

**Friends of Trinity River
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Public Trust Alliance
Butte Environmental Council
California Water Impact Network (C-WIN)
Pacific Coast Federation of Fishermen's Associations
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September 9, 2005

Mr. Richard Stevenson
Bureau of Reclamation
2800 Cottage Way, MP-440
Sacramento, CA 95825

Via Fax: 916-978-5292
Email: rstevenson@mp.usbr.gov

Re: Comments on Long-Term Contract between the United States and Westlands Water District (San Luis Unit and Delta Division)

Dear Mr. Stevenson:

Organizations on this letterhead submit the following comments on the long-term contract between the United States and Westlands Water District (San Luis Unit and Delta Division). We have reviewed the proposed water contract for Westlands Water District (Contract No. 14-06-200-495A-LTR1), and we request that the renewal process be suspended until a decision has been made that will provide a permanent, feasible solution to drainage problems for Westlands' contaminated soils.

Proposed Contract and Negotiations are Premature

It is clear there has been little, if any communication between those developing the environmental documentation for the San Luis Drain Feature Re-Evaluation Draft EIS (SLDFRE DEIS) and those conducting negotiations for this contract. The SLDFRE DEIS includes an alternative to retire land within Westlands Water District (WWD), yet before any land retirement decision is made the Bureau of Reclamation (Bureau) is attempting to proceed to a conclusion with this contract.

Land to be Irrigated under Contract Unknown

It is incomprehensible to renew a water delivery service contract before knowing how much land is to be irrigated. The only legal purpose for this proposed contract is irrigation of land within WWD. Land may well be retired to which the contracted water

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was intended to be applied. Water contracts in the San Luis Unit (SLU) will not be expiring for several more years. It is not rational or credible to begin the contract renewal process before all information requiring consideration in negotiating this contract is available.

WWD's proposed contract also is flawed in that the contracted quantity of water increases although approximately 41,000 acres in WWD already has been retired from irrigation. It is clear and obvious that it will be necessary to retire more WWD land in the next several years. Contract water quantity obviously should be reduced. If lands will not be irrigated, WWD does not need, and should not be provided with water previously used for irrigation. The proposed contract also provides for water deliveries greater than any amount of CVP water ever delivered to WWD by the Bureau since passage of the Central Valley Project Improvement Act in 1992 (P.L.102-575).

As a result of the July 28, 2005 decision by U.S. District Judge Lawrence Karlton regarding the Endangered Species Act (ESA) consultations on the Bureau's renewal contracts with the Friant Division, an Environmental Species Analysis (ESA) is required to evaluate full contract water deliveries, not partial, historical amounts of delivered water. The contract must be revised to reflect the amount of water that reliably can be delivered to the district, not a quantity that exceeds the ability of the CVP to deliver.

According to Reclamation's own information, WWD includes approximately 298,000 acres of drainage impaired lands (now 308,000 including Broadview, a part of WWD) and otherwise is in an arid region possessing high concentrations of selenium, boron, arsenic, and molybdenum in highly alkaline soils. Some 200,000 acres has been suggested for retirement by WWD itself, but currently the amount of land to be retired, as well as ownership and use of retired land, are complete unknowns. Thousands of tons of additional salt are imported from the Delta to irrigate these lands, further concentrating the witches' brew that exists in the semi-confined aquifer under WWD and its neighbors.

Over the years, federal and state studies – at an estimated cost exceeding \$100 million before costs of the recent SLDFRE DEIS - have provided figures on land required to be retired in WWD to solve toxic irrigation drainage problems. There follows a table of acreage that should be retired (figures modified to include Broadview) according to various identified sources:

	Land Retirement In Valley Groundwater Quality Alternative for SLD DEIS (acres)	Land Retirement In Valley Water Needs Alternative for SLD DEIS (acres)	Land Retirement In Valley Drainage Impaired Alternative (acres) for SLD DEIS	Land Retirement Westside Regiona Drainage Plan (ac
Westlands Water District Acreage	48,486	159,850	308,000	323,000

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Additionally, from the United States Geological Survey Open File Report 00-416 and the Rainbow Report, one can conclude that by 2040 the Western San Joaquin Valley will be a 950 million acre Superfund Site as a result of irrigation of toxic land, assuming irrigation was stopped today.

It is inconceivable that the Bureau would proceed with a contract for water service delivery for an effective term of 50 years or more to land, much if not all of which should be retired. What is the objective here? To provide water for agricultural irrigation in accordance with the law, or to provide a relative handful – essentially 200 or so - landowners with a taxpayer handout worth hundreds of millions of dollars that is outside the law?

Revised Water Needs Analysis Required

WWD's Water Needs Analysis should be started anew after a Record of Decision for the San Luis Drainage project is signed and prior to completing contract negotiations. This is necessary to determine how much water actually will be needed based upon the eventual amount of land to be retired as a result of the San Luis Drainage EIS process. It also will be necessary to consider additional realistic land retirement needs.

Even though the economic analysis for the SLDFRE DEIS identifies land retirement as the least costly and environmentally preferred alternative, there is no analysis of how land retirement would affect Westlands' Water Needs Analysis. Since the Bureau has not even identified a Preferred Alternative for the San Luis Drainage EIS, there is no basis to determine contract water volumes, and a Water Needs Analysis cannot possibly be correct at this time.

No Drainage Solution for Toxic Lands

It is unacceptable to renew WWD's contract without addressing the need for drainage service. The Bureau has embarked on a process to renew a long term water contract before a decision has been made on how to provide for disposal of contaminated drainage from WWD. No Preferred Alternative is identified in the SLDFRE DEIS. Many details of a workable, genuinely effective and permanent drainage disposal alternative do not yet exist, and drainage service will not be available for several more years.

Irrigation drainage pollutants are being transported, leached, and remain in the shallow groundwater that underlies the SLU and Delta-Mendota Canal (DMC) service areas. Polluted water exists within DMC and SLU areas as well.

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Water in the City of Mendota was made undrinkable and the Kesterson Wildlife Refuge disaster are two examples of downslope effects of this pollution. In addition, human health advisories have been issued against consuming selenium contaminated fish. Selenium contamination from 1986 to 1996 was sufficient to cause deformities and to threaten reproduction in key wildlife species within the area of the greater Grasslands downslope of WWD. Even recently, migratory birds in the Grasslands Area, downslope of Westlands, have been found.

From Grasslands, this contaminated drainage then enters Mud Slough and the polluted drainage continues to move downstream via the San Joaquin River and into the San Francisco Bay Delta, water source for two-thirds of California's population.

Water quality in the San Joaquin River has been degraded for decades and the salmon fishery that once thrived no longer exists. The river cannot support the amount salts and contaminants being added to it from poisoned irrigation drainage. Additionally, required water quality standards for the river are not being achieved.

Thomas Birmingham, General Manager/General Counsel for WWD, admits in his testimony for the Westside Drainage Plan congressional hearing that salt being discharged to the San Joaquin River is creating serious problems meeting water quality standards set by the State Water Resources Control Board.

In Mr. Birmingham's testimony, he said,

“Modeling analyses conducted by the Group demonstrates that the elimination of drainage discharges from the area served by the Westside Regional Drainage Plan will, without any other action, result in compliance with the salinity objective at Vernalis.”

Any contract renewal at this time is an obvious attempt to push contract renewals to a conclusion without assessing all significant environmental impacts and without providing proper environmental documentation upon which the public may comment. Premature and early renewal of this contract only perpetuates the same mistake that was made by the Bureau 40 years ago by executing contracts for these water deliveries prior to providing a drainage solution as now required by law.

Floyd Dominy, Commissioner of Reclamation from 1959-69, in the PBS video documentary “Cadillac Desert” said,

“We went ahead with the Westlands project before we solved the drainage problem. We thought we knew how to solve the drainage problem. We thought the Kesterson Reservoir could be flushed on out into the Delta.”

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We didn't have it solidified. So I made a terrible mistake by going ahead with Westlands at the time we did."

Contract Renewal Not in Compliance with Law

The implied provision 2(b) of the contract essentially allows an automatic right of renewal. This further extends the time allowed to create more unforeseen environmental degradation and delays restoring some rationality to the Central Valley Project (CVP). It also is inconsistent with the law - the Central Valley Project Improvement Act of 1992. Renewing this long term contract threatens the environment, the economy and the sustainability of the State of California and must be analyzed fully and completely under NEPA and the Endangered Species Act.

Area and County of Origin Water Rights Not Included

The proposed contract also lacks language regarding "Area of Origin" and "County of Origin" water rights and fishery restoration obligations. These are legally subordinate to water deliveries to WWD.

This proposed long term water service contract relies upon water, in part, from water supplied by the Trinity River Division (TRD) of the CVP. The TRD diverts water from the Trinity River Basin in Northern California to the Central Valley of California by means of a system of dams and trans-mountain diversion works. Water diverted from the TRD eventually flows into the Sacramento River and Delta, and becomes part of the supply available to satisfy CVP water service delivery contracts. The following language is required in the proposed contracts regarding instream fishery flow requirements and Area/County of origin water rights of the Trinity River:

All water deliveries pursuant to this contract are limited by and subordinate to the Secretary's fiduciary duty, referred to in section 3406(b) (23) of the Central Valley Project Improvement Act, to meet instream fishery flow requirements of the Trinity River as specified in the Trinity River Flow Evaluation Final Report (June 1999) and Trinity River Record of Decision (December 2000).

All water deliveries pursuant to this contract are limited by and subordinate to terms and conditions 9 and 10 in the Bureau's Trinity River water permits (Permit No.'s 11967, 11968, 11969, 11970, 11971, 11972, and 11973), which require the following:

"9. Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.

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“10. This permit shall be subject to the prior rights of the county in which the water sought to be appropriated originates to use such water as may be necessary for the development of the county, as provided in Section 10505 of the Water Code of California.”

Priority of Reserved Tribal Fishing Rights Not Included

The Hoopa Valley and Yurok Tribes, located along the Trinity and Klamath Rivers, have a long-standing right to the water of the Trinity River for the continued existence of the river's fisheries. Since time immemorial, members of these Tribes have subsisted from this fishery, particularly salmon, that swim upstream to spawn. The fishery was “*not much less necessary to the existence of the Indians than the atmosphere they breathed.*” (*United States v. Winans*, 198 U.S. 371, 381 (1905)). Reserved fishing rights, and the priority water rights of these Tribes are not included in the proposed contract.

Priority of Trinity River Basin Restoration Not Included

Congress has enacted a number of laws intended to restore the Trinity River fishery, including: the original 1955 Trinity River Act that created the Trinity Division (P.L. 84-386), the Trinity River Basin Fish and Wildlife Management Act of 1984 (P.L. 98-541, 98 Stat. 2721), the Trinity River Basin Fish and Wildlife Management Reauthorization Act of 1996, (P.L. 104-143, 110 Stat. 1338), and the Central Valley Project Improvement Act (§3406(b) (23) of the CVPIA).

CVPIA § 3406(b)(23) directed the Secretary to determine and, upon concurrence of the Hoopa Valley Tribe, to implement permanent instream fishery flow requirements and operating criteria and procedures for the Trinity River Division (TRD) to restore and to maintain the Trinity River fishery. This section also required that the Trinity River Flow Study (TRFS) be completed by the end of 1996. It ultimately was completed in June 1999. In order to implement the TRFS, environmental reviews were completed and on December 19, 2000 the Trinity River Record of Decision (ROD) was signed by the Secretary of the Interior and the Hoopa Valley Tribe.

The ROD required implementation of habitat improvement actions including instream fishery flow releases from the TRD corresponding to those recommended in the TRFS. The Trinity River EIS was upheld by the Ninth Circuit Court of Appeals in *Westlands v. United States* on November 8, 2004 and stated, “*nothing remains prohibiting the full implementation of the ROD, including its complete flow plan for the Trinity River.*” All water deliveries to the CVP are limited by and subordinate to the Secretary's fiduciary duty, referred to in section 3406(b) (23) of the CVPIA, to meet instream fishery flow requirements of the Trinity River as specified in the Trinity River Flow Evaluation Final Report.

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As indicated above, long-standing Congressional mandates give priority to Trinity fishery releases over transbasin diversions to CVP contractors. Those requirements must be implemented pursuant to CVPIA § 3406(b) (23), the 1955 Trinity Division Act (P.L. 84-386) and California Water Code Section 10505, and should be included as conditions for water deliveries to WWD.

In particular, CVPIA § 3406(b)(23) directed the Secretary of the Interior to determine and implement permanent instream fishery flow requirements and operating criteria and procedures for the TRD to restore and maintain the Trinity River fishery. This provision was one of many Congress added to the CVP authorizing legislation in 1992 in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources and mitigating fish and wildlife impacts as well as for providing water deliveries to irrigators and municipalities and industrial users (CVPIA § 3406(a)).

The 1955 Act gives legal priority to Trinity River in-basin water needs, including those of the two tribes' fishery, over diversions to the Central Valley. See Memorandum from Assistant Regional Solicitor of the Department of the Interior to Regional Director, Bureau, Sacramento, 1-2 (Dec. 6, 1973) (1973 Sol. Op.). This provision limits Interior's authority to divert water for allocation to Central Valley contractors. Rather, Congress "*specifically limited the Secretary's discretion*" regarding TRD operations by requiring priority for Trinity and Klamath in-basin needs.

Therefore, the proposed contract between WWD and the United States is illegal, since it does not comply with Trinity River Basin legal mandates, reserve as first priority Area/County of origin needs, as well as Tribal Trust obligations to the Hoopa Valley and Yurok tribes. The contract should be rewritten to explicitly identify those reservations.

Conclusion

We urge you to halt this flawed process until a solution has been identified and implemented for the drainage problems in WWD. Any land retired as a result of such an action, or other land retirement initiatives surely to come, should be deducted from the total volume of water contracted for delivery to WWD. Compliance with existing Area/County of Origin water rights, Tribal Trust water and fishing rights, as well as State Water Permit Terms and conditions must be included in the proposed contracts. The automatic right to renewal should be eliminated. It is a violation of the Central Valley Project Improvement Act. Endangered Species Act compliance must be completed based upon delivery of full contract water amounts, not historical amounts of water.

We look forward to your response to our comments.

Yours very truly,

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Friends of Trinity River
By: s/Byron W. Leydecker, Chairman

California Trout, Inc.
By: s/ Brian Stranko, Executive Director

Public Trust Alliance
By: s/ Michael Warburton, Executive Director

Butte Environmental Council
By: Lynn Barris, Water Policy Analyst

California Water Impact Network (C-WIN)
By: s/Carolee K. Krieger, President

Pacific Coast Federation of Fishermen's Associations
By: s/ W. F. "Zeke" Grader, Jr., Executive Director

cc: The Honorable Dianne Feinstein
The Honorable Barbara Boxer
The Honorable George Miller
The Honorable Mike Thompson
The Honorable Gale Norton
Mr. Kirk Rodgers
Mr. Steve Thompson