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Larry Collins
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Lorne Edwards
Secretary
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Mike Conroy
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In Memoriam:
Nathaniel S. Bingham
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February 16, 2021

President Joseph R. Biden
Office Of The President
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Secretary Designate Debra Haaland
Department of Interior
1849 C St NW
Washington, DC 20240
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Re: Request for Rescission of Trump Administration Memoranda on Status of CVPIA Implementation Funding, Illegal Water Contracts and Cost Allocations

Dear Mr. President and Secretary Designate Haaland,

We call on you to reverse a grave environmental injustice brought on by recent and last-minute actions of the Trump Administration by Interior Secretary Bernhardt, formerly employed by one of the biggest beneficiaries of these actions—Westlands Water District. Without your timely help, permanent diversions of water for corporate agriculture in the California's Central Valley threaten the health of Winnemem Wintu tribal homelands, fishing rights and water rights of the Hoopa Valley Tribe, rivers and estuaries, and the benefits these waters bring to imperiled salmon stocks and dependent fishing communities up and down the northern coast of California, Oregon, and Washington.

The vital water resources of these communities, including water sustaining the Pacific Flyway that supports countless migratory birds and provides critical food sources for the indigenous people of Alaska, are at stake due to permanent water contracts and last-minute administration actions that lock up water for agriculture and slash funding for environmental mitigation and restoration. This permanent allocation of Central Valley Project (CVP) water supplies without environmental review and endangered species consultation, all while slashing statutorily required water and payments for environmental mitigation and restoration—thus shifting the burden to taxpayers—must be reversed.

We urge you to move quickly in taking the following actions to remedy the potential damages before they occur:

1. Withdraw former Secretary Bernhardt's January 19, 2021 memorandum¹ that slashes statutorily required Central Valley Project mitigation and restoration funding.
2. Rescind illegally executed permanent water contracts for Westlands Water District and other CVP contractors to ensure Reclamation laws, the Central Valley Project Improvement Act, Endangered Species Act and the National Environmental Policy Acts are followed.
3. Withdraw the Business Practices and Guidelines pending before OMB that would shift hundreds of millions of dollars owed by the CVP contractors to the American taxpayer.
4. Withdraw and peer review the Trump Administration cost allocation methodology for the CVP that shifts hundreds of millions in costs owed by water and power beneficiaries to the American taxpayer.

If these Trump administration actions are not reversed, each will contribute to a closely related and interconnected web of adverse environmental, cultural, and economic impacts that will be difficult, if not impossible, to correct in the future. The causes and nature of these impacts are explained in more detail in Attachment 1.

Your leadership is urgently needed to ensure statutory obligations are enforced, the permanent water contracts are rescinded, and that there is meaningful oversight of federal agencies' performance under the CVPIA.

Sincerely,



Mike Conroy
Executive Director



Bill Jennings
Chairman Executive Director
California Sportfishing Protection Alliance

CC: cc: Senator Feinstein, Senator Padilla,
Rep Raúl Grijalva, Rep Jared Huffman, Rep. Katie Porter, & Rep Mike Thompson

¹ <https://calsport.org/news/wp-content/uploads/SIGNED-Concurrence-to-ASWS-ASFWP-from-Secretary-CVPIA-Jan-19-2021.pdf> & <https://calsport.org/news/wp-content/uploads/ASFWP-ASWS-to-Secretary-re-CVPIA-completion-Wallace-AND-Petty-e-sign.pdf> & https://calsport.org/news/wp-content/uploads/BOR-CVPIA-Memo-Jan-15-2021_Date-Stamp.pdf & <https://calsport.org/news/wp-content/uploads/SOL-Memo-to-RD-Re-Completion-Jan-2021.pdf>

ATTACHMENT 1

Trump Administration CVP Actions and Adverse Impacts

1. Secretary Bernhardt's January 19 Memorandum Slashes Restoration Funding²

In the dying hours of the Trump administration, then Interior Secretary Bernhardt signed a memorandum of concurrence, which overturns the findings and recommendations of the 2009 Central Valley Project Improvement Act Program Activity Report (“CPAR”)³. In its place, Bernhardt’s memorandum adopts the findings and recommendations of a 14 January 2021 Interior Solicitor’s memorandum entitled “Interpretation of Central Valley Project Improvement Act Sections 3406 and 3407”.

The Bernhardt memorandum radically undermines the environmental restoration purpose of the Central Valley Project Improvement Act (Public Law 102-575 Title XXXIV (October 30, 1992) (CVPIA)). Specifically, the Bernhardt memorandum:

- (1) incorrectly declares environmental restoration measures complete;
- (2) arbitrarily reduces by fifty percent the contractors’ obligation to fund ongoing environmental restoration and mitigation actions; and
- (3) ignores the separate obligation for contractors to reimburse environmental restoration costs specified in section 3406 of the CVPIA in cases where CVP Restoration Fund collections are insufficient to fund them.

Rather than adhering to the 2009 CPAR’s determination of when Section 3406 responsibilities will have been met, the January 19 memorandum simply declares that “the actions required under Section 3406 of the Central Valley Project Improvement Act have been completed” and that the requirements that CVP contractors contribute to the CVP Restoration Fund are therefore halved and other cost collection requirements in section 3406 will be abandoned.

The reality is that much of the CVPIA-mandated fish and wildlife restoration is yet to be completed. Many CVPIA-mandated fish and wildlife restoration projects and programs have languished. USFWS has not been provided the funding and authority sufficient to carry out these Congressionally mandated obligations. Instead, Reclamation has served as a handmaiden to the water contractors, taking more and more water without meeting their restoration and mitigation obligations. Multiple Inspector General reports have highlighted how Reclamation has failed to collect sufficient money to repay taxpayers and has failed to collect sufficient funds from the contractors to meet their mitigation and restoration obligations within statutory deadlines.⁴

² <http://www.schlosserlawfiles.com/~hoopa/Pages%20from%20Hoopa%20Letter%202.pdf> Bernhardt’s Completion Memos

³ <https://www.usbr.gov/mp/cvpia/docs-reports/docs/report-cvpia-cpar-08-25-09.pdf> Central Valley Project Improvement Act Program Activity Review Report 2009

⁴ <https://www.doi.gov/sites/doi.gov/files/WR-EV-BOR-0003-2012Public.pdf> OIG California’s Central Valley Project Repayment Status
https://www.doi.gov/sites/doi.gov/files/FinalAudit_BayDeltaPlan_Public.pdf OIG Delta Tunnels Audit

2. Permanent Water Contracts Shift Costs to Taxpayers and Short-Change Water for the Environment.⁵

Secretary Bernhardt set the table to grant permanent water allocations that cement exports from the Trinity River and Delta Estuary of quantities of water that simply do not exist under our changing climate. The required court validations of these contracts, which were issued in 2020, have not been secured so they are not binding on the United States.⁶ Despite these legal deficiencies, Reclamation has set the costs of this water at rock bottom prices without peer reviewed allocation methodology and without the statutorily required contractual payments for environmental mitigation and restoration.

The permanent contracts also exempt Westlands and other irrigators from acreage limits and give them an allocation of public water without collecting sufficient payments for mitigation and restoration of damage being caused to the environment and to those communities and Tribal lands from which the water is taken. Westlands, which is comprised of some 350 vertically integrated corporations⁷, is price gouging the low-income communities of El Porvenir and Cantua Creek by selling them water at inflated prices that is not safe to bath, cook or drink—all while keeping the cheap taxpayer-subsidized water for themselves.

These permanent contracts granted by Bernhardt's Interior to Westlands and other CVP contractors put these irrigators in charge of decisions regarding the allocation of these public waters without environmental review or compliance with the Central Valley Project Improvement Act. In short, the permanent contracts would be a massive transfer of wealth from public ownership to select irrigators. The CVPIA (section 3404(c)) requires the inclusion of environmental cost collection provisions in CVP contracts, which the Trump Administration

⁵<https://calsport.org/news/wp-content/uploads/PCL-et.-al.-Comments-on-WWD-Permanent-Contract-Conversion-Jan-6-2020.pdf>

⁶ **May 28, 2020** Ernest Conant, Regional Director of the California Great Basin Regional Office, [in a letter to Westlands](#), agrees to treat WWD's Converted Contract as controlling as of its intended "effective date" of June 1, 2020, despite Westlands' failure to obtain a "decree of the court" confirming the validity of its proceedings, required under law for such contracts under 43 U.S.C. § 511.

May 26, 2020 [Westlands writes to Reclamation \[Ernest Conant\] that Validation statutes should not apply to them.](#) **June 24, 2020** San Joaquin County writes to Reclamation to alert the US to misrepresentations made by Westlands Water District (Westlands) in the May 26, 2020 letter to you (Reclamation) from its General Manager, Thomas Birmingham (Ex. 1, "Westlands letter"). [That letter contains materially false and misleading statements about the challenged agreement to convert Westlands' time-limited water contract into a permanent repayment contract](#) (Contract No.14-06-200-495A-IR1-P, "Converted Contract")

June 6, 2020 [Coalition Letter to FitchRatings](#) and S&P Global the groups warn; *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.*

⁷ <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150920-column.html> *How a rich water district beat the federal government in a secret deal.* Michael Hiltzik

refused to do. Recall in December 10, 2016 around 2 AM, Representative McCarthy foisted the permanent water contract mechanism into a carefully crafted WRDA bill and threatened funding for the cleanup of Flint Michigan's drinking water funding unless these changes were adopted. Senator Feinstein promised existing law would be followed⁸ and these changes would be temporary. Pushed by Westlands' lobbyist David Bernhardt at the time, as Secretary of Interior he later interpreted the legislation as exempting his former client Westlands and other contractors from NEPA, ESA and the CVPIA environmental mitigation and restoration provisions despite Senator Feinstein's assurances. Interior's interpretation is wrong and the contracts are being challenged in federal court.

3. Bernhardt-Proposed Revisions to Business Practices and Guidelines Shift Costs from Water Contractors to Taxpayers.⁹

The Central Valley Project Business Practice Guidelines are now under review in the Office of Management and Budget at the request of the Trump administration. These guidelines bear directly on the accounting of past, present and future financial obligations of CVP contractors under the CVPIA. Proposed modifications to the Guidelines would relieve hundreds of millions of dollars in CVPIA restoration costs assigned to the CVP contractors and shift them to the federal taxpayer.

The proposed revisions are particularly egregious because they upend the CVPIA requirement that CVP water and power contractors pay the cost of repairing the systemic environmental damage to Central Valley rivers and streams caused by construction and operation of the CVP. Simply put, environmental restoration is a cost of doing business for CVP contractors. Section 3406 of the CVPIA identifies specific fish and wildlife restoration measures to be undertaken by the Secretary and paid for in whole or in part, depending on the action, by the CVP contractors. These measures include the restoration of the fishery resources of the Trinity River and the doubling of salmon numbers in Central Valley streams adversely impacted by CVP operations.

The CVPIA establishes a number of funding mechanisms for its environmental restoration actions. Section 3406 itself establishes reimbursement obligations for the contractors to pay for these damages created by the export of water from these rivers, communities and Tribal homelands. Section 3407 of the Act creates the Central Valley Project Restoration Fund and specifies, among other things, the manner in which CVP contractors will be assessed the costs of fish and wildlife restoration measures to help fund those obligations set out in Section 3406. The Business Practices and Guidelines should not be changed.

4. Revised Cost Allocation Model for the Central Valley Project Shifts Hundreds of Millions of Costs from Agricultural and Power Contractors to Taxpayers.¹⁰

⁸ <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=FF5C94EB-667A-4DEC-A0A4-296AB5027BE4> Feinstein declares in 2016 the WIIN Act rider is temporary and ensures compliance with existing laws, including the ESA, NEPA, CVPIA and Reclamation laws.

⁹ https://calsport.org/news/wp-content/uploads/Env-Advocates-Cmts-CVPIA-Restoration-Fund_True-Up--Proportionality-9....pdf & <http://www.schlosserlawfiles.com/~hoopa/Pages%20from%20Hoopa%20Letter%203.pdf> HVT Comments on the draft USBR Business Practices and Guidelines

¹⁰ <https://calsport.org/news/wp-content/uploads/Conservation-Fishing-and-Tribe-Cmts-RE-CVP-Cost-Allocation-Study-Burman-1-2-2020-.pdf> 20 Tribal, Conservation and Fishing Groups Denounce Reclamation's CVP Cost

The CVPIA (section 3404(c)) also requires the inclusion of cost collection provisions in CVP contracts, which the Trump Administration refused to do. At the last minute¹¹, Representative McCarthy foisted the permanent water contract mechanism into a carefully crafted WRDA bill and threatened funding for the cleanup of Flint Michigan's drinking water funding unless these changes were adopted. Senator Feinstein promised existing law would be followed¹² and these changes would be temporary. Pushed by Westlands' lobbyist David Bernhardt at the time, as Secretary of Interior he interpreted the legislation as exempting his former client Westlands and other contractors from NEPA, ESA and the CVPIA environmental mitigation and restoration provisions. In January 2020, Bernhardt's Interior adopted new cost allocation methods shifting hundreds of millions of dollars owed by the contractors to the taxpayers.¹³

The final result of the new CVP cost allocation proposal is that the taxpayers will pay more and the project beneficiaries will pay less. This outcome results from arbitrary changes for which the benefits have been misrepresented and the costs to the environment and costs of required mitigation have been arbitrarily and inappropriately shifted away from the irrigation contractors. The latest cost allocation study also repeats other serious flaws: Reclamation has included inappropriate costs and made questionable estimates of project benefits and alternative costs.

Moreover, no assurance is provided that repayment obligations and water quality obligations of the project will be met. Further, if the allocation of costs for any reimbursable purpose is too low, the annual rates necessary to ensure repayment of the full allocated amount by 2030 must increase each year and, if delayed, it is possible that irrigation water users will not have the ability to pay the high rates ultimately necessary to repay their obligation.

Our concerns about the Draft Final Central Valley Project Cost Allocation Study (CAS) include both inadequate study review and documentation, and inadequate transparency and justification of study methods and results. The new approach needs to be peer reviewed. The proposed Cost Allocation approach reduces costs borne by irrigators by dramatically underestimating benefits to irrigators. If capital repayment from Irrigation contractors continues to be under collected, capital rates will begin to spike as 2030 approaches. Failing to take corrective action now will likely result in failure to meet Congressionally mandated repayment deadlines, because it will be

Allocation Methodology for its failure to collect sufficient monies from water and power contractors and shifting costs to taxpayers. No Peer Review was conducted and Reclamation's faulty assumptions include that more than 80% of the CVP benefits exist without the CVP projects and diversions lacks credibility and scientific justification.

¹¹ <https://www.mcclatchydc.com/news/politics-government/congress/article120131428.html> *After years of drama, farmers score a big win in California water battle* Michael Doyle December 10, 2016

<https://www.sfgate.com/bayarea/article/Boxer-ends-career-with-a-filibuster-over-surprise-10786696.php> Carolyn Lochhead Dec. 9, 2016 *Boxer ends career with a filibuster over surprise rider in water bill*

¹² <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=FF5C94EB-667A-4DEC-A0A4-296AB5027BE4>

¹³ <https://calsport.org/news/wp-content/uploads/PCL-IFR-Coalition-CVP-Cost-Allocation-Completion-October-2019-Cmts.pdf> & See <https://gwire.com/2020/12/16/northern-california-tribe-asks-judge-to-block-permanent-water-contract-with-westlands/> *Northern California Tribe Asks Judge to Block Permanent Water Contract With Westlands*. Jim Jakobs December 16, 2020 "The Hoopa Valley Tribe in Humboldt County argued before a federal judge last Thursday that no Trinity River water can be sent to the Central Valley at the expense of the tribe's fishery."

too late to take corrective action after several more years. The magnitude of underpayment will soon reach a point where three choices are available: set water rates at levels that Irrigation Contractors cannot afford, force power contractors to pay the deficit or fail to meet the statutory requirement deadline of 2030. Under the provisions of PL 99-546 power contractors and their ratepayers will be on the hook for the shortfall in order to meet the statutory deadline of 2030. Thus, this ballooning aid to irrigation will likely have an unplanned impact on power rates.

Put another way, the broad purpose of the new January 2020 CAS is to remedy past mistakes and chart a course toward meeting the 2030 deadline. The adopted methodology fails to meet that purpose. The Bureau of Reclamation has waited far too long to address the longstanding problem of underpayment by CVP Irrigation Contractors. Further procrastination of this repayment responsibility will magnify the problem. Unless a pro-rated share of each Irrigation Contractor's outstanding capital balance is collected from 2020 through 2030, capital rates will balloon the aid to irrigators. The time to implement fair and effective change is past due.

Trump/Bernhardt Central Valley Project Improvement Act (CVPIA) Cost Allocation Process	
Lawful Actions	Potentially Unlawful Actions
1. DOI Adopts Separable Costs Remaining Benefits (SCRB) for Central Valley Project (CVP) Cost Allocation (CAS) ¹	
2. DOI Segregates CVP and CVPIA mitigation cost allocation ²	
3. DOI Declares mitigation without CVP Project Purpose a Joint Cost ³	
4. DOI Declares CVPIA with CVP Mitigation Project Purpose a Separable Cost ⁴	
5. DOI Completes CAS for CVP Joint Costs	
6. DOI Declares CVPIA a separate program and defer allocating CVPIA Separable Costs in CAS. ⁵ CVPIA costs not allocated are \$340,872,120 ⁶	
7. DOI Determines CVPIA Separable Costs on trend to exceed CVP Restoration Fund (RF) income ⁷	
8. DOI Converts Separable CVPIA Costs for Specific Project Purpose to Joint Costs	
9. DOI Revises 1993 Business Practices and Guidelines (BPG) ⁸	
10. DOI Uses revised BPG to convert CVPIA Separable Costs to Joint Costs ⁹	
11. DOI Yields an "average" \$400M credit to water & power contractors. ^{10 11}	

¹January 14, 2020. Central Valley Project Cost Allocation Study (CAS) <https://www.usbr.gov/mp/cvp/docs/cvp-final-cost-allocation-study-2020.pdf>.

² *Ibid.*, CAS @ pdf pg17

³ *Ibid.*, CAS Section 4.2

⁴ *Ibid.*, CAS pdf pg 17, footnote 3.

⁵ January 2020. "Central Valley Project Final Cost Allocation Study Frequently Asked Questions" at <https://www.usbr.gov/mp/cvp/docs/faq-cvp-01-13-20.pdf> See also CAS section 5.12 & section 5.11 whereby "activities are specifically authorized under CVPIA and have specific cost recovery assignments" (emphasis added) CAS section 12.6 that states the Business Practices Guidelines, not the CAS would specify the allocation of CVPIA mitigation costs.

⁶ CAS pdf page 13.

⁷ CAS Section 12.6; Memorandum pages 15, 19, and 21.

⁸ August 6, 2020 "1993 Revised interim Guidelines red-line_version_Public_Comment." See https://calsport.org/news/wp-content/uploads/1993-Revised-Interim-Guidelines-red-line-version_Public-Comment_08.06.20.pdf by Spencer Walden. Also see this link for the BPG PDF revisions including appendices:

https://calsport.org/news/wp-content/uploads/Business-Practice-Guidelines_11-21-2019.pdf

⁹ *Ibid.*, August 6, 2020 revised BPG at pg 10, deletes text referencing reimbursable functions from 'unlimited exposure to environmental mitigation costs and CVPIA's specific mitigation purpose as a separable, not joint costs. Also the revised BPG concludes if the CVPIA does not declare that the mitigation activity is 100 percent reimbursable the cost is declared nonreimbursable. Reclamation has no basis to circumvent Congressional direction which made 15 of the 37 mitigation activities partially reimbursable with specific percentages assigned to the contractors. Further a number of CVPIA statutory provisions under Section 3406 are 100% reimbursable with no cap on expenditures. The CVPIA made mitigation a project purpose and made funding for it a cost of doing business for the water and power contractors, instead of a taxpayer subsidy.

¹⁰ December 23, 2020 Westlands WD urges OMB to adopt BPG changes <https://calsport.org/news/wp-content/uploads/WWD-OMB-12-23-2020-White-Paper-re-CVPIA-True-Up-final.pdf> & https://calsport.org/news/wp-content/uploads/Supplemental-White-Paper-re-CVPIA-True-UP_final.pdf

¹¹ August 25, 2020. The Trump Administration devised a revised methodology relying upon Appendix B of the withdrawn BPG and revised CAS to change nearly a quarter century old administrative precedent in determining how CVPIA expenditures, credits and costs are determined. Under the new device, water and power contractors jump from owing hundreds of millions to obtaining a credit from the US Treasury for hundreds of millions of dollars. See CVPIA True Up August Workshop see slide # 10.

[http://www.schlosserlawfiles.com/~hoopa/CVPIA-True-up_August-Workshop_08.25.20%20\(002\).pdf](http://www.schlosserlawfiles.com/~hoopa/CVPIA-True-up_August-Workshop_08.25.20%20(002).pdf)

February 14, 2020 Westlands WD pushes to limit mitigation costs to just Restoration Fund payments despite statutory obligations to the contrary. <https://calsport.org/news/wp-content/uploads/WWD-Response-to-CVPIA-BPG.pdf>