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**Via Email**

eal@usbr.gov  
Erma Leal  
Bureau of Reclamation  
South-Centra California Area Office  
1243 N Street  
Fresno, CA 93721

**Re: WIIN Act Draft Repayment Contracts Between Bureau of Reclamation and Westlands Water District**

Ms. Leal:

On behalf of the Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc., we submit the following comments regarding the Bureau of Reclamation's ("Bureau's") draft agreements with Westlands Water District ("Westlands") to convert Westlands' renewal contracts to repayment contracts. Westlands currently receives Central Valley Project ("CVP") water from the Bureau through several water contracts, with contracts for deliveries of up to approximately 1,193,000 acre-feet ("AF") of CVP water each year.

In 1992 Congress enacted the Central Valley Project Improvement Act, Public Law No. 102-575, 108 Stat. 4600 ("CVPIA"), to reduce the adverse environmental impacts of Central Valley Project operations. CVPIA §§ 3402(a)-(b), 3406(b). The CVPIA limited the Bureau's authority to enter into new long-term contracts with existing water contractors. In order "[t]o address impacts of the Central Valley Project on fish, wildlife and associated habitat," the CVPIA requires the Bureau to undertake environmental review – including the preparation of an Environmental Impact Statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA") – before any long-term water service contract can be renewed by the Bureau. CVPIA §§ 3402(a), 3404(c)(1).

Despite the CVPIA's 1992 mandate, the Bureau never prepared the required EIS for its delivery of water to Westlands. Instead, upon expiration of the prior long-term contracts, the Bureau issued short-term interim contracts to Westlands. The Bureau relied upon the analysis of

a series of deficient environmental assessments (“EAs”) that failed to examine the full effects of the Bureau’s water deliveries under the contracts on the environment, including impacts at the source waters, impacts to the receiving waters once the water is used for irrigation, and related impacts to biological resources. The Bureau also relied upon the analysis performed by the United States Fish and Wildlife Service (“FWS”), which often concluded that due to the short term nature of the interim contracts, their impacts on special status species would not cause jeopardy. *See, e.g.*, February 26, 2010 FWS Biological Opinion regarding Consultation on the Interim Renewal of Ten Water Service Contracts . . . For March 1, 2010 – February 29, 2012, pp. 78 (“brief nature” of the interim contracts contributed to “finding that drainage disposal will adversely affect, but will not appreciably reduce the likelihood of both the survival and recovery fo the California least tern”), 81 (“Because of the brief nature” of the renewal contracts for Westlands, FWS “concludes that [Westlands’] contribution to selenium contamination in the Grasslands wetland supply channels and the San Joaquin River associated with [interim contract] CVP deliveries may adversely affect, but will not appreciably reduce the likelihood of both the survival and recovery of the giant garter snake during the three year life of project”).

None of this analysis took into account the serial nature of this quarter-century of interim renewals. And, in performing these interim renewals, the Bureau continued to rely upon Westlands’ self-serving assertions that it could beneficially use all water delivered under the contracts on lands within its service area, even as Westlands was retiring land to mitigate harmful drainage. Thus, instead of bridging a gap between the prior long-term contracts and the completion of environmental review for the new long-term contracts, the interim contract process was used as a way to *avoid* the scrutiny that Congress mandated.

Indeed, in the over quarter-century since Congress passed the CVPIA, populations of fish species in the Bay Delta have steeply declined toward extinction. Indeed, endangered winter-run Chinook salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened green sturgeon, and threatened delta smelt have all faced an uphill battle for survival in the face of increased salinity, sedimentation, rising temperature, and other harmful reductions in water quality and flow. These trends are not limited to fish species listed as threatened or endangered under the Endangered Species Act. Fall-run and late fall-run Chinook salmon – the remaining commercially fished Chinook – have also faced population declines. When there are insufficient returning fall-run and late-fall run Chinook, the commercial and recreational Chinook salmon fisheries have been shut down as emergency measures to protect the species. The adverse conditions causing these population declines can be attributed to Central Valley Project operations, including the Bureau’s delivery of water to Westlands under prior water contracts

These massive species declines have occurred as agencies have failed to meet restoration goals and standards intended to stave off extinction, starting with the CVPIA’s salmon-doubling goal. CVPIA § 3406(b)(1) (“natural production of anadromous fish in the Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991” by 2002). This goal has not been, and *cannot*

now be, achieved by the 2002 deadline. The 2001 Final Restoration Plan for the Anadromous Fish Restoration Program (“AFRP Plan”) adopted by the National Marine Fisheries Service established objectives that were supposed to meet the fish doubling goal, including “improve habitat for all life stages of anadromous fish through provision of [suitable] flows . . . and improved physical habitat,” “improve survival rates by reducing or eliminating entrainment of juveniles at diversions,” and “improve the opportunity for adult fish to reach their spawning habitats in a timely fashion” among others. AFRP Plan, p. 5 (capitalization altered).<sup>1</sup>

The Bureau adopted a Final Programmatic Environmental Impact Statement for Implementation of the CVPIA (“CVPIA PEIS”) in 1999. In it the Bureau acknowledged that its operation of the CVP had impaired fisheries through the suppression of storm flows, dams, reversed flow on the San Joaquin River, the loss of riparian vegetation through the levee system, and other habitat changes. CVPIA PEIS, pp. I-2, I-3. However, neither the Anadromous Fish Restoration Program nor the CVPIA PEIS led to compliance with the fish-doubling goal.

Instead of doubling, fish populations have continued to plummet. In June 2009, the National Marine Fisheries Service (“NMFS”) issued a Biological Opinion (“2009 NMFS BiOp”) that discussed these declines. It observed a “precipitous decline” in Sacramento winter-run Chinook in 2007 “that continued in 2008, when less than 3,000 adult fish returned to the upper Sacramento River.” 2009 NMFS BiOp, p. 81. It described how Central Valley steelhead have had “a pattern of negative growth rate since the late 1960s . . . [with] no indication that this trend has changed” since 1993. *Id.*, at 109. It also described how the Southern distinct population segment (“DPS”) of North American green sturgeon had “very little production” in 2007 and 2008, and that it was “clear that the abundance of the Southern DPS of green sturgeon is declining.” *Id.*, at 120.

The 2009 NMFS BiOp warned the Bureau that:

the long-term operations of the CVP and SWP are likely to jeopardize the continued existence of Sacramento River winter-run Chinook Salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern DPS of North American green sturgeon, and Southern Resident Killer whales. The long-term operations of the CVP and SWP are likely to destroy or adversely modify critical habitat for Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, and Central Valley steelhead.

2009 NMFS BiOp, p. 575. NMFS also warned that the “long-term operations of the CVP and SWP are likely to destroy or adversely modify proposed critical habitat for the Southern DPS of

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<sup>1</sup> Available at:  
[www.fws.gov/cno/fisheries/CAMP/Documents/Final\\_Restoration\\_Plan\\_for\\_the\\_AFRP.pdf](http://www.fws.gov/cno/fisheries/CAMP/Documents/Final_Restoration_Plan_for_the_AFRP.pdf) (last visited December 20, 2019).

North American green sturgeon.” *Id.*

Similarly, FWS found in its December 2008 Biological Opinion (“2008 FWS BiOp”) that “the coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued existence of the delta smelt.” 2008 FWS BiOp, p. 276. It observed that delta smelt in 2008 “at lowest level of abundance since monitoring began in 1967.” *Id.*

The 2009 NMFS BiOp makes clear that as much as 60 percent of the natural historical inflow to Central Valley watersheds and the Delta has been diverted for human uses. Depleted flows have contributed to higher temperatures, lower dissolved oxygen . . . levels, and decreased recruitment of gravel and large woody debris.” 2009 NMFS BiOp, p. 135. NMFS has found that “[w]ater withdrawals, for agricultural and municipal purposes, have reduced river flows and increased temperatures during the critical summer months, and in some cases, have been of a sufficient magnitude to reverse flows in the lower San Joaquin River. . . . Direct relationships exist between water temperature, water flow, and juvenile salmonid survival.” *Id.*, at 136. Thus, CVP exports significantly contribute to fish declines.

In addition to harming fish by reducing Delta flows, using CVP water for irrigation exacerbates the existing contamination of the soils, groundwater and surface waters of the San Joaquin Valley with salts and other pollutants such as selenium, which is “highly bioaccumulative.” February 29, 2016 FWS Biological Opinion on Interim Renewal Water Service Contracts . . . for March 1, 2016 – February 28, 2018 (“2016 FWS IRC BiOp”), p. 18. Extraordinarily “high selenium concentrations [are] found in subsurface agricultural drainwater in” Westlands’ service area. February 29, 2012 FWS Biological Opinion on One Delta and Five an Luis Unit Water Service Interim Renewal Contracts . . . From March 1, 2012 through February 28, 2014, p. 20. “[T]here is a hydraulic connection of shallow groundwater contamination originating in Westlands to lands downslope of Westlands that do discharge to surface waters.” 2016 FWS IRC BiOp, p. 19. For this reason, “[d]rainage contamination from Westlands . . . likely contributes to . . . selenium contamination in the . . . San Joaquin River.” 2016 FWS IRC BiOp, p. 21. In fish, “excessive exposure can lead to selenium toxicity or selenosis and result in death or deformities of fish embryos, fry, or larvae.” 2016 Final Environmental Impact Statement for Coordinated Long-Term Operation of the Central Valley Project and State Water Project (“2016 LTO EIS”), p. 6-22. Green sturgeon are “highly sensitive to selenium levels.” 2009 NMFS BiOp, p. 115.

Though “contaminant loading and its ecosystem effects within the Delta are not well understood,” “[t]here are longstanding concerns related to mercury and selenium levels in the watershed, Delta, and San Francisco Bay.” 2008 FWS BiOp, pp. 186-187; *see also* 2016 LTO EIS 9-77. For example, pollution may be linked to the fact that in “2005, . . . 6 percent . . . of adult delta smelt sampled were intersex.” 2008 FWS BiOp, p. 188. And in salmonids, the increase in pollutants – like those from discharges of the shallow groundwater originating under Westlands’ service area – “can lead to either acute toxicity, resulting in death . . . , or . . . when concentrations are lower, to chronic or sublethal effects that reduce the physical health of the

organism and lessens its survival over an extended period of time.” 2009 NMFS BiOp, p. 142.

The Bureau issued a Record of Decision (“ROD”) for the 2016 LTO EIS, purportedly in order to implement the reasonable and prudent alternative (“RPA”) mandated by the 2009 NMFS BiOp and 2008 FWS BiOp. Yet the Bureau’s subsequent actions were not sufficient. The Bureau continued to violate water quality standards in the Delta and allowed species populations to continue their downward trends.

Instead of taking appropriate action to protect imperiled fish and wildlife, the Bureau requested new consultation. While it received fast-tracked new biological opinions in 2019 – which due to improper and unlawful political influence no longer find jeopardy, despite allowing *worse* conditions for fish and wildlife – the Draft Environmental Impact Statement that the Bureau prepared for these new biological opinions, continues to avoid any discussion of the individual impacts of any of the CVP contracts.

In defiance of Congressional mandates to operate the CVP to protect and restore fish populations and their habitat, the Bureau has instead prioritized water deliveries to contractors, and has failed to ever take the hard look required by NEPA. Now, the Bureau claims it is no longer required to study these impacts before finalizing the Draft Agreements with Westlands.

The Water Infrastructure Improvements of the Nation Act, Public Law 114-322 (2016) (“WIIN Act”) does not exempt the Bureau from its statutory duty to prepare an EIS. In its briefing before the court in *North Coast Rivers Alliance v. United States Department of the Interior*, United States District Court for the Eastern District of California Case No. 16-cv-307-LJO-SKO, the Bureau has claimed that the WIIN Act imposes a non-discretionary duty on it to enter into conversion contracts with Westlands. Yet, the WIIN Act clearly indicates that the obligations of the CVPIA continue to apply to the Bureau’s actions, with the sole exception for “savings provisions for the Stanislaus River predator management program.” WIIN Act § 4012 (a)(2). Further, the WIIN Act provides the Bureau with the discretion to negotiate “mutually agreeable terms and conditions” in converting existing contracts to repayment contracts. WIIN Act § 4011(a)(1).

Thus, the Bureau is still required by NEPA to prepare an EIS detailing the environmental impacts of the draft conversion contracts with Westlands. This EIS must address the site-specific impacts of water deliveries to Westlands. It also must address the impacts of these water deliveries on the source watersheds, and the waters that receive Westlands’ contaminated drainage. The EIS must likewise address the impacts on the fish species discussed above, as well as the giant garter snake, California least tern, Ridgeway’s rail (formerly known as the California clapper rail), and other special status wildlife that are impacted by Westlands’ receipt of CVP water from the Bureau.

The draft conversion contracts between the Bureau and Westlands provide that the Bureau may reduce the quantity of water to be made available under the Contract, based upon

water needs assessments provided by Westlands. The Bureau must consider, in conducting this review, whether the water “can be put to reasonable and beneficial use . . . on [e]ligible [l]ands within [Westlands’] service area that are not retired . . . .” Draft Conversion Contract Article 3, pp. 15:316-16:317. In evaluating the water needs assessment, the Bureau must consider alternative sources of water available to Westlands. Further, the Bureau must consider whether Westlands’ use is reasonable and beneficial. Given these parameters, the Bureau must analyze in its EIS a reasonable range of alternatives, including alternatives that curtail water deliveries in order to allow for species recovery. In addition, in the conversion contracts themselves, the Bureau must include more specific terms to allow contract modifications to prevent the continued decline and potential extinction of the special status species harmed by ongoing CVP operations.

For the reasons stated above, the Bureau’s planned execution of the draft conversion contracts without appropriate NEPA compliance violates both NEPA and the CVPIA. The Bureau must prepare an EIS.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephan C. Volker". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Stephan C. Volker

Attorney for Winnemem Wintu Tribe, North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, California Sportfishing Protection Alliance, and San Francisco Crab Boat Owners Association, Inc.,