollars to be repaid by Westlands are deleted without explanation. Sections of the proposed contract are missing and others remain undisclosed. Attachments are identified and referenced, but withheld and undisclosed. The true amount of water to be provided is not disclosed to water users in the Delta, North of the Delta, South of the Delta, the San Joaquin Valley and Southern California. True costs and subsidies are misrepresented or just omitted." (*Id.* at p. 2.) Among the key problems detailed in the April 27, 2020 letter are the following:

- Congressionally mandated water quality standards and protections are removed and instead left to the discretion of the functionary contracting officer and Westlands to the "extent feasible."
- Congressionally mandated limits on the water service area are left to the discretion of the functionary contracting officer and Westlands to modify.
- The acreage Westlands identifies to receive water in the contract exceeds the acreage authorized by Congress under Section 1(a) the San Luis Act, Pub. Law No. 86-488, 74 Stat. 156 (1960).
- The converted contract fails to comply with numerous requirements of law, including NEPA, the ESA, the WIIN Act, numerous provisions of reclamation law, the California Environmental Quality Act, the California Endangered Species Act, and the Central Valley Project Improvement Act, and laws protecting water quality.
- Contrary to CVPIA section 3404(c)(2), the converted contract fails to ensure that provisions of law are written as contract terms enforceable between the parties.
- New cost allocation formulas initiated in 2020, and other Reclamation actions, reduce the amount Westlands owes for repayment by over 120 million dollars.
- Reclamation law and regulations requiring public notification, recirculation, and public comment on the Modified Final Contract have been circumvented. Cumulative impacts are ignored.

#### **"A Little Enron Accounting"**

Fitch's evaluation should ensure that potential investors are aware of the history of financial irregularities and violations of securities law involving Westlands, including violations

of the law by Thomas Birmingham, who continues to serve as General Manager of the District.

Attached as **Exhibit 5** is a March 9, 2016 order of the Securities and Exchange Commission (SEC) in an Administrative Proceeding entitled *In the Matter of Westlands Water District, Thomas Birmingham, and Louie David Ciapponi* (Administrative Proceeding File No. 3-17162, a matter involving “misrepresentations and omissions” by Westlands in the Official Statement for its Series 2012A bonds. (*Id.* at 2.) This enforcement action arose after Westlands artificially inflated its net revenue (operating income) by more than \$11 million in a previous year. Westlands ultimately agreed to the SEC’s cease-and-desist order under Section 8A of the Securities Act. In addition to civil penalties imposed on Westlands, Mr. Birmingham was ordered to pay a civil penalty of \$50,000, and Mr. Ciapponi, who served as Assistant General Manager, was fined \$20,000.

The director of SEC’s enforcement division, Andrew Ceresny, quoted Mr. Birmingham’s own reference to Westlands having engaged in “*a little Enron accounting*,” and concluded that Westlands’ undisclosed accounting transactions “*left investors in the dark*.” (See Securities and Exchange Commission, *California Water District to Pay Penalty for Misleading Investors*, March 9, 2016, <https://www.sec.gov/news/pressrelease/2016-43.html>.) The SEC found that if Westlands had accurately stated its 2010 position, it would have told bond buyers that it only had 11 percent of the money needed to service its debt, rather than 63 percent.

Westlands’ risky and unlawful conduct demonstrated in this enforcement action prompted Fitch to place a negative ratings watch on Westlands. (Michael Wines, *California Water District Fined by S.E.C. Over ‘Enron Accounting’*, New York Times, March 10, 2016 (online); <https://www.nytimes.com/2016/03/11/us/california-water-district-fined-by-sec-over-enron-accounting.html>.) This history, however, is equally relevant to the present, underscoring why those evaluating Westlands’ current bond issues cannot responsibly defer to the integrity of information received from Westlands and its leadership team. Much as Mr. Birmingham remains at Westlands, so does its culture of impunity, secrecy, and inclination to portray enormous financial and legal risks as if they were minor, fixable bumps in the road.

In short, Westlands’ prior misrepresentations and unlawful conduct demonstrate the need for careful scrutiny when reviewing its information relating to the risks associated with the 2020A and 2020B revenue bonds. For instance, independent analysis must explore whether Westlands has mistakenly assumed relatively stable projections for surface water allocation that are disconnected from current and likely future conditions. Since Westlands’ current leadership has already attempted to paper over inconvenient constraints with “Enron accounting,” its optimistic spin cannot be conflated with facts.

### **Surface Water and Groundwater Constraints**

Assumptions of relative stability for water deliveries to Westlands appear to be growing increasingly disconnected from reality. As Westlands’ own reporting of annual water deliveries confirms, in four of the seven years between 2013 and 2019, surface water allocations to Westlands have amounted to 20 percent or less of Westlands’ total contract entitlement. (See Westlands’ May 22, 2020 District Water Supply chart, <https://wwd.ca.gov/district-water-supply/>.) During these years, surface water costs become much more expensive to the extent that these surface water supplies are available at all. Financial projections are therefore likely to be

misleading unless they very carefully study significant variations in annual allocations, as well as anticipated future conditions.

Fitch's evaluation of Westlands' 2020A and 2020B bonds does not yet appear to fully account for additional constraints stemming from implementation of California's Sustainable Groundwater Management Act (SGMA). (See, e.g., DWR's web page on SGMA and groundwater management, <https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management>.) From the analysis provided, it is unclear whether Westlands has accurately disclosed how implementation of SGMA is likely to restrict Westlands' ability to overdraft groundwater supplies to compensate for surface water deficiencies, as they have often done in the past.

In addition to the legal constraints from statutes such as SGMA and the Endangered Species Act, climate change is likely to place growing constraints on both surface water and groundwater supplies. (See, e.g., R. Moore, et. al., *Cry Me a Reservoir: Water Management and Climate Change Adaptation*, 22 Environmental Law News (Summer 2013), p. 3, <http://landwater.org/wp-content/uploads/2014/04/Cry-Me-A-Reservoir-Water-Management-and-Climate-Change-Adaptation-Published-in-Environmental-Law-News-Vol-22-No-1-Summer-2013.pdf>.)

During the multi-year drought from 2013 through 2016, Westlands pumped more than 600,000 acre-feet of groundwater. During each of these years, groundwater represented more than half of the total water supplies within Westlands. According to Westlands, average groundwater pumping of up to 292,000 acre-feet would be available in future years. Yet during 2020, Westlands indicated in a Board meeting that it will use approximately 450,000 acre-feet of groundwater. That suggests a need to consider whether Westlands will only have 150,000 acre-feet of groundwater available in 2020.

Beyond the present year, future groundwater pumping restrictions must be fully accounted for in determining the default risk associated with the Westlands bonds. In the past, Westlands has routinely used groundwater overdrafting to compensate for surface water shortages. (See, e.g., Christian-Smith, M.C. Levy, P.H. Gleick, *Maladaptation to drought: a case report from California, USA*, P.H. Sustain Sci (2015) 10: 491. doi:10.1007/s11625-014-0269-1; <https://link.springer.com/article/10.1007/s11625-014-0269-1>(describing Westlands' maladaptation to drought and climate change, and compounding of environmental risks by making up for its reduced Central Valley Project allocations with large increases in groundwater pumping).)

For both the short-term and long term, the evaluation of Westlands' bond prospects must fully confront the high likelihood that Westlands' longstanding water supply backstop, groundwater overdraft, will be unavailable, and unlawful to attempt, in future water-short years.

### **Discrepancies in Westlands' Assumed Repayment Balance**

Evaluation of Westlands' proposed bonds needs to take into account the likelihood that the repayment balance referenced in Attachment D to the converted contract, which still remains subject to revision, will prove to be too low, perhaps significantly so. Westlands' repayment balance requirement for the conversion contract is ultimately derived from a Cost Allocation

Study, which determines the amount of Federal Water Project construction costs should be repaid by Westlands and other Federal Water Contractors. The undersigned groups believe there are significant flaws in the Cost Allocation Study, which underreports the full extent of associated costs in the Central Valley Project system and substantially understates the amount that Westlands should be repaying to the Federal Government to execute the converted contract.

The repayment amounts that emerged from negotiations between Westlands and the Bureau should also be viewed in the context of other current circumstances that may have prevented a truly arm's length negotiation. In a letter dated April 8, 2019 to the U.S. Attorney for the District of Columbia, United States Senator Ron Wyden requested an investigation of potential civil and criminal violations by the Secretary of Interior, David Bernhardt. The letter noted that “[p]ublic reporting and documents obtained via public records laws show that Mr. Bernhardt maintained his relationship with Westlands” after his November 2016 deregistration as a lobbyist, and “may have engaged in repeated lobbying contacts” with statutorily covered officials in the legislative branch.

(<https://www.wyden.senate.gov/imo/media/doc/040819%20Letter%20to%20U.S.%20Attorney%20Liu%20re%20Bernhardt.pdf>.)

The letter noted that the Inspector General's office was reviewing “repeated allegations” that as Acting Secretary Bernhardt “may have violated his ethics pledge by using his position as a federal employee to benefit Westlands.” (*Id.*)

The cloud of legal uncertainty surrounding negotiations between Westlands and the Department of Interior also carries financial risks. It is possible, for example, that a different Secretary of Interior and Bureau of Reclamation will later determine that the repayment balance reported by Westlands was too low because of flaws in the Cost Allocation Study, or that challenges to Westlands, the Bureau, or both may compel a different conclusion. Investors must be wary of how this could affect both the total amount of repayment and the future ability, if any, to enforce the conversion contract.

### **Risks from Reliance on Inflexible Crops**

Evaluation of Westlands' proposed bonds must be revised to carefully study the financial consequences of overreliance in the Westlands District on inflexible crops that lack resilience during multi-year droughts and due to climate change. The present evaluation leaves unclear whether Westlands has fully and accurately disclosed these risks. While row crop acreage may simply be allowed to fallow when water supplies are insufficient, tree crops must receive a minimum water supply each year to remain alive. Westlands has become heavily dependent upon tree crops in general and two crops in particular, almonds and pistachios.

Another extended multi-year drought is almost inevitable during the 30 year term of the 2020A bonds. Furthermore, climate change has undermined any assumption of “stationary” conditions informing assessments over this time horizon. (See R. Moore, et al., *Cry Me a Reservoir*, supra.) This has important financial consequences, as well as environmental and legal ones. For example, the evaluation must account for the likelihood of nut trees and other inflexible crops in the district not surviving the next multi-year drought. Any replacement of almond and pistachio trees would take multiple years, not months. The reasonableness and



viability of long-term uses in the district will depend on future conditions that face growing uncertainties.

### **Risks from Uncertain Water Baseline**

Evaluation of Westlands' proposed bonds must account for the highly uncertain water baseline affecting future Central Valley Project deliveries to Westlands. At least one court has already expressed concern about its assumptions concerning future CVP deliveries rooted in "stale water needs data." (*Pacific Coast Federation of Fishermen's Associations v. United States Department of Interior* (9th Cir. 2016) 655 Fed. Appx. 595, \*7.) Moreover, allocation amounts in the CVP, and in the Delta region and elsewhere in California, are notoriously oversubscribed. (See, e.g., T. Grantham and J. Viers, *100 years of California's water rights system: patterns, trends and uncertainty*, ENVIRON. RES. LETT. 9 (2014) 084012.)

### **Risks from Unresolved Drainage Problems**

Evaluation of Westlands' proposed bonds must account for chronic, unresolved problems stemming from selenium migration caused by irrigation of farms in the Westlands district. A generation after toxic drainage to the now-closed Kesterson Reservoir caused one of California's most prominent ecological disasters, the State Water Resources Control Board (State Board) still has not acted on its 1985 observation that that if Kesterson were closed and the CVP continued to supply irrigation water to Westlands without implementing an adequate disposal option, "continued irrigation in the affected area of Westlands Water District could constitute an unreasonable use of wastewater." (State Board Order WQ 85-1, at p. 43.)

### **Risks from Deficiencies in Biological Opinions**

Evaluation of Westlands' proposed bonds must account for uncertainties and risks reflected in pending litigation brought by the California Natural Resources Agency and the Pacific Coast Federation of Fishermen's Associations, challenging two 2019 Biological Opinions issued under the ESA. The challenged opinions will have consequences for Westlands and other Central Valley Project contractors, as they relate to the long-term operation of the Central Valley Project and the State Water Project.

Attached as Exhibit 6 is a March 11, 2020 order partly granting plaintiffs' request for a preliminary injunction in this pending action, *The California Natural Resources Agency, et al. v. Ross, et al.* (E.D. Cal. 2020), Case 1:20-cv-00426 (Document 106). The order notes, among other things, that "nothing in the WIIN Act modifies (or even bends) any of Federal Defendants' obligations under the ESA." (*Id.* at pp. 33-34.)

### **Request for Information**

At your earliest opportunity, please provide us with the documents Fitch Ratings used to arrive at the conclusions contained in the ratings issued June 1, 2020 with regard to the Westlands Water District 2020A revenue bonds and any other investor disclosure documents. We have been unable to obtain this information from Westlands. We remain concerned about the adequacy of the risk disclosures to prospective investors in these bonds. Please also provide us with the Public Offering Statement and all risk disclosure information included in that statement. Finally, please keep us informed of subsequent developments in your evaluation of


Westlands' proposed bonds, and keep us in mind as risks associated with Westlands' bonds receive further evaluation.

### Conclusion

We believe that the concerns expressed above cast serious, and likely insurmountable, doubts about the viability of assigning an investment-grade rating for Westlands Water District 2020A and 2020B Revenue Bonds. A thorough reevaluation is in order covering the areas detailed in this letter, and is needed to fulfill Fitch's fiduciary duty to investors who rely on its bond ratings when making investment decisions.

Should Fitch fail to revise its 2020A bond ratings, and the bonds subsequently default or otherwise become distressed, we reserve the right to share this message with any investors in these bonds as well as their legal representatives. We trust, however, that Fitch will share our concerns, and that it will decide, as it has in the past, to put Westlands under a negative ratings watch.

Respectfully,



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**EXHIBIT 1**



IN REPLY REFER TO

## United States Department of the Interior

BUREAU OF RECLAMATION  
2800 Cottage Way  
Sacramento, CA 95825-1898



**FEB 28 2020**

MP-440  
2.2.4.22

Mr. Thomas Birmingham  
General Manager  
Westlands Water District  
3130 N. Fresno Street  
Fresno, California 93703-6056

Subject: Repayment Contract No. 14-06-200-495A-IR1-P Between the United States and Westlands Water District

Dear Mr. Birmingham:

Enclosed is an executed original of the subject contract for your records. The Bureau of Reclamation appreciates the effort expended by the Westlands Water District and its representatives relative to this contract. Exhibit D to the Contract will be finalized on the Effective Date of the Contract, in accordance with the Water Infrastructure Improvements for the Nation Act of 2016 (Public Law 114-322).

If there are any questions, please contact Mr. Stanley Data, Repayment Specialist, at [sdata@usbr.gov](mailto:sdata@usbr.gov) or (916) 978-5246.

Sincerely,

Ernest A. Conant  
Regional Director

Enclosure

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INTERIOR REGION 10 • CALIFORNIA-GREAT BASIN

CALIFORNIA\*, NEVADA\*, OREGON\*

\* PARTIAL

1794 laws and regulations and Department of the Interior and Bureau of Reclamation policies,  
1795 directives, guidelines, and manuals, including but not limited to, the Department of the Interior  
1796 Manual, Part 517 *Integrated Pest Management Policy* and Part 609 *Weed Control Program*, the  
1797 Plant Protection Act of June 20, 2000 (Pub. L. 106-224), and Executive Order 13112 of February  
1798 3, 1999.

1799 MEDIUM FOR TRANSMITTING PAYMENT

1800 45. (a) All payments from the Contractor to the United States under this Contract  
1801 shall be by the medium requested by the United States on or before the date payment is due. The  
1802 required method of payment may include checks, wire transfers, or other types of payment  
1803 specified by the United States.

1804 (b) Upon execution of this Contract, the Contractor shall furnish the  
1805 Contracting Officer with the Contractor's taxpayer's identification number (TIN). The purpose  
1806 for requiring the Contractor's TIN is for collecting and reporting any delinquent amounts arising  
1807 out of the Contractor's relationship with the United States.

1808 CONTRACT DRAFTING CONSIDERATIONS

1809 46. This amended Contract has been negotiated and reviewed by the parties hereto,  
1810 each of whom is sophisticated in the matters to which this amended Contract pertains. The  
1811 double-spaced Articles of this amended Contract have been drafted, negotiated, and reviewed by  
1812 the parties, and no one party shall be considered to have drafted the stated Articles. Single-  
1813 spaced Articles are standard Articles pursuant to Bureau of Reclamation policy.

1814 CONFIRMATION OF CONTRACT

1815 47. Promptly after the execution of this amended Contract, the Contractor will  
1816 provide to the Contracting Officer a certified copy of a final decree of a court of competent  
1817 jurisdiction in the State of California, confirming the proceedings on the part of the Contractor  
1818 for the authorization of the execution of this amended Contract. This amended Contract shall not  
1819 be binding on the United States until the Contractor secures a final decree.

**EXHIBIT 2**

<b>SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO</b> Civil Unlimited Department, Central Division		Entered by:
TITLE OF CASE: <b>Westlands Water District vs All Persons Interested</b>		
<b>MINUTE ORDER</b>		Case Number: <b>19CECG03887</b>

Date: **March 16, 2020**

Re: **Decision**

Department: **502**

Judge/Temporary Judge: **Alan Simpson**

Court Clerk: **N. Capalare**

Reporter/Tape: **N/A**

Contested

Appearing Parties:	
Plaintiff:	<input type="checkbox"/> appearing on behalf of Plaintiff
Defendant:	<input type="checkbox"/> appearing on behalf of Defendant

Off Calendar

Set for \_\_\_\_\_ at \_\_\_\_\_ Dept \_\_\_\_\_ for \_\_\_\_\_

The Court having taken the February 27, 2020 motion for Validation of "Converted Contract" under submission, now takes the matter out from under submission and adopts the 2/27/20 tentative ruling as the final order. (see attached tentative ruling)

(19)

**Tentative Ruling**

Re: **Westlands Water District v. All Persons Interested**  
Superior Court Case No. 19CECG03887

Hearing Date: February 27, 2020 (Department 502)

Motion: by Westlands Water District for Validation of "Converted Contract"

**Tentative Ruling:**

To deny.

**Explanation:**

**1. Untimely Answers**

"We view the time limit established by section 862 like a statute of limitations. Put differently, if any interested party appears in a validation action after the time period permitted by the applicable summons, the government would have a valid defense, preventing that interested party from further challenging the government's proposed action."

*San Diego v. San Diegans for Open Government* (2016) 3 Cal. App. 5<sup>th</sup> 568, 579.

"The validating statutes should be construed so as to uphold their purpose, i.e., 'the acting agency's need to settle promptly all questions about the validity of its action.'" *McLeod v. Vista USD* (2008) 158 Cal. App. 4<sup>th</sup> 1156, 1166 (rev. denied). In construction of Code of Civil Procedure section 862, "[o]ur primary goal is to implement the legislative purpose." *Lateef v. City of Madera* (2020) 2020 WL 746176, \*4, Case No. F076227. Interpreting the statute to bar late filing honors the plain language of the statute as well as its purpose.

The answers of all but Central Delta Water Agency and South Delta Water Agency were filed after the December 16, 2019 deadline set forth in the Summons, and are therefore untimely.

**2. Validation Actions Generally**

"Validation proceedings are a procedural vehicle for obtaining an expedited but definitive ruling regarding the validity or invalidity of certain actions taken by public agencies. (Code Civ. Proc., § 860 et seq.) They are expedited because they require validation proceedings to be filed within 60 days of the public agency's action (Code Civ. Proc., §§ 860 & 863); they are



given preference over all other civil actions (*id.*, § 867) . . . They are definitive because they are in rem proceedings that, once proper constructive notice is given (*id.*, §§ 861, 862), result in a judgment that is binding ... against the world, and cannot be collaterally attacked, even on constitutional grounds. By providing a protocol for obtaining a prompt settlement of all questions about the validity of its action . . . validation proceedings provide much-needed certainty to the agency itself as well as to all third parties who would be hesitant to contract with or provide financing to the agency absent that certainty."

*Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency* (2016) 1 Cal. App. 4<sup>th</sup> 1684, 1096 (internal quotes and case citations omitted).

"Of course, not all actions of a public agency are subject to validation. The statutes defining validation proceedings do not specify the types of public agency action to which they apply; instead, they establish a uniform system that other statutory schemes must activate by reference." (*Id.* at 1097, internal quotes and citations omitted.)

### **3. Availability of Validation Proceeding for the Converted Contract**

#### **a. Not Under Water Code Section 35855**

The specific statute for validation proceeding on this type of contract is stated by Westlands to be Water Code section 35855. The comments to the 1961 amendment of Water Code section 35855 noted the prior version expressly allowed a validation action for a "proposed contract." The amendment took out "proposed." It is a tenet of statutory construction that where the Legislature has chosen to delete a provision, the Court cannot interpret the statute to put it back in. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." *Gikas v. Zolin* (1993) 6 Cal. 4<sup>th</sup> 841, 861. The Legislature did not intend that Courts make such advisory opinions on proposed contracts after 1961. This contract does not qualify for validation under that statute. But it is not the only one cited.

#### **b. General Validation Statutes for Debt Obligations**

"Government Code section 53511 makes validation proceedings available 'to determine the validity of [a local agency's] bonds, warrants, *contracts*, obligations or evidences of indebtedness.' (Government Code section 53511(a)), italics added.) Although 'contracts' could be read to reach *all* contracts, the courts have defined it by reference to the clause in which it has been used, and thus to reach only those contracts 'that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness.' (*Kaatz*, *supra*, 143 Cal. App. 4<sup>th</sup> at pp.

40, 42 . . . *Friedland, supra*, 62 Cal. App. 4<sup>th</sup> at p. 843 . . . 'contracts' in this statute do not refer generally to all public agency contracts, but rather to contracts involving financing and financial obligations."

Purchase contracts are not subject to validation under this statute. See *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency, supra*, 1 Cal. App. 5<sup>th</sup> at 1099. There, the plaintiff sought invalidation of a contract to purchase stock by a water agency from a retail water purveyor. The Court found such action was not properly subject to validation. See also *San Diego County Water Authority v. Metropolitan Water Dist. Of Southern California* (2017) 12 Cal. App. 5<sup>th</sup> 1124, finding an agency's action challenging rates was not a proper validation action. In *Phillips v. Seely* (1974) 43 Cal. App. 3d 104, the Court found that a contract obligation the County to pay \$12,500 a month for legal services to indigent defendants was not the type of contract subject to validation proceedings. In *Smith v. Mt. Diablo USD* (1976) 56 Cal. App. 3d 412, the Court found that a purchase contract by a school district did not fall under Code of Civil Procedure section 864.

Code of Civil Procedure section 864 does permit validation of proposed contracts: "For purposes of this chapter, bonds, warrants, contracts, obligations, and evidences of indebtedness shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution." *City of Ontario v. Superior Court* (1970) 2 Cal. 3d 335, 343-344, confirmed general validation was available for contracts of indebtedness.

Unless the Converted Contract can be considered a contract for indebtedness, it does not yet qualify for a validation action.

### **c. The Converted Contract Has Some Provisions Subject to Validation**

Para. 1.(i)(1) defines "Existing Capital Obligation" as the "remaining amount of construction costs or other capitalized costs allocable to the Contractor . . ." "Repayment Obligation" is defined in para. 1.(x) as that "for water delivered as irrigation water shall mean the Existing Capital Obligation discounted by ½ of the treasury rate, which shall be the amount due and payable to the United States . . ." under the WIIN Act.

"Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions," updated December 14, 2018,<sup>1</sup> discusses numerous provisions of the WIIN Act, but of particular interest for this case is Section 4011: "Accelerated Repayment and Surface Water Storage Account," starting on page 22. These publications are cited by California appellate courts. See, e.g., *In re A.A.* (2016) 243 Cal. App. 4<sup>th</sup> 765, 773; *Legal Services for Prisoners with Children v. Bowen*

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<sup>1</sup> See <https://crsreports.congress.gov/product/pdf/R/R44986>

(2009) 170 Cal. App. 4<sup>th</sup> 447, 456-457, *People v. Salcido* (2019) 42 Cal. App. 5<sup>th</sup> 529, 539, fnt. 3.

This shows that the contract at issue in this case is, in part, one for faster repayment of debts incurred to the Bureau of Reclamation for infrastructure used to store and move water around California. Thus the contract at issue meets the requirements, at least in part, for a validation action under Government Code section 53511 and Code of Civil Procedure section 864.

The Converted Contract does not meet such requirements for provisions unrelated to debt because it is a proposed contract, not an executed contract.

#### **4. The Converted Contract Lacks Material Terms.**

In the Appendix of Evidence submitted by Westlands ("AOE") Vol. II, page 108, paragraph 8, the draft resolution states: "The President of the District is hereby authorized to execute and deliver the Converted Contract in substantially the form attached hereto, with such additional changes and/or modifications as are approved by the President of the District, its General Manager, and its General Counsel." The resolution itself has that language as well. AOE, Vol. II, page 144. Exhibits A, B, C, and D to the Converted Contract are missing from all materials submitted to the Court. Exhibit D is the repayment page.

The proposed judgment seeks a ruling that "the Converted Contract is in all respects valid under applicable California Law and binding upon Westlands." Given that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate. It is not possible to make the determinations sought where no final contract is presented for validation.

Westlands' Declarant Gutierrez states he does not anticipate any major changes, but the validation statutes do not encompass judicial approval of incomplete contracts. Given the estimate for the repayment amount is over \$362,000,000 (Ex. 12 to Westlands' Exhibits), the absence of the actual final amount and payment schedule render the proposed contract lacking in material terms and incomplete.

#### **5. Brown Act Issues**

"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on



<p align="center"><b>SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO</b>  Civil Department, Central Division  1130 "O" Street  Fresno, California 93724-0002  (559) 457-2000</p>	<p align="center"><i>FOR COURT USE ONLY</i></p>
<p>TITLE OF CASE:  <b>Westlands Water District, a California Water District vs. All Persons Interested in the Matter of the Contract Between the United States and Westlands Water District Providing for Project Water Service, San Luis Unit and Delta Diversion and Facilities Repayment</b></p>	
<p align="center"><b>CLERK'S CERTIFICATE OF MAILING</b></p>	<p>CASE NUMBER:  <b>19CECG03887</b></p>

I certify that I am not a party to this cause and that a true copy of the:  
**Minutes/Order**

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 03/16/2020

Clerk, by \_\_\_\_\_



Deputy

**N. Capalare**

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Clerk's Certificate of Mailing Additional Address Page Attached

**EXHIBIT 3**

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23 Attorney for Plaintiffs Restore the Delta and  
24 Planning and Conservation League

25 **IN THE UNITED STATES DISTRICT COURT**  
26 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

27 CENTER FOR BIOLOGICAL DIVERSITY;  
28 RESTORE THE DELTA; and PLANNING  
AND CONSERVATION LEAGUE,

Plaintiffs,

v.

UNITED STATES BUREAU OF  
RECLAMATION; DAVID BERNHARDT, in  
his official capacity as Secretary of the Interior;  
and UNITED STATES DEPARTMENT OF  
THE INTERIOR,

Defendants.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**INTRODUCTION**

1  
2 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, RESTORE THE DELTA,  
3 and PLANNING AND CONSERVATION LEAGUE, (collectively, “Plaintiffs”) hereby sue  
4 Defendants UNITED STATES BUREAU OF RECLAMATION, DAVID BERNHARDT, in his  
5 official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE  
6 INTERIOR (collectively, “Reclamation”) for violations of the National Environmental Policy  
7 Act (“NEPA”), 42 U.S.C. section 4321 et seq.

8 2. Plaintiffs seek from this Court an order and judgment setting aside and rescinding  
9 Reclamation’s conversion of 14 of its Central Valley Project (“CVP”) renewal contracts into  
10 permanent repayment contracts with water contractors, and ordering Reclamation to comply with  
11 NEPA. Plaintiffs also seek an order and judgment restraining Reclamation from converting, or  
12 converting by amending, any additional contracts including 26 contracts that Reclamation is in  
13 the process of converting into permanent repayment contracts, and ordering Reclamation to  
14 comply with NEPA. Pursuant to the 14 contracts that Reclamation has already converted,  
15 Reclamation would be obligated to deliver about 1,799,148 acre-feet<sup>1</sup> of water through the CVP  
16 to those contractors each year. Pursuant to the 26 contracts that Reclamation is in the process of  
17 converting, Reclamation would be obligated to deliver about 480,679 acre-feet of water to those  
18 contractors each year. The total obligation including contracts already converted, and contracts  
19 Reclamation is the process of converting would be about 2,279,879 acre-feet of water per year.

20 3. Deliveries of CVP water are accomplished by diversions from rivers and the Delta  
21 and therefore have many significant adverse environmental impacts on the watershed, including  
22 the rivers and the San Francisco-San Joaquin Bay-Delta estuary. Adverse impacts include  
23 reducing freshwater flows and worsening already degraded Delta water quality; further  
24 endangering and destroying endangered and threatened fish species and critical habitat; reducing  
25 freshwater flows causing and worsening harmful algal blooms in the Delta; adverse impacts on  
26 public health and safety in the Delta region; and adverse impacts on agriculture in the Delta.

27  
28 <sup>1</sup> An acre-foot is the quantity of water that would cover one acre to a depth of one foot, or about 325,851.4 gallons.



1 Moreover, Reclamation is in the process of converting virtually all of its CVP contracts, about 35  
2 more of them, into permanent contracts like the 40 contracts already converted or in the process  
3 of being converted. Pursuant to NEPA, “cumulative impact” “is the impact on the environment  
4 which results from the incremental impact of the action when added to other past, present, and  
5 reasonably foreseeable future actions ... .” 40 C.F.R. § 1508.7. The conversion of all of these  
6 contracts would have many significant adverse cumulative impacts on the environment as well as  
7 direct significant adverse environmental impacts. Reclamation has discretion in determining and  
8 negotiating the terms and conditions of the contract conversions, and therefore must comply with  
9 NEPA, including preparation of an Environmental Impact Statement (“EIS”) and/or an  
10 Environmental Assessment (“EA”) before converting the contracts.

11 4. However, Reclamation has refused to prepare an EIS, EA, or comply with NEPA  
12 in any way whatsoever, contending that it has no discretion in determining and negotiating the  
13 terms and conditions of the contract conversions. Reclamation’s conclusion is an erroneous  
14 interpretation of law and of the plain language of the statute Reclamation relies upon.

15 5. Reclamation, therefore, has failed to proceed in the manner required by NEPA  
16 and has unlawfully withheld or unreasonably delayed required agency action pursuant to the  
17 Administrative Procedure Act (“APA”), 5 U.S.C. sections 706. Reclamation’s approvals of the  
18 contract conversions are arbitrary and capricious, and without observance of the procedure  
19 required by law. *Id.* Reclamation has also failed to proceed in the manner required by the  
20 Endangered Species Act (“ESA”), 16 U.S.C. section 1531 et seq. Plaintiffs may amend, or if  
21 required seek leave to amend or supplement, this complaint to allege ESA claims against  
22 Reclamation and additional federal parties following completion of 60 day notice under the ESA.

### 23 **JURISDICTION AND VENUE**

24 6. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal  
25 question), 1346 (United States as defendant), 1361 (mandamus against an officer of the United  
26 States), 2201 (declaratory judgment), and 2202 (injunctive relief), and under the APA, 5 U.S.C.  
27 sections 701-706 (review of final agency action).

1           7.       Venue is proper in this judicial district pursuant to 28 U.S.C. sections 1391(b)(2)  
2 and 1391(e)(2) because a substantial part of the events giving rise to Plaintiffs' claims occurred,  
3 and a substantial part of property that is the subject of the action is situated, in this judicial  
4 district. Intradistrict assignment of this matter to the Sacramento or Fresno Divisions of the Court  
5 would be appropriate as a substantial part of the events giving rise to Plaintiffs' claims occurred  
6 in those divisions.

7           8.       There exists now between the parties hereto an actual, justiciable controversy in  
8 which Plaintiffs are entitled to have a declaration of their rights and of Reclamation's  
9 obligations, and further injunctive relief because of the facts and circumstances hereinafter set  
10 forth.

11           9.       This Complaint is timely filed within the applicable six-year statute of limitations  
12 set forth in 28 U.S.C. section 2401(a).

13           10.      Plaintiffs have standing to assert their claims because they suffer tangible harm  
14 from Reclamation's violations of law as alleged herein. Plaintiffs' interests in improving water  
15 quality in the Central Valley and preserving fish and wildlife in the Central Valley and Trinity  
16 River watersheds and the San Francisco Bay-Delta Estuary, have been and will continue to be  
17 harmed by the activities permitted by the contracts. The diversion, pumping, delivery, and use of  
18 vast quantities of water from the Bay-Delta pursuant to the contracts directly harms fish through  
19 entrainment at the pumping plants and reduce freshwater flows in the Delta, and also alters the  
20 hydrologic flow patterns in the Delta, adversely affects the Delta's salinity barrier, causes water  
21 contamination in the San Joaquin River and other northern and Central Valley water bodies,  
22 produces toxic drainage that contaminates wetlands, and pollutes water and groundwater basins  
23 underlying much of the Central Valley, among other adverse impacts. A judgment from this  
24 Court requiring Reclamation to conduct a thorough environmental review of the impacts of the  
25 contracts would redress Plaintiffs' harms, at least in part, because Reclamation would be  
26 required to consider less harmful alternative terms and conditions in the contracts and also to a  
27 devise mitigation measures to address harms caused by the contracts.

1 11. Plaintiffs have suffered and are suffering procedural and informational injuries  
2 due to Reclamation's failure to fulfill its NEPA duties. Plaintiffs seeking to enforce a procedural  
3 requirement that has been disregarded and could impair a separate concrete interest of theirs, can  
4 establish standing without meeting all the normal standards for redressability and immediacy.  
5 They need only establish the reasonable probability of the challenged action's threat to their  
6 concrete interests.

7 12. Plaintiffs' interests in the preservation of fish and wildlife in the Bay-Delta,  
8 Central Valley, Trinity River watershed, and San Francisco Bay, as well as their interests in  
9 improving water quality in those areas, are concrete interests.

10 13. All applicable administrative remedies have been adequately exhausted by  
11 Plaintiffs. Within the period for public comment established by Reclamation, Plaintiffs submitted  
12 comment letters dated January 7, February 15, and April 22, 2020, to Reclamation, asserting that  
13 Reclamation must comply with NEPA before converting the contracts. Plaintiff Restore the  
14 Delta also submitted separate comment letters dated January 6 and 7, 2020, and Plaintiffs  
15 Planning and Conservation League and Restore the Delta submitted a comment letter dated  
16 January 6, 2020. Reclamation failed to provide any NEPA notices, prepared no NEPA  
17 documents, and provided no NEPA public comment period.

18 **PARTIES**

19 14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the "Center") is a non-  
20 profit, public interest organization with over 74,000 active members. The Center has offices in  
21 Oakland, Los Angeles, and Joshua Tree, California, as well as in Arizona, Florida, New Mexico,  
22 Oregon, Colorado, and Washington, D.C. The Center and its members are dedicated to  
23 protecting diverse native species and habitats through science, policy, education, and  
24 environmental law. The Center's members reside and own property throughout California as  
25 well as those areas to be affected and served by the contracts, and use the waters and lands  
26 affected by the contracts for wildlife observation, recreation, scientific research, environmental  
27 education, and aesthetic enjoyment. One of the Center's primary missions is to protect and  
28 restore habitat and populations of imperiled species throughout Western North America. The

1 group's members and staff include individuals who visit the streams, rivers, riparian areas and  
2 Bay-Delta and have biological, health, educational, scientific research, spiritual, and aesthetic  
3 interest in the ecosystems and the species and habitats affected by Central Valley Project  
4 including the deliveries of waters to Reclamation's contractors. The Center's members and staff  
5 regularly use and intend to continue to use these areas for observation, research, aesthetic  
6 enjoyment, and other recreational, scientific, and educational activities. The Center's members  
7 and staff have researched, studied, observed, and sought protection for many imperiled species,  
8 including federally listed threatened and endangered species that depend on the rivers, streams,  
9 riparian habitat, and Bay-Delta in California. The Center's members and staff have and continue  
10 to derive scientific, recreational, educational, conservation, and aesthetic benefits from the  
11 continued existence of imperiled species in the wild and the preservation of the ecosystems upon  
12 which they depend. Central Valley Project diversions are a detriment to achieving the group's  
13 goal of protection and restoration, and its members and staff are injured by Reclamation entering  
14 into the permanent contracts in the absence of compliance with NEPA. These injuries would be  
15 redressed by the relief sought.

16 15. Plaintiff RESTORE THE DELTA ("RTD") is a non-profit public benefit  
17 organization based in Stockton, California. RTD is a coalition of Delta residents, business  
18 leaders, civic organizations, community groups, faith-based communities, union locals, farmers,  
19 fishermen, and environmentalists seeking to strengthen the health of the Bay-Delta estuary and to  
20 protect the environmental interests in the Sacramento-San Joaquin Delta, including but not  
21 limited to public health, fishing, farming, and recreation. With over 60,000 members statewide,  
22 RTD advocates on behalf of local Delta stakeholders to ensure that they have a direct impact on  
23 water management decisions affecting the water quality and well-being of their communities,  
24 and water sustainability policies for all Californians. RTD works through public education and  
25 outreach so that all Californians recognize the Sacramento-San Joaquin Delta as part of  
26 California's natural heritage, deserving of restoration, seeking a Delta whose waters are fishable,  
27 swimmable, drinkable, and farmable, supporting the health of the San Francisco Bay-Delta  
28 Estuary. Members of RTD reside in and along the Bay-Delta and its watershed and use the

1 waters of the Central Valley and Bay-Delta for drinking, farming, and for aesthetic, recreational,  
2 and educational enjoyment. As just one example of environmental harms inflicted on RTD  
3 members by diversions for the Central Valley Project, diversions reduce freshwater flows  
4 through the Delta causing and worsening harmful algal blooms (HABs) which threaten the  
5 public health of those drinking, fishing in, or swimming in, Delta waters, or inhaling the air near  
6 Delta waters. These injuries would be redressed by the relief sought.

7 16. Plaintiff PLANNING AND CONSERVATION LEAGUE (“PCL”) is a nonprofit  
8 advocacy organization empowered to protect and restore California’s natural environment and to  
9 promote and defend the public health and safety of the people of California, through legislative,  
10 administrative, and judicial action. Founded in 1965, PCL was the first organization devoted to  
11 bettering Californians’ quality of life through environmental legislation. One of the  
12 organization’s earliest accomplishments was the enactment in 1970 of the California  
13 Environmental Quality Act (“CEQA”), which PCL helped draft and has continually supported  
14 over the years. PCL has been a party in successful legal actions to compel compliance with  
15 NEPA and CEQA. PCL members reside and own property throughout California as well as those  
16 areas to be served by CVP contracts, and use the waters and lands affected by the CVP contracts.  
17 PCL’s interests have been injured as a result of Reclamation’s permanent locking-in of CVP  
18 contracts, and these injuries would be redressed by the relief sought.

19 17. Defendant UNITED STATES BUREAU OF RECLAMATION is the federal  
20 agency within the United States Department of the Interior charged with managing the CVP and  
21 is responsible for complying with NEPA in connection with its CVP management actions.  
22 Reclamation approved and entered into the contracts challenged in this litigation without  
23 adequate or any environmental review.

24 18. Defendant DAVID BERNHARDT is sued in his official capacity as Secretary of  
25 the Department of the Interior (“Secretary”). He is responsible for the operation of the CVP,  
26 subject to the mandates of the Central Valley Project Improvement Act and WIIN Act, and  
27 oversees the Department of the Interior and the Bureau of Reclamation.

1 19. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is a cabinet-  
2 level federal agency, and the parent agency of the United States Bureau of Reclamation.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 **I. THE NATIONAL ENVIRONMENTAL POLICY ACT**

5 20. NEPA is “our basic national charter for protection of the environment.” 40 C.F.R.  
6 § 1500.1(a). Congress directed “that, to the fullest extent possible ... the policies, regulations,  
7 and public laws of the United States shall be interpreted and administered in accordance with the  
8 policies set forth in [NEPA] ... .” 42 U.S.C. § 4332(1).

9 21. NEPA’s goals are to (1) “prevent or eliminate damage to the environment and  
10 biosphere,” (2) “stimulate the health and welfare of” all people, and (3) “encourage productive  
11 and enjoyable harmony” between humankind and the environment. 42 U.S.C. § 4321. NEPA  
12 recognizes that “each person should enjoy a healthful environment” and ensures that the federal  
13 government uses all practicable means to “fulfill the responsibilities of each generation as trustee  
14 of the environment for succeeding generations” and “assure for all Americans safe, healthful,  
15 productive, and esthetically and culturally pleasing surroundings.” *Id.* § 4331(b)-(c).

16 22. To fulfill these purposes, NEPA requires that: (1) agencies take a “hard look” at  
17 the environmental impacts of their actions before the actions occur, thereby ensuring “that the  
18 agency, in reaching its decision, will have available, and will carefully consider, detailed  
19 information concerning significant environmental impacts,” and (2) “the relevant information  
20 will be made available to the larger audience that may also play a role in both the  
21 decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*  
22 *Citizens Council*, 490 U.S. 332, 349 (1989). NEPA processes must be integrated with other  
23 processes “at the earliest possible time to ensure that planning and decisions reflect  
24 environmental values ... .” 40 C.F.R. § 1501.2.

25 23. NEPA requires federal agencies to prepare an EIS for “major Federal actions  
26 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

27 24. “Major Federal actions” subject to NEPA include both new and continuing  
28 activities. 40 C.F.R. Regulations § 1508.18(a).

1 25. To determine whether the nature and extent of a proposed action’s environmental  
2 effects requires preparing an EIS, federal agencies may first prepare an EA. 40 C.F.R. §  
3 1501.4(b)-(c). If, on the basis of the EA, the agency finds that the proposed action will produce  
4 “no significant impact” on the environment, then an EIS need not be prepared. *Id.* § 1501.4(e).

5 26. An agency’s NEPA analysis must assess the direct, indirect, and cumulative  
6 impacts of the action. 40 C.F.R. §§ 1508.8. Cumulative impacts are those that “result from the  
7 incremental impact of the action when added to other past, present, and reasonably foreseeable  
8 future actions.” 40 C.F.R. §§ 1508.7. An agency must prepare an EIS if it is reasonable to  
9 anticipate a cumulatively significant impact on the environment. *Grand Canyon Trust v. Fed.*  
10 *Aviation Admin.*, 290 F.3d 339, 346 (D.C. Cir. 2002).

11 27. As part of its NEPA review, an agency is also required to prepare a detailed  
12 statement regarding the alternatives to a proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii), (E).  
13 This alternatives analysis is the “heart” of NEPA review. 40 C.F.R. § 1502.14; *see also id.* §  
14 1508.9(b). An agency must “[r]igorously explore and objectively evaluate all reasonable  
15 alternatives,” including a “no-action” alternative. 40 C.F.R. § 1502.14.

16 28. An agency may prepare a programmatic EIS covering a program. 40 C.F.R. §  
17 1502.20. Subsequent EISs and EAs covering specific actions within the broader program may  
18 “tier” off the programmatic EIS, relying on it to cover the program-level analysis while focusing  
19 on the “issues specific to the subsequent action.” *Id.*

## 20 **II. THE ADMINISTRATIVE PROCEDURE ACT**

21 29. The APA provides a right to judicial review for any “person suffering legal wrong  
22 because of agency action.” 5 U.S.C. § 702. Final agency actions “for which there is no other  
23 adequate remedy in a court” are reviewable under the APA. *Id.* § 704.

24 30. Under the APA, a reviewing court shall compel agency action unlawfully  
25 withheld or unreasonably delayed and hold unlawful. *Id.* § 706(1). In addition, a reviewing court  
26 shall set aside agency action found to be arbitrary, capricious, an abuse of discretion, or  
27 otherwise not in accordance with law, or without observance of the procedure required by law.  
28 *Id.* §§ 706(2)(A), 706(2)(D).

1 **III. THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT**

2 31. Congress enacted the Central Valley Project Improvement Act (“CVP  
3 Improvement Act”), Title 34, Public Law 102-575, in 1992 to:

4 (a) protect, restore, and enhance fish, wildlife, and associated habitats in the Central  
5 Valley and Trinity River basins of California;

6 (b) address impacts of the Central Valley Project on fish, wildlife and associated habitats;

7 (c) improve the operational flexibility of the Central Valley Project;

8 (d) increase water-related benefits provided by the Central Valley Project to the State of  
9 California through expanded use of voluntary water transfers and improved water  
10 conservation;

11 (e) contribute to the State of California's interim and long-term efforts to protect the San  
12 Francisco Bay/Sacramento-San Joaquin Delta Estuary; and

13 (f) achieve a reasonable balance among competing demands for use of Central Valley  
14 Project water, including the requirements of fish and wildlife, agricultural, municipal and  
15 industrial and power contractors.

16 CVP Improvement Act § 3402.

17 32. The CVP Improvement Act directed the Secretary to operate the CVP “to meet all  
18 obligations under State and Federal law, including but not limited to the [ESA], and all decisions  
19 of the California State Water Resources Control Board establishing conditions on applicable  
20 licenses and permits for the project.” CVP Improvement Act § 3406(a).

21 33. The CVP Improvement Act further directed the Secretary to develop and  
22 implement a program to ensure that natural production of anadromous fish in Central Valley  
23 rivers and streams is doubled by 2002 compared to 1967-1991 levels. CVP Improvement Act §  
24 3406(b)(1).

25 34. To address impacts of the CVP on fish, wildlife, and associated habitat, the CVP  
26 Improvement Act among other things requires Reclamation to conduct environmental review  
27 before any long-term water service contract can be renewed. CVP Improvement Act §  
28 3404(c)(1). Such environmental review must include, but is not limited to, the Secretary’s  
preparation of a programmatic EIS analyzing the effects of implementing the CVP Improvement  
Act, “including all fish, wildlife, and habitat restoration actions and the potential renewal of all  
existing Central Valley Project water contracts.” CVP Improvement Act § 3409.



1 **IV. THE WATER INFRASTRUCTURE IMPROVEMENTS OF THE NATION ACT**

2 35. In 2016, Congress enacted the Water Infrastructure Improvements of the Nation  
3 Act (“WIIN Act”), Public Law 114-322.

4 36. The WIIN Act provides that Reclamation shall convert existing CVP water  
5 service contracts to permanent repayment contracts upon the request of the contractor, under  
6 mutually agreeable terms and conditions. WIIN Act, § 4011(a). The WIIN Act expressly  
7 provides that it shall not be interpreted or implemented in a manner that (1) preempts or modifies  
8 any obligation of the United States under state law; (2) affects or modifies any obligation under  
9 the CVP Improvement Act, subject to a limited exception for the Stanislaus River predator  
10 management program; (3) overrides, modifies, or amends applicability of the ESA; (4) “would  
11 cause additional adverse effects on listed fish species beyond the range of effects anticipated to  
12 occur to the listed fish species for the duration of the applicable biological opinion, using the best  
13 scientific and commercial data available”; or (5) overrides, modifies, or amends any obligation  
14 of the Pacific Fisheries Management Council. WIIN Act, § 4012(a).

15 **FACTUAL ALLEGATIONS**

16 37. The CVP is the largest surface water storage and delivery system in California. It  
17 includes 20 reservoirs with a water storage capacity of nearly 12 million acre-feet, power plants  
18 and pump generating plants with a combined generation capacity of about 4.5 million megawatt  
19 hours annually, two pumping plants that extract water from the Delta and export it to the Central  
20 Valley, and about 500 miles of canals and aqueducts. The CVP provides nearly 6 million acre-  
21 feet of water annually, primarily to agricultural contractors in the Central Valley who account for  
22 about 5 million acre-feet.

23 38. The CVP has numerous adverse environmental effects on the ecosystems of the  
24 San Francisco-San Joaquin Bay-Delta estuary, Central Valley, and Trinity River watershed. CVP  
25 operations divert or pump water from the Delta, reducing freshwater flows through the Delta.  
26 CVP dams and diversions impede fish passage and reduce instream flows. The CVP harms  
27 endangered and threatened fish and adversely modifies or destroys their habitats, including areas  
28 designated as critical habitat under the Endangered Species Act. Reduced freshwater flows

worsen already degraded Delta water quality and contribute to harmful algal blooms in the Delta. Impaired water quality and reduced water quantity adversely affect public health and safety in the Delta region and farming in the Delta.

39. In written comments to Reclamation on the Draft EIS for re-initiation of ESA consultation on the coordinated long-term operation of the CVP and State Water Project (“SWP”), the State Water Resources Control Board explained that “fish and wildlife species are already in poor condition, some of which are on the verge of functional extinction or extirpation” and that the body of scientific evidence shows “that increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native and migratory fish.” September 25, 2019 SWRCB letter at p. 3.

40. On February 28, 2020, Reclamation approved the conversion of 14 CVP contracts into permanent water service contracts. The 14 converted contracts are shown on Table A:

**Table A Contract Conversions Approved on February 28, 2020**

<b>Contractor</b>	<b>Contract No.</b>	<b>Acre-Feet Per Year</b>
Westlands Water District	14-06-200-495A-IRI-P	1,150,000
Westlands Water District Distribution District No. 1 (Broadview Assignment)	14-06-200-8092-XXX	27,000
Westlands Water District Distribution District No. 1 (Centinella Assignment)	7-07-20-WO55-XXX	2,500
Westlands Water District Distribution District No. 2 (Mercy Springs Partial Assignment)	14-06-200-3365A-XXX-C	4,198
Santa Clara Valley Water District (and Westlands Water Dist. No. 1 Mercy Springs 2-Way Partial Assignment)	14-06-200-3365A-XXX-B	6,260
Westlands Water District Distribution District No. 1 (Widren Assignment)	14-06-200-8018-XXX	2,990
East Bay Municipal Utility District	14-06-200-5183A-LTR1-P	433,000
City of Folsom	6-07-20-W1372B-P	7,000

1	City of Roseville	4-06-200-3474A-IRI-P	32,000
2	Placer County Water Agency	14-06-200-5082A-IRI-P	35,000
3	Sacramento County Water Agency	14-06-200-5198B-IR1-P	30,000
4	Sacramento County Water Agency	6-07-20-W1372-P	15,000
5	Sacramento Municipal Utility District	14-06-200-5198A-IR1-P	30,000
6	San Juan Water District	6-07-20-W1373-LTR1-P	24,200

7  
8 41. Reclamation is in the process of converting an additional 26 CVP contracts. These  
9 contracts are shown on Table B.

10 **Table B Contracts in Process of Conversion**

11	Contractor	Contract No.	Acre-Foot Per Year
12	4-M Water District	14-06-200-5272A-P	5,700
13	Colusa County Water District	1-07-20-W0220-P	5,964
14	Colusa County Water District	14-06-200-304-A-P	62,200
15	Corning Water District	14-06-200-6575-P	23,000
16	Dunnigan Water District	14-06-200-399-A-P	19,000
17	Glenn Valley Water District	0-07-20-W0219-P	1,730
18	Glide Water District	7-07-20-W0040-P	10,500
19	Kanawha Water District	14-06-200-466-A-P	45,000
20	Proberta Water District	14-06-200-7311-P	3,500
21	Davis Water District	14-06-200-6001A-P	4,000
22	Cortina Water District	0-07-20-W0206-P	1,700
23	La Grande Water District	7-07-20-W0022-P	5,000
24	La Grande Water District	0-07-20-W0190-P	2,200
25	Hothouse Water District	1-07-20-W0224-P	2,450
26	City of West Sacramento	0-07-20-W0187-P	23,600
27	Orland-Artois Water District	14-06-200-8382A-P	53,000

1	City of Shasta Lake	4-07-20-W1134-P	4,400
2	Shasta County Water Agency	14-06-200-3367A-P	1,022
3	Mountain Gate Community Services District	14-06-200-6998-P	1,350
4	City of Redding	14-06-200-5272A-P	6,140
5	Bella Vista Water District	14-06-200-851A-P	24,578
6	Shasta Community Services Dist.	14-06-200-862A-P	1,000
7	Stony Creek Water District	2-07-20-W0261-P	3,345
8	Stockton East Water District	4-07-20-W0329-P	75,000
9	Central San Joaquin Water Conservation District	4-07-20-W0330-P	80,000

11  
12 42. In 1999, Reclamation issued the programmatic EIS required under the CVP  
13 Improvement Act. The programmatic EIS did not evaluate the environmental consequences of  
14 converting Reclamation's existing CVP contracts to permanent water service contracts, but  
15 provided that future NEPA review would occur at the level of specific actions, including new  
16 contracts and contract renewals consistent with NEPA's tiering provisions.

17 43. In 2000, following consultation with Reclamation pursuant to section 7 of the  
18 ESA (16 U.S.C. § 1536), the United States Fish and Wildlife Service released a biological  
19 opinion for the implementation of the CVP Improvement Act and the continued operation and  
20 maintenance of the CVP. The biological opinion states that:

21 Once the long-term contract renewal negotiations are completed, the renewals  
22 will be subject to a separate, tiered analysis that is consistent with the NEPA  
23 tiering in the PEIS. No contracts will be renewed until the appropriate  
24 environmental review has been completed. Reclamation will consult either  
25 formally or informally with the Service before executing a contract. The site  
26 specific, tiered analysis will address direct and indirect effects of contract  
27 renewal.

28 44. In December 2019, Reclamation issued a Final EIS for the Reinitiation of  
Consultation on the Long-Term Operation of the Central Valley Project and State Water Project  
("Reinitiation EIS"). The Reinitiation EIS did not evaluate the environmental consequences of  
converting existing CVP contracts to permanent water service contracts and did not consider

1 alternatives that might reduce deliveries of CVP water under the converted contracts or  
2 otherwise address the contract conversion. Instead, the Reinitiation EIS merely noted, without  
3 analysis, that “[c]onversion of such contracts will not affect operations under the action  
4 alternatives.” The Reinitiation EIS reflected Reclamation’s current policy to “maximize water  
5 deliveries and optimize marketable power generation” while minimizing environmental and  
6 regulatory limitations on water deliveries, such as those imposed by NEPA and the ESA.

7 45. Reclamation did not prepare an EIS, EA, or otherwise comply with NEPA in any  
8 way whatsoever prior to making its contracts permanent, and its failure to comply with NEPA is  
9 ongoing in the case of the contracts that are in the process of conversion.

10 46. Reclamation, on expiration of prior long-term contracts, has issued short-term  
11 interim contracts and prepared environmental assessments (“EAs”) to purport to comply with  
12 NEPA.

13 47. In the 27 years since the enactment of the CVP Improvement Act, fish species in  
14 the Bay-Delta have declined toward extinction including endangered winter-run Chinook  
15 salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened  
16 green sturgeon, threatened Delta smelt, and state-protected longfin smelt. These declines have  
17 been caused and worsened by CVP diversions which result in rising water temperatures,  
18 increased salinity, sedimentation and other harmful reductions in water quantities, freshwater  
19 flows, and water quality. Instead of meeting the salmon-doubling goal of the CVP Improvement  
20 Act, the species have continued to decline. Reclamation’s conversion of CVP contracts to  
21 permanent water service contracts will perpetuate these declines and is likely to cause further  
22 destruction and adverse modification of fish habitat, including designated critical habitat. In  
23 addition, the conversion of CVP contracts to permanent water service contracts is likely to  
24 impede recovery of endangered and threatened species.

25 48. The NEPA regulations list various factors to be evaluated in determining the  
26 intensity (meaning severity) of an impact to determine whether an action “significantly” affects  
27 the quality of the human environment requiring preparation of an EIS. 40 C.F.R. § 1508.27(b).  
28 The water deliveries to Reclamation’s contractors diminish freshwater flows through the Delta,

1 which decreases water supplies and water quality and worsens the amount and frequency of  
2 harmful algal blooms (HABs) in the Delta. In addition to the dangers posed by ingesting HABs,  
3 HABs can become airborne and inhaled by Delta residents and users. The conversion of CVP  
4 contracts to permanent water service contracts will perpetuate and exacerbate the effects of  
5 decreased freshwater flows, including HABs, significantly affecting public health and safety. 40  
6 C.F.R. § 1508.27(b)(2).

7 49. The Delta has unique characteristics, being the largest inland estuary in the  
8 Western Hemisphere, and which already fails to meet established water quality standards and is  
9 an ecologically critical area. Reclamation's conversion of CVP contracts to permanent water  
10 service contracts will contribute to and exacerbate the decline of the Delta. 40 C.F.R. §  
11 1508.27(b)(3).

12 50. The conversion and locking-in of the water contracts is highly controversial. 40  
13 C.F.R. § 1508.27(b)(4.)

14 51. Locking in the contracts for all time in the absence of an EIS or even an EA will  
15 have effects on the human environment that are highly uncertain and involve unique and  
16 unknown risks, highlighted by the absence of any NEPA environmental analysis whatsoever. 40  
17 C.F.R. § 1508.27(b)(5).

18 52. Reclamation's conversion of each contract establishes a precedent for future  
19 actions with significant effects and represents a decision in principle about future considerations.  
20 40 C.F.R. § 1508.27(b)(6). About 75 contractors have started or completed negotiating  
21 conversion of their CVP contracts with Reclamation. Consequently, each contract conversion  
22 establishes a precedent for future actions with significant effects.

23 53. Each contract conversion is related to the conversion of about 75 other CVP  
24 contracts, as well as to other past, ongoing, and reasonably foreseeable future actions affecting  
25 the San Francisco-San Joaquin Bay-Delta estuary, Central Valley, and Trinity River watershed.  
26 The incremental impact of each such contract conversion may be cumulatively significant in  
27 light of these related actions. 40 C.F.R. § 1508.27(b)(7).

28

1           54.     The conversion of the contracts will adversely affect endangered and threatened  
2 species and their habitats that have been determined to be critical under the ESA. 40 C.F.R. §  
3 1508.27(b)(9).

4           55.     The conversion of the contracts threatens a violation of Federal and State laws  
5 and requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b)(10). For  
6 example, the CVP Improvement Act requires:

7                   Upon renewal of any long-term repayment or water service contract providing for  
8 the delivery of water from the Central Valley Project, the Secretary shall  
9 incorporate all requirements imposed by existing law, including provisions of this  
10 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.

11 CVP Improvement Act § 3404(c)(2). The converted contracts do not incorporate all requirements  
12 imposed by existing law, in violation of the CVP Improvement Act, and the conversion of the  
13 contracts threatens violations of NEPA, the ESA, the CVP Improvement Act, and Reclamation  
14 law, among other things.

15           56.     Reclamation's failure to prepare an EIS or EA on the conversion of the contracts  
16 constitutes failure to proceed in the manner required by NEPA because entering into each  
17 contract was a major federal action significantly affecting the quality of the human environment.  
18 42 U.S.C. § 4332(2)(C). Reclamation's failure to prepare EIS or EA on the conversion of the  
19 contracts also constitutes agency action unlawfully withheld or reasonably delayed.

20           57.     Reclamation unlawfully failed to prepare an EIS or first prepare an EA and then  
21 an EIS, which must "[r]igorously explore and objectively evaluate all reasonable alternatives" to  
22 the action. 40 C.F.R. § 1502.14 (a.) As a result, Reclamation failed to consider alternative terms  
23 and conditions that might reduce deliveries of CVP water in order to increase freshwater flows  
24 and begin to restore the Delta and watersheds in the Central Valley and Trinity River system.  
25 Reclamation further failed to consider alternative terms and conditions requiring periodic  
26 contract evaluation for renewal, modification, or termination. These and other alternative terms  
27 and conditions are particularly important here because some of the subject lands, such as those  
28 serviced by Westlands Water District, continue to become unfarmable over time and be taken out

1 of production because of buildup of selenium, a toxic element that is leached from soil by  
2 irrigation.

3 58. The Westlands contract obligates Reclamation to deliver to Westlands 1.15  
4 million acre-feet of water each year (subject to its availability), making it the largest single CVP  
5 contract. Many of the lands in Westlands Water District have impaired drainage, that contributes  
6 to the buildup of selenium and other contaminants. The Ninth Circuit Court of Appeals reversed  
7 a district court decision denying environmental plaintiffs' summary judgment because the  
8 challenged environmental document issued by Reclamation under NEPA for eight interim CVP  
9 contracts including Westlands Water District's interim contract, "did not give full and  
10 meaningful consideration to the alternative of a reduction in maximum water quantities." *Pacific*  
11 *Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior*, 655 Fed.Appx. 595 (9th  
12 Cir., No. 14-15514, July 25, 2016) (not selected for publication). "Reclamation's decision not to  
13 give full and meaningful consideration to the alternative of a reduction in maximum interim  
14 contract water quantities was an abuse of discretion and the agency did not adequately explain  
15 why it eliminated this alternative from detailed study." *Id.* at 599. Reclamation's "reasoning in  
16 large part reflects a policy decision to promote the economic security of agricultural users, rather  
17 than an explanation of why reducing maximum contract quantities was so infeasible as to  
18 preclude study of its environmental impacts." *Id.* at 600. The decision pertained to interim two-  
19 year contract renewals. This case involves permanent contracts. NEPA alternatives analysis  
20 would allow meaningful consideration of the trade-offs between water deliveries and  
21 environmental harm as well as opportunities to reduce deliveries over time due to such  
22 developments as agricultural lands becoming drainage impaired and innovations and  
23 improvements in technology such as conservation, water recycling, and drip irrigation leading to  
24 the reduction in claimed needs for water deliveries. An example of one obvious alternative is to  
25 limit the term of the contracts so as to reduce quantities over time to reflect worsening conditions  
26 caused by climate change as well as reduction in needs for exports due to continued innovation.  
27 Other examples of alternatives include retiring drainage impaired lands and basing contractual  
28



1 water quantities on real water available and the impacts of providing real water, instead of basing  
2 quantities on “paper water.”

3 59. Reclamation also failed to conduct NEPA-required “scoping” and failed to  
4 publish a NEPA-required notice of intent in the Federal Register. 40 C.F.R. § 1501.7.

5 60. Reclamation contends it has no discretion with respect to contract conversion  
6 because of the WIIN Act. For example, the Westlands Water District Contract No. 14-06-200-  
7 495A-IRI-P recites:

8 WHEREAS, 4011(a)(1) provides that ‘upon request of the contractor, the  
9 Secretary of the Interior *shall* convert any water service contract in effect on the  
10 date of enactment of this subtitle and between the United States and a water users’  
Association [Contractor] to allow for prepayment of the repayment contract  
pursuant to paragraph (2) *under mutually agreeable terms and conditions.*’

11 Contract No. 14-06-200-495A-IRI-P, at p. 4 (emphasis added). But while the WIIN Act may  
12 require Reclamation to convert the contract, Reclamation retains discretion over the terms and  
13 conditions of the converted contract. The Westlands contract further recites:

14 This amended Contract has been negotiated and reviewed by the parties hereto,  
15 each of whom is sophisticated in the matters to which this amended Contract  
16 pertains. The double-spaced Articles of this amended Contract have been drafted,  
negotiated, and reviewed by the parties, and no one party shall be considered to  
have drafted the stated Articles.”

17 *Id.*, ¶ 46, p. 71 (emphasis added). Each contract contains similar provisions to those set forth in  
18 this paragraph. The title Reclamation uses on its website listing the contracts is “Negotiated  
19 Draft Conversion Contracts.”

20 61. Contrary to Reclamation’s contention that it has no discretion and therefore no  
21 duty to comply with NEPA before converting the contracts, Reclamation has discretion under the  
22 plain language of the WIIN Act section it relies upon, because the “terms and conditions” of any  
23 contract must be “mutually agreeable” to the Secretary of the Interior. The terms and conditions  
24 of the contracts were *negotiated* by Reclamation with the contractors.

25 62. Contrary to Reclamation’s contention that it has no duty to comply with NEPA  
26 before converting the contracts, NEPA compliance is also required by the CVP Improvement  
27 Act. The WIIN Act’s savings language expressly preserves Reclamation’s obligations under the  
28 CVP Improvement Act. WIIN Act, § 4012(a)(2). As alleged above in ¶ 34, the CVP

1 Improvement Act requires Reclamation to conduct environmental review before any long-term  
2 water service contract can be renewed. CVP Improvement Act, §§ 3402(a), 3404(c)(1).

3 63. NEPA compliance by Reclamation before converting the contracts is also  
4 necessary to create accurate information and analysis to ensure that the WIIN Act's savings  
5 language prohibiting interpretation or implementation in a manner that "preempts or modifies  
6 any obligation of the United States to act in conformance with applicable State law, including  
7 applicable State water law"; "overrides, modifies, or amends the applicability of the Endangered  
8 Species Act of 1973 ... to the operation of the Central Valley Project or the State Water Project";  
9 or that "would cause additional adverse effects on listed fish species beyond the range of effects  
10 anticipated to occur to the listed fish species for the duration of the applicable biological opinion,  
11 using the best scientific and commercial data available ..." are not violated. WIIN Act, §§  
12 4012(a)(1), 4012(a)(3), 4012(a)(4).

### 13 **CLAIMS FOR RELIEF**

#### 14 **First Claim for Relief**

#### 15 **(Violations of NEPA and the APA)**

16 64. The paragraphs set forth above are realleged and incorporated herein by this  
17 reference.

18 65. Reclamation's approvals of conversion of the CVP contracts to permanent water  
19 service contracts constitute a major federal action or actions that will significantly affect the  
20 quality of the human environment. Reclamation had a duty under NEPA to prepare an EIS or an  
21 EA before approving conversion of the contracts.

22 66. Reclamation failed to prepare an EIS or an EA before approving the conversion  
23 contracts in violation of NEPA.

24 67. Reclamation failed to develop or consider alternatives to the proposed contract  
25 conversion actions in violation of NEPA.

26 68. Reclamation's failure to comply with NEPA prior to its approvals of the contract  
27 conversions constitutes arbitrary and capricious agency action, is an abuse of discretion, and is  
28 contrary to law and procedures required by law. 5 U.S.C. § 706(2)(A), (D).

1 69. Reclamation's failure to comply with NEPA prior to its approvals of the contract  
2 conversions constitutes agency action unlawfully withheld or unreasonably delayed under the  
3 APA. 5 U.S.C. § 706(1).

4 **Second Claim for Relief**

5 **(Violations of NEPA and the APA)**

6 70. The paragraphs set forth above are realleged and incorporated herein by this  
7 reference.

8 71. Reclamation's approvals of the conversion of the CVP contracts to permanent  
9 water service contracts without any compliance with NEPA constitute agency action that is  
10 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and  
11 without observance of the procedure required by law. 5 U.S.C. § 706(2).

12 **PRAYER FOR RELIEF**

13 Wherefore, Plaintiffs request that this Court:

14 A. Find and declare that Reclamation's failure to prepare an EIS or an EA to assess,  
15 disclose, and consider alternatives to the environmental effects of the contract conversions  
16 violates NEPA.

17 B. Find and declare that Reclamation's approvals of the conversion contracts are  
18 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and  
19 without observance of the procedure required by law.

20 C. Order Defendants to comply with NEPA by preparing an EIS or an EA for the  
21 contract conversions.

22 D. Vacate, set aside, and rescind Reclamation's contract conversions.

23 E. Enjoin Defendants from taking any action pursuant to the contract conversions,  
24 until Defendants have fully complied with NEPA.

25 F. Enjoin Defendants from converting any other contracts until Defendants have  
26 fully complied with NEPA.

27 G. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees.

28 H. Grant any other relief as the Court deems just and proper.

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Respectfully submitted,

Dated: May 20, 2020

/s/ John Buse  
John Buse  
CENTER FOR BIOLOGICAL DIVERSITY  
Attorney for Plaintiff Center for Biological Diversity

Dated: May 20, 2020

/s/ E. Robert Wright (as authorized May 20, 2020)  
E. Robert Wright  
LAW OFFICE OF E. ROBERT WRIGHT

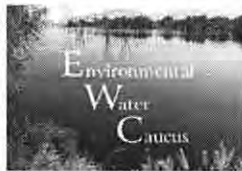
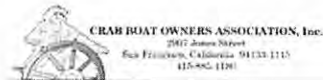
Adam Keats  
LAW OFFICE OF ADAM KEATS, PC

Attorneys for Plaintiffs Restore the Delta and  
Planning and Conservation League

**EXHIBIT 4**



**AQUALLIANCE**  
DEFENDING NORTHERN CALIFORNIA WATERS



**CA Save Our Streams Council**



April 27, 2020

Ernest Conant,  
Regional Director  
California-Great Basin Reg. Fed Bldg.  
2800 Cottage Way  
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Erma Leal  
Repayment Specialist - SCCAO-445  
Dept. of Interior | Bureau of Reclamation  
Interior Region 10 - California - Great Basin  
South-Central California Area Office

Via email and Regular Mail

**Re: Comments on WIIN Act Final Conversion Contract (“Final Modified Contract”) between the U.S. Bureau of Reclamation (Reclamation) and Westlands Water District (Westlands): Fails to Comply with Reclamation policy and Federal and State Laws.**

Dear Mr. Conant and Ms Leal;

Our organizations are providing comments on the Final Modified Contract, although this Contract still has not been released to the public. We previously submitted comments to Reclamation on the WIIN Act Draft Conversion Contracts between Reclamation and Westlands on January 6 and 7, 2020 (incorporated by reference).<sup>1</sup> The Draft Repayment Contracts,

<sup>1</sup> <http://calsport.org/news/wp-content/uploads/1-7-20-O-cmts-Reclamation-Westlands-k.pdf>

however, were actually draft templates with none of the critical exhibits, such that comments were necessarily incomplete. The following is a summary of our comments on the Final Modified Contract, with detailed comments on key topics attached.

This Final Modified Contract was executed on February 28, 2020, without public negotiations or public release of the final contract and its exhibits. We received a copy only through a Public Information Request. This contract will provide the Westlands with a base allocation of 12 million acre-feet over the first 10 years. This is the largest water services contract managed by Reclamation and will have major impacts on the environment.

This Final Modified Contract is riddled with gaps and undisclosed provisions, as detailed in attached comments. Millions of dollars to be repaid by Westlands are deleted without explanation. Sections of the proposed contract are missing and others remain undisclosed. Attachments are identified and referenced, but withheld and undisclosed. The true amount of water to be provided is not disclosed to water users in the Delta, North of the Delta, South of the Delta, the San Joaquin Valley and Southern California. True costs and subsidies are misrepresented or just omitted. Key examples include:

- Congressionally mandated water quality standards and protections are removed and instead left to the discretion of the functionary contracting officer and Westlands to the "*extent feasible*."
- Congressionally mandated limits on the water service area are left to the discretion of the functionary contracting officer and Westlands to modify. We know of no Reclamation regulation or law that grants such authority to a contracting officer to deliver water outside of the Congressionally designated service area. Further, this provision of the Contract directly contradicts the specific acreage specified for delivery to the San Luis Unit.<sup>2</sup>
- The Modified Final Contract fails to comply with (1) the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321 et seq., (2) the Endangered Species Act (ESA), 16 U.S.C. §1531 et seq., (3) Federal Reclamation law, (4) CEQA Public Resources Code 21000-21189 and CESA Cal. Fish & Game Code §§2050-2106.5, and (5) CVPIA in general and specifically Section 3404(c)(2) which requires that provisions of *law* be written as *contract terms* enforceable between the parties. These enforceable provisions of law required by the CVPIA are absent from the contract.
- The Contract evades water quality requirements specified in subsection 2(b) of the Act of August 26, 1937 (50 Stat. 865), as added by Section 101 of the Act of October 27, 1986

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<http://calsport.org/news/wp-content/uploads/PCI-et-al.-Comments-on-WWD-Permanent-Contract-Conversion-Jan-6-2020.pdf>

<sup>2</sup> See PL 86-488: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress That (a) for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area*, emphasis added.

(100 Stat. 3050) Federal Coordination Act<sup>3</sup> or other existing Federal laws, by omitting these water quality obligations and the obligation to meet repayment by 2030.

- New cost allocation formulas as of January 2020 and other Reclamation actions reduce the amount Westlands owes for repayment by over 120 million dollars.
- Reclamation law and regulations requiring public notification, recirculation, and public comment on the Modified Final Contract were ignored.
- Cumulative impacts are ignored. Reclamation is in the process of converting virtually all CVP water service contracts, about 77 of them, into permanent water repayment 9(d) contracts similar to the Westlands Contract.<sup>4</sup> Pursuant to NEPA, “cumulative impact” “is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . .” (NEPA Regulations § 1508.7.) The cumulative environmental impacts of converting all of Reclamation’s contracts into permanent contracts will be enormous and adverse, but have not been considered.

The Final Modified Contract is substantially different from the incomplete draft contract made available for public review in October 2019. The public interest has been significant (see the 76 detailed comments in exhibit 5). Press reports of the secrecy, unexplained financial changes, and lack of public notification have been extensive.<sup>5</sup> Given the significance of the alterations

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<sup>3</sup> <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3050.pdf> See Section 101 Project Operation and Section 102 Reimbursable costs for salinity control.

<sup>4</sup> On December 20, 2019, Reclamation gave public notice on its web site that 77 contractors had requested contract conversions. The same notice said that 14 of the contract conversions had already been negotiated and the public comment period on those contract conversions would close on February 19, 2020. The subject contracts were spread among the Central, Northern, and South Central California Area Offices. See: <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=69044>

<sup>5</sup> See

1. ***Interior proposes coveted deal to ex-client of agency head*** Associated Press By Ellen Knickmeyer, November 8, 2019 <https://apnews.com/4527b2b31fcf452f8e6d35afcebc8cf2>
2. ***Interior Secretary Bernhardt's previous job raises questions about a deal for his ex-client***, Los Angeles Times By Michael Hiltzikbusiness Columnist, Nov. 15, 2019 <https://www.latimes.com/business/story/2019-11-15/interior-secretary-westlands-water-deal>
3. ***California must help kill sleazy Westlands water deal*** Mercury News & East Bay Times Editorial Boards | <https://www.mercurynews.com/2019/11/15/editorial-westlands-water-deal-smells-of-politics/>
4. ***Feds set to lock in huge water contract for well-connected Westlands Water District*** 11-19-2019, Los Angeles Times, Boxall <https://www.latimes.com/environment/story/2019-11-11/westlands-water-district-federal-water-contract>
5. ***Interior Proposes Coveted Deal to Ex-Client of Agency Head\_ The Interior Department is proposing to award a contract for federal water in perpetuity to a powerful water district that used to employ Secretary David Bernhardt as a lobbyist.*** US News and Reports <https://www.usnews.com/news/politics/articles/2019-11-07/interior-proposes-coveted-deal-to-ex-client-of-agency-head>
6. ***Groups slam Trump administration's sweetheart water deal with Westlands Water District*** Dan Bacher, Friday November 08, 2019. <https://www.dailykos.com/stories/2019/11/8/1898102/-Groups-condemn-Trump-administration-s-sweetheart-water-deal-with-Westlands-Water-District>



and the extensive public interest, public review is required by Reclamation policy.<sup>6</sup> At a minimum, according to Reclamation policy and regulation, the Regional Director is to furnish revised contracts to all parties who requested the contract in response to the initial public notice. This did not occur.

To execute this contract a Judge must validate it. However, according to Judge Alan Simpson, who denied the validation request after finding that some important pieces of information were missing from the proceedings, "*Given that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate, at this time.*"<sup>7</sup>

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7. <https://www.restorethedelta.org/2019/11/15/breaking-news-ap-reveals-bernhardt-westlands-sweetheart-water-deal/>
  8. *Interior suggests ex-client of department head for major contract* The Hill By Marty Johnson - 11/08/19 <https://thehill.com/policy/energy-environment/469642-interior-proposes-coveted-deal-to-ex-client-of-agency-head>
  9. *Environmentalists Oppose Westlands' Bid to Secure Water.* GreenWire November 8, 2019 <https://gywire.com/2019/11/08/environmentalists-oppose-westlands-bid-to-secure-water/>
  10. *Seeking stability, Westlands nears permanent water contract with Feds* Alex Tavlian <http://sjvsun.com/ag/westlands-is-seeking-a-permanent-water-contract-what-does-that-mean/> November 20, 2019,
  11. *Trump delivers on pledge for wealthy California farmers*, Associated Press, By ELLEN KNICKMEYER and ADAM BEAM February 18, 2020. <https://apnews.com/ddaf365a5b5528d4949b478e92daf98b>
  12. *Westlands Water District gets permanent U.S. contract for massive irrigation deliveries.* Los Angeles Times, Bettina Boxall, Feb. 28, 2020 <https://www.latimes.com/environment/story/2020-02-28/westlands-water-district-gets-permanent-u-s-contract-for-massive-irrigation-deliveries>
  13. *Feds Ink Deal with Water District Tied to Bernhardt*, March 3, 2020 /E&E News by Jeremy P. Jacobs <https://www.eenews.net/stories/1062498809/> *As of Sept. 30, 2018, Westlands owed about \$480.7 million to the federal...*
  14. *Judge rebuffs bid to lock in Westlands contract switch.* Jeremy P. Jacobs, E&E News, March 19, 2020 <https://www.eenews.net/greenwire/stories/1062646713?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1062646713>
  15. *Hoopa Tribe strikes at interiors coveted Westlands Water District corporate deal*, NORTH COAST NEWS Tuesday, March 31, 2020. <https://krctv.com/north-coast-news/eureka-local-news/hoopa-tribe-strikes-at-interiors-coveted-westlands-water-district-corporate-deal> "*Reclamation should not approve this contract until appropriate provisions are included to protect water and fisheries that are lawfully reserved to the Hoopa Valley Tribe and citizens of the Trinity River watershed," Billings said. The tribe said it has proposed contract language to protect the Trinity water and called upon Reclamation and its Central Valley Project contractors to meet their obligations under existing federal law to provide for Trinity River fishery restoration funding as part of their contract requirements.*

<sup>6</sup> <https://www.law.cornell.edu/cfr/text/43/426.22> See also <https://www.federalregister.gov/documents/2019/03/14/2019-04703/quarterly-status-report-of-water-service-repayment-and-other-water-related-contract-actions> *At a minimum, the regional director will furnish revised contracts to all parties who requested the contract in response to the initial public notice.* emphasis added.

<sup>7</sup> *Judge rebuffs bid to lock in Westlands contract switch* Jeremy P. Jacobs, E&E News reporter Published: Thursday, March 19, 2020 <https://www.eenews.net/greenwire/stories/1062646713?t=https%3A%2F%2Fwww.eenews.net%2Fstories%2F1062646713>

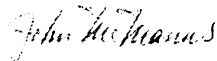
In view of the above shortcomings, the Final Modified Contract should be withdrawn and the public negotiation process started over with transparency and proper public notice. Our detailed comments that follow are necessarily incomplete because they are based on what could be publicly located. Our comments are submitted with the understanding that we reserve the right to supplement the comments and Reclamation will be obligated to consider them in good faith at such time as Reclamation provides full disclosure of the entirety of the Record and all relevant documents.



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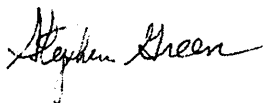
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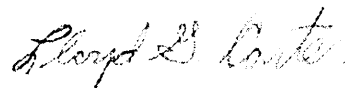
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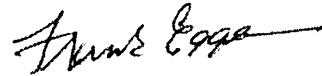
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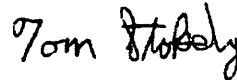
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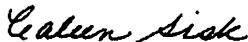
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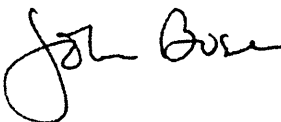
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## DETAILED COMMENTS ON THE MODIFIED FINAL CONTRACT

### No Public Release of Final Modified Contract.

- Reclamation modified the draft contract template and finalized a permanent repayment contract (“Final Modified Contract” or “Contract”) with Westlands on February 28, 2020, to become effective on June 1, 2020 (Contract, Article 2(a), p. 12.).<sup>8</sup>
- A copy of the Final Modified Contract still has not been provided by Reclamation despite repeated requests.<sup>9</sup> Nor is the contract available on Reclamation’s or Westlands’ websites.<sup>10</sup> The failure to provide the Final Modified Contract to the public violates requirements of 43CFR 426.22(d).<sup>11</sup>
- Our organizations were only able to secure copies of the Final Modified Contract and exhibits via a Public Records Act [Gov. Code, § 6250 et seq] request to Westlands dated March 3, 2016. Westlands responded to our request and provided the Final Modified Contract and exhibits via email on March 16, 2020.

### Impacts of Diversions.

Water from the Trinity, Sacramento, and American Rivers, and the tributaries with dams owned by the Federal Government export these waters from the San Francisco Bay-Delta Estuary to serve water to the San Luis Unit (PL 86-488) of the CVP, where Westlands receives the majority of the exported water. Such deliveries have many adverse environmental impacts on the watershed, including the rivers and the San Francisco-San Joaquin Bay-Delta estuary.

Adverse impacts range from reducing freshwater flows and worsening already degraded Delta water quality; to further endangering and destroying endangered fish species and critical habitat;

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<sup>8</sup> See: <https://wwd.ca.gov/wwd-media/press-release-27/>

<sup>9</sup> See [http://calsport.org/news/wp-content/uploads/WWD-Permanent-Contract-FOIA-Correspondence-10-19\\_4-2020.pdf](http://calsport.org/news/wp-content/uploads/WWD-Permanent-Contract-FOIA-Correspondence-10-19_4-2020.pdf) & <http://calsport.org/news/wp-content/uploads/Conant-Letter-Re-WWD-1-15-MAF-Contract-Conversion-10-29-19-.pdf>

<sup>10</sup> A copy of the contract and exhibits was requested on October 29, 2020 from Ernest Conant and the contracting officer. In addition a FOIA request for the Contract was filed on October 28, 2019, Freedom of Information Act (FOIA) Request - BOR-2020-00031. On the April 17, 2020 the designated response date, BOR again delayed providing a copy of the contract and associated documents including summaries of public negotiation sessions and notices.

<sup>11</sup> <https://www.law.cornell.edu/cfr/text/43/426.22> See also <https://www.federalregister.gov/documents/2019/03/14/2019-04703/quarterly-status-report-of-water-service-repayment-and-other-water-related-contract-actions> *In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary. At a minimum, the regional director will furnish revised contracts to all parties who requested the contract in response to the initial public notice.*

to reducing freshwater flows worsening dangerous toxic algal blooms in the Delta; to adverse impacts on public health and safety in the Delta region; to adverse impacts on agriculture in the Delta. The environmental impacts of diverting this amount of water in perpetuity and exporting it to some set of lands outside of both the Congressionally authorized service area of the San Luis Unit and the State of California's authorized place of use under Reclamation's water right permits has not been analyzed nor legally sanctioned.

**The Acreage in Westlands Identified to Receive Water in the Contract Exceeds Acreage Authorized by Congress Pursuant to the San Luis Act of 1960.**

The Exhibit A to the Final contract – Map of Contractor’s Service Area— is not consistent with Congressional authorization and the map contained in the 1956 San Luis Unit Feasibility Study.<sup>12</sup> In 1960, Congress passed the San Luis Act, Pub. Law No. 86–488, 74 Stat. 156 (1960). Section 1(a) of the San Luis Act authorized Reclamation to “construct, operate, and maintain the San Luis unit as an integral part of the Central Valley Project,” in accordance with the 1956 Feasibility Study for the purpose of irrigating only 500,000 acres in the entire San Luis Unit in three counties—Merced, Fresno, and Kings. Emphasis added. We note PL 86-488 has not been amended.

The authorization for the San Luis Unit, Central Valley Project<sup>13</sup> limits the gross service area to 500,000 acres of land and refers to the feasibility report<sup>14</sup>, which includes a map<sup>15</sup> that clearly

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<sup>12</sup> In 1956, the Bureau of Reclamation delivered to the United States Congress, “A Report on Feasibility of Water Supply Development” for the San Luis Unit (the 1956 Feasibility Report), which recommended constructing a group of water management facilities, called the San Luis Unit, as an addition to the Central Valley Project, in order to bring irrigation waters to an area of approximately 496,000 acres in the San Joaquin Valley. In 1960, Congress passed the San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960) authorizing water deliveries to 500,000 acres for the entire unit consistent with the Feasibility Report, see § 1(a). See: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/LA\\_NID/part2rebuttal/land\\_299.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/LA_NID/part2rebuttal/land_299.pdf) and [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/LA\\_NID/part2rebuttal/land\\_302.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/LA_NID/part2rebuttal/land_302.pdf)

<sup>13</sup> In 1960, Congress passed the San Luis Act, Pub. Law No. 86–488, 74 Stat. 156 (1960). Section 1(a) of the San Luis Act authorized Reclamation to “construct, operate, and maintain the San Luis unit as an integral part of the Central Valley Project,” in accordance with the 1956 Feasibility Study for the purpose of irrigating only 500,000 acres in the entire San Luis Unit in three counties—Merced, Fresno, and Kings. Emphasis added. We note PL 86-488 has not been amended.

<sup>14</sup> U.S. Dept Of the Interior, Feasibility Report (approved by President Roosevelt, December 2, 1935), reprinted in House Committee on Interior & Insular Affairs, Central Valley Project Documents-Part One: Authorizing Documents, H.R. Doc. No. 416, 84th Cong., 2d Sess. 563 (1956). The Feasibility Report, released in Sacramento in May 1955 and reported to Congress December 17, 1956.

<sup>15</sup> *Ibid.* See the 1956 Feasibility Report page 36.

describes the location, size, and elevation of that service area. Subtracting out acreage for San Luis Water, Panoche and Pacheco Water Districts, leaves roughly 400,000 acres of eligible land within Westlands, according to the federal authorization and confirmed in the Special Task Force Report on the San Luis Unit [PL 94-46].

After subtracting the roughly 100,000 acres that has already been retired with taxpayer dollars and largely put to other industrial uses, that leaves approximately 300,000 acres in Westlands eligible to receive CVP San Luis Unit water exports.<sup>16</sup> Yet, this Final contract would irrigate over 600,000 acres of land within Westlands as identified in Exhibit A of the contract. Under the contract, that acreage would be allocated between 2.2 and 1.7 ac/ft of water per acre. The inclusion of the additional acres to be irrigated represents 400,000 AF of additional unauthorized allocation of water to lands not authorized by Congress to receive federal CVP water under the San Luis Act. Without Congressional authorization, this contract arbitrarily takes water from other CVP contractors, communities, and the environment.

Public Law 86-488, authorizing the San Luis Unit, does not contain any provision authorizing an enlargement of the San Luis Unit Service area. The law is based on a feasibility study that was released in May 1955 and reported to Congress on December 17, 1956. It states that the service area is 496,000 acres and it establishes a long-term crop pattern for 440,000 acres.<sup>17</sup> The Final contract also contradicts the December 30, 1961 Federal-State Agreement for the construction and operation of the joint-use facilities of the San Luis Unit.<sup>18</sup>

In simple terms, the Final contract enlarges the service area beyond the limit authorized by Congress. In addition to an unauthorized enlargement of the CVP contract service area, and thus an unauthorized increase in water allocation, the environmental and water quality impacts are not addressed in any NEPA documents or in any ESA consultation.

Exhibit A of the Final Contract shows inflated acreage of the district (over 600,000 acres) and associated inflated water deliveries to Westlands. This Exhibit A map documents an expansion

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<sup>16</sup> Special Task Force Report on San Luis Unit 1978 available online [see pages 18 and 20 for the finding of 500,000 gross acres authorized for all three districts finding an unauthorized expansion of more than 100,000 acres or 30%.] <http://babel.hathitrust.org/cgi/pt?id=umn.31951002836772c;view=1up;seq=35>. Also see Lloyd Carter's law review: <https://digitalcommons.law.ggu.edu/gguelj/vol3/iss1/3/>. And Friends of the Trinity water rights testimony before the State Water Resources Control Board: [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/FOTR/for\\_94.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/FOTR/for_94.pdf)

<sup>17</sup> Ibid. See the 1956 Feasibility Report pg 91.

<sup>18</sup> See pg 4 of the Federal State Contract which reads: "The 'Federal San Luis Unit service area' shall mean the area of approximately 500,000 acres in Merced, Fresno, and Kings Counties as described in the report of the Department of Interior entitled, "San Luis Unit Central Valley Project," dated December 17, 1956.. ...This agreement established that the federal service under this contract.

of acreage beyond what is Congressionally authorized.<sup>19</sup> No statutory authority is provided for this arbitrary inflated acreage and water deliveries. The enlargement of the San Luis Unit service area and distribution canals exceed the construction and operations costs of the distribution and drainage facilities. The inflated water exports causes increased impacts from the areas of export including the Trinity and Sacramento Rivers and the Sacramento-San Joaquin Delta Estuary and Bay. Further the pollution created by irrigating these lands and constructing distribution systems has not been analyzed nor disclosed. After this contract was executed Reclamation issued a public notice in March 2020, that apparently negotiation and execution of a long-term repayment contract to provide reimbursement of costs related to the construction of drainage facilities.<sup>20</sup> No repayment costs or the funds necessary for Westlands to repay what is owed to satisfy the Federal Government's construction obligation to provide drainage service to lands within the San Luis Unit of the CVP including the Westlands WD service area have been included in this permanent water contract.

**The Secretary is Required to Contract for the Delivery of Project Irrigation Water Only to Lands with Characteristics that Allow Delivery--this Final contract Violates that Mandate.**

As stated above water is being provided outside of the Congressionally designated service area and no updated irrigable lands map has been provided. Public Law 99-546, 100 Stat. 3050. (Coordinated Operations Act) Sec. 305. § 4(c) of the Act requires, among other things, that the Secretary must show that lands receiving project water are capable of "*successful irrigability of those lands and their susceptibility to sustained production of agricultural crops by means of irrigation has been demonstrated in practice. Such proposal shall also include an investigation of soil characteristics which might result in toxic or hazardous irrigation return flows.*" No such documentation and evidence has been provided in support of the proposed permanent water contract to irrigate these lands referenced in Exhibit A of the proposed contract. In fact, the San Luis Drainage Feature Re-evaluation EIS found that roughly 300,000 acres of the lands proposed for irrigation under this contract in Westlands are drainage-impaired<sup>21</sup> and will generate "toxic or hazardous irrigation return flows" to ground or surface waters. Indeed, current practice results in some of these toxic flows being discharged to the California Aqueduct without proper Clean Water Act permits or consideration of hazardous conditions for fish and wildlife.<sup>22</sup>

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<sup>19</sup> See Plate 1--Map of the Service Area & Plate 5 Map of Land Classification found in the 1956 Feasibility Report can be found online: <http://cdm15911.contentdm.oclc.org/edm/ref/collection/p15911coll10/id/2106>

<sup>20</sup> <https://www.federalregister.gov/documents/2020/03/31/2020-06620/quarterly-status-report-of-water-service-repayment-and-other-water-related-contract-actions> @ #21.

<sup>21</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=61](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=61)

<sup>22</sup> <http://calsport.org/news/wp-content/uploads/PCL-et.-al.-Cmts-Re-WWD-Interim-Contract-12-14-19.pdf>  
<http://calsport.org/news/wp-content/uploads/Conant-Burman-Ltr-Re-Extension-of-Cmt-Re-SLD-Discharges-Use-Agreement-12-10-19.pdf>  
<http://calsport.org/news/wp-content/uploads/CBD-PCL-et.-al-Cmt-Ltr-Cross-Valley-Interim-Contract-12-12-2019.pdf>

## **Delivery of Project Water to Toxic Soils Obligates the Secretary to Provide Drainage, but Such Drainage is not Provided by the Final Contract.**

Judge Hewitt ruled that under Westlands' interim contracts, the government was not obligated to provide drainage service, "*Because (Westlands) failed to show that drainage service was a bargained-for benefit of any of these contracts.*"<sup>23</sup> And yet, the Final permanent contract proposal obligates delivery of water to these lands that are unsuitable for irrigation and to other lands that would receive project water that are, however, outside of Congressional authorization,<sup>24</sup> but could obligate the federal government to furnish something that has been unattainable for decades—drainage.

The drainage obligation would not exist, however, if Project water deliveries to drainage-impaired lands is cut off because of the impracticability of irrigation. This alternative—cessation of irrigation water from unsuitable lands—is mandated by law and regulation.<sup>25</sup> The toxic drainage, groundwater pollution, and surface water pollution is created in large part by the Reclamation's deliveries of CVP water to these non-irrigable lands. Reducing water service instead of expanding it is the obvious and rational solution. Controlling or eliminating the supply of drainage water by eliminating deliveries to these identified toxic soils will control the demand for drainage and the enormous costs estimated at \$2.6 billion. Westlands' land uses have changed significantly<sup>26</sup> within the proposed contract acreage. These land use changes together with cessation of delivery to these lands impracticable of

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[http://calsport.org/news/wp-content/uploads/PCL-et-al\\_Comments-on-DEA-for-GBP-Stormwater-Plan\\_12-23\\_-2019-.pdf](http://calsport.org/news/wp-content/uploads/PCL-et-al_Comments-on-DEA-for-GBP-Stormwater-Plan_12-23_-2019-.pdf)

<sup>23</sup> Westlands Water District v. United States, 12-12C (Fed. Cl. 2013) United States Court of Federal Claims Filed: January 15th, 2013 Docket Number: 12-12C

<sup>24</sup> See San Luis Act of 1960 Section 1(a) *for the principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area.*  
<https://www.govinfo.gov/content/pkg/STATUTE74/pdf/STATUTE-74-Pg156.pdf>

<sup>25</sup> Continuing to provide project water to these toxic soils would require approval from Congress to increase the authorized appropriation cap under the San Luis Act. Also see Reclamation Directives and Standards PEC P12 for required continuing investigations into land classification and suitability for irrigation for the delivery of project water.

<sup>26</sup> Industrial uses including massive utility land conversion in thousands of acres has replaced irrigated agricultural uses and yet the contract is silent regarding the municipal and industrial rates and interest owed on these land use changes along with water use changes that are restricted to 5 AF per quarter section. See the maps referenced in previous comments: <http://calsport.org/news/wp-content/uploads/PCL-et-al.-Cmts-Re-WWD-Interim-Contract-12-14-19.pdf> See also <https://www.solarpowerworldonline.com/2020/03/westlands-solar-park-california-construction-begins/> And June 25, 2019 *Kings County solar projects advance* <https://sierra2thesea.net/energy/kings-county-solar-projects-advance>



irrigation without generating pollution must be considered. The unauthorized financial obligation inferred by issuing this permanent water contract has not been addressed.<sup>27</sup>

### **Failure to Comply with NEPA.**

An EIS must be prepared by Reclamation before entering into a contract with Westlands. The reason is that the contract would be a major federal action significantly affecting the quality of the human environment. (42 U.S.C. § 4332(C.) “Actions include new and continuing activities, . . .” (NEPA Regulations § 1508.18(a).)<sup>28</sup> NEPA requires “that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter [NEPA], . . .” (42 U.S.C. §4332.)

NEPA processes must be integrated with other processes “at the earliest possible time to ensure that planning and decisions reflect environmental values, . . .” (NEPA Regulations § 1501.2.) Reclamation, however, has not prepared an EIS on the proposed contract. Reclamation *has not even prepared an environmental assessment* to determine whether an EIS must be prepared. (NEPA Regulations §§ 1501.3; 1508.9.) Reclamation has not made a “finding of no significant impact” on the action. (NEPA Regulations § 1508.13.) Reclamation has not instituted the required “scoping” process and has not published a notice of intent in the Federal Register. (NEPA Regulations § 1501.7.) Reclamation has not prepared a categorical exclusion or notice thereof on the contract. (NEPA Regulations § 1508.4.) The subject action would not in any event qualify for a categorical exclusion. Consequently, Reclamation has not furnished the public any information whatsoever, by which to evaluate the potential environmental consequences of the contract and the water diversions and deliveries authorized by it. Reclamation also has not furnished the public any information whatsoever, by which to evaluate the *cumulative* environmental impacts of all of the contract conversions in Reclamation’s pipeline and the water diversions and deliveries authorized by them. Reclamation has not prepared a single EIS on the related contract conversions (NEPA Regulations § 1502.4(a) and has not prepared a broad “program” EIS on the contract conversions in its pipeline. (NEPA Regulations § 1502.4(b.) Reclamation has not prepared any “environmental document” on its action. (NEPA Regulations §1508.10.)

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<sup>27</sup> The 2008 SLDFR Feasibility Report sent to Congress explained that “Federal interest is established either by legislation or through an evaluation of a proposed action relative to the agency’s mission” and that, to be federally implementable, an action “must be feasible as defined by the Economic and Environmental Principles and Guidelines (Principles and Guidelines). The Principles and Guidelines require Federal actions contribute to the national economic development (NED).” The 2008 Feasibility Report continued: The San Luis Act of 1960 as amended establishes the Reclamation’s Federal interest in the proposed action. However, the requirement for a net positive contribution to the Nation’s economy cannot be met by either of the two action alternatives. The 2008 SLDFR Feasibility Report concluded the action alternative selected by the Bureau was not appropriate for implementation according to the government’s own accepted standards.

<sup>28</sup> The NEPA Regulations are codified at 40 C.F.R. §1500 et seq.

The EIS section on “alternatives” “is the heart of the environmental impact statement.” (NEPA Regulations § 1502.14.) The alternatives section, should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public. (NEPA Regulations § 1502.14.)

An environmental assessment also must include discussion of alternatives. Reclamation must prepare an EIS or first prepare an environmental assessment and then an EIS, which must “Rigorously explore and objectively evaluate all reasonable alternatives, . . .” to the action. (NEPA Regulations § 1502.14(a.) The EIS will necessarily include alternatives that reduce deliveries of project water in order to increase freshwater flows and begin to restore watershed rivers and the Delta.

The Ninth Circuit Court of Appeals reversed a district court decision denying environmental plaintiffs’ summary judgment because the challenged environmental document issued by Reclamation under NEPA, “did not give full and meaningful consideration to the alternative of a reduction in maximum water quantities.” (*Pacific Coast Federation of Fishermen’s Assn’s v. U.S. Dept. of the Interior*, 655 Fed. Appx. 595, 2016 WL 3974183\*3 (9th. Cir., No. 14-15514, July 25, 2016) (Not selected for publication).) “Reclamation’s decision not to give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities was an abuse of discretion and the agency did not adequately explain why it eliminated this alternative from detailed study.” (*Id.* at \*2.) Reclamation’s “reasoning in large part reflects a policy decision to promote the economic security of agricultural users, rather than an explanation of why reducing maximum contract quantities was so infeasible as to preclude study of its environmental impacts.” (*Id.* at \*3.)

The requirement under NEPA to consider the alternative of reducing exports to increase flows through the Delta is so obvious that the Ninth Circuit’s decision was not selected for publication because no new legal analysis was required to reach the decision. The decision pertained to interim two-year contract renewals. If the alternative of reducing exports must be considered during renewal of two-year interim contracts, it most assuredly must be considered before entering into permanent contracts. Moreover, “an alternative may be reasonable, and therefore required by NEPA to be discussed in the EIS, even though it requires legislative action to put it into effect.” *Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454 (9thCir. 1984.)

Reclamation has failed to proceed in the manner required by NEPA with this contract conversion. Reclamation proceeded with FINAL contract agreements with Westlands to convert the contract renewal contracts to permanent repayment contracts without having first prepared and issued an EIS.

### **Examples of Environmental Issues Ignored by Reclamation’s Failure to Prepare an EIS or even an Environmental Assessment.**

The NEPA Regulations give guidance on whether an action “significantly” affects the quality of the human environment. “‘Significantly’ as used in NEPA requires considerations of both

context and intensity.” (NEPA Regulations § 1508.27.) Ten factors are listed in § 1508.27(b) 1-10 in evaluating intensity meaning severity of the impact.

*1508.27(b)(2) The degree to which the proposed action affects public health or safety*

The water deliveries to Westlands diminish freshwater flows through the Delta which decreases water supplies and water quality and worsens the amount and frequency of toxic algal blooms in the Delta. That is one of the ways by which the action affects public health and safety.

*(3) Unique characteristics of the geographic area*

The Delta already fails to meet established water quality standards and is an ecologically critical area. The water deliveries to Westlands exacerbate the decline of the Delta.

*(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.*

The effects of the contract will be highly controversial because of the worsening water supply and water quality crisis in the Delta. The controversy is evidenced by the recent article in the Los Angeles Times entitled *Feds set to lock-in huge water contract for well-connected Westlands Water District* (Bettina Boxall, Los Angeles Times November 11, 2019)<sup>29</sup>.

The new contract doesn't include the water reduction. Nor does it contain provisions for reassessing delivery amounts if Westlands retires land on its own without a drainage settlement.

The Westlands contract is highly controversial.

*(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks*

Because Reclamation has failed to engage in any NEPA environmental analysis whatsoever, the impacts of the contract are highly uncertain.

*(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration*

About 77 contractors started negotiations to convert the contracts. Converting the Westlands contract would, therefore, establish a precedent for future actions with significant effects.

*(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.*

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<sup>29</sup> See: <https://www.latimes.com/environment/story/2019-11-11/westlands-water-district-federal-water-contract>

The Westlands contract conversion is related to other contract conversions in the pipeline that would have cumulatively significant impacts.

*(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat*

Endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, Central Valley steelhead, Green Sturgeon, and Delta smelt continue to decline because of the reductions in water quality and flows resulting in rising temperatures, increased salinity, and sedimentation. CVP water deliveries harm the fish by reducing water flows and worsen the contamination of San Joaquin Valley surface waters, groundwater, and soils with pollutants including selenium.

*(10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment*

It appears that the contract would violate Reclamation Law by enlarging the service area and water quantities beyond the limits authorized by Congress. Reclamation's refusal to prepare an EIS appears designed to facilitate the violation of reclamation law by not providing any information whatsoever by which the public can evaluate how much land will remain in production for how long and how much land will be retired from agricultural production and when. And how much land will be converted to municipal and industrial uses.

#### **Reclamation's Action is Discretionary.**

Our organizations have not seen any communication from Reclamation explaining why the Westlands contract was finalized without completing any NEPA review. Reclamation does refer in "whereas" clauses in the draft contract to the Water Infrastructure Improvements for the Nation Act (Pub. L.) 114-322, 130 Stat. 1628), Section 4011 (a-d) and (f) (WINN Act.) The contract recites,

WHEREAS, 4011(a)(1) provides that 'upon request of the contractor, the Secretary of the Interior *shall* convert any water service contract in effect on the date of enactment of this subtitle and between the United States and a water users' Association [Contractor] to allow for prepayment of the repayment contract pursuant to paragraph (2) *under mutually agreeable terms and conditions.*' (Draft Contract, 8<sup>th</sup> Whereas clause, p. 4; also, 20<sup>th</sup> Whereas clause, p. 8.) (Emphasis added.)

Reclamation may contend that the WINN Act including use of the word "shall" makes entry into the conversion contracts non-discretionary and thus not subject to NEPA. As provided by WINN Act section 4011(a)(1), however, the terms and conditions *must be mutually agreeable* meaning they must be agreeable to the Secretary of the Interior, as well as to the contractor. That means under the plain language of the Act, the Secretary of the Interior retains discretion because the terms and conditions of the contracts must be agreeable to him. In *Aluminum Co. of America v. Central Lincoln Util. Dist.*, 467 U.S. 380, 397 (1984), the Supreme Court held,

Because the Regional Act does not comprehensively establish the terms on which power is to be supplied to DSIs [direct-service industrial customers] under the new contracts, it is our view that the Administrator has broad discretion to negotiate them.

NEPA cases have rejected efforts by agencies to avoid complying with NEPA by contending their actions are non-discretionary, when there is some discretion.<sup>30</sup> The Secretary of the Interior has discretion to determine contract terms and conditions that are agreeable to him. That being the case, Reclamation has failed to comply with NEPA by converting the Westlands water contract without completing environmental review before that contract was finalized.

### **Failure to Comply with CVPIA.**

NEPA Compliance is also Required by the Central Valley Project Improvement Act before entering into Conversion Contracts.<sup>31</sup> Savings language in the WINN Act (section 4012(a)(2) requires, “This subtitle shall not be interpreted or implemented in a manner that— [omitted] (2) affects or modifies any obligation under the Central Valley Project Improvement Act [CVPIA] (Public Law 102-575; 106 Stat. 4706), except for the savings provisions for the Stanislaus River predator management program expressly established by section 11 (d) and provisions in section 11(g); [omitted]”

The CVPIA was enacted in 1992 to reduce adverse environmental impacts of Central Valley Project (CVP) operations and to modify State water right permits to included fish and wildlife as a purpose of the project. The CVPIA requires preparation of an EIS before Reclamation renews any long-term water service contract. (CVPIA §§ 3402(a), 3404(c)(1.) That requirement has not been eliminated by the WINN Act.

Further the contract does not contain within the contract terms explicit language that is enforceable between the parties as required by CVPIA Section 3404(c)(2). This section requires that provisions of *law* be written as *contract terms* enforceable between the parties. Exhibit D, which previously was not available to the public for comment, provides no repayment for required Trinity River Division (TRD) facilities or CVPIA restoration activities. Enforceable contract provisions of *law* that by law must be written as *contract terms* enforceable between the parties include for example:

- *Section 3406(b)(2), which authorizes and directs the dedication of up to 800 thousand AF (TAF) of CVP water for environmental purposes.*

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<sup>30</sup> Such cases include *Forelaws on Board v. Johnson*, 743 F.2d 677 (9<sup>th</sup> Cir. 1984.)

<sup>31</sup> Section 3404(c) of the CVPIA requires that an EIS be completed before Reclamation can renew any long-term repayment or water service contract for a period of 25 years. Reclamation defines “long term contract” as a “contract with a term of more than 10 years.” See <https://www.usbr.gov/recman/pec/pec-p05.pdf> By these definitions any contract term longer than 10 years is by Reclamation's own definition 'a long-term contract.' A conversion to a permanent contract fits the definition of a long-term contract. Thus, federal law requires a full EIS before entering into permanent repayment contracts. Congress determined that long-term contracts would have a significant effect on the environment such that an EIS is required.

- *Section 3406(b)(23), which addresses restoration efforts for the Trinity River Division (TRD).*
- *Section 3406(d), which requires firm CVP water supplies amounting to 480 TAF to be delivered to federal, state and some private wildlife refuges.*

At page 7, lines 13-16, of the reporter’s transcript of the February 27, 2020 Westlands' validation proceeding, Westlands' Daniel O’Hanlon states that “Exhibit D . . . is the repayment obligation . . . the total represents Westlands’ share of the construction costs of the Central Valley Project.”<sup>32</sup> However, most of the CVP project elements necessary to provide water to Westlands have been omitted from repayment contrary to Reclamation law:

- What about repayment for the capital costs of the Trinity River Division (TRD) and other CVP facilities that convey water 400 miles to Westlands?
- Has the TRD’s capital cost been fully retired?
- If not, then why is there no repayment allocated to WWD for its share of the remaining capital costs of the TRD and other conveyance facilities?
- Why aren’t those constructions costs that are “not reflected in such schedules”(see *section 4011(a)(2)*) pursuant to WINN Act paragraphs A and B required to be repaid and thus included in exhibit D?

In addition Reclamation has failed to prepare an EIS before entering into the contract with Westlands. CVPIA Section 3404(a), precludes the issuance of any new short term, temporary, or long term CVP contracts for any purpose other than fish and wildlife without NEPA compliance.

**Judicial Confirmation of the Contract Amendments Has Not Been Obtained.**

Westlands has failed to obtain from the court a ruling with regard to the validity of this contract.<sup>33</sup> To protect the United States, Reclamation law<sup>34</sup> and specifically the Act of May 15, 1922, requires state court to validate the contract. Section 1 of the Act of May 15, 1922, which states in part:

*..that no contract with an irrigation district under this act shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid.*

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<sup>32</sup> IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO  
 ·Before the Honorable ALAN M. SIMPSON, Judge, Department 502 Reporter’s Transcript 2-27-2020 Job # 610275.

<sup>33</sup> Superior Court Of The State Of California County Of Fresno, Central Division, Case No. 19CECG03887, Validation Of Contract Date: January 28, 2020

<sup>34</sup> See 43 U.S.C §511(1976) Section 46 of the Omnibus Adjustment Act of 1926 and 43 U.S.C. §423 (1976).

The Act of May 15, 1922 requires the judicial confirmation of contracts with irrigation districts. This has not occurred.

### **Failure to Comply with the Coordinated Operations Act of 1986<sup>35</sup>**

The modified Final Contract omits the obligation of Westlands and the United States to deliver Project water in accordance with water quality standards specified in PL 99-546. This language was omitted from the Final Contract: "*water quality standards specified in subsection 2(b) of the Act of August 26, 1937 (50 Stat. 865), as added by Section 101 of the Act of October 27, 1986 (100 Stat. 3050) or other existing Federal laws.*" Instead the quality of water and operations are left to the Contracting Officer instead of specific reference to required water quality protection levels. Congress directed that the United States and its Contractors operate the CVP *in conformity with State water quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta and Estuary* and to operate the CVP *so that water supplied at the intake of the Contra Costa Canal is of a quality equal to the water quality standards contained in the Water Right Decision 1485 of the State of California Water Resources Control Board, dated August 16, 1978, except under limited conditions.* We know of no law that authorizes Reclamation to change this Congressional direction in a contract. This substantially changes the terms of the contract and obligations to meet state water quality standards. Changing the water quality protection standards to some undefined term as "what is feasible" also has significant environmental impact and has not been analyzed nor the endangered species impacts considered. This is a significant change to the final contract and received no public notice.

This is from the draft contract release:

#### *QUALITY OF WATER*

*16. (a) Project facilities used to deliver Project Water to the Contractor pursuant to this Contract shall be operated and maintained to enable the United States to deliver Project Water to the Contractor in accordance with the water quality standards specified in subsection 2(b) of the Act of August 26, 1937 (50 Stat. 865), as added by Section 101 of the Act of October 27, 1986 (100 Stat. 3050) or other existing Federal laws. (emphasis added)*

This is from the Final modified contract:

#### *PROTECTION OF WATER AND AIR QUALITY*

*(a) The Contractor, without expense to the United States, will care for, operate and maintain transferred works in a manner that preserves the quality of the water at the highest feasible level as determined by the Contracting Officer.*

*(b) The United States will care for, operate and maintain reserved works in a manner that preserves the quality of the water at the highest level possible as determined by the Contracting Officer. (emphasis added)*

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<sup>35</sup> <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3050.pdf> See Section 101 and Section 102

Also required under Section 102 of Public Law 99-546—OCT. 27, 1986 100 STAT. 3051, the contract needs to provide for repayment of D-1485 salinity costs and complying with State water quality standards. The modified Final contract does not include these reimbursements and repayment of these costs.

### **Failure to Comply with CEQA.**

Public Resources Code Section 21151, which provides that EIRs are required for certain projects, notes that a Categorical Exclusion is not allowed when:

1. The project site is environmentally sensitive as defined by the project's location. A project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant.
2. The project and successive projects of the same type in the same place will result in cumulative impacts;
3. There are "unusual circumstances" creating the reasonable possibility of significant effects.

The final contract amendments contain significant changes to compliance with State water quality standards, the amount of land disturbance and water exports that were not previously disclosed in the draft contract that was made available for public comment. Our previous comments have also described significant groundwater contamination and downstream cumulative impacts. The toxic runoff, drainage, and effects of drainage treatment and disposal, including but not limited to, fish, wildlife, air emissions, transportation and other impacts, have not been disclosed. The final contract is also silent with regard to paying for these water quality costs and protections. Without a proven drainage solution, water quality impacts from irrigation of toxic soils in Westlands have far reaching impacts outside of the district and in downstream waters.<sup>36</sup> Therefore, there clearly are significant effects to the environment associated with the issuance of permanent water contracts and, therefore, a full EIR under CEQA needs to be completed along with compliance with federal and state endangered species laws.

Further any full EIR for long term contracts should include information on the relationships between irrigation in the San Luis Unit (including Westlands) and groundwater movement downslope, in terms of flow and water quality. The USEPA has noted previously that such an environmental review should provide information on the San Luis Unit's role in groundwater

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<sup>36</sup> The Department of Interior's Inspector General issued a report in November 2019 that finalized their investigation on the Demo-Plant. The Inspector General found that the Demo-Plant did not provide the agricultural drainage service that is required by statute and it did not consistently meet operational performance criteria. In addition, the USBR was found to not have provided effective oversight of the cooperative agreement for operation and maintenance of the Demo-Plant. As a result, USBR spent a reported \$67.8 million for a project that does not meet its legal obligation and that had not consistently met operation performance goals.[see <https://www.doiioig.gov/reports/bureau-reclamation-did-not-effectively-manage-san-luis-demonstrationtreatmentplant>]



accretions and discharges of pollutants into wetland channels and the San Joaquin River and identify impacts to wetlands and wildlife.<sup>37</sup> Absent this information, the public and decision makers are left in the dark as to significant impacts and required mitigation measures, such as *“changes in amounts and location of water applied, which will reduce drainage production and selenium mobilization.* The effects of toxic pollution from Westlands caused by irrigation enabled by the proposed permanent water contracts are significant and complex and must be addressed in a comprehensive EIR.

Finally, consideration and analysis of a full range of project alternatives is needed to prevent significant impacts. We have raised these issues in the past, and they are even more pertinent today. They include first the failure to study “the alternative of a reduction in maximum interim contract water quantities. By failing to study this alternative, the Westlands defies the *PCFFA* Court’s instruction that Reclamation must “give full and meaningful consideration to the alternative of a reduction in maximum interim contract water quantities.” *PCFFA*, 655 Fed. Appx. at 599. Second, the CEQA exemption fails to disclose – let alone analyze as required – the massive environmental impacts of diverting this water from the Delta and applying to contaminated soils. Third, an accurate map of the land uses that will be receiving water under these contracts is needed to determine the impacts of converting these agricultural areas to other uses, including utilities<sup>38</sup>. And, fourth, there needs to be an assessment of the ability of existing agricultural users to pay the significant amounts of debt required under the contract conversion process. This required debt load predictably will change land uses and the likely shift to industrial uses must be disclosed and analyzed. Lastly, no information is provided as to how this debt will be repaid and the impacts on existing agricultural and industrial operations, especially during severe prolonged droughts and climate change, will be managed. These critical shortcomings leave decision-makers and the public in the dark.

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<sup>37</sup> See <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

<sup>38</sup> See WWD 2008 Bond Debt Statement: 30,065,000 Westlands Water District adjustable Rate Refunding Revenue Certificates of Participation, Series 2008a \_ Westlands Water District Notes To Financial Statements Years Ended FEBRUARY 28, 2007 AND 2006 @ page 31: *“In February and March 2005, the District acquired approximately 8,750 acres of land within the Broadview Water District, which is substantially all of Broadview’s irrigable acreage. In conjunction with the acquisition, the District initiated the process to annex all of Broadview’s lands and will seek a permanent assignment of Broadview’s Central Valley Project Water Contract totaling 27,000 acre-feet to the District from the Bureau of Reclamation. Of this water supply, the District plans to annually make available 6,000 acre-feet of entitlement to the Naval Air Station – Lemoore pursuant to the Supplemental Water Allocation Agreement between the District and NASL.”* See this 2016 overview of transmission lines, towers and land conversion maps for Westlands WD: [http://docketpublic.energy.ca.gov/PublicDocuments/15-RETI\\_02/TN210903\\_20160330T140735\\_Daniel\\_Kim\\_Comments\\_WSP\\_comments\\_to\\_RETI\\_20\\_plenary\\_group\\_meeti.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/15-RETI_02/TN210903_20160330T140735_Daniel_Kim_Comments_WSP_comments_to_RETI_20_plenary_group_meeti.pdf) & <http://web.energyvacuity.com/REProject.aspx?id=16887>

## Failure to comply with California Endangered Species Act (CESA) or Federal Endangered Species Act (ESA)

This final modified contract contains significant changes which have not been analyzed nor disclosed to the general public for review and comment. As emphasized in our December 14, 2019 comments Westlands' CVP Interim Contracts and our January 7, 2020, comments on Westlands' CVP Repayment contract conversions for Westlands, and January 21, 2020 comments on proposed adoption of a Categorical Exemption under CEQA, areas within the project site, and downstream habitats known to be habitats for endangered species that are sensitive to selenium contamination and salt. Specifically, impacts from these water contract deliveries and drainage contamination may occur to the following State and Federally-listed species:

- San Joaquin kit fox (*Vulpes macrotis mutica*) State Threatened (ST) and Federally Endangered (FE),
- Tipton kangaroo rat (*Dipodomys nitratooides nitratooides*) SE and FE,
- Nelson's antelope squirrel (*Ammospermophilus nelsoni*) ST,
- California Least Tern (*Sterna antillarum browni*) SE and FE,
- Swainson's hawk (*Buteo swainsoni*) ST,
- tricolored blackbird (*Agelaius tricolor*) ST, the federally endangered
- blunt-nosed leopard lizard (*Gambelia sila*) SE and FE,
- giant garter snake (*Thamnophis gigas*) ST and FT, and,
- San Joaquin woollythreads (*Monolopia congdonii*) FE and Rare Plant Rank (CRPR) 1 B.2,
- Green sturgeon (*Acipenser medirostris*) FT
- Central Valley spring-run chinook salmon (*Oncorhynchus tshawytscha*) FT
- Steelhead trout (*Oncorhynchus mykiss*) FT
- Buena Vista lake ornate shrew (*Sorex ornatus relictus*) FE

Impacts may also occur to State candidate species (CS) and State species of special concern (SSC):

- American badger (*Taxidea taxus*) State SSC,
- Tulare grasshopper mouse (*Onychomys torridus tularensis*), State SSC,
- burrowing owl (*Athene cunicularia*) State SSC,
- San Joaquin coachwhip (*Masticophis flagellum ruddocki*) State SSC,
- crotch bumble bee (*Bombus crotchii*) the State CS, and,
- Munz's tidy-tips (*Layia munzii*) CRPR 1 B.2.

These concerns were previously raised in regard to the issuance of two-year interim contracts.<sup>39</sup> These previously identified impacts are now be further compounded by a permanent contract and yet, no compliance with the CESA or the Federal ESA have been provided. Further, Senator Feinstein noted with the passage of the WIIN Act, "... the bill's savings clause that prevents the legislation from violating state or federal environmental laws including the *Endangered Species Act* and biological opinions..."<sup>40</sup>

### **Final Contract References Compliance with ESA Without Compliance.**

The Final contract states on Lines 359-362 that the Contractor shall "*comply with requirements applicable to the Contractor in biological opinion(s) prepared as a result of a consultation regarding the execution of any water service contract between the Contracting Officer and the Contractor in effect immediately prior to the Effective Date of this Contract undertaken pursuant to Section 7 of the Endangered Species Act of 1973 (ESA)...*" Yet no ESA consultation has been completed on these contracts nor has there been a consultation that identifies Westlands as an Applicant under the ESA. As denoted on page 2-12 of the USFWS ESA Section 7 Handbook,<sup>41</sup>

*For purposes of this discussion, the Federal action involves the approval of a permit or license sought by the applicant, together with the activities resulting from such permission. The action agency determines applicant status, including requests arising from prospective applicants in early consultations. The action agency also determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the Act and the section 7 regulations.*

Reclamation has failed to proceed in the manner required by ESA and Westlands has failed to proceed in the manner required by CESA with this contract conversion. Reclamation has failed to complete an ESA consultation and Westlands has failed to consult under CESA before the contract was finalized. Even language in the Final contract suggests that ESA consultations would be completed and that Westlands would comply with applicable provisions of biological opinions. Without Applicant status, there are no applicable provisions in an ESA consultation for Westlands. This contract provision is a mirage designed to evade federal ESA requirements. Reclamation failed to request Applicant status for Westlands, so the language in the Contract suggesting that there are applicable provisions in biological opinions is inappropriate and misleading.

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<sup>39</sup> See Environmental Advocate Comment Letter Re Interim Contract Renewal WWD Santa Clara.pdf John Buse, Center for Biological Diversity February 6, 2018. See <http://calsport.org/news/wp-content/uploads/Environmental-Advocate-Comment-Letter-Re-Interim-Contract-Renewal-WWD-S....pdf>

[https://www.restorethedelta.org/wp-content/uploads/2020.01.21-CBD-PCL-et-al\\_Objects-to-CEQA-Exemption-for-Westlands-Perman....pdf](https://www.restorethedelta.org/wp-content/uploads/2020.01.21-CBD-PCL-et-al_Objects-to-CEQA-Exemption-for-Westlands-Perman....pdf)

<sup>40</sup> see <https://www.feinstein.senate.gov/public/index.cfm/pressreleases?ID=FF5C94EB-667A-4DEC-A0A4-296AB5027BE4>

<sup>41</sup> See: [https://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf)

## **Insufficient Information is Provided to Initiate ESA Consultation**

Exhibit C of the final contract fails to provide an accurate updated water needs assessment and instead provides an amorphous methodology that defers the water needs assessment to some vague time in the future. As noted in previous communication on San Luis Unit water contract renewals from USFWS<sup>42</sup> to Reclamation the water needs assessment information is outdated and insufficient. USFWS wrote in 2004:

*However, the Service believes that the BA inadequately describes: the specific area that may be affected by the action, the manner in which the action may affect any listed species or critical habitat, the effects of related actions, and any cumulative effects. We are therefore not initiating consultation on this project until such a time as the information requested below is provided. Based on the information provided in your BA and in our files, we believe the proposed action has the potential to adversely affect listed species and their critical habitat as described in Table 6 of the BA, and attached to this memo and request that Reclamation provide the additional information requested to initiate formal consultation on this project. In addition to the species included in Table 6, we believe that water deliveries to SLU contractors may also affect groundwater and surface water quality outside of the SLU which could affect delta smelt downstream in the San Joaquin River and Delta.... The Service therefore requests that Reclamation update the water needs assessment for Westlands Water District to reflect the reduced irrigated acreage within the District, and provide such water needs assessment to the Service with a request for formal consultation on this project. Reclamation should revise the water needs assessments for Pacheco, Panoche and Westlands WD's to reflect a more recent baseline of water usage within these districts. Reclamation should further revise the water needs assessment for WWD to include a reduction in irrigated acreage as a result of permanent land retirement within the district...*

The final contract still does not contain an accurate up to date water needs assessment. Substantial changes have occurred since this 2004 USFWS information request including over 102,000 acres of land retirement, changes to municipal and industrial uses including roughly 20,000 acres slated for solar utility uses.<sup>43</sup> Reclamation needs to provide an accurate water needs assessment for WWD that includes the reduction in irrigated acreage as a result of permanent land retirement within the district.

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<sup>42</sup> See <http://calsport.org/news/wp-content/uploads/04-I-2958-SLU-LTCR-Insuff-Memo.pdf>  
Assistant Field Supervisor, Sacramento Fish and Wildlife Office Endangered Species Division to Chief Resources management Division BOR, November 22, 2004, *Request for Additional Information to Initiate Formal Section 7 Endangered Species Act (ESA) Consultation on Execution of Long-Term Water Service Contract Renewals between the United States and Eight Water Service Contractors of the Central Valley Project's San Luis Unit.* pg 1,2 & 12

<sup>43</sup> See <https://wwd.ca.gov/wp-content/uploads/2017/12/westlands-solar-park.pdf>

## **Effects of Drainage from Westlands Caused by Imported Irrigation Water from the CVP are Significant and Complex and Must be Addressed in a Comprehensive EIS.**

Federal and State law prohibit degradation of the waters of the State and Nation. The proposed contract conversions would allow the continued delivery of CVP water to lands known to create pollution when applied to irrigate these soils without data or substantive environmental analysis of the effects of drainage contamination from Westlands or Reclamation. This drainage pollution can deform fish and wildlife, impair reproduction, and reduce survival. These adverse impacts affect trust resources including migratory birds, anadromous fish, and federally and state listed species. Continued delivery of water to these soils, as contemplated by this contract renewal, will degrade the waters of the State and Nation. The USEPA, in their comments on San Luis Unit Long Term Contract Renewals (@ pg 4 of Attachment A), concluded that, “*the Drainage solutions and features relied upon to implement these solutions should not be separated from the implementation of long-term water contracts.*”<sup>44</sup> Yet that is exactly what Reclamation has done in with this contract conversion for Westlands.<sup>45</sup>

The USEPA in their comment letter on the Draft EIS and Supplemental Information for Renewal of Long Term Contracts for San Luis Unit (SLU) Contractors (CEQ# 050411 and 060056, dated April 17, 2006, @ pg 5 and 6 of Attachment A) found that, “*Subsurface drainage flow comes in part from the Westlands Water District and other water districts upgradient of the northerly [San Luis Unit] districts with high selenium/Total Dissolved Solids (TDS) concentrations ([USBR SLDFR] Plan Formulation Report Addendum, July 2004).*” EPA recommended that the FEIS for San Luis Unit Long Term Contracts should include information on the relationships between irrigation in the San Luis Unit (including Westlands) and groundwater movement downslope, in terms of flow and water quality. EPA further noted that Reclamation should provide information on the San Luis Unit’s role in groundwater accretions and discharges of pollutants into wetland channels and the San Joaquin River and identify impacts to wetlands and wildlife. Based on this additional information, the FEIS should consider mitigation measures, such as “*changes in amounts and location of water applied, which will reduce drainage production and selenium mobilization.*”<sup>46</sup>

## **Cumulative Impacts of Project Water Deliveries are Significant.**

Reclamation and Westlands failed to consider the effects of other past, present, and reasonably foreseeable future actions that could result in cumulative impacts on the

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<sup>44</sup> Ibid.

<sup>45</sup> <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=68443> USBR October 25, 2019 Reclamation releases draft repayment contract for Central Valley Project contractor. And Reclamation extends the public comment period for the released draft repayment contract for Central Valley Project contractors <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=68567>

<sup>46</sup> <https://archive.epa.gov/region9/nepa/web/pdl/san-luis-deis-supplemental.pdf>

biological resources of the study area before finalizing Westlands permanent contract. Reclamation concluded, for the last Westlands' interim contract renewals that there would only be minimal cumulative impacts to biological resources over a 2-year period.<sup>47</sup> However, that rationale does not extend to a contract executed permanently. Further, these conclusions of finding minimal cumulative impacts to biological resources are dependent on the timely implementation of future agricultural drainage service, habitat restoration, land acquisition and retirement, water conservation, and CVPIA programs including implementation of Fish and Wildlife Habitat Restoration Programs under Sections 3406 b(2), b(3) and 3406 d(1) and d(2).

The 2019 Draft EA for Westlands interim contracts references the Programmatic EIS for CVPIA which identified these restoration programs necessary to remediate adverse impacts of these contract renewals<sup>48</sup>. Yet, some important ecosystem restoration provisions of CVPIA, such as acquisition of full Level 4 refuge water supplies, have lacked funding for adequate implementation. Purchase of environmental water under the CVPIA b(3) program has also fallen substantially short of targeted needs due to inadequate funding mechanisms. This unmet need may increase in the future as market prices for water continue to rise with demand. Further, past and present efforts to meet water quality standards in the San Joaquin Basin have been significantly hampered by the lack of adequate fresh water supplies. The USEPA recommended, in their comments on the DEIS and Supplemental Information for San Luis Unit Long Term Contracts (@ pg 6 of Attachment A) that, "The cumulative impacts analysis in the FEIS should be based on the past and present trends of supplies available for redirection to meet restoration and refuge needs in the area, including Trinity Restoration needs. Where information is available, the analysis should reflect the actual implementation status of CVPIA restoration actions."<sup>49</sup> Further as noted previously, the portion of these costs as well as, the obligation for payment need to be included in the contract as an enforceable provision.

**Examples of actions that should be reviewed in a Cumulative Effects analysis include:**

CVP water assignments

In October 2019, Reclamation released a draft EA on new water assignments from Mercy Springs and Fresno Slough WDs (both Delta-Mendota Unit CVP contractors) to Angiola Water District.<sup>50</sup> Angiola WD is a non-CVP contractor in the Tulare Basin that is outside of

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<sup>47</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=41301](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=41301)

<sup>48</sup> [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=41303](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41303)

<sup>49</sup> <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

<sup>50</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=33881](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=33881)

the CVP Place of Use (POU) as established by the SWRCB.<sup>51</sup> Allocating federal water outside of the State permitted Place of Use, and without consideration of CVPIA fish and wildlife restoration programs is not consistent with state or federal laws.

James ID commented on the DEA for this partial water assignment in October 2019.<sup>52</sup> Comments included:

1. Proposed action will cause unrecoverable land subsidence;
2. the action will create additional flood risk;
3. the action will alter historical groundwater flows between the Delta-Mendota and the Kings Groundwater Subbasins;
4. the action will prevent the Kings Groundwater Subbasin from achieving sustainability;
5. the action will impact surface water quality deliveries to CVP and Settlement Contract Water Contractors; and,
6. the DEA fails to satisfy the requirements of NEPA.

#### Aqueduct pump-ins from Westlands

Polluted groundwater from Westlands is being pumped into the California Aqueduct as part of a Warren Act Contract approved by USBR in 2015 despite records showing elevated levels of selenium, arsenic, and boron in this groundwater.<sup>53</sup> The California Department of Water Resources conducts monthly monitoring of the California Aqueduct and has documented occurrences of elevated levels of concern for selenium at Check 21 near Kettleman City (station number KA017226), especially during times when surface water flows have been restricted in the Aqueduct and groundwater from Westlands is being pumped into the Aqueduct. Some of these monthly water quality samples have exceeded the US EPA's November 2018 proposed selenium objectives for protection of aquatic fish and wildlife. These proposed objectives include a lentic water quality objective of 1.5 µg/L (lentic meaning of, relating to, or living in still waters, such as lakes, ponds, or swamps), which would be the applicable selenium objective for Kern National Wildlife Refuge and other wetlands that are fed by water from the Aqueduct.<sup>54</sup>

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<sup>51</sup> [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/cirs/eir1999\\_ccpou/docs/ccpoufeir.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/cirs/eir1999_ccpou/docs/ccpoufeir.pdf)

<sup>52</sup> Comments for James ID on the Partial Assignment from Mercy Springs to Angiola begins on pdf page 23 of FEA: [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=42646](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42646)

<sup>53</sup> [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=21021](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=21021)

<sup>54</sup> Federal Selenium Criteria for Aquatic Life and Aquatic Dependent Wildlife Applicable to California Docket RIN, 2040-AF79 EPA-HQ-OW-2018-0056 FRL-9989-46-OW. These selenium criteria established lentic and lotic water values, and bird egg and fish tissue values. See: <https://www.regulations.gov/document?D=EPA-HQ-OW-20180056-0001>.

The 50 µg /L drinking water selenium objective that is currently applicable to water in the California Aqueduct is not protective of fish and wildlife resources that use water from the Aqueduct. Kern National Wildlife Refuge receives their refuge water supplies from the California Aqueduct. Endangered species, such as the federally listed as endangered Buena Vista Lake Shrew, are likely to be impacted from cumulative levels of selenium in this source water contaminated by Westlands' groundwater discharges. The once-a-month water quality sampling is insufficient to capture selenium spikes that accumulate downstream, or to assess the bioaccumulation in the food chain.<sup>55</sup>

#### Water Transfers and Exchanges that could benefit or involve Westlands

##### ***Mendota Pool Group 20 Year Exchange Program***

Reclamation and Westlands jointly prepared an Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the Mendota Pool Group (MPG) 20-Year Exchange Program. The MPG proposes to pump non-CVP groundwater into the Mendota Pool in exchange for CVP water, which would otherwise be delivered to the Mendota Pool.

The EIS/EIR evaluates up to 25,000 acre-feet of water per year (AFY) of groundwater to be pumped into the Mendota Pool and exchanged for 25,000 acre-feet of CVP water which would be delivered to Westlands. This project would be implemented through a series of exchange agreements over a 20-year period between Reclamation and the MPG as authorized by Section 14 of the Reclamation Project Act of 1939 (53 Stat. 1197; 43 U.S.C., subsection 389) and the Warren Act of 1911 (36 STAT.925; 43 U.S.C., subsection 523), and 34 U.S.C. §3408(d). These Exchange Agreements would supplement Westlands CVP water deliveries. The Project also includes construction of an 85-acre groundwater recharge facility just west of Mendota Pool.

CDFW commented on the NOP for MPG 20 Year Exchange Program in 2013.<sup>56</sup> CDFW was very concerned about salt loading into the Mendota Pool conveyance system and water supplies for the Mendota Wildlife Area. The Mendota Pool/Fresno Slough is the only water conveyance system available for Reclamation to deliver Level 2 and Level 4 Refuge Water supplies to Mendota WA. CDFW provided the following concerns of this project:

1. Continuing water quality degradation and impacts to associated biological (both terrestrial and aquatic) resources within the Mendota Pool/Fresno Slough.
2. Degradation of the quality of Refuge water supplies and related water quality impacts to wildlife habitats with the Department's Mendota WA.
3. Subsidence of the Mendota Dam and levees that allow the Mendota Pool to function.

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<sup>55</sup> Selenium & Arsenic concentrations in the California Aqueduct, downstream of where groundwater has been pumped into the canal, have increased markedly in 2015 and in the case of Arsenic are approaching the Maximum Contaminant Level for drinking water of 0.010 mg/L.

See [http://www.water.ca.gov/waterdata/library/waterquality/station\\_group/index.cfm](http://www.water.ca.gov/waterdata/library/waterquality/station_group/index.cfm)

<sup>56</sup> 2013 CDFW comments on NOP for MPG starting on page 5 of Appendix B:  
[https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=41116](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41116)



4. Water delivery impacts, such as delivery schedules, for Level 2 and 4 water supplies to the Mendota WA.

CDFW commented on the MPG DEIS/R in 2019. CDFW identified sections of the DEIR/S that do not adequately identify or mitigate all of the Project's significant, or potentially significant, impacts on biological resources...In addition, because of these issues, CDFW has concerns that USBR and WWD may not have the basis to approved the project or make "findings" as required by CEQA unless the environmental document is modified to eliminate and/or mitigate significant impacts as feasible (CEQA Guidelines, §§ 15704, 15091 & 15092). Increases in Total Dissolved Solids from groundwater pumped into Mendota Pool could adversely affect the federally and State listed giant garter snake. Further, groundwater overdraft and subsidence has adversely affected water conveyance in the Mendota Wildlife Area.<sup>57</sup>

James ID submitted comments on the MPG DEIS/R on January 14, 2019.<sup>58</sup> James ID commented that their district "*would bear the brunt of significant direct, indirect, and cumulative water quality degradation and other impacts caused by the Project, given its southerly position relative to Project discharges, which become more degraded as they flow towards JID's point of diversion...the EIS/EIR fails to consider or require any mitigation or alternative to protect JID. Indeed, the EIS/EIR essentially fails to analyze and ignores water quality impacts to JID, including associated impacts to crops, soils, and groundwater within the district that is relied upon by its growers. Such failure of evaluation and analysis is prejudicial because it precludes very relevant information about the environmental consequences of the project from being presented to or know by the public and decionmakers, including lead and responsible agencies. Because of such deficiencies, ... the EIS/EIR fails to comply with NEPA and CEQA and must be revised and recirculated before the proposed Project can be considered for approval...*" James ID sued Westlands in March 2020 over the MPG Exchange Program.<sup>59</sup>

**Long Term Water Transfer Program** (formerly known as North to South Water Transfer Program). Revised Final EIS/R completed in September 2019.<sup>60</sup> USBR is federal lead agency, San Luis and Delta Mendota WA is State lead agency. Aqualliance legally challenged these transfers in 2015, ultimately forcing Reclamation to revise the NEPA and FWS to revise the ESA

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<sup>57</sup> 2019 CDFW comments on the MPG DEIS/R starting on page 504 of the FEIS:  
[https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=41117](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41117)

<sup>58</sup> See James ID comments on DEIS/R starting on page 565 of FEIS:  
[https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=41118](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=41118)

<sup>59</sup> See: <https://sjvwater.org/district-sues-to-stop-salty-water-exchange/>

<sup>60</sup> See: [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=40932](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=40932)

consultation.<sup>61</sup> Reclamation issued a revised Final EIS in September 2019 and signed a ROD on 4/7/2020.<sup>62</sup>

### Groundwater banking

#### ***Agricultural Aquifer Storage and Recovery Program***

In August 2019, Westlands filed a Mitigated Negative Declaration (MND) for the Agricultural Aquifer Storage and Recovery (Ag-ASR) Program. The Ag-ASR Program will be implemented within Westland's 600,000+ acre service area on the west side of the San Joaquin Valley. With the Ag-ASR Program, surface water from existing sources will be recharged into groundwater aquifers through groundwater wells during times when surplus or supplemental surface water is available, and later extracted by landowners for irrigation when it is needed. The Ag-ASR Program includes the incremental additions of about 20 well conversions per year for recharge with a conservatively high target of 400 operational Ag-ASR wells over the next 15 to 20 years. Most infrastructure is already in place.

Imported surface water within the Westside Subbasin will be derived largely from CVP water deliveries and smaller amounts from flood flows off the Kings River. Surface water from the San Luis Canal and from the Kings River, diverted from a location near the upstream end of the Mendota Pool, would be the main sources of supply for the Project. The Project would average up to 29,000 acre-feet annually. The Project proposes to import surface water from the Kings River by diverting from a location near the upstream end of the Mendota Pool.

CDFW provided comments on the MND on September 30, 2019.<sup>63</sup> CDFW voiced concern regarding adequacy of mitigation measures for the following special status plant and wildlife species and habitats “*known to occupy the Project area: the State threatened and federally endangered San Joaquin kit fox (Vulpes macrotis mutica), the State and federally endangered Tipton kangaroo rat (Dipodomys nitratooides nitratooides), the State and federally endangered and State fully protected blunt-nosed leopard lizard (Gambelia sila), the State threatened Swainson's hawk (Buteo swainsoni), the State threatened Nelson's antelope squirrel (Ammospermophilus nelsoni), the State threatened tricolored blackbird (Agelaius tricolor), the federally endangered and California Rare Plant Rank (CRPR) 1 B.2 San Joaquin woollythreads (Monolopia congdonii), the CRPR 1 B.2 Munz's tidy-tips (Layia munzii), the State candidate crotch bumble bee (Bombus crotchii), and the State species of special concern American badger (Taxidea taxus), Tulare grasshopper mouse (Onychomys torridus tularensis), San Joaquin coachwhip (Masticophis flagellum ruddocki), and burrowing owl (Athene cunicularia).*”

CDFW recommended USFWS be consulted on impacts of this project: “*CDFW recommends consultation with the USFWS prior to any ground disturbance related to this Project due to potential impacts to Federal listed species. Take under the Federal Endangered Species Act*

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<sup>61</sup> See: [www.aqualliance.net/wp-content/uploads/2018/02/AquAlliance10YearMSJ\\_Order021518.pdf](http://www.aqualliance.net/wp-content/uploads/2018/02/AquAlliance10YearMSJ_Order021518.pdf)

<sup>62</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=18361](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=18361)

<sup>63</sup> See: <https://ceqanet.opr.ca.gov/2019089109/2/Attachment/6QMajD>

*(ESA) is more stringently defined than under CESA; take under ESA may also include significant habitat modification or degradation that \_ could result in death or injury to a listed species, by interfering with essential behavioral patterns such as breeding, foraging, or nesting.”*

CDFW also noted that, “*Project-related diversions acquiring surface water from the Kings River watershed may impact additional riparian, wetland, fisheries and terrestrial (upland) wildlife species and habitats, including the Fresno Slough and Mendota Wildlife Area (MWA), and the San Joaquin River. Affected special status species and habitats vary depending upon location and may include, but are not limited to, the Federal threatened Central Valley DPS steel head (Oncorhynchus mykiss), the Federal and State threatened Central Valley spring-run ESU Chinook salmon (O. tshawytscha), the Federal candidate and State species of special concern Central Valley fall-run and late fall-run ESU Chinook salmon (O. tshawytscha), the State and Federal threatened giant garter snake (Thamnophis gigas), the State threatened Swainson's hawk, the State candidate tricolored blackbird, the State species of special concern burrowing owl and western pond turtle, and numerous additional special status species and habitats. The Project proposes to divert an average of up to 29,000 AF annually, and the Mendota Pool would be one of two main sources for this diversion amount. CDFW recommends revising the MND to identify potential impacts to riparian and other natural resources listed above due to surface flow diversion from the Kings River and Fresno Slough, and proposing measures that minimize and mitigate potential impacts to a less than significant level.”*

***Conveyance of up to 50,00 acre-feet of Westlands Water District's 2017 Central Valley Project (CVP) water to Semitropic Water Storage District's Groundwater Bank***

DWR will deliver up to 50,000 acre-ft of Westlands' 2017 CVP water to KCWA for storage in Semitropic's Groundwater Banking Program, under Article 55 of KCWA's long-term Water Supply Contract with DVR. The US Dept. of Interior's Bureau of Reclamation (Reclamation) will make Westlands' 2017 CVP water available for delivery by DWR to KCWA's turnout(s) at either Banks Pumping Plant or O'Neill Forebay by February 28, 2018. The return of water to Westlands is proposed to be delivered in two ways: 1) pump-in delivery to the CA Aqueduct at Reaches 10A, 12E, and/or 13B in exchange for a like amount concurrently delivered by DWR to the CVP portion of O'Neill Forebay; or 2) by delivery of KCWA's SWP Table A water to the CVP portion of O'Neill Forebay. The return of water from KCWA to Westlands must be completed by Dec. 31, 2028.<sup>64</sup>

- Westlands is involved with a number of groundwater pump-ins, transfers and exchanges. These actions have adverse local effects as many involve substitution of higher quality surface water supplies with lower quality groundwater or commingling of poor quality groundwater with surface water supplies. These projects can cumulatively effect...The cumulative total potential water that would be made up by these actions is over 700,000 AF, although availability of some of these supplies rely on floodwater capture and are variable. (See Exhibit 3) The present, and reasonably foreseeable future groundwater pumping,

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<sup>64</sup> See: <https://ceqanet.opr.ca.gov/2017051016/3>

exchanges and transfers that involve Westlands include Mendota Pool Group (MPG) Exchange<sup>65</sup>

- Westlands San Luis Canal Pump-in Program<sup>66</sup>
- Reclamation Approvals Associated with the Poso Creek Water Company's Multiyear Banking and Transfer Program<sup>67</sup>
- Reclamation Approvals Associated with Harris Farms and Shows Family Farms Multiyear Banking and Transfer Program<sup>68</sup>
- Westlands Water District 5-year Warren Act Contract for Kings River Flows in the San Luis Canal<sup>69</sup>
- Firebaugh Canal Water District 5-Year Transfer Program, 2019-2023<sup>70</sup>
- Delta-Mendota Canal Groundwater Pump-In Program Revised Design Constraints<sup>71</sup>
- San Joaquin River Exchange Contractors Water Authority, 25-Year Groundwater Pumping and Water Transfer Project<sup>72</sup>
- Long Term Water Transfer Program<sup>73</sup>
- Water transfers from the San Joaquin Exchange Contractors<sup>74</sup>

Westlands is also planning and/or implementing a number of groundwater banking projects:

- Agricultural Aquifer Storage and Recovery Program<sup>75</sup>
- Panoche Creek Groundwater Replenishment Project<sup>76</sup>
- Pasajero Groundwater Replenishment Project<sup>77</sup>

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<sup>65</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=36282](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=36282)

<sup>66</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=21021](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=21021)

<sup>67</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=28801](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=28801)

<sup>68</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=32081](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=32081)

<sup>69</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=29341](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=29341)

<sup>70</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=36203](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=36203)

<sup>71</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=32781](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=32781)

<sup>72</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=2771](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=2771)

<sup>73</sup>See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=18361](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=18361)

<sup>74</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=9086](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=9086)

<sup>75</sup> See: <https://ceqanet.opr.ca.gov/2019089109/2/Attachment/QdGizdr>

<sup>76</sup> See: <http://sldmwa.org/integrated-regional-water-management-plan/>

<sup>77</sup> Ibid.

### **Impacts outside of Westlands**

Impacts of the execution of the Westlands contract go far beyond the district's boundary. The impacted area includes the zones of export including the Trinity and Sacramento Rivers and the, Sacramento-San Joaquin Delta Estuary and Bay. The effects to these areas outside of the district's boundary can be profound and significant. For example, since 1964, Reclamation has been diverting Trinity River water 400 miles south to the San Luis Unit, including Westlands. These diversions have had a profound effect on fisheries, including a 90% decline in Trinity River fish populations. In 1984, Congress passed the Trinity River Basin Fish and Wildlife Management Act (Pub. L. No. 98-541) which recognized that Trinity River Division (TRD) operations substantially reduced instream flows in the Trinity River, resulting in degraded fish habitat and consequently a drastic reduction in anadromous fish populations. The 1984 Act directed the Secretary to develop a management program to restore fish and wildlife populations in the Basin to levels approximating those that existed immediately before TRD construction began. In 2000, the USDI signed a Record of Decision for the Trinity River Restoration Program. The TRRP ROD noted that "*Amendments to the 1984 Act redefined its restoration goals so that the fishery restoration would be measured not only by returning anadromous fish spawners, but also by the ability of dependent tribal and non-tribal fishers to participate fully in the benefits of restoration through meaningful harvest opportunities. (These restoration goals were reaffirmed through enactment of the Trinity River Fish and Wildlife Management Reauthorization Act of 1995, Pub. L. No. 104-143, May 15, 1996)*".<sup>78</sup>

The San Francisco Bay and Delta ecosystem is also at risk due to environmental degradation, including impacts from elevated levels of selenium. Waterways in the North Bay and Delta including Carquinez Straits, Suisun Marsh, and Sacramento San Joaquin Delta are listed as impaired for selenium on the 303(d) list (being addressed by a USEPA approved TMDL).<sup>79</sup> Sources of selenium contamination include agricultural drainage from the Central Valley (Linares et al 2015; Presser and Luoma 2010).<sup>80</sup>

### **Drainage Impacts**

The Effects of Drainage from Westlands caused by irrigation enabled by the execution of this Final contract are Significant and Complex. The pollution created by irrigating drainage-impaired lands in Westlands, and the future implementation drainage management actions within the district have not been analyzed or disclosed. The USEPA noted in their comments on the San Luis Unit DEIS (@ pg 6 of Attachment A) that, "*continuing the current practices of managing agricultural drainage will have adverse impacts on groundwater and surface water quality, and beneficial uses including fish and wildlife, potential drinking water supplies, and agriculture.*"<sup>81</sup> These adverse impacts affect trust resources including migratory birds, anadromous fish, and

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<sup>78</sup> See: <https://www.trrp.net/DataPort/doc.php?id=227>

<sup>79</sup> See: [https://www.waterboards.ca.gov/water\\_issues/programs/tmdl/2014\\_16state\\_ir\\_reports/category4a\\_report.shtml](https://www.waterboards.ca.gov/water_issues/programs/tmdl/2014_16state_ir_reports/category4a_report.shtml)

<sup>80</sup> See: <https://setac.onlinelibrary.wiley.com/doi/abs/10.1002/etc.2775> & See: <https://pubs.usgs.gov/pp/p1646/>

<sup>81</sup> See: <https://archive.epa.gov/region9/nepa/web/pdf/sanluis-deis.pdf>

federally and state listed species. Continued delivery of water to these soils, as contemplated by this Final contract, will degrade the waters of the State and Nation. The USEPA in their comments on San Luis Unit Long Term Contract Renewals (@ pg 4 of Attachment A) concluded that, “*the Drainage solutions and features relied upon to implement these solutions should not be separated from the implementation of long-term water contracts.*”<sup>82</sup> Yet that is exactly what Reclamation has done.

Additionally, there is no disclosure of the effects of reallocation of water from retired lands in Westlands to upslope lands within District. The USEPA in their comments on the San Luis Unit Long Term Contracts Supplemental EIS (@ pg 3 of Attachment A) noted concern that “*redistribution of supplies from lands which are no longer in production to land currently dependent on groundwater could lead to expansion of drainage-impaired lands* (p. 84, “Land Retirement Final Report”, Feb. 1999). *Water redistributed upslope can create conditions of shallow groundwater in downslope areas, leading to more widespread drainage problems.*”<sup>83</sup> Some of the drainage impaired lands in Westlands have been permanently retired from irrigation and repurposed into a Master-planned energy park. CIM Group is repurposing 21,000 acres of selenium-contaminated and drainage-impaired farmland to accommodate solar PV generating facilities with a total generating capacity of approximately 2,000 MW with construction to be phased over 12 years. Water needs for solar O&M are approximately 0.5% of agricultural needs. Annual water consumption estimates for a 250 MW solar facility is 2.16 acre-feet per quarter-section (160 acres). For comparison, the average irrigation rate for agricultural lands within Westlands Water District is approximately 2.5 acre-feet per acre per year, or 400 acre-feet per quarter-section per year.<sup>84</sup> Water originally applied to the lands in the Solar Park are being reallocated for Ag use within the district.

## **Conclusion**

In short, Reclamation and Westlands' have failed to comply with State and Federal laws including NEPA, CVPIA, CEQA, CESA and ESA under this contract conversion process. The public has been given a puzzle of dizzying complexity without the puzzle picture. Despite federal laws and rules, Reclamation did not provide the public with copies of the contract and thus, thwarted federal law. Westlands' proposed contract conversion must be withdrawn and restarted with full consideration of all similar contract conversions and their cumulative effects. The water contract conversion process must start with outreach to the 17-20 parties of interest that have thus far been excluded or contracted out under the proposal. Furthermore, all of these invisible draft contracts must be publicly disclosed and the critical exhibits must be provided to the public and those areas of origin that are most impacted by the water that is being taken and exported to Westlands.

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<sup>82</sup> Ibid.

<sup>83</sup> See: <https://archive.epa.gov/region9/nepa/web/pdf/san-luis-deis-supplemental.pdf>

<sup>84</sup> See: <https://wwd.ca.gov/wp-content/uploads/2017/12/westlands-solar-park.pdf>

Reclamation has failed to address reduction in exports, the expanded Service Area outside of Congressional boundaries, the irrigability of lands in Westlands, the cumulative effects such as groundwater pump-ins and exchanges, transfers along with the drainage impacts and conversion to municipal and industrial uses as contemplated under the conversion of this 9(e) contract to a 9(d) repayment contract that would be issued in perpetuity. Given the numerous potential environmental effects associated with Westlands water deliveries, a full EIS and ESA analysis must be completed prior to the execution of these new conversion contracts in perpetuity.

**EXHIBITS:**

1. Contract Conversions South of the Delta
2. Operation and Maintenance and Reconstruction Contracts
3. Pump-In Projects
4. Drainage Projects
5. Public Interest & Agency Comment Letters

Exhibit 1: Status of permanent contract conversions for south of the Delta and compliance with Federal laws.

Permanent Contract Conversion							Contract Conversion Compliance with Federal Laws		
Contractor	Quantity (acre-feet)	Contract Use	Contract Status	Contract Effective Date	NEPA	ESA	CVPIA		
<b>San Luis Unit</b>									
14-06-200-495A-IR1-P	Westlands WD	1,150,000	Ag/M&I	No public release of final, Executed 2/2	6/1/2020	NO	NO	NO	
14-06-200-7773A-IR5	San Luis WD	125,080	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-7864A-IR5	Panoche WD	94,000	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
6-07-20-W0469-BA	Pacheco WD	10,080	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-4173-IR5	City of Coalinga	10,000	M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-4619A-IR5	City of Avenal	3,500	M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-7081A-IR3	City of Huron	3,000	M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-8033A-IR5	CPFW M&I Only for Mendota WA	10	M&I	No public release, In negotiation	TBD	NO	NO	NO	
Subtotal		1,395,670							
<b>Delta Mendota Canal Unit -- Assigned to Westlands</b>									
14-06-200-3365A-XXX-B	Westlands WD 2-Way Mercy Springs WD Partial Contract	6,260	Ag/M&I	No public release of final, Comment Closed 2/19/2020	TBD	NO	NO	NO	
14-06-200-8092-XXX	Assignment with Santa Clara Westlands WD DD #1, Broadview WD Contract Assignment	27,000	Ag/M&I	No public release of final, Comment Closed 2/19/2020	TBD	NO	NO	NO	
7-07-20-W0055-XXX	Westlands WD DD#1, Centinella WD Contract Assignment	2,500	Ag/M&I	No public release of final, Comment Closed 2/19/2020	TBD	NO	NO	NO	
14-06-200-8018-XXX	Westlands WD DD #1, Widren WD Contract Assignment	2,990	Ag/M&I	No public release of final, Comment Closed 2/19/2020	TBD	NO	NO	NO	
14-06-200-3365A-XXX-C	WWD DD #2, Mercy Springs WD Partial Contract Assignment	4,198	Ag/M&I	No public release of final, Comment Closed 2/19/2020	TBD	NO	NO	NO	
14-06-200-78231	Westlands WD, Oro Loma Partial Contract Assignment	4,000	Ag/M&I	Unknown	TBD	NO	NO	NO	
Subtotal		46,948							
<b>Delta Mendota Canal Unit</b>									
14-06-200-7858A	City of Tracy	20,000	M&I	No public release, In negotiation	TBD	NO	NO	NO	
7-07-20-W0045-LTR1	The Westside Irrigation District-- assigned to City of Tracy	5,000	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-4305A-LTR1	Banta Carbona Irrigation District	20,000	M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-785-LTR1	Byron Bethany Irrigation District	20,600		Unknown	TBD	NO	NO	NO	
7-07-20-W0045-LTR1	The Westside Irrigation District	5,000	M&I	No public release, In negotiation	TBD	NO	NO	NO	
3-07-20-W1124-LTR1	U.S. Department of Veterans Affairs, San Joaquin Valley National Cemetery	850	M&I	Unknown	?	NO	NO	NO	
14-06-200-1072-LTR1	West Stanislaus Irrigation District	50,000	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-922-LTR1	Del Puerto Water District	140,210	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-7754-LTR1	Eagle Field WD	4,550	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	
14-06-200-3365A-LTR1	Mercy Springs Water District-- 1300 AF assigned to Angiola WDI(SWP)	2,842	Ag/M&I	No public release, In negotiation	TBD	NO	NO	NO	



Contract Conversion Compliance with  
Federal Laws

Permanent Contract Conversion	Contractor	Quantity (acre-feet)	Contract Use	Contract Status	Contract Effective Date	NEPA	ESA	CVPIA
14-06-200-7823-LTR1	Oro Loma Water District	600	Ag/M&I	Unknown	?	NO	NO	NO
14-06-200-3598A-LTR1	Patterson Irrigation District	22,500	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
Subtotal		292,152						
<b>Mendota Pool Unit</b>								
14-06-200-7859A-LTR1	Coechio Family Trust	2,080	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-4019A-LTR1	Fresno Slough Water District-- Assigned to Angiola W/D(SWP)	4,000	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-700-A-LTR1	James Irrigation District	35,300	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
2-07-20-W0266-LTR1	Laguna Water District	800	M&I	Unknown	?	NO	NO	NO
14-06-200-3802A-LTR1	Reclamation District # 1606	228	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-701-A-LTR1	Tranquillity Irrigation District	13,800	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-3537A-LTR1	Tranquillity Public Utility District	70	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
Subtotal		56,278						
<b>Contra Costa Canal</b>								
175r-3401A-LTR1	Contra Costa Water District	195,000	M&I	No public release, in negotiation	TBD	NO	NO	NO
Subtotal		195,000						
<b>Cross Valley Canal</b>								
14-06-200-8292A-IR17	County of Fresno	3,000	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8293A-IR17	County of Tulare	5,308	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8466A-IR17	Hills Valley Irrigation District	3,346	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8601A-IR17	Kern-Tulare Water District	40,000	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8237A-IR17	Lower Tule River Irrigation District	31,102	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8238A-IR17	Pixley Irrigation District	31,102	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8367A-IR17A	Rag Gulch Water District	13,300	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
14-06-200-8565A-IR17	Tri-Valley Water District	1,142	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
Subtotal		128,300						
<b>Eastside Division (New Melones)</b>								
6-07-20-W0329	Stockton East Water District	75,000	Ag/M&I	No public release, comment closes May 18, 2020	TBD	NO	NO	NO
4-07-20-W0330	Central San Joaquin Water Conservation District	80,000	Ag/M&I	No public release, comment closes June 8, 2020	TBD	NO	NO	NO
Subtotal		155,000						
<b>San Felipe Division</b>								
8-07-20-W0130	San Benito County WC and FCD	43,800	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
7-07-02-W0023A	Santa Clara Valley Water District	152,500	Ag/M&I	No public release, in negotiation	TBD	NO	NO	NO
Subtotal		196,300						
South of Delta Total (excluding SIR exchange contracts)		2,465,648						

**Exhibit 2: Status of Operations and Maintenance Contracts for south of the Delta and compliance with Federal laws.**

Project Name	Contractor(s)	Project Description	Project Status	Project Effective Dates	Compliance with Federal Laws	
					NEPA	ESA
San Luis & Delta Mendota WA 35-Year Operation, Maintenance and Replacement Agreement	SLDMWA	Reclamation proposes to issue a 35-year OM&R agreement to the Authority, who will continue to operate, maintain, and replace all facilities covered under the current agreement.	CEC signed on 11/12/2019, draft Contract out for 15-day public comment thru 12/20/2019.	35-year Contract	YES, CEC	YES, USFWS 2005 BiOp (04-F-0369) for USBR's SCCAO O&M
Draft repayment contract for Central Valley Project Delta Division - C.W. "Bill" Jones Pumping Plant	SLDMWA	Contract between USBR and SLDMWA for the Repayment of Extraordinary Maintenance Costs for the C.W. "Bill" Jones Pumping Plant.	Draft contract out available for public comment thru May 29, 2020, CEC signed 6/13/2019.	This Contract shall become effective on the date it is signed and shall remain in effect until the Authority has fully repaid its Repayment Obligation to the United States as described in Article 5 in the Contract.	YES, CEC	?





Exhibit 4: Status of Drainage projects south of the Delta and compliance with Federal laws.

Project Name	Contractor(s)	Project Description	Project Status	Project Effective Dates	Compliance with Federal Laws		
					NEPA	ESA	CWA
Kalijian Drainage Reuse Project	SLWD	The project is located within the San Luis Water District approx. 9 miles south of Los Banos. The project will reclaim drain water from the Charleston Drainage District for blending and permit conveyance of other supplies for beneficial use. Project will augment the District's supply and increase reliability enable the conveyance of flood water for beneficial use reduce poor quality drain water discharges to the San Joaquin River (SJR) system and free up capacity in the SJR Water Quality Improvement Project.	In development	TBD	TBD	TBD	?
Westlands Upper Aquifer Groundwater Supply Pilot Project	Westlands WD	The pilot project will extract groundwater from the upper aquifer using a private well and the water will be treated to remove dissolved solids (TDS). The goal is to produce product water with TDS equivalent to the water quality in the San Luis Canal. The water user will pump the product water into Lateral 7 and use the treated reject water to grow Jose Tall Wheat Grass on District owned land. The pilot project will evaluate costs of treating upper aquifer groundwater and will track reduction in shallow groundwater levels around groundwater well and Jose tall wheat grass.	Uncertain	Assume this will be implemented over a short time period (1 year)? Project funding is small \$20,000. Was discussed during WWD Board Meeting.	NO	NO	NO
Widren Water District Pilot Project Extension	Widren WD	Widren constructed a Reverse Osmosis Treatment Plant to extract and treat their shallow drainage water for use within an in-district Reuse Area. Product water is discharged into the DMIC for transfer for exchange. In 2019 Reclamation issued a 5-year Warren Act contract/Exchange Agreement to Widren Water District for the introduction and conveyance of up to 1,000 acre-feet of Reverse Osmosis-treated groundwater (non-Project water) into the Delta-Mendota Canal as well as potential storage in San Luis Reservoir.	In 2017, Reclamation completed an EA/FONSI (EA-16-035) for this pilot project which included issuance of a 1-year Warren Act contract/Exchange Agreement and a 25-year land use authorization for installation, operation, and maintenance of a pipeline connection to an existing discharge facility on the Delta-Mendota	March 2019-March 2022	YES	NO	NO
Westlands Upper Aquifer Groundwater Supply Pilot Project	Westlands WD	This pilot project is being conducted in cooperation with a Westlands water user. The pilot project will extract groundwater from the Upper Aquifer using a private well and the water will be treated to remove dissolved solids from the product water. The goal is to produce product water with total dissolved solids concentration equivalent to the water quality in the San Luis Canal. The water user will pump the product water into Lateral 7 and use the treated reject water to grow Jose Tall Wheat Grass on District owned land. The pilot project will evaluate costs of treating upper aquifer groundwater and will track reduction in shallow groundwater levels around groundwater well and Jose tall wheat grass.	Uncertain	Assume this will be implemented over a short time period (1 year)? Project funding is small \$20,000. Was discussed during WWD Board Meeting.	NO and because it is a "pilot project" probably no CEQA either.	NO	NO
10-Year Use Agreement for the San Luis & Delta-Mendota Water Authority Long-Term Storm Water Management Plan for the Grasslands Drainage Area	SLDMWA, Panchoe Drainage District	Under the Proposed Action, Reclamation will allow the SLDMWA to continue to introduce and convey up to 150 cfs of stormwater commingled with drainage through the San Luis Drain for 10 years.	FONSI Signed 12/31/2019	1/1/2020 - 12/31/2029	YES	YES	NO NPDES permit. State issued WDR to be reopened in 2 years.
Grasslands Channel Enlargement	SLDMWA, Panchoe Drainage District	The Grassland Bypass Project currently is limited to a capacity of 150 cfs. The proposed project will increase the capacity of the Grassland Bypass Channel (GBC) to 300 cfs by enlarging the inlet and outlet connections of the system. Maximum historic storm flows are approximately 250 cfs.	Not included in 2019 CEQA/NEPA for 10 Year Use Agreement for the San Luis Drain. Listed as "low" priority in SLDMWA Westside-San Joaquin IRWMP Update 2018	TBD	TBD	TBD	TBD
Westlands Solar Park	Westlands	Master-planned energy park in Westlands on drainage-impaired lands managed by CIM Group. CIM Group is repurposing 21,000 acres of selenium-contaminated and drainage-impaired farmland to accommodate solar PV generating facilities with a total generating capacity of approximately 2,000 MW with construction to be phased over 12 years.	12-year buildout. Final EIR completed in December 2017: <a href="https://wwd.ca.gov/wp-content/uploads/2017/12/westland-solar-park.pdf">https://wwd.ca.gov/wp-content/uploads/2017/12/westland-solar-park.pdf</a>	Indefinite	N/A	?	N/A

**Exhibit 5:**

**Documents Adopted by Reference: Public Interest & Comments Incorporated by Reference [All Documents can be found in the record of earlier contract renewals, earlier NEPA processes and in some cases on the BOR website.]**

- 1. January 21, 2020, CBD et. al. Re: Objection to Adoption of Westlands Water District Board of Directors Distribution District #1 & #2 Resolution Nos. 101-20, 102-20, 103-20 and 104-20 Because of: (1) Insufficient Public Notice and Inadequate Project Description and (2) Failure to Comply with the California Environmental Policy Act (CEQA), the Central Valley Project Improvement Act (CVPIA), and state and federal Endangered Species Acts. Westlands Water District Board of Directors.**
- 2. January 7, 2020, PCL et. al. Re: Written Comments on WIIN Act Draft Repayment Contracts between Bureau of Reclamation and Westlands Water District. Ernest Conant, Bureau of Reclamation Regional Director Mid-Pacific Regional Office, and Erma Leal, Repayment Specialist, Bureau of Reclamation.**
- 3. January 6, 2020, PCL et al. Re: Comments Westlands WD Conversion Contract for 1.15 MAF & Exhibits under the WIIN Act § 4011. Brenda Burman, Bureau of Reclamation Commissioner, Ernest Conant, Bureau of Reclamation Regional Director Mid-Pacific Regional Office, and Erma Leal, Repayment Specialist, Bureau of Reclamation.**
- 4. January 2, 2020, “Conservation, Fishing and Tribal Comments on Bureau of Reclamation Mid-Pacific Region December 2019 Central Valley Project Final Cost Allocation Study” to Brenda Burman, Commissioner, USBR from PCL et al [20 Conservation, Fishery, Tribal and Community Organizations].**
- 5. December 23, 2019, “Comments on the Draft EA on a 10-Year Use Agreement for the San Luis & Delta-Mendota Water Authority Long-term Storm Water Management Plan for the Grassland Drainage Area (Draft EA – 19-029) – A Comprehensive EIS is Required and Compliance with the Clean Water Act” to Rain Emerson, USBR from PCL et al [20 Conservation, Fishery, Tribal and Community Organizations].**
- 6. December 20, 2019, “Comments on draft Agreement between US Bureau of Reclamation and San Luis & Delta Mendota Water Authority Operations and Maintenance Activities” to USBR from PCL et al [20 Conservation, Fishery, Tribal and Community Organizations].**
- 7. December 14, 2019, PCL et. al. Re: Interim Renewal Contract for Central Valley Project Water Contracts for Westlands Water District (Draft EA-19-043)—An abuse of discretion and failure to comply with federal law. Colin Davis, Bureau of Reclamation, South-Central California Area Office.**

- 8. December 12, 2019, “Comments on Draft Environmental Assessment Cross-Valley Contractors Interim Renewal Contracts (Draft EA-19-0441)--An abuse of discretion and failure to comply with federal law” to Colin Davis, USBR from Center for Biodiversity et al [17 Conservation, Fishery and Community Organizations].**
- 9. December 10, 2019, “New Information Regarding Deformities in Sacramento Splittail and Drinking Water Quality Raise Significant National Issues for Consideration in the Draft Environmental Assessment for the proposed 10-Year Agreement to Use the San Luis Drain for Discharges to the San Joaquin River and San Francisco-Bay Delta by the San Luis & Delta-Mendota Water Authority--We Seek a Public Hearing, an EIS and Extended Comment Period--2 Weeks Is Insufficient.” Letter to Brenda Burman, Commissioner and Ernest Conant, California-Great Basin Regional Director, USBR from PCL et al [8 Conservation and Fishery Organizations].**
- 10. November 5, 2019, “Comments on Tentative Waste Discharge Requirements (WDRs) for Surface Water Discharges from the Grassland Bypass Project in Merced and Fresno Counties” to Ashley Peters, Central Valley Regional Water Quality Control Board from PCFFA et al [22 Conservation, Fishery, Tribal and Community Organizations].**
- 11. October 29, 2019, PCL et. al. Re: Westlands WD Conversion Contract for 1.15 MAF Exhibits under the WIIN Act § 4011. Ernest Conant, Bureau of Reclamation Regional Director Mid-Pacific Regional Office.**
- 12. September 9, 2019, “Coalition Comments on Grassland Bypass Project Long-Term Storm Water Management Plan EIR Addendum and Initial Study--A Full EIR-EIS is Required” to Joseph C. McGahan, Drainage Coordinator, San Luis and Delta Mendota Water Authority, Sue McConnell, Central Valley Regional Water Quality Control Board, and Rain Emerson, USBR from PCL et al [21 Conservation, Fishery, Tribal and Community Organizations].**
- 13. July 31, 2019, “Comments of PCFFA and IFR on Grassland Bypass Project Long-Term Storm Water Management Plan, 2020 – 2035” to Karl Longley, Chairman, Central Valley Regional Water Quality Control Board and Ernest Conant, Regional Director, USBR Mid Pacific Region.**
- 14. March 28, 2019, “Comments on Federal Selenium Criteria for Aquatic Life and Aquatic-Dependent Wildlife Applicable to California, Docket RIN, 2040-AF79 EPA-HQ-OW-2018-0056 FRL-9989-46-OW.” To USEPA from PCL et al [18 Conservation, Fishery, Tribal and Community Organizations].**

- 15. January 16, 2018, Steve Volker, "Comments of PCFFA, SFCBOA, IFR and NCRA on 16 Central Valley Project Interim Renewal Contracts for Cross Valley Canal, Delta Division and American River Division" Brenda Burman, Commissioner Bureau of Reclamation; Quentin Branch, Kate Connor Bureau of Reclamation, David Murillo, Regional Director Mid-Pacific Regional Office.**
- 16. January 12, 2018, PCL et. al. Re: Interim Renewal Contract for Central Valley Project Water Contracts for Westlands Water District (EA17-021& FONSI-15-023A1 )--An abuse of discretion and failure to comply with federal law. Brenda Burman, Commissioner Bureau of Reclamation; Quentin Branch, Kate Connor Bureau of Reclamation, David Murillo, Regional Director Mid-Pacific Regional Office.**
- 17. November 20, 2017 Comments of Fishery Organizations Opposing H.R. 1769, the San Luis Drainage Resolution Act.**
- 18. April 6, 2017 Comments of Fishery Organizations to Rain Emerson USBR on on Draft EA/FONSI for the Central Valley Project Interim Renewal Contracts for Westlands Water District, Santa Clara Valley Water District, and Pajaro Valley Water Management Agency 2016-2018.**
- 19. February 6, 2017, Environmental Advocates et. al. Re: Comments EA-17-021, FONSI-15023A & Renewal of Six Interim Contracts for Westlands, Santa Clara et. al. Brenda Burman Commissioner of Reclamation David Murillo Mid-Pacific Regional Director Michael Jackson, Area Manager, SCC-100 South-Central California Area Office, Paul Souza Pacific Southwest Region Regional Director USFWS.**
- 20. August 8, 2016 Comments from the Bay Institute, Contra Costa Water Agency, Contra Costa Water District, Defenders of Wildlife, and Natural Resources Defense Council to Alicia Forsythe USBR on Northerly District Agreement, San Luis Unit.**
- 21. August 8, 2016 Comments from the Bay Institute and Defenders of Wildlife to Alicia Forsythe USBR on Northerly District Agreement, San Luis Unit.**
- 22. August 8, 2016 Coalition of Environmental Organizations concerned about water bird and wetland habitats Comments to Alicia Forsythe USBR on Northerly District Agreement, San Luis Unit.**
- 23. August 8, 2016 Coalition of Environmental, Environmental Justice, Tribal and Fishing Organizations Comments to Alicia Forsythe USBR on Northerly District Agreement, San Luis Unit.**



- 24. June 30, 2015 Comments from Pacific Advocates to Karl Longley Central Valley Regional Water Quality Control Board on Draft Waste Discharge Requirements for the Grassland Bypass Project.**
- 25. June 25, 2015 Coalition of Environmental, Environmental Justice, Tribal and Fishing Organizations Comments to Karl Longley Central Valley Regional Water Quality Control Board on Draft Waste Discharge Requirements for Surface Water Discharges from the Grassland Bypass Project.**
- 26. June 25, 2015 The Bay Institute Comments to Margaret Wong, Central Valley Regional Water Quality Control Board on Waste Discharge Requirements for SLDMWA and USBR – Surface Water Discharges from the GBP.**
- 27. June 22, 2015, Comments of the Pacific Coast Federation of Fishermen's Associations to Margaret Wong, Central Valley Regional Water Quality Control Board Requesting Denial of Proposed Waste Discharge Requirements for for Surface Water Discharges from the Grassland Bypass Project.**
- 28. June 30, 2014, Coalition Of Environmental, Environmental Justice, Tribal and Fishing Organizations Comments to Karl Longley Central Valley Regional Water Quality Control Board on Draft Waste Discharge Requirements for the Grassland Bypass Project.**
- 29. June 4, 2014, Institute for Fisheries Resources (IFR COALITION) Comments on Proposed CVP Cost Allocation Methodology: A recipe for continuing deficits and failure to repay taxpayers, Brooke Miller-Levy Project Manager, Bureau of Reclamation.**
- 30. April 2, 2014, PCL et. al. Subject: "Final Record of Decision and Final Environmental Assessment [FEA] for Westlands Water District et. al. Central Valley Project Interim Contract Renewals for Approximately 1.2 MAF of water" Rain Emerson Bureau of Reclamation, South-Central California Area Office.**
- 31. March 29, 2014, "Subject: Final Record of Decision and Environmental Assessment [EA] for Westlands Water District et. al. Central Valley Project Interim 6 Contract Renewals for Approximately 1.2 MAF of water. Rain Emerson Bureau of Reclamation, South-Central California Area Office.**
- 32. February 13, 2014 "Coalition of Environmental, Environmental Justice, Tribal and Fishing Organizations' Comments In Opposition To The Grassland Drainer Proposal To Discharge Selenium And Other Pollutants To Broadview Water District Lands—Another Kesterson In The Making". EWC letter to Sally Jewell, Secretary of Interior; Rod McInnis NMFS Regional Administrator & Jared Blumenfeld, USEPA Regional IX Administrator.**

33. **January 13, 2014, "The Environmental Assessment [EA] for Westlands Water District et. al. Central Valley Project Interim Contract Renewals" Rain Emerson, Bureau of Reclamation, South-Central California Area Office.**
34. **January 9, 2014, "The EA for Westlands Water District Central Valley Project Interim Contract Renewals listed below & the Finding of No Significant Impact (FONSI) is supported by Reclamation's Environmental Assessment (EA) Number EA-13-023, *Central Valley Project Interim Renewal Contracts for Westlands Water District, Santa Clara Valley Water District, and Pajaro Valley Water Management Agency 2014 – 2016.* Rain Emerson, Bureau of Reclamation, South-Central California Area Office."**
35. **December 21, 2013 "Comments On the Draft Environmental Assessment (DEA 13-026) for the 10 year 100,000 Acre Feet of Proposed Water Transfer/Exchange Program from the Arvin-Edison Water Storage District (AEWSD) to Metropolitan Water District (MWD) & Draft Finding of No Significant Impact (FONSI 13-026)" To Chuck Siek, Bureau of Reclamation From PCL et. al. [13 Conservation, Fishery and Community Organizations.]**
36. **November 26, 2013 "Grasslands Bypass Project -- Violations of the Endangered Species Act and Reduced Monitoring Threaten Endangered Species and Public Health" To Secretary of Interior Sally Jewell, Rod McInnis Regional Administrator, National Marine and Fisheries Service; Jared Blumenfeld Regional IX Administrator, EPA. [From CWIN et. al. and 15 Conservation, Fishery and Community Organizations.]**
37. **November 1, 2013, Central Valley Project Interim Contract Renewals: Pajaro Valley Water Management Agency, Westlands Water District Distribution District No. 1, and Santa Clara Valley Water District 14-06-200-3365A-IR14-B Tracy, City of (The West Side) 7-07-20-W0045-IR14-B Tracy, City of (Banta-Carbona) 14-06-200-4305A-IR14-B Westlands Water District Distribution District 1 (Widren) 14-06-200-8018-IR14-B Westlands Water District Distribution District 1 (Centinella) 7-07-20-W0055-IR14-B Westlands Water District Distribution District 1 (Broadview) 14-06-200-8092-IR14 Westlands Water District Distribution District 2 (Mercy Springs) 14-06-200-3365A-IR14-C Westlands Water District 14-06-200-495A-IR4 Tracy, City of 14-06-200-7858A-IR1. EWC et. al letter to Karen Hall Bureau of Reclamation.**
38. **April 22, 2013 Comments on GBP Revised Monitoring Plan To Stacy Brown USBR from 14 Conservation, Fishery and Community Organizations.**
39. **March 26, 2012, "Comments on CVP Interim Renewal Contracts for three Delta Division and five San Luis Unit interim water service renewal contracts for: Pajaro Valley Water Management Agency, Santa Clara Valley Water District, and Westlands Water District (five contracts) 2012 to 2014 and Environmental Documents." To Hon. David J. Hayes, Donald R. Glaser, Michael L. Connor, Hilary**

**Tompkins and Michael Jackson from PCFFA et. al [13 Conservation, Fishery and Community Organizations.]**

- 40. February 13, 2012 “Comments on FONSI-070-103 Long-term Warren Act Contract and License for Delta Lands Reclamation District No. 770 EA-07-103.” To Rain Healer, USBR, From 11 Conservation, Fishery and Community Organizations.**
- 41. January 20, 2012, “Delta Division, San Luis Unit and Cross Valley CVP Interim renewal contracts—Comments of the Hoopa Valley Tribe on draft EA-11-049 and EA-11011 and FONSI 11-049 and FONSI 11-011” To Rain Healer, Bureau of Reclamation, South-Central California Area Office, from Leonard E. Masten Jr. Chairman Hoopa Valley Tribe.**
- 42. January 18, 2012, “Comments on Draft EA/FONSI for Oro Loma Water District Partial Assignment of Central Valley Project Water to Westlands Water District FONSI-11-092” To Rain Healer, Bureau of Reclamation, South-Central California Area Office, from 12 Conservation, Fishery and Community Organizations.**
- 43. January 5, 2012, “Comments on Draft EA/FONSI for Three Delta Division and Five San Luis Unit Water Service interim Renewal Contracts 2012-2014” To Rain Healer, Bureau of Reclamation, South-Central California Area Office from Stephen Volker on behalf of 4 Tribal, Conservation, Fishery and Community Groups.**
- 44. November 16, 2011, Notice Inviting Public Comment on BDCP MOA to Hon. Kenneth Salazar, Secretary John Laird, Secretary from 190 Conservation, Fishery and Community Organizations.**
- 45. November 15, 2011 “Full Environmental Impact Statement Needed for San Luis Drainage Feature Reevaluation Demonstration Treatment Facility at Panoche Drainage District [FONSI-10-030]” To Donald Glaser, Bureau of Reclamation, Regional Director Mid-Pacific Region, from 13 Conservation, Fishery and Community Organizations.**
- 46. October 17, 2011 “Comments on Draft EA/FONSI (DEA) for the San Luis Drainage Feature Reevaluation Demonstration Treatment Facility at Panoche Drainage District’s San Joaquin River Improvement Project (SJRIP) FONSI-10-030” To Rain Healer, Bureau of Reclamation, South-Central California Area Office, from 8 Conservation, Fishery and Community Organizations.**
- 47. September 7, 2011 “Closure of Grassland Bypass Project (GBP) Data Collection and Review Team (DCRT) Meetings to Selected Members of the Public.” To Michael L. Connor USBR Commissioner from 11 Conservation, Fishery and Community Organizations.**

48. **August 11, 2011 “Opposition to the Proposal to Curtail Monitoring at the Grassland Bypass Project.” To Michael C. S. Eacock (Chris), Donald R. Glaser, USBR and Ren Lohofener USFWS et. al from 7 Conservation, Fishery and Community Organizations.**
49. **May 5, 2011 “Request for Revised Notice of Intent for the Bay Delta Conservation Plan (BDCP) that Recognizes Water Supply Realities” To Deputy Interior Secretary Hayes from 16 Conservation, Fishery and Community Organizations.**
50. **February 28, 2011 “Scoping Comments Proposed Ten Year North to South Water Transfer of CVP and Non CVP Water Using State Water Project (SWP) and Central Valley Water Project (CVP) Facilities” To Brad Hubbard, USBR et. al from 10 Conservation, Fishery and Community Organizations.**
51. **December 13, 2010 Comments on the Draft Finding of No Significant Impact [FONSI] San Luis Water District’s [SLD] and Panoche Water District’s [PWD] Water Service Interim Renewal Contracts 2011-2013 FONSI-10-070. To Rain Healer, USBR from 8 Conservation, Fishery and Community Organizations.**
52. **November 16, 2010 “Letter to Senator Feinstein on Long Term Solution to Westlands Drainage Problem” To Commissioner Connor from Environmental Working Group.**
53. **July 30, 2010 “San Joaquin River Central Valley Selenium Basin Plan Waiver, 303 (d) Delisting of San Joaquin River for Selenium and the California Toxics Rule” To Jared Blumenfeld, USEPA from 16 Conservation, Fishery and Community Organizations.**
54. **July 16, 2010 Letter to Tom Glover, Westlands Deputy District Manager, Re RE: Opposition to Negative Declaration for the Westlands Water District and San Luis Water District Transfers and Related Exchanges Project. Eastside to Westside 57,500 acre feet.[Updated] From Zeke Grader et.al. From 13 Conservation, Fishery and Community Organizations.**
55. **July 3, 2010 Letter to Brad Hubbard Bureau of Reclamation, “Comments on Draft DEIS/EIR for proposed new transfer program that would provide for the transfer and/or exchange of up to 150,000 acre-feet of water from the San Joaquin River Exchange Contractors Water Authority [SJEC]1 to several potential users— Westlands Water District, SWP Contractors, Kern Water Bank and other users for over 25 years—2014-2038.” Adam Lazar Center for Biological Diversity et. al. and 11 Conservation, Fishery and Community Organizations.**
56. **May 19, 2010 Letter to Donald Glaser, USBR From David Ortmann, Pacific Coast Management Council.**

- 57. March 2, 2010 “Final Scoping Comments for Westlands Water District [Westlands] Proposed “Conveyance of Non-project Groundwater from the Canal-side project using the California Aqueduct”. The project proposes to discharge up to 100,000-acre feet of groundwater into the State Water Project California Aqueduct, a Drinking Water Supply for Approximately 20 Million People”. To Russ Freeman, Westlands WD, from 14 Conservation, Fishery and Community Organizations.**
- 58. February 18, 2010 “Comments Re Two Year Interim Renewal Central Valley Project Water Service Contracts: Westlands Water District [WWD] Contracts 14-06-200-8237AIR13; 14-06-200-8238A-IR13; WWD DD1-Broadview 14-06-200-8092-IR12; WWD DD1 Centinella 7-07-20-W0055-IR12-B; WWD1 Widren 14-06-200-8018-IR12-B; WWD DD2 Mercy Springs 14-06-200-3365A-IR12-C. To Karen Hall, USBR, from 11 Conservation, Fishery and Community Organizations.**
- 59. January 29, 2010 “Comments of The Bay Institute and NRDC on Draft Environmental Assessment (EA) and Draft Finding of No Significant Impact (FONSI) for the San Luis Unit interim renewal contracts (Central Valley Project, California)” To Rain Healer, USBR, from Hamilton Candee.**
- 60. January 29, 2010 “Comments on Draft EA/FONSI on San Luis Interim Contract Renewal” To Rain Healer, USBR from California Water Information Network and California Sportfishing Protection Alliance.**
- 61. January 29, 2010 “Comments on Draft EA/FONSI on San Luis Interim Contract Renewal” To Rain Healer, USBR from PCL, Friends of the River & Sierra Club.**
- 62. January 29, 2010 “Comments on Draft Environmental Assessment and Finding of No Significant Impact for the San Luis Unit Water Service Interim Renewal Contracts” To Rain Healer, USBR from Joseph Membrino for Hoopa Valley Tribe.**
- 63. September 18, 2007 “Comments on Draft Environmental Assessment (EA) and seven Draft Findings of No Significant Impact (FONSI) for the proposed execution of seven San Luis Unit interim renewal water service contracts.” To Judi Tapia, USBR from Hamilton Candee, NRDC.**
- 64. September 7, 2007 “Comments on San Luis Unit Interim Renewal Contracts.” To Sheryl Carter, USBR from California Water Information Network.**
- 65. April 17, 2006: “Final NRDC-TBI Comments on Long-Term Water Service Renewal Contract for Westlands Water District.” To Richard Stevenson, USBR from Hamilton Candee NRDC.**
- 66. April 8, 2006: “Comments on DEIS and Draft Supplemental Information for San Luis Unit Renewal Contracts – Part II.” To Shane Hunt, USBR from The Bay Institute and NRDC.**

- 67. September 15, 2005: “Supplemental NRDC Comments on Westlands contract - ESA & NEPA issues.” To Richard Stevenson, USBR from Hamilton Candee, NRDC.**
- 68. September 14, 2005: “Additional Comments on Draft Renewal Contract for Westlands Water District.” To Richard Stevenson, USBR from Hamilton Candee, NRDC.**
- 69. August 31, 2005: “NRDC Supplemental Comments on Drainage DEIS.” To Claire Jaquemin, USBR, from Hamilton Candee NRDC.**
- 70. August 4, 2005: “Comments on Proposed CVP Long Term Water Service Renewal Contract for Westlands Water District.” To Richard Stevenson, USBR from Hamilton Candee for NRDC and TBI.**
- 71. January 21, 2005: “NRDC – TBI Comments on Draft EIS for San Luis Unit Renewal Contracts.” To Joe Thompson, USBR from NRDC and TBI.**
- 72. December 17, 2004: “Further Additional Comments of NRDC and Bay Institute on Draft EA/FONSI for DMC Unit Renewal Contracts.” To Joe Thompson, USBR from NRDC and TBI.**
- 73. December 16, 2004: “Comments on Draft EA/FONSI for DMC Unit Renewal Contracts.” To Joe Thompson, USBR from NRDC and TBI.**
- 74. December 14, 2004: “NRDC Comments on Draft EA/FONSI for DMC Unit Renewal Contracts.” To Joe Thompson, USBR from Hamilton Candee, NRDC.**
- 75. January 9, 2001: “Comments on Proposed CVP long Term Renewal Contracts for Friant, Hidden Buchanan, Cross-Valley, Feather River and Delta-Mendota Canal Units.” To David Hayes, Deputy Secretary of Interior et. al. from Hamilton Candee NRDC.**
- 76. December 7, 2000: “Comments on the Draft EA on long-term renewal of Central Valley Project water service contracts prepared by the Bureau of Reclamation.” To Al Candlish, USBR, from Hamilton Candee NRDC.**

**Agency Comments and ESA Consultations adopted by reference:**

- 1. June 25, 2015: “USFWS Comments on the May 2015 Draft Waste Discharge Requirements for the Surface Water Discharges from the Grassland Bypass Project and the Discharges to Groundwater from the Growers in the Grassland Drainage Area.” To Margaret Wong, Central Valley Regional Water Quality Control Board, from Jennifer Norris, USFWS.**

- 2. November 13, 2014: “USFWS Response to Questions from Congressman George Miller on a Proposed Settlement on San Joaquin Valley Drainage.” From Ren Lohofener, USFWS Region 8 Regional Director.**
- 3. November 10, 2014: “USEPA Response to Questions from Congressman George Miller on a Proposed Settlement on San Joaquin Valley Drainage.” From Jared Blumenfeld, Regional Administrator, USEPA Region 9.**
- 4. August 26, 2014: “USEPA Comments on Draft Environmental Impact Statement for the Bay Delta Conservation Plan, San Francisco Bay Delta, California (CEQ# 20130365).” To Will Stelle, Regional Administrator West Coast Region National Marine Fisheries Service from USEPA Region 9.**
- 5. June 4, 2012: “USFWS ESA Consultation on San Luis Drainage Feature Reevaluation Demonstration Treatment Facility at Panoche” To: Dave Hyatt, USBR from Ken Sanchez, USFWS.**
- 6. September 22, 2010: “NMFS Comment Letter – San Joaquin River Selenium Control Plan Basin Plan Amendment” To: Ms. Jeanine Townsend, Clerk to the State Water Resources Control Board from Howard Brown, NMFS.**
- 7. September 22, 2010: “USFWS Comment Letter – San Joaquin River Selenium Control Plan Basin Plan Amendment” To: Ms. Jeanine Townsend, Clerk to the State Water Resources Control Board from Susan K. Moore, USFWS.**
- 8. May 8, 2010: “USFWS Comments on the March 2010 Draft Staff Report Concerning the Proposed Basin Plan Amendments to the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins to Address Selenium Control in the San Joaquin River Basin.” To Gail Cismowski, Central Valley Regional Water Quality Control Board, from David Harlow, USFWS.**
- 9. December 18, 2009: “USFWS ESA Consultation on the Proposed Continuation of the Grassland Bypass Project, 2010 – 2019.”**
- 10. August 27, 2007: “USFWS Comments on Draft EA/IS for 25-Year Groundwater Pumping/Water Transfer Project for the San Joaquin River Exchange Contractors Water Authority.” Letter to Robert Eckart, USBR from Michael Hoover, USFWS.**
- 11. April 17, 2006: “EPA Comments on the Draft Environmental Impact Statement (DEIS) and Supplemental Information for Renewal of Long Tenn Contracts for San Luis Unit Contractors (CEQ# 050411 and 060056).” Letter to Kirk Rogers, USBR from USEPA.**
- 12. March 6, 2006: USFWS Fish and Wildlife Coordination Act Report to USBR for the San Luis Drainage Feature Re- Evaluation.**

- 13. December 8, 2000: “Comments on Proposed Long-Term Contracts and Associated Environmental Assessments.” Letter to Alan R. Candlish and Bill Luce, USBR, from Deanna Wieman, USEPA.**
- 14. January 8, 1999: “Review of USBR’s Notice of Intent for Long-term Contract Renewal, Central Valley Project, California.” Letter to Alan R. Candlish, USBR, from Deanna Wieman, USEPA.**



**EXHIBIT 5**

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 10053 / March 9, 2016**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 3752 / March 9, 2016**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-17162**

**In the Matter of**

**WESTLANDS WATER  
DISTRICT, THOMAS W.  
BIRMINGHAM, and  
LOUIE DAVID CIAPPONI**

**Respondents.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS PURSUANT TO  
SECTION 8A OF THE SECURITIES ACT  
OF 1933, MAKING FINDINGS, AND  
IMPOSING A CEASE-AND-DESIST  
ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”), against Westlands Water District (“Westlands”), Thomas W. Birmingham, and Louie David Ciapponi (collectively “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (the “Offers”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondents' Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. This matter involves misrepresentations and omissions by Westlands in the Official Statement for its October 2012 offering of \$77 million in Refunding Revenue Bonds, Series 2012A (the "2012 Bonds"). The Official Statement for the 2012 Bonds was misleading in its treatment of one key metric for Fiscal Year 2010: Westlands' debt service coverage ratio. The debt service coverage ratio is important to investors because it signals whether an issuer has sufficient ability to meet its debt service obligations. In prior bond offerings, Westlands had covenanted to fix and collect water rates at least sufficient to generate net revenues equal to at least 125% of its debt service payments for that year. Failure by Westlands to meet that 1.25 debt service coverage ratio could be a technical default on its bonds which could lead to undesirable outcomes, including higher interest rates on future bonds, ratings downgrades, and an inability to sell bonds in the following fiscal year.

2. The Official Statement for the 2012 Bonds contained a table representing that Westlands had met or exceeded the required debt service coverage ratio for each of the prior five years.<sup>2</sup> For fiscal year 2010, however, the revenue and coverage ratio reported in the table were misleading because Westlands failed to disclose: (1) that it had engaged in extraordinary accounting transactions in 2010 *solely* to recognize additional revenue for purposes of calculating the debt service coverage ratio without raising rates on customers, and (2) the impact of a 2012 prior period adjustment to account for expenses that would have decreased revenue in 2010 and negatively affected the ratio.

3. In the latter half of fiscal year 2010, Westlands staff informed Birmingham and Ciapponi that, because of reductions in water supply, Westlands would not generate sufficient revenue to achieve a 1.25 debt service coverage ratio. At Ciapponi's direction, Westlands staff consulted with its independent auditor about accounting transactions that could be implemented to avoid raising water rates in order to meet a 1.25 debt service coverage ratio. Subsequently, Westlands staff, including Birmingham and Ciapponi, advised Westlands' Finance and Administration Committee that it recommend to Westlands' Board of Directors (the "Board") to approve two accounting transactions to recognize additional revenue. These transactions and their effect on revenue and the debt service coverage ratio were not disclosed in the Official Statement for the 2012 Bonds. Separately, in 2012, Westlands adjusted the accounting for certain expenses. Had these expenses been recorded in 2010, the 2010 debt service coverage ratio would have been negatively affected. While this prior period adjustment was disclosed in the Official Statement for the 2012 Bonds, its impact on the 2010 debt service coverage ratio was not disclosed. If the effect of the 2010 and 2012 accounting transactions on the debt service

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<sup>1</sup> The findings herein are made pursuant to Respondents' Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> Westland's fiscal year ends on February 28. Unless otherwise specified in this Order, references to specific years are to fiscal years.

coverage ratio had been disclosed, Westlands' coverage ratio for 2010 would have been 0.11, rather than the 1.25 which was reported in the Official Statement.

4. As a result of the conduct described herein, Westlands violated Section 17(a)(2) of the Securities Act and Birmingham and Ciapponi caused Westlands' violation.

### **Respondents**

5. **Westlands Water District** is headquartered in Fresno, California and is the largest agricultural water district in California. Westlands is a public agency of the State of California, originally formed in 1952 for the primary purpose of providing irrigation water to customers within the district. Its customers are approximately 700 agricultural land owners and water users and approximately 200 municipal and industrial land owners and water users. Westlands' Board is elected by land owners in the district, and as a result, Westlands is managed by representatives of its customers. For 2014, Westlands had operating revenues in excess of \$120 million.

6. **Thomas W. Birmingham**, age 60, of Sacramento, California, has served as the General Manager of Westlands, the highest executive level position, from October 2000 through the present. He is a member of the State Bar of California and also served as Westlands' General Counsel through May 2010 and was reappointed General Counsel in September 2015.

7. **Louie David Ciapponi** age 64, of Fresno, California, was the Assistant General Manager of Westlands from June 1995 to June 2012. Since June 2012 Ciapponi has been employed as the General Manager of a neighboring water district that had previously been annexed by Westlands. While employed at the other water district, Ciapponi continued to perform many of the same functions for Westlands that he had previously performed. He is also presently serving as Westlands' Secretary, a position he has held since 1995, and was Westlands' Treasurer from 1995 to December 16, 2015.

### **Facts**

#### **Westlands' Rate Covenant**

8. In most years, Westlands purchases the majority of the water it sells to its customers from the United States Bureau of Reclamation ("USBR") and is required to pay a share of USBR's capital costs and operations and maintenance expenses. In drought years such as 2010, the USBR often reduces the quantity of water it makes available to Westlands, forcing Westlands to purchase water from other, more expensive, sources. Westlands charges its customers for the cost of water it sells and collects additional fees both for its own operational expenses and the share of the USBR expenses it pays.

9. In prior debt offerings, Westlands had covenanted, to the fullest extent permitted by law, to fix and prescribe, and collect customers' water rates and charges at least sufficient during each fiscal year to yield net revenues equal to 125% of the debt service payable in that fiscal year. The purpose of this covenant is to assure investors and others, including ratings agencies, that Westlands will have sufficient ability to meet its debt service obligations on the

bonds. Westlands has significant incentive to maintain the 1.25 ratio because a failure to do so could preclude Westlands from issuing bonds in the following fiscal year. Failure to maintain the ratio could also result in higher borrowing costs in future debt offerings and could negatively affect Westlands' debt ratings.

10. The Official Statement for the 2012 Bonds included a table reporting the debt service coverage ratio for fiscal years 2008 through 2012. The table contains, among other operating data, columns showing five years of summary income statement information and the ratio for each year, derived from Westlands' audited financial statements, which reflects that Westlands maintained a debt service ratio of exactly 1.25 for 2010. The bond sale transaction closed on October 25, 2012.

Extraordinary Accounting Transactions in Fiscal Year 2010 to  
Increase the Debt Service Coverage Ratio

11. In October 2009, Ciapponi learned that the projected full year revenue for fiscal year 2010 would be approximately \$10 million short of what was required to maintain the 1.25 debt service coverage ratio. Westlands' fiscal year ends February 28, so it had very little time to rectify the revenue shortfall for fiscal year 2010 in order to maintain the 1.25 ratio for that year.

12. In order to meet the ratio, Westlands could have collected additional revenue by raising the water rates or other charges on its customers. This would have meant increasing water rates and land charges by about 11.6%. Westlands decided not to do so because management, including Birmingham and Ciapponi, wanted to minimize the costs on Westlands' customers. Instead, Westlands decided to reclassify certain assets as revenue. Ciapponi instructed Westlands staff to meet with Westlands' independent auditor to discuss this potential alternative to raising water rates. A memo prepared by Westlands employees and sent to Westlands' auditor in November 2009 described the proposal to "reclassify cash reserves or retained earnings" to record additional revenue "in lieu of collecting current revenue while maintaining the required debt coverage ratio." Westlands staff met with the auditor in January 2010. The auditor informed the Westlands staff that he believed the suggested transactions were permissible and subsequently issued an unqualified opinion on Westlands' 2010 audited financial statements. The auditor was not asked whether, or how, disclosure of the transactions should be made in the Official Statement. These reclassification transactions would not increase cash collections and were merely accounting transactions done for the sole purpose of maintaining the ratio.

13. Westlands staff, through Birmingham, as General Manager/General Counsel, and Ciapponi, as Assistant General Manager, presented a memorandum to Westlands' Finance and Administration Committee describing the various accounting transactions that were proposed to achieve a 1.25 debt service coverage ratio. The Finance and Administration Committee decided, based on the recommendation of staff, including Birmingham and Ciapponi, to recommend to the Westlands Board that it approve the reclassification transaction in lieu of increasing rates and charges that would be offset by credits. Subsequently, the Westlands Board approved the Finance and Administration Committee's recommendation.

14. Some of the reclassified assets came from “payable” accounts consisting of amounts that were collected from customers in previous periods but for which revenue was never recorded in the financial statements. The original intent of these accounts was to collect and retain funds to be used for the payment of certain expenses of Westlands and USBR. In the event the funds were not needed in the current fiscal year, they were retained by Westlands until they were needed for the stated purpose or otherwise dispensed at the direction of Westlands’ Board. Westlands decided to reclassify \$8.3 million from these accounts to revenue for 2010. Westlands had never previously reclassified funds from these accounts in a similar manner.

15. In addition, Westlands decided to record \$1.46 million of revenue in 2010 by means of a “return of equity” to landowners in the district. The “equity” came from a reserve fund originally established to ensure debt service payments in future years, related to a 1999 debt issue and had been funded through a rate component of customer charges collected between 1999 and 2002. Together, the two sets of transactions would result in \$9.8 million in additional revenue being recorded, solely to meet the debt service ratio covenant. Without the transactions, Westlands would have reported a debt service coverage ratio of .63.

16. At the public Board meeting at which the transactions were discussed, Birmingham and Ciapponi recommended that the Board approve the transactions. They told the Board that Westlands needed additional revenue to achieve a 1.25 debt ratio and the Board could either increase rates and charges or approve the transactions. When one Board member, who was also a Westlands customer, began to question whether rates and charges in an area in which he owned land would be raised as a result of having to meet the covenant, Birmingham joked that they were engaging in “a little Enron accounting.” Birmingham went on to state: “We’re not collecting any more money from the rate payers, nor are we paying any more money than we would otherwise pay under that the . . . um . . . to pay off the debt. All we’re doing is we’re taking money and saying we are reclassifying it from an account payable to income. And I’m told by Mr. Ciapponi that that satisfies – and he’s vetted it – that that satisfies our debt coverage with the bonds.”

17. The Board voted to approve the transactions, which were recorded as part of the year end closing process for fiscal year 2010. Other than customers who were present at the Board meeting, Westlands’ customers were not made aware that their “equity” had been returned to them. The benefit of these transactions to Westlands and its customers was twofold. First, Westlands avoided reporting a debt service coverage ratio of 0.63 for 2010 and any potential negative consequences associated with failing to meet its covenant under prior bond issuances. Second, Westlands was able to meet the debt service coverage ratio without raising its customers’ water rates.

#### The 2012 Prior Period Adjustment

18. Two years later, and separate from the transactions described above, Westlands changed the way it accounted for advance operations and maintenance payments made to the USBR in 2010 and 2011, classifying them as expenses instead of their original capitalization. Had these expenses been recorded in 2010, Westlands debt service coverage ratio would have been even lower unless Westlands had raised rates and land charges or lowered expenses in

2010. In 2012, when it changed the method by which it accounted for these payments, Westlands recorded a prior period adjustment for the fiscal year 2010 expenses, but in accordance with Generally Accepted Accounting Principles did not restate net revenue for that year. If the payments initially had been recorded as expenses in 2010, net revenue would have decreased and Westlands' debt service coverage ratio for 2010 would have been 0.73 rather than 1.25 (excluding the impact of the 2010 accounting transactions described above).

19. Westlands disclosed this prior period adjustment in a note to its audited financial statements for fiscal year 2012, which were appended to the Official Statement for the 2012 Bonds. However, Westlands did not correct the coverage ratios reported in the Historic Operating Results table for 2010 to account for the adjustment.

20. Westlands did not consider in 2012 whether the debt service coverage ratio reported for 2010 should have been revised as a result of the prior period adjustment. Ciapponi understood that, if the payments made to the USBR in 2010 had been treated in 2010 as an expense, the net revenue for that year would have been reduced, but he did not consider whether it would have affected the 2010 debt service ratio. Similarly, Birmingham was aware of the adjustment but he did not consider its effect on the 2010 debt service ratio.

The Official Statement for the 2012 Bonds Contained False and Misleading Statements Concerning the 2010 Debt Service Coverage Ratio

21. The Official Statement for the 2012 Bonds was false and misleading because it represented that Westlands' debt service coverage ratio for 2010 was 1.25 and, therefore, that Westland had complied with its covenants to fix water rates at levels reasonably expected to yield a debt service coverage ratio of 1.25. Westlands did not disclose that the ratio was met only because of the extraordinary transactions undertaken in 2010 to create additional purported revenue, nor did it disclose the effect the 2012 prior period adjustment would have had on the debt service coverage ratio for 2010. Had Westlands disclosed in the Official Statement the combined effect of both the 2010 transactions and the 2012 prior period adjustment, it would have reported its debt service coverage ratio for 2010 as 0.11— less than 10% of what was required. In addition, the failure to disclose the nature of the 2010 and 2012 transactions in the Official Statement masked the fact that Westlands had experienced a significant drop in net revenue in 2010.

22. The dramatic drop in Westlands' 2010 net revenue, its negative effect on the debt service coverage ratio for that year, and the effect of the 2012 prior period adjustment on the 2010 debt service coverage ratio, would have been material to investors in the 2012 Bonds.

Birmingham and Ciapponi Certified the Accuracy of the Official Statement on Behalf of Westlands

23. Both Birmingham and Ciapponi were involved in the issuance of the 2012 Bonds and the Official Statement. On behalf of Westlands, both Birmingham and Ciapponi signed the 2012 Bond Purchase Contract with the underwriter. As part of that contract, they certified to the underwriter that the Preliminary Official Statement and the Official Statement "contain no

misstatement of any material fact and do not omit any statement necessary to make the statements contained therein, in light of the circumstances in which such statements were made, not misleading.” Birmingham also made a similar representation in the Closing Certificate he signed on behalf of Westlands.

24. Birmingham received drafts of the Official Statement for the 2012 Bonds. He was aware of the extraordinary 2010 transactions Westlands used to record revenue solely to achieve a 1.25 debt service coverage ratio without raising rates or other charges, but did not take any steps to disclose their effect on the 2010 debt service coverage ratio reported in the Official Statement. Similarly, despite being aware that the 2012 prior period adjustment affected Westland’s net revenue for 2010, Birmingham did not consider whether the 2010 debt service coverage ratio reported in the Official Statement should have been revised.

25. Ciapponi reviewed each draft of the Official Statement as well as the final version. He was aware of the extraordinary 2010 transactions Westlands used to record revenue in order to meet the debt service coverage ratio, but did not take any steps to disclose their effect on the 2010 debt service coverage ratio which was reported in the Official Statement. Similarly, despite being aware that the 2012 prior period adjustment affected Westland’s net revenue for 2010, he did not consider whether the 2010 debt service coverage ratio reported in the Official Statement should have been revised.

## Legal Discussion

### Respondents’ Violations

26. Section 17(a)(2) of the Securities Act makes it unlawful “in the offer or sale of any securities . . . directly or indirectly . . . to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” 15 U.S.C. § 77q(a)(2) (2012). Negligence is sufficient to establish a violation of Section 17(a)(2) and no finding of scienter is required. *See Aaron v. SEC*, 446 U.S. 680, 696-97 (1980). The Commission has held that the “knew or should have known” standard is appropriate to establish negligence. *See KPMG, LLP v. SEC*, 289 F.3d 109, 120 (D.C. Cir. 2002). A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

27. The Commission may institute cease-and-desist proceedings against any person held to be a cause of violations of the federal securities laws due to acts or omissions such person knew or should have known would contribute to the violation. *See Valicenti Advisory Servs., Inc.*, Inv. Advisors Act Rel. No. 1774, 1998 SEC LEXIS 2497, at \*16, n.11 (Nov. 18, 1998), 53 S.E.C. 1033, 1040 n.11 (Nov. 18, 1998), *aff’d*, *Valicenti Advisory Servs., Inc. v. SEC*, 198 F.3d 62 (2d Cir. 1999). Negligence is sufficient to establish a violation for causing the primary violation. *See KPMG Peat Marwick L.L.P.*, Exchange Act Rel. No. 43862, 2001 SEC LEXIS 98, at \*102 (Jan. 19, 2001), 54 S.E.C. 1135, 1185, *aff’d*, 289 F.3d 109 (D.C. Cir. 2002).



28. Birmingham and Ciapponi each knew, or should have known, that Westlands' revenue and debt service coverage ratio for 2010 as reported in the Official Statement for the 2012 Bonds were misrepresented as a result of the extraordinary transactions recorded in 2010. They were also negligent for failing to consider the effect of the 2012 prior period adjustment on the revenue and the debt service coverage ratio calculation that was reported in the Official Statement for the 2012 Bonds. The negligent conduct of Birmingham and Ciapponi is imputed to Westlands.

29. As a result of the conduct described herein, Westlands violated Section 17(a)(2) of the Securities Act and Birmingham and Ciapponi caused Westlands' violations.

### **Cooperation and Remedial Efforts**

30. In determining to accept Respondents' offers, the Commission considered the Respondents' cooperation and prompt remedial actions, including the development of written financial disclosures policies, and staff training related to Westlands' debt offerings.

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act, Respondents cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

B. Within ten (10) days of the entry of this Order, Westlands shall pay a civil money penalty in the amount of \$125,000 and Birmingham shall pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Ciapponi shall pay a civil money penalty in the amount of \$20,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made by Ciapponi in the following installments: \$10,000 due ten (10) days from the date of the Order, and \$10,000 due twelve (12) months from the date of the Order. If any payment from Ciapponi is not made by the date the payment is required by this Order, the entire outstanding balance of his civil penalty, plus any additional interest accrued pursuant to 31 U.S.C. § 3717, shall be due and payable immediately, without further application. Payment by the Respondents must be made in one of the following ways:

- (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

- (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Westlands, Birmingham, or Ciapponi, respectively, as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to LeeAnn Ghazil Gaunt, Chief, Municipal Securities and Public Pensions Unit, Securities and Exchange Commission, 33 Arch Street, 23rd Floor, Boston, MA 02110-1424.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

**V.**

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S. C. §523, that the findings in the Order are true and admitted by Respondents Birmingham and Ciapponi, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents Birmingham and Ciapponi under the Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondents Birmingham and Ciapponi of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields  
Secretary

**EXHIBIT 6**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE CALIFORNIA NATURAL  
RESOURCES AGENCY, *et al.*,

Plaintiffs,

v.

WILBUR ROSS, *et al.*,

Defendants.

No. 1:20-CV-00426-DAD-EPG

ORDER GRANTING MOTION FOR  
PRELIMINARY INJUNCTION

(Doc. No. 54)

PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS, *et al.*,

Plaintiffs,

v.

WILBUR ROSS, *et al.*,

Defendants.

No. 1:20-CV-00431-DAD-EPG

ORDER GRANTING IN PART AND  
DENYING IN PART AS MOOT  
MOTION FOR PRELIMINARY  
INJUNCTION AND HOLDING  
CERTAIN ISSUES IN ABEYANCE

(Doc. No. 81.)

**INTRODUCTION**

This order addresses motions for preliminary injunction filed in two largely overlapping cases: *California Natural Resources Agency v. Ross*, No. 1:20-CV-00426-DAD-EPG (*CNRA*), and *Pacific Coast Federation of Fishermen's Associations v. Ross*, 1:20-CV-00431-DAD-EPG

1 (PCFFA). In *CNRA*, plaintiffs are the People of the State of California, California’s Natural  
2 Resources Agency, and California’s Environmental Protection Agency (collectively,  
3 “California”). In *PCFFA*, plaintiffs are a coalition of six environmental organizations led by  
4 PCFFA (collectively, “PCFFA”).

5 Both sets of plaintiffs bring claims against the National Marine Fisheries Service (NMFS),  
6 the U.S. Fish and Wildlife Service (FWS), the U.S. Bureau of Reclamation (Reclamation), and  
7 various official representatives of those agencies. (*CNRA*, Doc. No. 51, First Amended  
8 Complaint (FAC); *PCFFA*, Doc. No. 52, FAC.) California’s first and second claims for relief in  
9 *CNRA* challenge the adoption by NMFS and FWS, respectively, of a pair of “biological opinions”  
10 (BiOps) issued in 2019 pursuant to the Endangered Species Act (ESA), 16 U.S.C § 1531 *et seq.*,  
11 regarding the impact on various ESA-listed species of implementing Reclamation’s updated Plan  
12 for the long-term operation of the Central Valley Project (CVP) and the State Water Project  
13 (SWP) (collectively, “Water Projects” “Plan” or “Proposed Action”). More specifically, in its  
14 first and second claims for relief California alleges that NMFS and FWS violated the  
15 Administrative Procedure Act (APA), 5 U.S.C. § 706, in various ways by concluding that the  
16 Water Projects would not jeopardize the continued existence of the ESA-listed species addressed  
17 in each biological opinion. California also brings claims against Reclamation under the ESA  
18 (third claim for relief) for unlawfully relying on the 2019 BiOps in formally adopting and  
19 implementing the Proposed Action, and the National Environmental Policy Act (NEPA), 42  
20 U.S.C. § 4321 *et seq.*, (fourth claim for relief). Finally, California alleges in its fifth claim for  
21 relief that Reclamation has violated the APA by failing to comply with the California Endangered  
22 Species Act (CESA), which compliance California alleges is required by various provisions of  
23 federal law. PCFFA’s claims are largely identical to California’s, although its complaint does not  
24 include a CESA-based claim. (*PCFFA*, Doc. No. 52, First Amended Complaint.)

25 On March 25, 2020, these cases were transferred to this district from the U.S. District  
26 Court for the Northern District of California in light of related cases already pending before the  
27 undersigned. (*CNRA*, Doc. No. 26; *PCFFA*, Doc. No. 112.)

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1 Now pending before the court are inter-related and overlapping motions for preliminary  
2 injunction in both cases. (*PCFFA*, Doc. No. 81 (filed March 5, 2019); *CNRA*, Doc. No. 54 (filed  
3 April 21, 2019).) The briefs, declarations, and attachments submitted in connection with these  
4 pending motions make up a lengthy and complex record. *PCFFA* and California have urged the  
5 court to act expeditiously before certain events take place in May. Accordingly, the court  
6 accelerated the briefing schedule where necessary and set a hearing on the pending motions for  
7 May 7, 2020. All parties made appearances through counsel at an all-day videoconference  
8 hearing on that date, as stated on the record. (*See PCFFA*, Doc. No. 167; *CNRA*, Doc. No. 99).  
9 Thereafter, the parties submitted a small number of additional documents referenced at the  
10 hearing, which the court has also reviewed.

11 *PCFFA* requests that the court issue a broad preliminary injunction order “temporarily  
12 setting aside” the 2019 BiOps and prohibiting Federal Defendants from implementing or taking  
13 any actions in reliance on those BiOps, including prohibiting Reclamation from implementing the  
14 Proposed Action in reliance on those BiOps. (*PCFFA*, Doc. No. 81-1 at 2–3.) *PCFFA* also has  
15 requested that the court order Federal Defendants to instead adhere to the **previous** operational  
16 regime for the Water Projects authorized pursuant to previously-controlling BiOps issued in 2008  
17 and 2009 by FWS and NMFS, respectively, until this court can resolve the merits of *PCFFA*’s  
18 claims asserted in the pending action. (*Id.* at 2.) *PCFFA*’s request was accompanied by extensive  
19 and wide-ranging briefing challenging numerous aspects of the Proposed Action and the 2019  
20 BiOps, focusing on issues related to operations at the Water Projects’ export pumping facilities in  
21 the southern portion of the Sacramento-San Joaquin Delta (Delta) as well as instream temperature  
22 management planning and protocols for Shasta Dam on the Upper Sacramento River and New  
23 Melones Reservoir on the Stanislaus River. (*See generally PCFFA*, Doc. No. 86.) The record  
24 presented by *PCFFA*, Federal Defendants, and Defendant Intervenors in *PCFFA* in connection  
25 with the pending motions also contains extensive information addressing how the planned  
26 operations may, or may not, harm ESA-listed winter-run Chinook salmon (winter-run), spring-run  
27 Chinook salmon (spring-run), California Central Valley steelhead (CCV steelhead), and Delta  
28 smelt.

1 California's motion for preliminary injunction is more narrowly focused on the period  
2 from now until May 31, 2020. It requests that the current operating regime (i.e., the Proposed  
3 Action as approved by the 2019 BiOps) be enjoined from the date of this court's order through  
4 and including May 31, 2020, "to the extent that operation is inconsistent with the requirement in  
5 ***Reasonable and Prudent Alternative Action IV.2.1***," which was contained within NMFS's 2009  
6 BiOp (2009 NMFS BiOp). (CNRA, Doc. No. 60 at 7–8.) (emphasis added). The emphasized text  
7 requests imposition of one aspect of the 2009 NMFS BiOp that was not carried forward into the  
8 2019 NMFS BiOp: a restriction on the amount of exports permitted at the CVP and SWP  
9 pumping plants in the South Delta that operates by imposing an inflow to export ratio, with the  
10 inflow numerator based upon flow in the San Joaquin River measured at Vernalis. California's  
11 motion focuses on harm during this narrower period to ESA-listed Delta smelt and CCV  
12 steelhead, as well as to CESA-listed Longfin smelt. (*See generally* CNRA, Doc. No. 54.)

13 These requests for preliminary injunctive relief are not mutually exclusive, since the  
14 broader injunction sought by PCFFA's motion encompasses the relief requested by California.

15 Having considered the papers filed thus far and the parties' arguments, for the reasons  
16 explained below, the court will: (a) grants plaintiffs' joint request to enjoin the Proposed  
17 Action's export operations in the South Delta and reinstate RPA Action IV.2.1 from the 2009  
18 NMFS BiOp from the date of this order up to and through May 31, 2020, on the specific ground  
19 that operations carried out pursuant to the Proposed Action will irreparably harm threatened CCV  
20 steelhead; (b) deny California's motion in all other respects as having been rendered moot by this  
21 order; (c) deny PCFFA's request to enjoin operations on the Stanislaus River as moot; and  
22 (d) hold all other aspects of PCFFA's motion in abeyance with the understanding that the court  
23 intends to issue a separate order addressing those remaining requests for injunctive relief in the  
24 near future.

#### 25 STANDARD OF DECISION

26 "The proper legal standard for preliminary injunctive relief requires a party to demonstrate  
27 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
28 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction



1 is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting  
2 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also Ctr. for Food Safety v.*  
3 *Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (“After *Winter*, ‘plaintiffs must establish that  
4 irreparable harm is likely, not just possible, in order to obtain a preliminary injunction.”); *Am.*  
5 *Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth  
6 Circuit has also held that an “injunction is appropriate when a plaintiff demonstrates . . . that  
7 serious questions going to the merits were raised and the balance of hardships tips sharply in the  
8 plaintiff’s favor.” *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011)  
9 (internal quotation and citation omitted).<sup>1</sup> For the purposes of injunctive relief,

10 “serious questions” refers to questions which cannot be resolved one  
11 way or the other at the hearing on the injunction and as to which the  
12 court perceives a need to preserve the *status quo* lest one side prevent  
13 resolution of the questions or execution of any judgment by altering  
the status quo. Serious questions are substantial, difficult and  
doubtful, as to make them a fair ground for litigation and thus for  
more deliberative investigation.

14 *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quotations marks and  
15 citation omitted).

16 The party seeking an injunction bears the burden of proving these elements. *Klein v. City*  
17 *of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009); *see also Caribbean Marine Servs. Co. v.*  
18 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted) (“A plaintiff must do more than  
19 merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate  
20 immediate threatened injury as a prerequisite to preliminary injunctive relief.”). Finally, an  
21 injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the  
22 plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

23 An injunction must be narrowly tailored to avoid the irreparable identified. *Nat’l Wildlife*  
24 *Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 823 (9th Cir. 2018). “There must be a

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26 <sup>1</sup> The Ninth Circuit has found that this “serious question” version of the circuit’s sliding scale  
27 approach survives “when applied as part of the four-element *Winter* test.” *All. for the Wild*  
28 *Rockies*, 632 F.3d at 1134. “That is, ‘serious questions going to the merits’ and a balance of  
hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction,  
so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the  
injunction is in the public interest.” *Id.* at 1135.

1 sufficient causal connection between the alleged irreparable harm and the activity to be enjoined,  
2 but a plaintiff need not further show that the action sought to be enjoined is the exclusive cause of  
3 the injury.” *Id.* (internal quotation and citation omitted). Moreover, “[i]t is not an abuse of  
4 discretion for a court to issue an injunction that does not completely prevent the irreparable harm  
5 that it identifies.” *Id.*

## 6 APPLICABLE STATUTORY STANDARDS

### 7 A. APA

8 Under the APA, a district court can “set aside only agency actions that are ‘arbitrary,  
9 capricious, an abuse of discretion, or otherwise not in accordance with law.’” *The Lands Council*  
10 *v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (citing 5 U.S.C. § 706(2)(A)), *overruled*  
11 *on other grounds by Winter*, 555 U.S. 7; *see also Earth Island Inst. v. Carlton*, 626 F.3d 462, 468  
12 (9th Cir. 2010). An agency’s “determination in an area involving a ‘high level of technical  
13 expertise’” is to be afforded deference. *McNair*, 537 F.3d at 993. The district court’s role “is  
14 simply to ensure that the [agency] made no ‘clear error of judgment’ that would render its action  
15 ‘arbitrary and capricious.’” *Id.* (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).  
16 “Factual determinations must be supported by substantial evidence,” and “[t]he arbitrary and  
17 capricious standard requires ‘a rational connection between facts found and conclusions made.’”  
18 *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755,  
19 759–60 (9th Cir. 2014) (internal citations omitted).

20 This requires the court to ensure that the agency has not, for instance,  
21 “relied on factors which Congress has not intended it to consider,  
22 entirely failed to consider an important aspect of the problem, offered  
23 an explanation for its decision that runs counter to the evidence  
before the agency, or [an explanation that] is so implausible that it  
could not be ascribed to a difference in view or the product of agency  
expertise.”

24 *McNair*, 537 F.3d at 987 (citing *Motor Vehicle Mfrs. Assn., Inc. v. State Farm Mut. Auto. Ins.*  
25 *Co.*, 463 U.S. 29, 43 (1983)).

### 26 B. ESA

27 “Under the ESA, the Secretary of the Interior and the Secretary of Commerce are charged  
28 with identifying threatened and endangered species and designating critical habitats for those

1 species.” *Nat. Res. Def. Council v. Jewell*, 749 F.3d 776, 779 (9th Cir. 2014) (*NRDC v. Jewell*)  
2 (citing 16 U.S.C. § 1533). FWS and NMFS administer the ESA on behalf of the Departments of  
3 the Interior and Commerce, respectively. *See* 50 C.F.R. §§ 17.11, 222.101(a), 223.102,  
4 402.01(b). Most pertinent to the present motion is Section 7 of the ESA (Section 7). 16 U.S.C.  
5 § 1536. Section 7(a)(2) imposes a procedural duty on the federal agencies to consult with the  
6 FWS or NMFS, depending on the protected species,<sup>2</sup> to “insure that any action authorized,  
7 funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of  
8 any endangered species or threatened species or result in the destruction or adverse modification”  
9 of critical habitats of listed species. 16 U.S.C. § 1536(a)(2). An agency “action” is defined to  
10 mean all activities carried out by federal agencies, including, among other things, the granting of  
11 licenses and permits. *See* 50 C.F.R. § 402.02. “If a contemplated agency action may affect a  
12 listed species, then the agency must consult with the Secretary of the Interior, either formally or  
13 informally.” *Am. Rivers v. NMFS*, 126 F.3d 1118, 1122 (9th Cir. 1997).

14 Formal consultation results in the issuance of a BiOp by the relevant wildlife agency  
15 (FWS or NMFS). *See* 16 U.S.C. § 1536(b). If the BiOp concludes that the proposed action  
16 would jeopardize the species or destroy or adversely modify critical habitat, *see id.* § 1536(a)(2),  
17 then the action may not go forward unless the wildlife agency can suggest a “reasonable and  
18 prudent alternative[.]” (RPA) that avoids jeopardy, destruction, or adverse modification. *Id.*  
19 § 1536(b)(3)(A). If a BiOp concludes that the proposed action (or the action implemented in  
20 conjunction with actions described in the RPA) will cause incidental taking of protected species,  
21 but that despite this taking, the action will not jeopardize the species or threaten critical habitat,  
22 the wildlife agency

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25 <sup>2</sup> Generally, FWS has jurisdiction over species of fish that either (1) spend the major portion of  
26 their life in fresh water, or (2) spend part of their lives in estuarine waters, if the remaining time is  
27 spent in fresh water. *See Cal. State Grange v. Nat’l Marine Fisheries Serv.*, 620 F. Supp. 2d  
28 1111, 1120 n.1 (E.D. Cal. 2008), *as corrected* (Oct. 31, 2008). NMFS is granted jurisdiction over  
fish species that (1) spend the major portion of their life in ocean water, or (2) spend part of their  
lives in estuarine waters, if the remaining portion is spent in ocean water. *Id.* FWS exercises  
jurisdiction over the delta smelt; NMFS exercises jurisdiction over the winter-run and spring-run  
and the CCV steelhead.

1 shall provide the Federal agency and the applicant concerned, if any  
2 with a written statement that—

3 (i) specifies the impact of such incidental taking on the species,

4 (ii) specifies those reasonable and prudent measures that the  
5 Secretary considers necessary or appropriate to minimize such  
6 impact,

7 (iii) . . . , and

8 (iv) sets forth the terms and conditions (including, but not limited to,  
9 reporting requirements) that must be complied with by the Federal  
10 agency or applicant (if any), or both, to implement the measures  
11 specified under clauses (ii) and (iii).

12 *Id.* § 1536(b)(4). This required written statement, with its “reasonable and prudent measures”  
13 “RPM” and associated terms and conditions, is referred to as an “Incidental Take Statement”  
14 (ITS), which, if followed, exempts the action agency from the prohibition on takings found in  
15 Section 9 of the ESA. *Id.* § 1536(o); *Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin.*,  
16 175 F.3d 1156, 1159 (9th Cir. 1999).

## 17 **FACTUAL BACKGROUND**

### 18 **A. The Central Valley Project and the State Water Project**

19 The CVP and the SWP, “operated respectively by [Reclamation] and the State of  
20 California, are perhaps the two largest and most important water projects in the United States.”  
21 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 592 (9th Cir. 2014) (*San Luis v.*  
22 *Jewell*). “These combined projects supply water originating in northern California to more than  
23 20,000,000 agricultural and domestic consumers in central and southern California.” *Id.* As one  
24 part of CVP operations, Reclamation releases water stored in CVP reservoirs in northern  
25 California, which then flows down the Sacramento River to the Delta. *See id.* at 594. Pumping  
26 plants in the southern region of the Delta (South Delta) then divert the water to various users  
27 south of the Delta. *See id.* at 594–95.

28 “Although the [Water] Projects provide substantial benefits to people and to state  
agriculture, they arguably harm species native to the Delta by modifying those species’ natural  
habitats.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 986 (9th Cir. 2014)  
(*San Luis v. Locke*). This is because the Water Projects pump fresh water out of the “Old and

1 Middle River” (OMR) branches of the San Joaquin River in volumes sufficient to reverse the  
2 flow in the OMR. *Id.* at 996. “Absent pumping, the rivers would flow north into the Delta.  
3 Under pumping operations, the rivers flow south to the [CVP’s] Jones and [SWP’s] Banks  
4 pumping plants.” *Id.* Listed species—particularly juveniles—are caught in the negative current  
5 and drawn towards the pumping facilities. *Id.* Some of these fish are “salvaged” at the pumps,  
6 “meaning they are diverted from the fatal pumping plants to fish salvage facilities and into tanks  
7 where they are counted, measured, loaded into trucks, driven north, and dumped back into the  
8 Delta.” *Id.* But even if salvaged, fish that are drawn towards the pumps by the “negative OMR”  
9 flow have a lower likelihood of surviving outmigration than their counterpoints that avoid  
10 “entrainment”<sup>3</sup> by Water Project operations. *Id.*

11 The Delta smelt (*Hypomesus transpacificus*) is a “small, two-to-three inch species of fish  
12 endemic to the [Delta].” *San Luis v. Jewell*, 757 F.3d at 595. In 1993, FWS concluded the delta  
13 smelt’s population had declined by ninety percent over the previous twenty years and listed it as a  
14 “threatened” species under the ESA. Determination of Threatened Status for the Delta Smelt, 58  
15 Fed. Reg. 12,854, 12,855–56 (Mar. 5, 1993). FWS further determined that “Delta water  
16 diversions,” including those resulting from operations of the CVP and SWP, are a significant  
17 “synergistic cause[ ]” of the decline in the delta smelt population. *Id.* at 12,859.

18 Longfin smelt (*Spirinchus thaleichthys*) “range from the fresh waters of the Delta during  
19 their spawning season from January through March down to the coastal waters outside the Golden  
20 Gate.” (CNRA, Doc. No. 55, Declaration of Bruce Herbold (Herbold Decl.) at ¶ 31.) Longfin  
21 smelt “generally live for two years and have almost always been more abundant than Delta  
22 Smelt.” (*Id.*) Nonetheless, Longfin smelt populations “have been in severe decline since the  
23 drought of the mid-1980s.” (*Id.* at ¶ 32.) Longfin smelt are listed under CESA but not the ESA.  
24 (*See id.* at ¶ 19.)

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26 \_\_\_\_\_  
27 <sup>3</sup> As the court in *San Luis v. Locke* roughly described “[a] fish is ‘entrained’ when it follows  
28 diverted water rather than the natural course of a river, stream, pond, or lake. The danger with  
entrainment is that fish can become stranded in irrigation canals or killed when they are trapped  
in pumps.” 776 F.3d at 996.

1 The winter-run and spring-run (*Oncorhynchus tshawytscha*), and CCV steelhead  
2 (*Oncorhynchus mykiss*), are “anadromous” fish, meaning that they live most of their lives in salt  
3 water, but “are born, mature, lay eggs, and often die in inland freshwater lakes and rivers.” *San*  
4 *Luis v. Locke*, 776 F.3d 986–87.

5 After they grow from fry (baby fish) to smolts (juvenile fish) in fresh  
6 water, anadromous salmon outmigrate through rivers and deltas into  
7 the oceans and seas where they will spend most of their adult lives.  
8 When it is time to reproduce, these salmon migrate back through the  
9 deltas to the rivers and lakes in which they were born to lay eggs.  
10 During this migration, salmon must pass impediments in inland  
11 rivers such as locks, dams, channels, and pumps.

12 *Id.* at 987. Notable for purposes of the pending motions, NMFS divides CCV steelhead into three  
13 “diversity groups” for management purposes: the basalt and porous lava diversity group, the  
14 northern Sierra Nevada diversity group, and the southern Sierra Nevada diversity group. (*See*  
15 *PCFFA*, Doc. No. 85-2 (2019 NMFS BiOp) at 769.)

16 Because the remainder of the discussion in this Order focuses on impacts to CCV  
17 steelhead, the court will briefly review only the development of regulatory regimes designed to  
18 protect the listed salmonid species in the region impacted by the Water Projects, and will largely  
19 skip over the roughly parallel developments related to the smelt species.

#### 20 **B. 2004 Operations and Criteria Plan & Resulting BiOps**

21 On June 30, 2004, Reclamation prepared an operational plan, dubbed the “Operations  
22 Criteria and Plan” (OCAP), to provide, among other things, a basis for renewing various long-  
23 term water contracts. *NRDC v. Jewell*, 749 F.3d at 780. Pursuant to Section 7, Reclamation  
24 initiated consultation with NMFS over the impact of the 2004 OCAP on listed species under  
25 NMFS’s jurisdiction. NMFS issued an initial “no jeopardy” BiOp in October 2004. (*See* 2019  
26 NMFS BiOp at 10 (describing consultation history).) That BiOp became the subject of numerous  
27 lawsuits, ultimately resulting in a finding that the October 2004 no jeopardy BiOp was unlawful.  
28 *Pac. Coast Fed’n of Fishermen’s Ass’n v. Gutierrez*, 606 F. Supp. 2d 1122 (E.D. Cal. 2008)  
(*PCFFA v. Gutierrez*).

Starting in 2006, NMFS and Reclamation engaged in renewed consultation. *See San Luis*  
*v. Locke*, 776 F.3d at 988. On June 4, 2009, NMFS issued, and Reclamation accepted, a BiOp



1 **C. Reconsultation Request & Issuance of New BiOps & NEPA Document**

2 In 2016, after years of drought and concerns over extremely low population numbers of  
3 winter-run, FWS and NMFS reinitiated consultation under the ESA. (*PCFFA*, FAC at ¶ 6; *see*  
4 *also PCFFA*, Doc. No. 86-4 (8/2/16 reinitiation request letter from NMFS to Reclamation).) In  
5 January 2019, Reclamation issued a biological assessment (BA)<sup>4</sup> for the Proposed Action. (*See*  
6 2019 NMFS BiOp at 12.) Pursuant to the ESA, Reclamation again consulted with FWS and  
7 NMFS. (*See id.*)

8 In July 2019, NMFS prepared a draft BiOp in which the agency concluded that, absent  
9 constraints, the Reclamation’s proposed plan as set forth in the January 2019 BA was likely to  
10 jeopardize the continued existence of and destroy or adversely modify the critical habitat of the  
11 listed salmonid species. (*PCFFA*, Doc. No. 85-13 (NMFS July 2019 Draft BiOp).) Thereafter,  
12 Reclamation and DWR incorporated changes to the proposed plan, including additional  
13 commitments to address impacts to listed species. (*See* 2019 NMFS BiOp at 12–14.)

14 A few months later, however, on October 21, 2019, Reclamation issued a revised, Final  
15 BA describing a revised operating plan for the Water Projects (*PCFFA*, Doc. No. 85-12 (BA)),  
16 which constituted the final Proposed Action. On the same day, NMFS issued a BiOp that  
17 concluded Reclamation’s revised proposed plan was **not** likely to jeopardize the existence of  
18 winter-run and spring-run salmon and Central Valley steelhead beyond that permitted under its  
19 2009 opinion. (*See generally* 2019 NMFS BiOp.) Following a very similar consultation  
20 pathway, FWS issued an opinion that Reclamation’s proposed plan was not likely to jeopardize  
21 the continued existence of the Delta smelt or modify its habitat. (*PCFFA*, Doc. No. 85-1 (2019

22 \_\_\_\_\_  
23 <sup>4</sup> Under the ESA, an agency proposing to take an action (often referred to as the “action agency”)  
24 must first inquire of FWS and/or NMFS whether any threatened or endangered species “may be  
25 present” in the area of the proposed action. *See* 16 U.S.C. § 1536(c)(1). If endangered species  
26 may be present, the action agency may prepare a BA to determine whether such species “is likely  
27 to be affected” by the action. *Id.*; 50 C.F.R. § 402.12(b). “An agency may avoid the consultation  
28 requirement only if it determines that its action will have ‘no effect’ on a listed species or critical  
habitat.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc)  
(internal citation omitted). If the BA determines that a threatened or endangered species is “likely  
to be affected,” the agency must formally consult with FWS and/or NMFS. *See* 16 U.S.C.  
§ 1536(a)(2); 50 C.F.R. 402.14.



1 FWS BiOp.) Having found no jeopardy, the BiOps imposed no additional protective conditions  
2 on the Proposed Action, which was allowed to proceed as described in Reclamation's Final BA.<sup>5</sup>  
3 On February 18, 2020, Reclamation issued its Record of Decision on the Coordinated Long-Term  
4 Operation of the Central Valley Project and State Water Project (ROD), thereby approving the  
5 Proposed Action. (*PCFFA*, Doc. No. 85-14 (ROD)).

6 These lawsuits followed close on the heels of the issuance of the challenged BiOps and  
7 ROD.

## 8 DISCUSSION

9 As the court explained at the May 7, 2020 hearing, it has divided its evaluation of the  
10 pending motions according to the broad geographic regions addressed therein. Roughly speaking,  
11 those regions are: (1) the upper Sacramento River below Shasta Dam; (2) the Stanislaus River  
12 below New Melones Dam; and (3) the Delta. The court will soon address the issues raised in  
13 PCFFA's briefs regarding the upper Sacramento River by way of a separate order. The remainder  
14 of this order will address the pending motions with respect to the second and third geographic  
15 areas in turn.

### 16 A. Request for Injunctive Relief Regarding Stanislaus River Operations

17 The briefing submitted in connection with PCFFA's preliminary injunction motion raises  
18 merits challenges to, and discusses the potential harms flowing from, the Proposed Action's  
19 alleged weakening of requirements for minimum Stanislaus River flows below New Melones  
20 Dam. In particular, PCFFA alleges and has attempted to prove that CCV steelhead spawning and  
21 rearing in the Stanislaus will be harmed by reduced releases from New Melones in the coming  
22 weeks and months between now and this court's ruling on the merits of the action. (*See PCFFA*,  
23 Doc. No. 86 at 15.)

24 At the hearing on the pending motions, however, Kristen White, the Operations Manager  
25 of Reclamation's Central Valley Operations Office, forthrightly testified that it is anticipated  
26 operations at New Melones will largely be controlled by factors other than the 2019 NMFS BiOp,  
27

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28 <sup>5</sup> Overlapping with this process, Reclamation conducted a NEPA review. Because that process is not relevant to the resolution of the pending motions, the court does not discuss it in detail here.

1 resulting in flows in May and at least part of June that will be at least as protective for CCV  
2 steelhead as conditions would have been under the 2009 NMFS BiOp. (See May 7, 2020 Rough  
3 Hearing Transcript (Tr.) 125–32.) The court interprets Ms. White’s hearing testimony and related  
4 statements by counsel to be a commitment to meet or exceed instream flows that would have been  
5 provided under the 2009 NMFS BiOp through May and at least a portion of June. Given that  
6 commitment, the court will also accept counsel for PCFFA assurance provided at the hearing (*id.*  
7 at 127:10-14) that this commitment resolves PCFFA’s request for injunctive relief as to Stanislaus  
8 operations, at least through that time period.

9 The court further finds that the evidence presented by PCFFA as to irreparable harm on  
10 the Stanislaus is largely confined to the March through June timeframe. (See *PCFFA*, Doc. No.  
11 82, Declaration of Dr. Jonathan Rosenfeld (Rosenfeld Decl.), at ¶ 128.) The parties have not  
12 highlighted any evidence in the record currently before the court that suggests irreparable harm to  
13 CCV steelhead in the Stanislaus river is likely to occur for the remaining months of this year.  
14 Accordingly, PCFFA’s motion for a preliminary injunction will be denied as moot as to their  
15 assertions regarding instream flow requirements below New Melones Dam. This ruling,  
16 however, will not foreclose any future motion for injunctive relief premised upon a renewed  
17 showing of likely harm.

18 **B. Request for Injunctive Relief Regarding Delta Operations**

19 1. Likelihood of Success Re: ESA Claims Against NMFS

20 The motions of both sets of plaintiffs focus at least in part on impacts to salmonids in the  
21 South Delta. Among many other complaints, plaintiffs assert that operations under the Proposed  
22 Action in April and May of 2020 are not sufficiently protective of the listed salmonids (winter-  
23 run and spring-run Chinook, and/or CCV steelhead)—juveniles of each of which pass through the  
24 Delta during the spring. Plaintiffs emphasize the 2019 NMFS BiOp’s omission of a particular  
25 protective measure required by the 2009 NMFS BiOp. As mentioned, the 2009 NMFS BiOp  
26 imposed limits on exports by way of a requirement that San Joaquin River inflow be balanced  
27 against exports according to pre-determined ratios (I:E Ratio) set according to the category of  
28 water year (designated as critically dry, dry, above normal, or wet). (2009 NMFS BiOp at 644–

1 45.) For a critically dry year, the 2009 NMFS BiOp imposed a ratio of San Joaquin River inflow  
2 to combined exports of 1:1, while in a dry year, the ratio was 2:1, with increasingly large (3:1,  
3 4:1) ratios being imposed as conditions become wetter. (*Id.*) The Ninth Circuit previously  
4 reviewed one specific aspect of this I:E Ratio—the imposition of a 4:1 ratio in wet years—and  
5 found this “conservative threshold” to be “traceable to the record” and therefore within NMFS’s  
6 discretion to implement. *San Luis v. Locke*, 776 F.3d at 1004.

7 The 2019 NMFS BiOp eliminated this requirement, leaving no I:E Ratio in place for April  
8 and May, instead imposing alternative protective measures built into the Proposed Action,  
9 centered in the near term around certain “performance measures.” Of particular importance here  
10 is a provision that limits “losses”<sup>6</sup> at the export facilities in any single year to 90% of the greatest  
11 annual loss recorded since the implementation of the 2009 BiOp (2010 to 2018). (2019 NMFS  
12 BiOp at 528, 534–35.) The “loss” limit for CCV steelhead, calculated based on historically  
13 observed salvage at the export facilities is subdivided into two time periods in order to help  
14 protect the “San Joaquin [River]-origin fish” that make up the southern Sierra diversity group,  
15 resulting in two separate single-year loss thresholds: 1,414 between December 1 and March 31,  
16 and 1,552 between April 1 and June 15. (2019 NMFS BiOp at 534, 547). If in any year, 50%  
17 and 75% of the annual loss thresholds are exceeded, CVP and SWP exports will be managed in  
18 such a way so as to limit OMR reverse flow to -3,500 cubic feet per second (cfs) and -2,500 cfs,  
19 respectively. (*Id.*; see also PCFFA, Doc. No. 130-1, Declaration of Chandra Chilmakuri

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26 <sup>6</sup> “Loss” is a term of art in this context that uses a “methodology for calculating salvage and loss,  
27 based on expansion of observed salvaged fish and using [] current loss multipliers.” (2019 NMFS  
28 BiOp at 507.) The details of the underlying calculations do not appear to be placed at issue by the  
pending motions.

1 (Chilmakuri Decl.), ¶ 32.)<sup>7</sup> In other words, if the loss thresholds are met (i.e., triggered),  
2 Reclamation and DWR will collectively manage export pumping to ensure that reverse flows in  
3 OMR are less negative (i.e., more positive) than -2,500 or -3,500 respectively. In short, if those  
4 management limits are triggered, the hydrodynamic situation in the region of the Delta influenced  
5 by the export pumps would tend to be more natural than it otherwise would be without those  
6 management limits.

7 Plaintiffs vigorously argue that, for a variety of reasons, the replacement of the I:E Ratio  
8 with the performance measures, including the single-year loss thresholds described above, renders  
9 the 2019 NMFS BiOp irrational/arbitrary under the APA. In early April 2020, before briefing on  
10 the pending preliminary injunction motions was complete, PCFFA brought this particular issue  
11 before the court as part of an application for a temporary restraining order (TRO Motion) based  
12 upon information suggesting that, contrary to Federal Defendants' earlier assertions, operations  
13 under the Proposed Action in early April would likely permit export pumping significantly above  
14 and beyond that which would have been permissible had the I:E Ratio been in place. (*See*  
15 *generally PCFFA*, Doc. No. 131.) At issue in the TRO Motion was a very short window of time  
16 between the motion's filing and the imposition on April 10, 2020, of a so-called "pulse flow"  
17 protective action that closely resembles the I:E Ratio. (Tr. 59:8–2.) After a hearing, the court  
18 denied *PCFFA's* TRO Motion, finding that the showing of irreparable harm was insufficient on  
19 the then-presented record, particularly in light of the brief period of time at issue. (*PCFFA*, Doc.  
20 No. 142 at 11 (TRO Order).)

21 ////

22 \_\_\_\_\_  
23 <sup>7</sup> The 2019 NMFS BiOp also imposes a baseline limit, layered on top of the -3,500 and -2,500  
24 cfs limits triggered by the loss thresholds, that prohibits OMR reverse flows from being more  
25 negative than -5,000 cfs. (2019 NMFS BiOp at 16.) Generally, this -5,000 cfs limit operates  
26 from January through June. (*Id.*) But, that -5,000 cfs limit is subject to a potentially large  
27 exception in the form of a provision in the Proposed Action that would allow reverse flows to  
28 exceed -5,000 cfs during certain kinds of storm events. (*Id.* at 16, 60.) Exactly when that  
provision could be invoked is unclear on the present record before the court, although the  
negative OMR limits associated with the single year loss thresholds, if triggered, would preclude  
invocation of the storm event provision. (*Id.* at 479.) The parties discussed the storm event  
provision in their papers and at oral argument on, but the court finds it unnecessary to address this  
matter in detail as its reasoning in resolving the pending motions is grounded elsewhere.

1 Nothing has been presented to the court to cause it to depart from its conclusion expressed  
2 in the TRO Order that plaintiffs have raised serious questions on the merits with respect to the I:E  
3 Ratio issue. The court still believes that the record before it supports, at least preliminarily, a  
4 finding that NMFS's decision to not impose an I:E Ratio going forward amounts to a change of  
5 position that triggers certain obligations under the APA. Specifically, where an agency departs  
6 from its previous findings, the bedrock principle that an agency "must examine the relevant data  
7 and articulate a . . . rational connection between the facts found and the choice made," means that  
8 the agency must examine its own "prior factual findings [and] conclusions," and "'articulate a  
9 satisfactory explanation' when it changes its mind." *Def. of Wildlife v. Zinke*, 856 F.3d 1248,  
10 1262 (9th Cir. 2017) (quoting *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir.  
11 2010)). Here, for the reasons explained below, the court again concludes plaintiffs have raised  
12 serious questions about whether NMFS has articulated a satisfactory explanation for its  
13 dramatically changed approach.<sup>8</sup>

14 NMFS's July 2019 Draft BiOp concluded that the approach advocated in an early version  
15 of the Proposed Action was "considerably less protective" than that contained in the 2009 NMFS  
16 BiOp "which provided substantial export reductions in the April and May periods to protect San  
17 Joaquin River basin CCV steelhead." (Doc. No. 140-3 at 405.) The final 2019 NMFS BiOp  
18 reiterates in various places that the originally-framed Proposed Action would be detrimental to  
19 fish populations. For example, in discussing the results of at least one flow modeling exercise,  
20 NMFS acknowledged that the proposed regulatory regime would result in flows that are "more  
21 negative" than under the 2009 NMFS BiOp which in turn will "be more negative to fish." (2019  
22 NMFS BiOp at 483.) After undergoing revisions, the final version of the Proposed Action

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23  
24 <sup>8</sup> At oral argument on the TRO Motion, counsel for Defendant Intervenors San Luis & Delta  
25 Mendota Water Authority and Westlands Water District suggested, at least indirectly, that this  
26 might not be the appropriate standard to be applied because, here, NMFS has not technically  
27 changed its position. Rather, they suggested, only the Water Project proposed by Reclamation  
28 has changed. As the court noted in its TRO Order, this is a distinction without a difference.  
"Either way, NMFS's obligations under the APA would require it to explain why a protective  
measure it previously thought was crucial enough to impose upon operations is no longer  
necessary either as part of the project itself or as a condition of its implementation." (TRO Order  
at 6 n. 3.)

1 included the performance measures and loss targets described above. Although NMFS leans  
2 heavily on the performance objectives as a mechanism for reaching its “no jeopardy” conclusion  
3 even in light of these recognized negative impacts, it does not appear to be prepared to conclude  
4 those measures are entirely sufficient to make up for the lost ground it acknowledges.

5 Particularly with respect to impacts to San Joaquin-origin CCV steelhead, NMFS has stated:

6 Reclamation’s proposed action could create conditions that would  
7 reduce steelhead survival to Chipps Island<sup>9</sup> for the Southern Sierra  
8 Nevada Diversity Group, further exacerbating the already  
diminished status of this diversity group.

9 During the consultation process, NMFS and Reclamation worked to  
10 develop actions that might *partially offset* the effects to San  
11 Joaquin basin steelhead related to not having [an] I:E ratio or Head  
12 of Old River Barrier in plan. Delta Performance Objectives  
13 including a Cumulative Loss Threshold and a Single-year Loss  
14 Threshold with two time periods (December through March and  
April through June) that are intended to provide protections for both  
San Joaquin basin and Sacramento basin CCV steelhead.  
Reclamation also proposed the CCV steelhead Lifecycle  
Monitoring Program, in part to help improve CCV steelhead  
science [that] can be used to protect San Joaquin Basin steelhead  
and inform actions such as water operations.

15 (2019 NMFS BiOp at 777) (emphasis added). Federal Defendants have directed the court’s  
16 attention to a lengthy section of the 2019 NMFS BiOp that attempts to integrate and synthesize  
17 the impacts of all of the various changes incorporated into the Proposed Action relative to the  
18 2009 NMFS BiOp. (*Id.* at 747–96.) Among other things, the 2019 NMFS BiOp imposes various  
19 conservation measures and limits on negative flows in the Old and Middle River channels of the  
20 San Joaquin River. The court has thoroughly reviewed that entire section of the 2019 NMFS  
21 BiOp with a particular focus on the discussion of CCV steelhead (*id.* at. 769–86), keeping in mind  
22 the deference the court must give the agency’s expert opinion. The key lessons from this review  
23 are as follows:

- 24 • First, as mentioned, the CCV steelhead are divided into three “diversity groups”: the  
25 basalt and porous lava diversity group, the northern Sierra Nevada diversity group, and the  
26 southern Sierra Nevada diversity group. (*Id.* at 769.) Watersheds utilized by the four

27 <sup>9</sup> Chipps Island is a location at the western edge of the Delta; if a juvenile makes it to Chipps  
28 Island, they are considered to have “successfully migrated” past the primary dangers of the Delta.  
(*See* 2019 NMFS BiOp at 149.)

1 diversity groups were prioritized into three categories (Core 1, Core 2 and Core 3). (*Id.* at  
2 777.)

3 Core 1 watersheds possess the known ability or potential to support  
4 a viable population. Core 2 populations meet, or have the potential  
5 to meet, the biological recovery standard for moderate risk of  
6 extinction. Although Core 2 watersheds are lower priority, they  
7 remain important because they provide increased life history  
8 diversity [listed populations] and are likely to buffer against local  
9 catastrophic occurrences that could affect other nearby populations.

10 (*Id.*)

- 11 • Many watersheds in the Central Valley “are experiencing decreased abundance of CCV  
12 steelhead.” While some habitat restoration efforts have helped to some extent,

13 adult numbers are still low, a large percentage of the historical  
14 spawning and rearing habitat is lost or degraded, and smolt  
15 production is dominated by hatchery fish. Many planned restoration  
16 and reintroduction efforts have yet to be implemented or completed.  
17 Most natural origin CCV steelhead populations are not monitored  
18 and may lack the resiliency to persist for protracted periods if  
19 subjected to additional stressors, particularly widespread stressors  
20 such as climate change and drought.

21 (*Id.* at 770.)

- 22 • Among the numerous threats to steelhead is entrainment (*see* note 3 above), which **initial**  
23 modeling expected to be more pronounced in dry years and greatest in April and May:

24 Delta export actions at both State and Federal Facilities can create  
25 near- and far-field effects on emigrating fish in the Delta including  
26 decreased transit times, increase risk of predation and direct salvage  
27 and loss (entrainment) at the facilities . . . . Reclamation proposes to  
28 increase south Delta water exports relative to a current operations  
scenario and results from the [initial modeling] indicate that losses  
of CCV steelhead would increase under the proposed action in the  
winter and spring months. The effects of these changes on the  
relative flow conditions in the Delta are more pronounced in drier  
year types. ***Loss increases are expected to be greatest during April  
and May***, coinciding with the peak of juvenile outmigration of CCV  
steelhead from the San Joaquin Basin.

(*Id.* at 773) (emphasis added) (citations omitted).

- Loss estimates described in the 2019 NMFS BiOp “do not include loss due to [fish  
screening equipment] cleaning, predation observed to occur on the upstream side of the  
trash racks, or far-field predation associated with altered hydrodynamics, and therefore

1 *underestimate mortality* associated with south Delta pumping and fish salvage  
2 operations.” (*Id.* at 774) (emphasis added).

- 3 • In response to initial loss modeling, Reclamation revised its proposed action to include the  
4 cumulative loss thresholds and single year loss thresholds (cumulatively referenced as  
5 “performance objective thresholds”). (*Id.*) In light of these revisions, NMFS concluded:  
6 “While loss is expected to occur under the final proposed action, performance objective  
7 thresholds are expected to limit loss to levels similar [to] what has been observed over the  
8 past 10 years.” (*Id.*) A critical question arises in the context of this conclusion: How can  
9 a “similar” amount of loss be justified in relation to a species that even the BiOp  
10 recognizes has been in decline? Put into legal parlance: How can NMFS reach a “no  
11 jeopardy” conclusion after acknowledging that “similar” impacts will continue given the  
12 evidence of record suggesting that the species cannot withstand those ongoing, “similar”  
13 impacts? For example, the 2019 NMFS BiOp itself indicates that “natural-origin CCV  
14 steelhead have continued to decrease in abundance and in the proportion of natural-origin  
15 to hatchery-origin fish over the past 25 years” and that “the long-term trend remains  
16 negative.” (*Id.* at 108.) In short, according to the 2019 NMFS BiOp itself, the listed  
17 population “is likely to become endangered within the foreseeable future throughout all or  
18 a significant portion of its range.” (*Id.*)
- 19 • The BiOp provides some clues as to NMFS’s reasoning:
- 20 ○ NMFS expects that the operation of the loss thresholds themselves, if they trigger  
21 reductions in the magnitude of reverse OMR flows, “will maintain survival rates of  
22 juvenile CCV steelhead as they move through the Delta.”<sup>10</sup> (*Id.*)

23 <sup>10</sup> NMFS also reasons that “turbidity management” and “managing for Delta Smelt entrainment”  
24 are expected to provide additional protections for CCV steelhead migrating through the Delta.  
25 (*Id.* at 774.) The court does not believe it is necessary or expedient to delve into all of the details  
26 of those issues here, but notes that both sets of plaintiffs have raised significant questions about  
27 the efficacy of the referenced Delta smelt protections. For example, many of those purportedly  
28 protective actions are triggered by (or have exceptions that may be triggered by) the application  
of a life cycle model that had not been finalized by the time the 2019 FWS BiOp issued. (*See*  
PCFFA Doc. No. 85-1 (2019 FWS BiOp) at 42–43, 151). Moreover, the 2019 FWS BiOp relies  
in a number of ways on real-time monitoring even though by all accounts Delta smelt are so rare  
that monitoring is largely unreliable (*id.* at 394 (discussing how it is “impossible to accurately



- 1           ○ Conservation actions are planned as part of the Proposed Action, including actions  
2           specifically targeting CCV steelhead habitat

3           The proposed conservation measures are expected to help CCV  
4           steelhead withstand adverse effects of the proposed action and  
5           improve the science that can be used to protect CCV steelhead from  
6           adverse effects associated with CVP and SWP water operations.  
7           NMFS expects that these measures maintain the abundance, survival  
8           and productivity metrics of populations throughout the action area.

9           (*Id.* at 776.)

- 10          • The BiOp acknowledges that the Proposed Action “will continue or increase juvenile  
11          entrainment in CVP/SWP pumping projects, and is expected to impede migration for adult  
12          and juvenile CCV steelhead from the Sacramento and San Joaquin basins migrating  
13          through the Delta.” (*Id.* at 779). Nonetheless, the BiOp appears to conclude these impacts  
14          are acceptable, in part because the CCV steelhead populations impacted by export  
15          pumping—those in the Stanislaus and Tuolumne Rivers<sup>11</sup>—are considered “Core 2” rather  
16          than “Core 1” populations. NMFS appears to engage in the following rough math  
17          regarding the overall impacts to these types of populations:

18                 In total, three of six Core 1 populations and three of 15 Core 2  
19                 populations are expected to be affected by the CVP. NMFS expects  
20                 that despite ongoing adverse effects of the Central Valley Project on  
21                 individuals and their respective populations, and the continued and  
22                 significant adverse effects that are part of the environmental baseline  
23                 (such as the loss of historical habitat related to the physical presence

24                 quantify and monitor the amount or number of individuals that are expected to be incidentally  
25                 taken” as a result of the Proposed Action”). Even in light of the applicable deferential APA  
26                 standard, the court is hesitant to give significant weight to a reference to this provision, which is  
27                 not formally incorporated into the 2019 NMFS BiOp.

28                 <sup>11</sup> Three populations make up the southern Sierra Nevada diversity group: the Calaveras River  
                  population (Core 1), the Stanislaus River population (Core 2), and the Tuolumne River population  
                  (Core 2). (*See id.* at 780.) At one point in the 2019 NMFS BiOp, NMFS indicates only one of  
                  the three populations that make up this diversity group—the Stanislaus River population—would  
                  be impacted by export pumping. (*Id.* at 779–80.) This seems illogical at first blush because,  
                  while the Calaveras River (and therefore CCV steelhead emerging therefrom) merges with the  
                  San Joaquin River downstream of the export pumping facilities, the Tuolumne River merges with  
                  the San Joaquin upstream of the Stanislaus River. (*Compare* 2019 NMFS BiOp at 3 (Figure 1  
                  (showing CVP dams and facilities), *with id.* at 109 (Figure 24 (showing CCV steelhead critical  
                  habitat and associated waterways); *see also* PCFFA, Doc. No. 82 (Declaration of Jonathan  
                  Rosenfeld) at 41 n. 13 (noting the same)).

1 of Keswick and Shasta Dams), the proposed action includes  
2 conservation measures and other actions intended to maintain the  
3 abundance, productivity, spatial structure, and/or diversity of the  
DPS in those populations potentially impacted by the proposed  
action.

4 (*Id.* at 781.) First, as previously mentioned, *see* note 6 above, it is not clear that this  
5 tallying is correct or meaningful. Second, absent more detailed discussion/justification,  
6 the logic underpinning this reasoning seems to be at odds with other statements made  
7 elsewhere in the 2019 NMFS BiOp, including the general acknowledgement that  
8 “[a]lthough Core 2 watersheds are lower priority, they remain important because they  
9 provide increased life history diversity to the ESU/DPS and are likely to buffer against  
10 local catastrophic occurrences that could affect other nearby populations.” (2019 NMFS  
11 BiOp at 777.)

12 Based upon its review of the 2019 NMFS BiOp, the court concludes that the evidence  
13 before it continues to support the basic findings of the TRO Order regarding plaintiffs’ likelihood  
14 of success on the merits. The record is too mixed for the court to conclude at this time that  
15 plaintiffs are clearly likely to be able to show that NMFS has violated the APA. However,  
16 plaintiffs have certainly raised serious questions as to whether NMFS has justified its changed  
17 position as to elimination of the San Joaquin River I:E Ratio generally. At a bare minimum,  
18 plaintiffs have raised at least the following serious question: Even after Reclamation incorporated  
19 the new performance measures/loss limits into its Proposed Action, NMFS was only able to  
20 conclude that harms would be “similar” to those experienced in the past. Given that it appears to  
21 be undisputed that CCV steelhead are declining, the court has serious concerns as to whether this  
22 reasoning satisfies NMFS’s obligations under the ESA to evaluate whether the Proposed Action  
23 would jeopardize the species or destroy or adversely modify critical habitat. 16 U.S.C.  
24 § 1536(a)(2). These concerns are “substantial, difficult and doubtful,” so as to “make them a fair  
25 ground for litigation and thus for more deliberative investigation,” and thereby constitute “serious  
26 questions” on the merits established by plaintiffs. *Republic of the Philippines*, 862 F.2d at 1362.

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1           2.     Likelihood of Success Re: ESA Claims Against Reclamation

2           Because the requested injunctive relief would apply directly to Reclamation, the court  
3 finds it necessary to also address, briefly, plaintiffs’ associated ESA claims against Reclamation.

4                     a.   *Threshold Jurisdictional Challenge*

5           The ESA contains a citizen suit provision that permits “any person” to commence a civil  
6 action to, among other things, “enjoin any person, including the United States and any other  
7 governmental instrumentality or agency (to the extent permitted by the Eleventh Amendment to  
8 the Constitution), who is alleged to be in violation of any provision of this chapter or regulation  
9 issued under the authority thereof.” 16 U.S.C. § 1540(g). The ESA’s citizen suit provision  
10 contains a requirement that notice be provided to the alleged violator (e.g., Reclamation), as well  
11 as to the Secretary of the Interior and/or Commerce, sixty days prior to the filing of any citizen  
12 suit. *Id.* § 1540(g)(2)(A)(i).

13           Here, PCFFA provided a notice of intent to sue on November 23, 2019, to all the  
14 appropriate persons/agencies. (*PCFFA*, Doc. No. 52-1.) Although the notice was sent after the  
15 2019 BiOps were adopted by NMFS and FWS, on October 21, 2019, the notice was sent before  
16 Reclamation formally decided to adopt the terms and conditions contained within those BiOps, a  
17 determination Reclamation made on February 18, 2020. (*PCFFA*, Doc. No. 85-14.) Federal  
18 Defendants argue here that the court therefore lacks jurisdiction over PCFFA’s third claim for  
19 relief because plaintiffs’ notice was sent too early. (*PCFFA*, Doc. No. 119 at 30.)

20           Although the court’s review of the caselaw suggests Federal Defendants may be  
21 advocating for an overly strict interpretation of this provision, *see All. for the Wild Rockies v. U.S.*  
22 *Dep’t of Agric.*, 772 F.3d 592, 602–03 (9th Cir. 2014) (permitting non-ESA claims to commence  
23 before notice and allowing amendment of a complaint after the notice period expired), the court  
24 finds it unnecessary to resolve this issue. This is because Federal Defendants do not argue that  
25 the court lacks jurisdiction over California’s claim against Reclamation, likely because California  
26 alleges it gave notice to Reclamation on February 20, 2020. (*CNRA*, FAC at ¶ 6.)

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1                   b.       *Merits of ESA Claim Against the Reclamation*

2                   Plaintiffs claim that Reclamation, as the action agency, unjustifiably relied on and  
3                   accepted the 2019 NMFS BiOp. The relevant inquiry is not whether the BiOp itself is flawed, but  
4                   rather whether the action agency’s reliance on the BiOp was arbitrary and capricious. *City of*  
5                   *Tacoma, Wash. v. FERC*, 460 F.3d 53, 75–76 (D.C. Cir. 2006); *see also Defs. of Wildlife v. Zinke*,  
6                   856 F.3d at 1265. While reliance on a “fatally flawed” BiOp is likely to be found arbitrary and  
7                   capricious, “the action agency need not undertake a separate, independent analysis of the issues  
8                   addressed in the BiOp.” *Tacoma*, 460 F.3d at 75 (citing *Aluminum Co. of Am. v. Adm’r*  
9                   *Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999)) (internal quotations omitted).

10                                [If the law required the action agency to undertake an independent  
11                                analysis, then the expertise of the consultant agency would be  
12                                seriously undermined. Yet the action agency must not blindly adopt  
13                                the conclusions of the consultant agency, citing that agency’s  
14                                expertise. Rather, the ultimate responsibility for compliance with the  
15                                ESA falls on the action agency.

16                   *Id.* at 76 (internal citations omitted).

17                   In some circumstances, if a BiOp is based on information, the action agency would only  
18                   be found to have acted unlawfully in relying on that opinion if the challenging party can point to  
19                   “new information—i.e., information the consultant agency did not take into account—which  
20                   challenges the opinion’s conclusions.” *Id.*; *see also PCFFA v. Gutierrez*, 606 F. Supp. 2d at  
21                   1189. Even if that “new information” standard is not triggered, the action agency must, whether  
22                   through the BiOp or some other document, “consider all the relevant factors,” *Ctr. for Biological*  
23                   *Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1157 (D. Ariz. 2002), and “offer [ ] an explanation  
24                   for its decision that is both plausible and internally coherent,” *Defs. of Wildlife v. EPA*, 420 F.3d  
25                   946, 959 (9th Cir. 2005), *reversed on other grounds by Natl. Ass’n of Home Builders v. Defs. of*  
26                   *Wildlife*, 551 U.S. 644 (2007).

27                   Here, PCFFA points out that it provided Reclamation with a detailed notice letter prior to  
28                   Reclamation’s issuance of the ROD (representing Reclamation’s decision to proceed with  
29                   Proposed Action in light of the reasoning in and conclusions of the 2019 BiOps), identifying  
30                   numerous issues with the 2019 NMFS BiOp. Yet, Reclamation took no action to remedy those

1 flaws. Moreover, given the extensive incorporation into the NMFS BiOp of reasoning and  
2 modeling generated by Reclamation and set forth in Reclamation’s BA, it is apparent that  
3 Reclamation “embraced” (if not generated itself) much of the reasoning of the 2019 NMFS BiOp.  
4 *Nat’l Wildlife Fed’n v. NMFS*, No. CV 01-640-RE, 2005 WL 1398223, \*3 (D. Or. June 10, 2005)  
5 (finding the action agency liable where it embraced the same fundamental legal flaws set forth in  
6 the applicable environmental document). For these reasons, the court finds that the serious  
7 questions plaintiffs have raised with respect to NMFS’s liability under Section 7 extend to their  
8 claims challenging Reclamation’s acceptance of the 2019 NMFS BiOp and therefore raise serious  
9 questions as to Reclamation’s liability as well.

10 3. Irreparable Harm

11 a. *Applicable Standard*

12 “Environmental injury, by its nature, can seldom be adequately remedied by money  
13 damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co.*  
14 *v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). In the context of the ESA, “Congress has spoken  
15 in the plainest of words, making it abundantly clear that the balance has been struck in favor of  
16 affording endangered species the highest of priorities . . . .” *Tenn. Valley Auth. v. Hill*, 437 U.S.  
17 153, 194 (1978). To show irreparable harm in the context of the ESA, plaintiffs do not need to  
18 demonstrate an “extinction level” threat. *See Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries*  
19 *Serv.*, 886 F.3d 803, 818–19 (9th Cir. 2018) (*NWF III*) (permitting without specifying that some  
20 “lesser magnitude” of harm will suffice); *see also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries*  
21 *Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (*NWF II*) (finding an agency “may not take action that  
22 deepens [pre-existing/baseline] jeopardy by causing additional harm”). Thus, for example,  
23 impeding a listed species’ progress toward recovery may suffice to satisfy the irreparable harm  
24 requirement. *Wishtoyo Found. v. United Water Conservation Dist.*, No. CV 16-3869-DOC  
25 (PLAx), 2018 WL 6265099, at \*65 (C.D. Cal. Sept. 23, 2018), *aff’d*, 795 F. App’x 541 (9th Cir.

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1 2020); *see also* *PCFFA v. Gutierrez*, 606 F. Supp. 2d at 1207–10, 1249.<sup>12</sup>

2 The court also notes that, while its analysis of likelihood of success in the context of an  
3 injunctive relief request is governed by the deferential APA’s arbitrary and capricious standard,  
4 *see Lands Council*, 537 F.3d at 987; *Ranchers Cattlemen Action Legal Fund United Stockgrowers*  
5 *of Am. v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005), as amended (Aug. 17, 2005),  
6 Ninth Circuit authority suggests that the court does not necessarily owe deference to federal  
7 agencies’ positions concerning irreparable harm, balance of hardships, or public interest. The  
8 decision in *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9th Cir. 2011) is instructive. There,  
9 in the context of a motion for a post-judgment permanent injunction, the Ninth Circuit held that a  
10 district court “abused its discretion by deferring to agency views concerning the equitable  
11 prerequisites of an injunction.” *Sherman*, 646 F.3d 1186. The Ninth Circuit reasoned that  
12 “[e]cology is not a field within the unique expertise of the federal government,” and remanded for  
13 analysis by the district court “without deference” to the agency’s experts “simply because of their  
14 relationships with the agency.” *Id.* In doing so the court observed that if government experts  
15 “were always entitled to deference concerning the equities of an injunction, substantive relief  
16 against federal government policies would be nearly unattainable.” *Id.*

17 b. *Record Evidence of Harm to CCV Steelhead*

18 In assessing plaintiffs’ showing with respect to irreparable harm, the first question the  
19 court must address is a practical one: whether operational actions in the Delta in coming weeks  
20 and months will be any different as a result of the shift from the old regime (under the 2009  
21 NMFS BiOp and related 2008 FWS BiOp) to the new one (under the Proposed Action and the  
22 2019 BiOps). As was the case with the Stanislaus River, the primary focus of the harms evidence

23  
24 <sup>12</sup> PCFFA points out, correctly, that in the course of permitting an injunction based upon some  
25 “lesser magnitude of harm” than an “extinction level threat,” the Ninth Circuit has indicated that  
26 “the fact that section 7(a)(2) permits some incidental take of listed species does not establish that  
27 harm to individual members of a species cannot be irreparable.” *NWF III*, 886 F.3d at 819. To  
28 the extent PCFFA is attempting to argue that harm to individual members of the species at issue  
in this case will suffice to justify irreparable harm, the court finds it unnecessary to go that far  
since the record presently before the court demonstrates a magnitude of harm that is cognizable  
via the more traditional pathway.

1 presented in connection with the pending motions regarding South Delta operations for the  
2 remainder of the year concerns the remainder of the month of May.<sup>13</sup> (*See CNRA*, Doc. No. 60  
3 (California requesting relief only through May 31); Doc. No. 55, Declaration of Bruce Herbold  
4 (Herbold Decl.) at ¶ 55 (California’s fisheries expert discussing predominantly concerns to larval  
5 Delta smelt and Longfin smelt up to and through May, noting that most of the Delta smelt will  
6 arrive in the more favorable Low Salinity Zone (not in the South Delta) in the last three weeks of  
7 May, and that “[a]ny Delta smelt that do not reach this habitat by approximately mid-June  
8 generally do not survive”).) At the May 7, 2020 hearing, Reclamation’s technical expert Ms.  
9 White testified that as we move into June, operations are “likely” to be governed by state law  
10 requirement that would dictate exports to be at “minimum” levels. (Tr. 50.) Moreover, all parties  
11 before the court agree that because we are in a period of relatively dry hydrology (*see* Tr. 25:7–9,  
12 60:18–19, 61:20), certain “habitat actions” set forth in the respective FWS BiOps aimed at  
13 improving Delta smelt habitat conditions—the “Fall X2” action set forth in the 2008 FWS BiOp  
14 and the “Summer-Fall Habitat Action” set forth in the 2019 FWS BiOp—are not in play this year,  
15 since they would only take place in a relatively wet year (Tr. 66). Accordingly, the court finds  
16 there has been a lack of proof by plaintiffs as to the need for any injunctive relief with respect to  
17 Delta export operations past the end of May.

18 Turning to the May 11 to May 31 timeframe, the operational picture is less clear. During  
19 her testimony at the recent hearing, Ms. White could not definitively indicate what particular  
20 regulatory control would govern Delta export operations. (*Id.* at 50.) Evidence has been  
21 presented indicating that, at least generally in a dry year like this one, OMR flows will be more  
22 negative in the coming weeks under the 2019 BiOps than would have been the case under the  
23 previous regulatory regime. (*See* 2019 FWS BiOp at 152 (plot of modeled mean OMR flows  
24 showing that flows under the Proposed Action will be more negative than under the previous  
25 regulatory regime).) No defendant seriously disputes this conclusion. In fact, Defendant  
26 Intervenors San Luis & Delta Mendota Water Authority and its member agency Westlands Water  
27

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28 <sup>13</sup> Obviously, given the date of this Order, the focus of the court’s analysis will be on the  
likelihood of harm from May 11, 2020 onward.

1 District (collectively, “San Luis”) have presented counter-harms evidence indicating that  
2 implementing California’s proposed injunction through May 31 would “result in a loss of CVP  
3 water supply to areas south of the Delta of approximately 52,000 acre-feet.” (*CNRA*, Doc. No.  
4 74-4, Declaration of Thomas Boardman (Boardman Decl.) at ¶ 3.) Such evidence serves to  
5 confirm that the general trends warned of in the BiOp itself (more export pumping under the new  
6 regulatory regime) likely would occur in the absence of the granting of an injunction.

7 The next question that must be answered in assessing irreparable harm is whether a not-  
8 insignificant percentage of CCV steelhead will be in a location where they may likely be  
9 negatively impacted by Delta export operations. Dr. Rosenfeld testified at the May 7 hearing that  
10 the 2019 NMFS BiOp identifies the largest migration of steelhead from the San Joaquin side of  
11 the system to occur in April and May. (Tr. 173:3–5.) Other documents before the court, such as  
12 the most recent (May 5, 2020) “notes” of the Salmon Monitoring Team, indicate 35-55% of  
13 natural origin steelhead were then “in the Delta.” (*PCFFA*, Doc. No. 168-2 (5/5/20 SMT Notes)  
14 at 111.) On the other hand, San Luis’ fisheries expert Dr. Charles Hanson opined that as of April  
15 30, 2020, a “typical seasonal pattern of declining salvage risk” was being exhibited. (*CNRA*,  
16 Doc. No. 74-1, Declaration of Charles Hanson (Hanson Decl.) at ¶ 4.) Dr. Hanson also stated that  
17 by the end of April, “[h]istorically, an estimated 93% of juvenile steelhead have migrated  
18 downstream past Chipps Island, and an estimated 81.9% of steelhead salvage has [already]  
19 occurred.” (*Id.* at ¶ 13.) This general statistic does not, however, take into consideration the  
20 distinct life history of the southern Sierra Nevada diversity group, which the BiOp acknowledges  
21 migrates through the Delta on a relatively later schedule. (2019 NMFS BiOp at 102 (“In the San  
22 Joaquin River basin, CCV steelhead smolts are expected to appear in the southern Bay-Delta  
23 regional waterways as early as January, based on observations in tributary monitoring studies on  
24 the Stanislaus River, but in very low numbers. The peak emigration in the lower San Joaquin  
25 River, as determined by the Mossdale trawls near the Head of Old River, occurs from April to  
26 May, but with presence of fish typically extending from late February to late June.”).)

27 The primary question therefore becomes the extent to which operations over the coming  
28 weeks will harm CCV steelhead in a material way, remembering that the proof of harm need not



1 approach an “extinction level” to show irreparable harm in the context of the ESA. *NWF III*, 886  
2 F.3d at 818–19. Here, it is undisputed that “salvage” and “loss” of CCV Steelhead continues to  
3 occur at (or as a result of) the export pumping facilities. The court observes that its denial of  
4 PCFFA’s TRO Motion appears to have resulted in increased export pumping which was  
5 associated with increased CCV steelhead salvage, as depicted in the chart provided by Dr.  
6 Hanson in his declaration in the CNRA case. (Hanson Decl. at 6.) As exports declined due to the  
7 “pulse flow” operation implemented from April 10 through May 10, so too did CCV steelhead  
8 salvage. Dr. Hanson opines that this was due to seasonal trends (*id.* at ¶ 13), but California’s  
9 fisheries expert, Dr. Herbold, suggests Dr. Hanson’s opinion ignores the distinct nature of the San  
10 Joaquin-origin steelhead population, of which approximately 34% will be out-migrating in the  
11 last 21 days of May. (*See* Herbold Decl. ¶ 62.)

12 Dr. Herbold also opines that “[f]rom mid-March through the date of his declaration on  
13 April 21, 2020, [CCV] steelhead salvage has been sharply increasing.” (*Id.* at ¶ 46.) Finally, he  
14 declares that many of those salvaged in the days just prior to his declaration were “wild produced  
15 fish . . . essential to the survivability and recovery of [s]teelhead in the isolated populations in the  
16 San Joaquin watershed.” (*Id.*)

17 As mentioned, the 2019 NMFS BiOp set two separate loss thresholds for CCV steelhead:  
18 1,414 between December 1 and March 31, and 1,552 between April 1 and June 15. (2019 NMFS  
19 BiOp at 534, 547). Operationally, the first “trigger” under the loss threshold approach is set at  
20 50% of that threshold. For April 1 through June 1, therefore, 50% is 776 fish. (*CNRA*, Doc. No.  
21 73-1, Declaration of Joshua Israel (Israel Decl.) at ¶ 15.) Federal Defendants’ declarant Joshua  
22 Israel, a Supervisory National Resource Specialist with Reclamation, reports that natural  
23 steelhead “loss” from April 1 through April 28 was calculated to be 244.8 fish, which was, as of  
24 that date, 31.5% of the way toward the 776 fish 50% loss threshold “trigger” that would require  
25 reductions in export pumping. As of May 5, 2020, updated records put the total as of that date at  
26 253 (or 33% of the 50% loss threshold). (5/5/20 SMT Notes at 114.)

27 In light of the above, defendants emphasize that actual loss numbers have not yet  
28 approached the 50% loss threshold, suggesting that this fact is dispositive of the court’s

1 irreparable harm analysis. (*See generally* Israel Decl.; Chilmakuri Decl. ¶ 39.) The court does  
2 not agree. For one thing, the evidence indicates it is possible that losses will “accumulate  
3 toward” the 50% loss threshold. (*See id.* at 114 (5/5/20 SMT Notes plotting out whether observed  
4 loss and potential future loss (based on historic salvage data) could cause the 50% loss threshold  
5 to be exceeded and concluding that such a scenario is possible “depending on the magnitude of  
6 loss observed” in coming weeks.); *but see* Israel Decl. at ¶ 15 (stating his opinion that  
7 approximately 132 more natural steelhead would be lost between April 29 and June 15 this year  
8 based on historical timing, which would accumulate to 49% of the 50% loss threshold).)

9 In addition, the court is persuaded by many of the arguments advanced by plaintiffs that  
10 the loss threshold approach is not sufficiently protective. For example, as mentioned, NMFS  
11 contends in the 2019 NMFS BiOp that, despite the fact that initial modeling indicated that CCV  
12 steelhead loss would increase markedly in May under the Proposed Action, this potential harm  
13 would be mediated by the addition of the loss threshold triggers. Dr. Herbold opines, however,  
14 that due to declining numbers of CCV steelhead, particularly those in the Stanislaus River that are  
15 part of the southern sierra Nevada Diversity Group, the loss limits will “almost certainly never be  
16 limiting or protective.” (*Id.* at ¶ 63.)

17 The BiOp itself indicates that the loss threshold approach is anticipated to provide roughly  
18 the same amount of protection as was created by the measures enacted under the 2009 NMFS  
19 BiOp. As recognized in the court’s likelihood of success on the merits analysis set forth above,  
20 despite Reclamation’s inclusion in its revised Proposed Action of performance objective  
21 thresholds that include the loss limits, NMFS was only able to conclude that the “performance  
22 objective thresholds are expected to limit loss to levels similar [to] what has been observed over  
23 the past 10 years.” (2019 NMFS BiOp at 774.) The court has questioned above how a “similar”  
24 amount of loss could be justified (i.e., would not contribute to jeopardy) with respect to a species  
25 that NMFS concedes has already been in decline. Here in the harm context, a related question  
26 cannot be escaped: How can these loss limits effectively function to avoid irreparable harm to a  
27 declining steelhead population if those loss limits are “expected to” do no more than “limit loss to  
28 levels similar what has been observed over the past 10 years?” As the 2019 NMFS BiOp itself

1 indicates, this steelhead population is in serious peril:

2 An important aspect of the analysis for CCV steelhead concerns the  
3 status of the Southern Sierra Nevada Diversity Group, which is  
4 critical to preserving spatial structure of the CCV steelhead DPS.  
5 This diversity group, consisting of extant populations in the  
6 Calaveras, Stanislaus, Tuolumne, Merced and upper mainstem San  
7 Joaquin rivers, is very unstable due to the poor status of each  
8 population. This status is due to both project-related and non-project  
9 related stressors.

7 (2019 NMFS BiOp at 674.)

8 Unlike the then-seemingly-nominal loss levels presented in the context of the TRO  
9 Motion, the present cumulative losses are considerably higher and continue to occur. Given the  
10 extremely precarious situation faced by the San Joaquin-origin CCV steelhead, the court  
11 concludes plaintiffs have established irreparable harm in the absence of the granting of injunctive  
12 relief.

13 Plaintiffs have also established that the requested injunction is likely to alleviate at least  
14 some of this harm. Through Dr. Rosenfeld, plaintiffs have presented evidence that recent  
15 research demonstrates the imposition of an I:E Ratio improves survival of salmonids migrating  
16 through the Delta. (Rosenfeld Decl. at ¶ 120–21 (discussing 2018 research and concluding that it  
17 “found that survival of [CCV] steelhead juveniles emigrating from the San Joaquin Valley was  
18 better predicted by a measure that considers Project exports in the context of San Joaquin River  
19 flows into the Delta (San Joaquin I:E) than it was by either export rates or river inflows alone –  
20 this finding strongly supports the use of the San Joaquin I:E ratio to protect migrating juvenile  
21 Central Valley Steelhead”).) According to testimony provided by Ms. White, operational  
22 uncertainties make it impossible to determine at this time whether a re-instituted I:E Ratio will  
23 even control operations. (*See* Tr. 49.) Nonetheless, the record certainly suggest imposition of the  
24 I:E Ratio will reduce export pumping to the detriment of water users. (*See* Boardman Decl. at ¶  
25 3.) This evidence supports a finding of irreparable harm.

26 The court further finds that imposing the I:E Ratio is a narrowly tailored form of  
27 injunctive relief. It will last through the end of this month of May; was specifically designed to  
28 assist out-migrating steelhead from the San Joaquin river; and may not even result in as much

1 detriment to water users as feared by Defendant Intervenors, depending on the extent to which  
2 other operational constraints control export pumping this month.

3 4. Balance of the Harms.

4 a. *General Legal Standard*

5 In cases arising under the ESA, Congress has “removed from the courts their traditional  
6 equitable discretion in injunction proceedings of balancing the parties’ competing interests.”  
7 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 793–94 (9th Cir. 2005) (*NWF*  
8 *I*) (internal quotation marks omitted). Thus, it is a “fundamental principle” that, when courts are  
9 “confronted with requests for injunctive relief in [ESA] cases,” the third and fourth prongs of the  
10 preliminary injunction standard—the equities and public interest factors—“always tip in favor of  
11 the protected species.” *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091  
12 (9th Cir. 2015).

13 In light of these authorities, the court finds that the irreparable harm identified above tips  
14 the balance strongly in favor of the imposition of an injunction. Although plaintiffs have not  
15 demonstrated those harms to be “extinction-level” in the near term, the harms are real, ongoing  
16 and are likely to have enough of a population level impact to warrant an injunction. As discussed  
17 above, there are serious issues with the application of the loss threshold approach adopted in the  
18 2019 BiOp. Defendants near exclusive reliance on that loss threshold approach in the near term  
19 (since other actions are being planned for the future), undermines the effective use of that  
20 approach as an adequate protective measure.

21 b. *Public Interest Underpinning the WIIN Act*

22 San Luis argues that the 2016 Water Infrastructure Improvements for the Nation Act  
23 (WIIN Act), Title III, Subtitle J, § 4002(a), Pub. L. No. 114-322, 130 Stat. 1628, 1855 (2016),  
24 should be taken into consideration by the court in conducting the public interest balance. (*CNRA*,  
25 Doc. No. 74 at 6.) In assessing the impact of the WIIN Act in this regard, one must be mindful of  
26 both the 2008 FWS BiOp, which imposed an outer limit on reverse OMR flows of -5,000 with  
27 more stringent limitations coming into play depending on conditions, fish monitoring, and the  
28 time of year (see 2008 FWS BiOp at 280–82), and the 2009 FWS BiOp which, as discussed

1 above, imposed various provisions that constrained export pumping, including the I:E Ratio.  
2 Some viewed the approaches taken in these BiOps as more cautionary (and therefore more  
3 restrictive to water supply) than justified by the then-available science, but ultimately the Ninth  
4 Circuit found the restrictions to be lawful and supported by the record. *See San Luis v. Jewell*,  
5 747 F.3d at 607–15; *San Luis v. Locke*, 776 F.3d at 1004.

6 In the WIIN Act, Congress instructed Reclamation to maximize export pumping, but to do  
7 so within the sideboards of the applicable biological opinions and state law requirements. Thus,  
8 WIIN Act § 4002(a) requires Reclamation to

9 manage reverse flow in Old and Middle Rivers ***at the most negative***  
10 ***reverse flow rate allowed under the applicable biological opinion***  
11 to maximize water supplies for the Central Valley Project and the  
12 State Water Project, unless that management of reverse flow in Old  
13 and Middle Rivers to maximize water supplies would cause  
14 additional adverse effects on the listed fish species beyond the range  
of effects anticipated to occur to the listed fish species for the  
duration of the applicable biological opinion, or would be  
inconsistent with applicable State law requirements, including water  
quality, salinity control, and compliance with State Water Resources  
Control Board Order D–1641 or a successor order.

15 (*Id.*) (emphasis added); *see also* WIIN Act § 4001(a) (“The Secretary of the Interior and Secretary  
16 of Commerce shall provide the maximum quantity of water supplies practicable to Central Valley  
17 Project [contractors], by approving, in accordance with applicable Federal and State laws  
18 (including regulations), operations or temporary projects to provide additional water supplies as  
19 quickly as possible, based on available information.”). Reclamation is required under the WIIN  
20 Act to document in writing the reasons why it constrains reverse flows to a level not as negative  
21 as the most negative flow permitted. *Id.* at § 4002(b).<sup>14</sup> The WIIN Act directs Reclamation to  
22 move toward an approach that “increase[s] monitoring to inform real-time operations,” *id.*  
23 § 4010(a), and then “use[s] all available scientific tools to identify any changes to the real-time  
24 operations . . . that could result in the availability of additional water supplies.” *Id.* at  
25 § 4001(b)(1)(B). However, nothing in the WIIN Act modifies (or even bends) any of Federal

26 <sup>14</sup> The court notes that the WIIN Act does not appear to contemplate the scenario presented by  
27 the 2019 FWS BiOp’s storm event flexibility provisions, which do not impose any limit on  
28 reverse flows when that provision is found to be applicable. Nonetheless, the overall tenor of the  
WIIN Act endorses the maximizing of exports while remaining in compliance with the mandates  
of the ESA and other applicable laws.

1 Defendants' obligations under the ESA.

2 While the WIIN Act perhaps expresses a Congressional preference for a balanced  
3 approach to managing OMR flows, its plain language does not modify the scope or application of  
4 the ESA in any way. Here, plaintiffs have raised serious questions as to the validity of the  
5 applicable NMFS BiOp. The WIIN Act does nothing to alter the well-established jurisprudence  
6 regarding the balance of the harms in an ESA case such as this one.

7 Having concluded that plaintiffs have established that they are entitled to the granting of a  
8 preliminary injunction, the court now turns to the specific terms and requirements of that relief.

9 **C. Bond Requirement**

10 Federal Rule of Civil Procedure 65(c) provides

11 Security. The court may issue a preliminary injunction or a  
12 temporary restraining order only if the movant gives security in an  
13 amount that the court considers proper to pay the costs and damages  
14 sustained by any party found to have been wrongfully enjoined or  
restrained. The United States, its officers, and its agencies are not  
required to give security.

15 "Rule 65(c) invests the district court with discretion as to the amount of security required, if any."  
16 *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). Courts "routinely impose either no  
17 bond or a minimal bond in public interest environmental cases." *City of South Pasadena v.*  
18 *Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999); *see also Save Strawberry Canyon v. DOE*,  
19 613 F.Supp.2d 1177, 1190 (N.D. Cal. 2009) (waiving a Rule 65(c) bond in a NEPA case where  
20 "[p]laintiff is a small nonprofit organization and has indicated that it would have difficulty  
21 posting the bond"). Moreover, the Ninth Circuit has held that "special precautions to ensure  
22 access to the courts must be taken where Congress has provided for private enforcement of a  
23 statute." *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d  
24 1319, 1325–26 (9th Cir.), *amended*, 775 F.2d 998 (9th Cir. 1985). Where "the proposed bond  
25 requirement would effectively deny access to judicial review," it is to be waived by the court. *See*  
26 *Save Strawberry Canyon*, 613 F. Supp. 2d at 1191.

27 Here, however, neither set of plaintiffs have directly addressed the issue of the posting of  
28 a bond or security. California does suggest in its proposed order granting relief that the court

1 should entirely waive the bond requirement here but provides no evidence or authority in support  
2 of such a determination. (See *CNRA*, Doc. No. 60 at 8.) There is authority suggesting that even  
3 parties such as the plaintiffs now before this court must make a showing to justify the setting of  
4 only a nominal bond amount or no bond at all. See *W. Watersheds Project v. Zinke*, 336 F. Supp.  
5 3d 1204, 1246–47 (D. Idaho 2018). In the context of prior challenges to the 2009 NMFS BiOp,  
6 in the absence of comment or evidence on this issue, the court reasoned that “[b]ecause [the] case  
7 involve[d] the management of public resources, wholly under the control of the action agency,  
8 Reclamation, and because the injunctive relief is of limited duration, [the water agency plaintiff]  
9 was required to post a bond in the amount of \$5,000 to secure the relief provided by law in the  
10 event it is determined injunctive relief was improvidently issued.” *San Luis & Delta-Mendota*  
11 *Water Auth. v. Locke*, No. 1:09-CV-01053-OWW-DLB, 2010 WL 500455, at \*8 (E.D. Cal. Feb.  
12 5, 2010)

13 Here, based on the present record and given that the plaintiffs include a coalition of  
14 environmental organizations of various sizes and the independent sovereign State of California,  
15 the court concludes a slightly lesser total bond amount is appropriate. Accordingly, each set of  
16 plaintiffs will be required to post a \$1,000 bond.

### 17 CONCLUSION

18 For the reasons set forth above the court:

- 19 (1) grants plaintiffs’ joint request to enjoin the Proposed Action’s export operations in the  
20 south Delta to the extent that those operations do not comply with RPA Action IV.2.1  
21 from the 2009 NMFS BiOp from the date of this order up to and through May 31,  
22 2020, on the specific ground that such operations will irreparably harm threatened  
23 CCV Steelhead;
- 24 (2) denies California’s motion in all other respects as moot;
- 25 (3) denies PCFFA’s request to enjoin operations on the Stanislaus River as moot subject  
26 to renewal; and
- 27 (4) holds all other aspects of PCFFA’s motion in abeyance with the intention of  
28 addressing those remaining matters in a separate order.

**PRELIMINARY INJUNCTION ORDER**

IT IS HEREBY ORDERED that Defendant U.S. Bureau of Reclamation, its officers, agents, servants, employees and attorneys, and those in active concert or participation with Defendant U.S. Bureau of Reclamation, are hereby preliminarily enjoined, from the effective date of this order through and including May 31, 2020, pursuant to Federal Rule of Civil Procedure 65, from operating the Central Valley Project in the manner described in the Final Biological Assessment for Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project issued by the U.S. Bureau of Reclamation on October 17, 2019, and the Final Environmental Impact Statement on the Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and State Water Project, to the extent that operation is inconsistent with the requirement in Reasonable and Prudent Alternative Action IV.2.1, which appears on pages 642–44 of the Biological Opinion and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project issued by the National Marine Fisheries Service on June 4, 2009. The court recognizes that Defendant U.S. Bureau of Reclamation will require time to operationalize this change and it and its agents are therefore excused from compliance for no more than 24 hours from the date of entry of this order, so long as they are taking all reasonable steps during that period of time toward implementation.

IT IS FURTHER ORDERED that, absent subsequent waiver by the court, on or before Friday, May 15, 2020, plaintiffs in *California Natural Resources Agency v. Ross*, No. 1:20-CV-00426-DAD-EPG, must post a \$1,000 bond; likewise, on or before Friday, May 15, 2020, plaintiffs in *Pacific Coast Federation of Fishermen's Associations v. Ross*, 1:20-CV-00431-DAD-EPG must post a \$1,000 bond. Both bonds must be deposited into the court registry.

IT IS SO ORDERED.

Dated: May 11, 2020

  
DALE A. DWYER  
UNITED STATES DISTRICT JUDGE