

Apr-19-2006 12:08pm From-

T-447 P.002/007 F-479

KRONICK  
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TIEDEMANN  
& GIRARD  
A PROFESSIONAL CORPORATION

DANIEL J. O'HANLON  
dohanlon@kmtg.com

April 19, 2006

**VIA FACSIMILE AND U.S. MAIL**

Kirk C. Rodgers  
Regional Director  
U.S. Bureau of Reclamation  
Mid-Pacific Region  
2800 Cottage Way, P-100  
Sacramento, CA 95821

Steve Thompson  
Manager  
California-Nevada Operations Office  
U.S. Fish and Wildlife Service  
2800 Cottage Way, Suite W2606  
Sacramento, CA 95825

Re: *Westlands Water District, et al. v. U.S. Department of the Interior*  
Case No. CIV F-00-7124-OWW DLB

Dear Messrs. Rodgers and Thompson:

This firm represents the San Luis & Delta-Mendota Water Authority and the Westlands Water District in matters concerning the Trinity River. This letter concerns the flow releases planned for the Trinity River this spring.

Under the Record of Decision for the Trinity River Mainstem Fishery Restoration program, this is a "Wet" year. It has come to our attention, however, that the Department of the Interior is planning to makes releases at the level set for an "Extremely Wet" year. Unless this error is corrected, the Bureau of Reclamation will release more water than is authorized under the Record of Decision. The additional unauthorized releases, in excess of eighty thousand acre-feet of water, could result in a loss of water supply and hydropower to Central Valley Project contractors. Accordingly, we request that you promptly direct agency staff to set releases at the annual volume specified for a Wet year.

The agencies' error in year type designation results from using the wrong forecast. Under the Record of Decision, the designation of water year type is based on the volume of runoff above the Lewiston gage from October 1st to April 1st, plus additional runoff predicted by a ninety percent probability of exceedance forecast. This year, the ninety percent

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exceedance forecast predicts flows of one million nine hundred and forty-five thousand acre-feet. Under the Record of Decision, that means this year is a "Wet" year. The total volume of water that should be released this year is therefore seven hundred and one thousand acre-feet. The implementing agencies, however, have incorrectly used a fifty percent forecast to determine year type. The fifty percent exceedance forecast predicts flows of two million one hundred and five thousand acre-feet. Based on the fifty percent forecast, the implementing agencies are assuming that this is an Extremely Wet year type. It is our understanding that they propose to release a total volume of seven hundred and eighty-three thousand acre-feet of water. Thus, they propose to exceed the level of releases specified by the Record of Decision by some eighty thousand acre-feet. They have no authority to make such releases.

This problem, in which the implementing agencies base the year type designation on the wrong forecast, is not new. The same problem arose in 2005. Enclosed is a copy of a letter to you dated March 10, 2005. The enclosed letter explains in detail why using the fifty percent forecast is in error, with specific references to the Record of Decision and related documentation that show that year type designation is to be based on a ninety percent exceedance forecast. This matter is not open to reasonable dispute. Indeed, in the litigation, the Department of the Interior admitted that the year type designation is based on a ninety percent forecast. Despite what the Record of Decision provides, what the Department of the Interior has previously said, and the explanation in the March 10, 2005 letter, the implementing agencies have used the fifty percent forecast again this year.

Fortunately, in 2005 the year type designation was the same regardless of which forecast was used. This year, however, use of the wrong forecast results in the wrong year type designation, and higher proposed releases than are actually authorized. This error must be corrected promptly. Under the release schedule in the Record of Decision, releases will increase significantly beginning on April 29<sup>th</sup>.

We therefore request your assurances, by no later than April 26<sup>th</sup>, that the volume of releases to the Trinity River this year will be capped at seven hundred and one thousand acre-feet, based on a Wet year designation, and that you will instruct your staff accordingly. We would prefer that this matter be addressed without renewed litigation. However, we reserve the

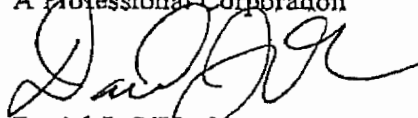
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right to seek injunctive relief against the proposed unlawful releases if there is no prompt corrective action.

Very truly yours,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
A Professional Corporation

  
Daniel J. O'Hanlon

DJO/dg  
Enclosure

cc: Thomas W. Birmingham  
Diane V. Ratlmann  
Dan Nelson  
(with enclosure)

827046.1



March 10, 2005

Kirk C. Rodgers  
Regional Director  
U.S. Bureau of Reclamation  
Mid-Pacific Region  
2800 Cottage Way, P-100  
Sacramento, CA 95821

Steve Thompson  
Regional Director  
California-Nevada Operations Office  
U.S. Fish and Wildlife Service  
2800 Cottage Way, Suite W2606  
Sacramento, CA 95825

Re: *Westlands Water District, et al. v. U.S. Department of the Interior*  
Case No. CIV F-00-7124-OWW DLB

Dear Messrs. Rodgers and Thompson:

The litigation challenging the December 19, 2000, Trinity River Record of Decision ("ROD") is essentially over, and the U.S. Bureau of Reclamation ("Reclamation") and the U.S. Fish and Wildlife Service ("Service") are now implementing the ROD. This letter concerns the method by which Reclamation and the Service must determine the annual volume of Trinity River Division ("TRD") flow releases into the Trinity River pursuant to the ROD. It has come to our attention that Reclamation and the Service may be planning to use a method different from the ROD, a method that could unlawfully increase releases to the Trinity River above the flows specified in the ROD.

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The ROD adopted a specific and detailed approach for determining annual TRD flow release volumes. Section 3406(b)(23) of the Central Valley Project Improvement Act ("CVPIA") makes that approach "permanent." Since the statute makes this ROD flow regime "permanent," Reclamation and the Service are not free to change it. Under the ROD, the annual TRD flow release volume is determined on April 1 based on the designation of the Trinity River water year as one of five hydrologic year types. See ROD at 12 (describing flow regime and incorporating FEIS Implementation Plan for determining annual release volume). The water-year designation is based on the amount of runoff above the Lewiston gage from October to April 1, plus the additional runoff predicted by a "90 percent probability of exceedence" forecast. Implementation Plan at C-4. Thus, the permanent TRD flow release regime approved by the ROD and concurred in by the Hoopa Valley Tribe specifically requires a 90 percent exceedence approach. Indeed, during the Trinity River litigation, both the United States and Hoopa Valley Tribe advised the court that the ROD requires a 90 percent exceedence approach.

We understand that Reclamation and the Service are now planning to use a 50 percent exceedence approach for designating the Trinity River year type that will determine TRD flow release volumes starting this April. This is contrary to the ROD, and it may have significant consequences. Depending upon hydrologic conditions in a given year, using a 50 percent rather than 90 percent forecast may change the "year type," and hence the level of releases to the Trinity River. This year is a year when this difference may occur. If this March is wet, the April 1 forecast based on a 50 percent exceedence forecast will likely be a "normal" year, while the forecast based on a 90 percent exceedence forecast will likely be a "dry" year. The ROD flow release volume for a "normal" year is 647,000 acre feet ("af"). The ROD flow release volume for a "dry" year is 453,000 af. The difference—an unlawful 194,000 af release—would be irretrievably lost to other CVP uses, including water deliveries to south-of-Delta agricultural contractors.

We understand that Reclamation and the Service may be proceeding under the mistaken belief that the CVP-OCAP Biological Opinion authorizes the 50 percent exceedence approach. That Biological Opinion, however, cannot amend or supersede the permanent flow regime established in the ROD.

We hope that by bringing this matter to your attention now, before April 1, the apparent misunderstandings of those charged with implementing the ROD will be resolved without the need for further action by those who depend on the CVP's water and hydropower. We request that you direct your staff to base the water year type, and

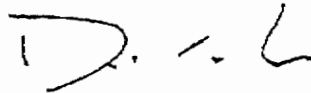
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hence the releases to the Trinity River, upon the 90 percent exceedence forecast, as required by the ROD.

Thank you for your consideration of this matter.

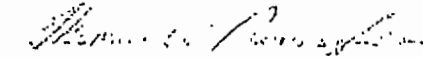
Very truly yours,

SAN LUIS & DELTA MENDOTA WATER  
AUTHORITY



Daniel G. Nelson  
Executive Director

WESTLANDS WATER DISTRICT



Thomas W. Birmingham  
General Manager/General Counsel

DGN/sim

cc: Julie MacDonald, Department of the Interior  
Jason Peltier, Department of the Interior