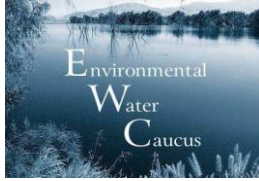
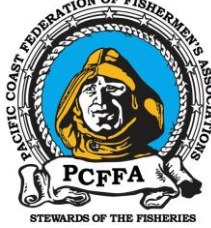




**AQUALLIANCE**  
DEFENDING NORTHERN CALIFORNIA WATERS



**CA Save Our Streams Council**



August 18, 2021

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Via Email and Regular Mail

**Re: Comments on Cross Valley Canal Unit Draft Conversion Contracts under the WIIN Act § 4011--Violate WIIN Act and Reclamation Law.**

Dear Deputy Commissioner Touton and Ms. Leal;

The Trump Administration appointed water extractive industry attorneys to key positions of power at the Department of Interior. These key officials like Secretary Bernhardt and Regional Director Ernest Conant ensured permanent water contracts were executed without collecting full repayment as required by federal laws and without compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Central Valley Project Improvement Act (CVPIA), the WIIN Act and Reclamation law.

And now the Biden administration under Secretary Haaland's watch is following the Trump Administration down this legally fraught road. Listening to Trump administration holdovers, the Biden administration, under the Trump Administration's holdovers, like Regional Director Ernest Conant, are poised to continue the Trump administration path by executing contracts under the WIIN Act that:

- 1) Violate the Central Valley Project Improvement Act's environmental restoration and reimbursement mandates;
- 2) Violate NEPA and ESA mandates;
- 3) Shortchange repayment to the federal taxpayers;
- 4) Fraudulently reduce or fail to collect more than \$400 million in debt owed by water and power contractors for required fish and wildlife mitigation and environmental restoration in California; and,
- 5) Set a course for violating Hoopa's trust interests and destruction of Hoopa's vested property rights in the Trinity River fishery.

Now, with Ernest Conant still acting as Regional Director of the California Great Basin Region of the U.S. Bureau of Reclamation, the wrongdoing will be perpetuated by execution of the Cross Valley permanent water contracts. The Cross Valley contracts will become permanent unless these proposed illegal contracts are voided and the Secretary of the Interior and Attorney General reverse the positions they have taken against conservation, fishing and tribal groups. Specifically, the Cross Valley contracts fail to:

- 1) Provide proper notice to the public as the contracts submitted for public review are incomplete.
- 2) Conduct any NEPA review nor ESA compliance prior to the federal execution of these contracts that will cause significant environmental damages and promise more water than exists under climate changes. No alternatives or mitigation measures are considered.
- 3) Collect CVPIA statutorily required payments for all required mitigation and restoration of environmental damage caused by the project. Rate payments for CVPIA mitigation and restoration are not included in the contract exhibits, precluding public comment.
- 4) Collect WIIN Act obligations to fully pay for CVP capital obligations along with operation, maintenance, and reconstruction. This includes collection of more than \$400 million in CVPIA fishery restoration and mitigation obligations.

- 5) Collect Hoopa Valley Tribe fishery restoration, rights and trust obligations required by Reclamation law and CVPIA statutory requirements.

On July 14, 2021, the U.S. Bureau of Reclamation (Reclamation) made available eight draft repayment contracts (contracts) for the Cross Valley Canal Unit (Cross Valley) contractors for a 60-day public comment period.<sup>1</sup> The Cross Valley contractors include: Hills Valley Irrigation District, Kern-Tulare and Kern-Tulare/Rag Gulch Water Districts, Lower Tule River Irrigation District, Pixley Irrigation District, Tri-Valley Irrigation District, and Fresno and Tulare counties. As denoted on Reclamation’s website, written comments on these contracts must be received by close of business on September 13, 2021.<sup>2</sup> Our organizations filed comments on the Draft Environmental Assessment (DEA) on the interim contracts for the Cross Valley contractors on December 12, 2019, and we incorporate those comments by reference.<sup>3</sup>

The eight Cross Valley contracts that are the subject of this comment letter permanently lock-in deliveries from the Sacramento/San Joaquin Delta of about 128,300 acre-feet of water per year. Additionally, the County of Tulare Cross Valley contract includes 10 subcontractors (listed below). Our organizations provide these comments on the draft conversion contracts for:

Contractor Name	Subcontractors	Contract No.	Maximum Contract Quantity (acre-feet/year)
Hills Valley Irrigation District		14-06-200-8466A-IR5-P	3,346
Kern-Tulare Rag Gulch Water District		14-06-200-8367A-IR5-P	13,300
Kern-Tulare Water District		14-06-200-8601A-IR5-P	40,000
Lower Tule River Irrigation District		14-06-200-8237A-IR5-P	31,102
Pixley Irrigation District		14-06-200-8238A-IR5-P	31,102
Tri-Valley Water District		14-06-200-8565A-IR5-P	1,142
City of Fresno		14-06-200-8292A-IR5-P	3,000

<sup>1</sup> See: <https://www.usbr.gov/newsroom/#/news-release/3914?filterBy=region&region=California-Great%20Basin>

<sup>2</sup> Copies of the draft Cross Valley contracts are available here: <https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html>

<sup>3</sup> See Appendix H, Coalition comments starting at pdf page 136: [https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc\\_ID=42468](https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42468)

County of Tulare	1. Alpaugh ID, 2. Atwell Island WD, 3. City of Lindsey, 4. City of Visalia, 5. Frasinetto Farms LLC, 6. Hills Valley ID, 7. Saucelito ID, 8. Stone Corral ID, 9. Strathmore PUD, 10. Styro-Tek Inc.	14-06-200-8293A-IR5-P	5,308
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The draft Cross Valley contracts also include a provision under Article 5(a) that allows exchanges (Article 5 exchanges) of Cross Valley contract supply with other non-CVP contractors in the Tulare Basin: *“The parties acknowledge that Project Water to be furnished for the Contractor pursuant to this Contract shall be delivered to the Contractor by direct delivery via the Cross Valley Canal and/or by exchange arrangements involving Arvin-Edison Water Storage District or others. The parties further acknowledge that such exchange arrangements are not transfers subject to Section 3405(a) of CVPIA.”* These Article 5 exchanges *“shall be submitted to the Contracting Officer for approval prior to the implementation of the proposed exchange.”*

**Failure to Comply with NEPA.**

An EIS must be prepared by Reclamation before entering into these permanent Cross Valley contracts. The reason is that execution of these contracts 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>4</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 these contract renewals and the water diversions and deliveries authorized by it. Reclamation also has not furnished the public any information whatsoever, by which to evaluate

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<sup>4</sup> The NEPA Regulations are codified at 40 C.F.R. §1500 et seq.

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.)

We note that the Cross Valley contracts get their water from the Sacramento-San Joaquin Delta and use two major Federal and State water projects both the State Water Project and Federal Central Valley Project –along with local water delivery projects and four counties—Fresno, Tulare, Kings, and Kern with source water impacts from Trinity, Sacramento, Placer, San Joaquin, Merced, and Stanislaus counties, for their water deliveries. Yet the 2019 DEA for Cross Valley interim contracts proclaimed that the renewal of up to 128,300 acre feet of exports from the Delta for two years would have minor impacts to biological resources.<sup>5</sup> Without analysis or data, the DEA asserted that these eight interim renewal contracts and proposed Article 5 exchanges would not have no more than a “minor” impacts to the environment.<sup>6</sup> Further, the environmental analysis (DEA) for a 2-year interim contract does not equate to the long-term impacts of these permanent contract conversions.

### **Failure to Consider a Full Range of Alternatives**

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.*

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<sup>5</sup> *Ibid.* @ pdf pg 32 of DEA.

<sup>6</sup> “Up to 128,300 acre-feet (AF) per year (AF/y) of the Cross Valley Contractors’ contractual CVP water supply from the Delta would be allowed to be transferred under the exchange arrangements for Friant Division CVP supplies and other sources (other sources of water include rivers, streams, creeks, previously banked surface water, and State Water Project [SWP] water). The Cross Valley Contractors and potential exchange partners (CVP contractors and non-CVP contractors) are all located within Fresno, Tulare, Kings, and Kern counties. This EA covers the broadest flexibility for Article 5 exchange arrangements known at this time.” [DEA @pdf pg 13]. All of the Cross Valley Contractors are currently on their seventeenth interim renewal contract. The Proposed Action would be their eighteenth. The Proposed Action also includes Reclamation’s transfer approvals associated with the Cross Valley Contractors exchange arrangements with individually proposed exchange partners for the same time period as the interim renewal contracts for up to the full Cross Valley Contractors’ CVP contract supply (up to 128,300 AF/y). In addition, the Proposed Action would include the continued transfers associated with the historical exchanges between the Cross Valley Contractors and Arvin-Edison Water Storage District (Arvin-Edison). [DEA @pdf pg17].

*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.)

### **Failure to Consider Cumulative Impacts**

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 these draft contracts.<sup>7</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.

Examples of actions that should be reviewed in an EIS Cumulative Effects Analysis include:

- Groundwater pump-ins into the Friant-Kern Canal<sup>8</sup>
- Water transfers and exchanges (including Article 5 exchanges)
- Groundwater banking projects

### **Examples of Environmental Issues Ignored by Reclamation’s Failure to Prepare an EIS or even an Environmental Assessment for Cross Valley contracts:**

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

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<sup>7</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>8</sup> See: [https://www.usbr.gov/mp/nepa/nepa\\_project\\_details.php?Project\\_ID=49768](https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=49768)

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 Cross Valley contractors diminishes 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 Cross Valley contractors exacerbate the decline of the Delta. Water quality standards are not being met, temperatures are being exceeded, pulse flows are not being provided and species are in fact facing deteriorating habitat and extirpation.

*(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>9</sup>.

These new contracts do not include the water reductions. Nor does it contain water needs assessments to assess delivery amounts to the Cross Valley contractors.

The Cross Valley contract conversions are 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) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.*

The Cross Valley contract conversions are related to other WIIN Act contract conversions in the pipeline that would have cumulatively significant impacts.

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<sup>9</sup> See: <https://www.latimes.com/environment/story/2019-11-11/westlands-water-district-federal-water-contract>

(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 and longfin 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.

**Reclamation's Action is Discretionary.**

Our organizations have not seen any communication from Reclamation explaining why these Cross Valley contracts are being 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>10</sup> The Secretary of the Interior has discretion to determine contract terms and conditions that are agreeable to her.

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<sup>10</sup> Such cases include *Forelaws on Board v. Johnson*, 743 F.2d 677 (9<sup>th</sup> Cir. 1984.)



## **The Draft Contracts Fail to Comply with CVPIA § 3404(c)(2).**

NEPA Compliance is also required by the Central Valley Project Improvement Act (CVPIA) before entering into long-term contracts.<sup>11</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]”

CVPIA Section 3404(c)(2) states: “*Upon renewal of any long-term repayment or water service contract providing for the delivery of water from the Central Valley Project, the Secretary shall incorporate all requirements imposed by existing law, including provisions of this title, within such renewed contracts. The Secretary shall also administer all existing, new, and renewed contracts in conformance with the requirements and goals of this title.*” The draft 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 C of the draft contract (Unpaid Construction Cost), 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.*
- *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.*

## **The Draft Contracts Fail to Comply with the Coordinated Operations Act of 1986.<sup>12</sup>**

These draft contracts omit the obligation of the Cross Valley contractors and the United States to deliver Project water in accordance with water quality standards specified in PL 99-546. This language was omitted from these draft contracts: "water quality standards specified

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<sup>11</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.

<sup>12</sup> See Section 101 and Section 102: <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3050.pdf>

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.

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 the Endangered Species Act (ESA) and California Endangered Species Act (CESA).**

Excess water exports from the Trinity, Sacramento and San Joaquin Rivers and Delta associated with operations of the Central Valley Project have led to dozens of species being listed as threatened or endangered.<sup>13</sup> The evidence before Reclamation and the Services demonstrates that these diversions from the Delta to the Cross Valley contractors may appreciably reduce the likelihood of survival and recovery of at least four species under NMFS jurisdiction (Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, and green sturgeon) and at least three species of fish under USFWS jurisdiction (the Delta smelt, longfin smelt and Sacramento splittail). The evidence also demonstrates that these Delta diversions do adversely modify the critical habitat for these species. Continued operation of the CVP and SWP is likely to jeopardize the continued existence of endangered species in the Delta, and cumulative effects from stormwater runoff and subsurface agricultural drainage from other CVP-irrigated lands contaminates the San Joaquin River and hence the Delta with selenium and other toxic constituents. See testimony from Restore the Delta on Salinity and Selenium Science and Modeling for the Bay/Delta Estuary.<sup>14</sup>

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<sup>13</sup> See USFWS, 2000, CVPIA biological opinion, appendix B.

<sup>14</sup> Testimony on Recent Salinity and Selenium Science and Modeling for the Bay/Delta Estuary Submitted by Tim Strohshane Senior Research Associate California Water Impact Network (CWIN) August 17, 2012 [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/docs/RestoretheDelta/part2/RTD\\_161.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/RestoretheDelta/part2/RTD_161.pdf)

Reclamation concluded in the DEA for Cross Valley interim contracts without analysis or information that the “*Effects to Delta species and critical habitats, such as the Delta smelt, salmonids, and green sturgeon which are the result of CVP operations, are addressed in the CVP/SWP Coordinated Operations consultation. As such, Reclamation has determined that there would be no effects to species and critical habitats for the Proposed Action under the jurisdiction of NMFS that have not already been addressed.*” [DEA @pdf pg 42]. Further, the DEA claimed, there is no need for consultation the National Marine and Fishery Service and cites the CVP/SWP Coordinated Operations consultation (@ pg 42).<sup>15</sup> These claims are not supported by fact. The 2019 Biological Opinions on CVP/SWP Operations identified in the DEA have been challenged in court<sup>16</sup>, and the specific impacts of the tiered actions have not been disclosed or analyzed. Nor have the impacts from operational changes. The exchanges when added to the Article 55 provision in the SWP contracts could result in more frequency of DWR pumping and conveying the 128,300 af/y of water. This fails to consider violations of temperature, salinity and flow requirements of D-1641. There have been repeated violations of the Clean Water Act standards<sup>17</sup> and Endangered Species Act requirements under the Reasonable and Prudent Alternatives. CVP operations and the exports of water pursuant to this interim contract have consistently violated the Coordinated Operation Act of 1986 requiring adherence to Delta Water Quality Standards contained in D-1485 and subsequent water quality standards.

Some of the Cross Valley and Article 5 Exchange service areas include designated critical habitat for federally listed species. As denoted in the DEA for Cross Valley interim contracts (@ pdf pg 25), Critical habitat exists in the affected environment for the following species: Buena Vista Lake shrew, California condor, California tiger salamander, Hoover’s spurge, San Joaquin Valley Orcutt grass, succulent owl’s-clover, vernal pool fairy shrimp, and vernal pool tadpole shrimp. The proposed actions could cause direct adverse modification to critical habitat, which will be compounded by the interrelated export of substitute water from the Delta to the Exchange Contractors.<sup>18</sup> These previously identified impacts are now further compounded by permanent contract conversions 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>19</sup>

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<sup>15</sup> DEA @pdf pg 42: “Reclamation has determined that there would be no effects to species and critical habitats for the Proposed Action under the jurisdiction of NMFS that have not already been addressed.”

<sup>16</sup> See: <http://www.courthousenews.com/wp-content/uploads/2019/12/Bay-Delta-Complaint.pdf>

<sup>17</sup> Of particular note, the SWRCB, referencing WR Order 90-05, stated in WR 92-02 at page 9: The State Water Board also has advised the USBR that decisions on water deliveries are subject to the availability of water, and that water should not be considered available for delivery if it is needed as carryover to maintain an adequate cold water pool for the fishery. SWRCB warned against USBR decisions to maximize water deliveries in the initial years of a drought and failing to maintain sufficient carryover storage to protect fisheries and public trust resources.

<sup>18</sup> NRDC v. Rodgers, No. S-88-1658 LKK, Order at 19-20 (May 31, 1995).

<sup>19</sup> See: <https://www.feinstein.senate.gov/public/index.cfm/pressreleases?ID=FF5C94EB-667A-4DEC-A0A4-296AB5027BE4>

**A Complete Set of the Contract Exhibits has not been provided, thus public comment is precluded.**

We note that no draft contract exhibits were made available at USBR's website for Pixley Irrigation District.<sup>20</sup> Further, draft contract exhibits provided online for all the remaining Cross Valley contracts are incomplete and fully informed public comment has thus, been precluded. Problems with the exhibits include:

- 1. Exhibit B – Rates and Charges** [*--rate components are available on the Internet at: <https://www.usbr.gov/mp/cvpwaterrates/ratebooks/index.html>*] Two DOI Inspector General Reports have indicated the amounts being charged are insufficient to repay the capital costs.<sup>21</sup> Reclamation law and policy require a contract to ensure that sufficient rates are charged to repay federal taxpayers. The undersigned have provided comment on how the proposed cost allocation will impact environmental protections and take additional money from the federal treasury without adequate repayment, as required.<sup>22</sup> We adopt those comments by reference.
- 2. Exhibit C – Repayment Obligation**—We find there is no evidence in either the direct contract language or exhibit C's that all of the CVPIA cost obligations for fish and wildlife restoration and mitigation have been collected or will be paid under the proposed contracts.
- 3. Water Needs Assessments are not Included** -- We note that other contracts (e.g., Westlands) have included an **Exhibit C - Central Valley Project Water Needs Assessments**. No such exhibits including water needs assessments for the Cross Valley contractors was provided for public review. Reclamation is contractually required to conduct a proper water needs assessment, and without a current water needs assessment, there is no way of knowing if the needs of the Cross Valley contractors equal the current total contract quantity.<sup>23</sup>

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<sup>20</sup> See Pixley ID contract but no exhibits provided at: <https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html>

<sup>21</sup>[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/exhibits/land.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/land.html) & 2004 DOIG *Central Valley Contract Renewal Process August 2004* [OIG Report No W-IN-BOR-0016-2004]

<sup>22</sup> <http://calsport.org/news/wp-content/uploads/Conservation-Fishing-and-Tribe-Cmts-RE-CVP-Cost-AllocationStudy-Burman-1-2-2020-.pdf>

<sup>23</sup> See: [https://www.usbr.gov/mp/cvpia/3404c/process\\_info/cont\\_policies/3\\_cvp\\_policies/01\\_02-22-99.pdf](https://www.usbr.gov/mp/cvpia/3404c/process_info/cont_policies/3_cvp_policies/01_02-22-99.pdf) and <https://pcffa.org/wp-content/uploads/2016/07/102-7-25-16-Amended-Memorandum.pdf> pg 7

## Conclusion.

We urge you to rescind these Cross Valley permanent contract conversions and instead restart the process with proper public transparency, following established legal requirements including a full EIS review under NEPA. We request public contract negotiations be held with adequate notice provided, especially in the counties and areas from which the proposed irrigation water is taken. Furthermore, these negotiations should not be held until a full environmental impact statement is completed, and endangered species consultations, and complete draft contracts and exhibits (including a water needs assessments) are provided.

Thank you for considering these comments. Please make sure the undersigned are included in any future actions with regard to CVP contract renewals and/or conversion of CVP contracts pursuant to Section 4011 of the WIIN Act.



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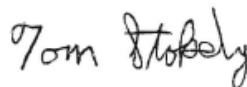
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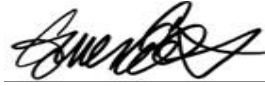
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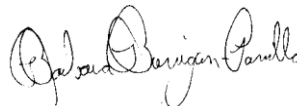
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