



Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

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Clifford Lyle Marshall, Sr.
Chairman

April 24, 2006

By Facsimile

202 208-6948

202 208-1873

The Honorable Mark Limbaugh
Assistant Secretary, Water and Science
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

James E. Cason
Associate Deputy Secretary and
Acting Assistant Secretary, Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Trinity River Restoration Program/Meeting Request

Gentlemen:

The persistent antagonism of the Westlands Water District (Westlands) and the San Luis & Delta-Mendota Water Authority (Water Authority) to Trinity River restoration violates their obligations under the Central Valley Project Improvement Act (CVPIA), Public Law 102-575 Title XXXIV (1992) (CVPIA), unreasonably consumes time and resources of both the Tribe and the United States, and threatens the fishery resources that the United States holds in trust for our Tribe. In recent months, Westlands, the Water Authority and their attorneys have taken the following actions:

1) by letter of December 6, 2005, to assistant Secretary Limbaugh, the Central Valley Project Water Association, of which the Water Authority and Westlands are members, and NCPA an organization of CVP power beneficiaries, sought to reduce their payments for environmental restoration required of Central Valley Project (CVP) beneficiaries by section 3407 the CVPIA;

2) By letter of March 27, 2006, Westlands and the Water Authority submitted comments to the Trinity River Restoration Program (TRRP) challenging habitat restoration activities which are an integral feature of the Record of Decision (ROD) for Trinity River restoration issued in December 2000;

3) By letter of April 6, 2006, attorneys for the Water Authority and Westlands wrote to the U.S. Forest Service opposing implementation another feature of the ROD regarding spawning gravel replenishment. Artificial replenishment is the only way by which appropriate sized spawning gravels can be made available to the habitat sites because the dams of the Trinity River Division (TRD) have blocked natural gravel replenishment; and

4) By letter of April 19, 2006, Westlands' and the Water Authority's attorneys wrote to the Department threatening litigation against the Secretary for the means used to determine that 2006 is an Extremely Wet Year under the Trinity River fishery restoration Record of Decision (ROD).

These actions arise in the following context.

1) The devastated condition of the Klamath/Trinity fishery has caused cancellation of virtually the entire ocean fishery off the Pacific coast of the United States this year.

2) There is an abundant supply of Central Valley Project water available to contractors this year. (The Bureau of Reclamation issued a press release on April 20 (MP-06-049) stating that "extremely wet conditions and runoff in the first half of the month have surpassed the April 1, 90 percent exceedence forecast and it is now assumed that the April 1 50 percent exceedence (median) forecast is the appropriate conservative forecast to be used for the water supply determination.") Analysis has demonstrated that use of the median forecast most closely replicates in execution the effects and impacts analyzed and predicted in the studies that produced the ROD.

3) Westlands, the Water Authority, and other Central Valley interests spent four years in a judicial challenge of the science of Trinity River fishery restoration and the Secretary's judgment and actions in adopting the ROD. The Court of Appeals conclusively ruled in favor of the ROD:

As we have disposed of all of the issues ordered to be considered. . . , nothing remains to prevent the full implementation of the ROD, including its complete flow plan for the Trinity River. We remand to the district court for further proceedings not inconsistent with this opinion.

Westlands Water District. U.S. Department of the Interior, 376 F. 3d 853, 878 (9th Cir. 2004) (Westlands 9th Circuit Decision).

4) Section 3404(c)(2) of the CVPIA requires that any water service contract between the Bureau of Reclamation and the Water Authority and Westlands, as well as

any other CVP water user, include a provision explicitly committing the contractors to accept the Trinity River ROD. Section 3404(c)(2) provides that:

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.

To date, the Bureau of Reclamation has insisted that suitable protection for the goals of the CVPIA are in place in the current form of water service contracts. This is not true. The form of contract negotiated by Westlands and the Bureau of Reclamation stands the requirement of section 3404(c)(2) on its head and expressly gives Westlands carte blanche to attack any federal law or regulation associated with the CVPIA.

36. By entering into the Contract, the Contractor does not waive its rights to contest the validity or application of any Federal law or regulation; Provided, that the Contractor agrees to comply with the terms and conditions of this Contract unless and until relief from application of such Federal law or regulation is granted by a court of competent jurisdiction.

See also, Section 18 of the contract (“Opinions and Determinations” in this regard. Westlands Water District 14-06-200-495A-LTR1, available at the Mid-Pacific Region website: (http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/2006_foc/index.html)). Section 36 of the draft contract practically invites challenges to CVPIA implementation. Although the proviso in section 36 constrains Westlands to conduct itself according to the contract terms pending dispute resolution over its own water use, Westlands remains free to train its sights on other CVPIA programs such as Trinity restoration. (As discussed, Westlands and other contractors are already doing this.) Thus, section 36 of the Westlands contract is in direct, irreconcilable conflict with the requirements and policy of section 3404(c)(2) of the CVPIA, and therefore illegal.

5) Construction and operation of the Trinity River Division of the CVP is a major, if not exclusive, cause of severe damage to the Trinity River fishery. Congress in the CVPIA established a policy requiring CVP beneficiaries to agree to contribute to the cost of remedying the environmental impacts of CVP water development. Westlands and the Water Authority contend that they have no financial obligation to Trinity River restoration. In the aforementioned April 6 letter, they argue that:

(A) the Restoration Fund established by section 3407 of the CVPIA may be used, if at all, only for “certain identified activities to increase flows in the Trinity

River, which are activities that have been completed and never included physical restoration activities”; and

(B) “the CVPIA does not . . . authorize the use of the Restoration Fund [established by section 3407 of the CVPIA] for the Canyon Creek Project or any other Trinity River mechanical restoration project.”

Both contentions are incorrect.

An opinion of the Solicitor of the Department of the Interior (Memorandum to the Secretary from the Solicitor re Trinity River Flow Evaluation Study (May 22, 1998) (Solicitor’s Opinion) reviewed the legislation associated with the Trinity River Division, including the CVPIA. A copy of the Solicitor’s Opinion is attached for your convenient reference. The Solicitor’s Opinion considered in its analysis a draft of the Trinity River Flow Evaluation then being coauthored by the Fish and Wildlife Service and the Hoopa Valley Tribe. In its final form the Flow Evaluation was published in June 1999 and became the basis for the restoration program adopted in the Trinity River Restoration Record of Decision (ROD), which was signed by the Secretary on December 18, 2000, and concurred in by the Hoopa Valley Tribe on that same date. With respect to the issues addressed in this letter, there is no difference in the draft flow study and the ROD eventually adopted by the Secretary with the concurrence of the Hoopa Valley Tribe.

The Solicitor’s Opinion specifically responded to inquiries about the authority for funding restoration program activities. The Solicitor’s Opinion at page 6 squarely contradicts the March 27 letter’s first contention that the Secretary is precluded from using the Restoration Fund for non-flow restoration activities:

Funding for habitat restoration activities is provided in section 3407, which establishes the CVP Restoration Fund and authorizes appropriations from that Fund of monies “to carry out programs, projects, plans, and habitat restoration, improvement, and acquisition provisions of this title.” Such authorization for appropriations clearly supports funding the recommended mechanical habitat restoration as well as sediment control activities through section 3407.

The further assertion in the first contention that the increased flows authorized by the original legislation “are activities that have been completed” is also incorrect. The flows in the Trinity River ROD were originally provided for by Section 2 of the Act of August 12, 1955, which authorized construction of the Trinity River Division, ch. 872, 69 Stat. 719. Initial flow releases from the Trinity River Division established in 1959 proved inadequate for the preservation and propagation of the fishery, which went into a steep decline following the completion of the Trinity River Division dams. In the ensuing years, numerous administrative, legislative, and judicial actions were taken to remedy the situation, including development of fishery restoration programs and increased instream flow releases from the Trinity River Division to the Trinity River. The Water Authority and Westlands were actively involved in many of those activities, most often as

adversaries to the use of Trinity River Division water for fishery restoration and maintenance.

The 2000 ROD implements Congress' mandate in section 3406(b)(23) of the CVPIA to meet federal trust responsibilities to the Hoopa Valley Tribe, which has vested fishing rights in the Trinity and Klamath Rivers, and fishery restoration goals established first by Congress in 1984 and expanded in 1996. The mandate entailed formulating and implementing Trinity River Division releases for restoration and maintenance of the Trinity River fishery. By their nature, the annual instream flow releases and flow-related activities adopted in the ROD pursuant to section 3406(b)(23) have not "been completed" as contended by the Water Authority and Westlands; rather, they are ongoing. The annual flow regime for Trinity River fishery restoration is permanent, though the volume each year varies by water year type. The flow-related monitoring activities and the adaptive management component of the ROD, both of which are integral to the restoration program, also are annual and permanent. As the Solicitor's Opinion states at page 4:

Section 3406(b)(23) . . . mandates that, once the Secretary and the Hoopa Valley Tribe concur in the Flow Study's recommendations on permanent instream fishery flow requirements and operating criteria and procedures (OCAP), such recommendations "shall be implemented accordingly." (Emphasis added)

This would include the recommendations for (1) temperature control, (2) spawning/rearing, (3) fluid geomorphic/salmonid temperature control, and (4) ramping. It would also include monitoring activities that are part of an adaptive management program to evaluate the effectiveness of the flows.

The mechanical restoration of the 47 sites identified in the ROD, which include the Canyon Creek rehabilitation sites, as well as the replenishment of spawning gravels are essential components of the ROD's operating criteria and procedures. The Solicitor concluded that the CVPIA included authority in section 3406(b)(1) to implement the non flow provisions of the ROD that "are designed to address adverse environmental impacts of the [Central Valley] Project." Solicitor's Opinion, 5. The Solicitor left open the possibility that the Trinity River OCAP (which was not then completed) could also provide authority for the mechanical "reconfiguration of the stream bed." Id. The costs associated with such activities are "reimbursable pursuant to existing statutory and regulatory procedures." CVPIA section 3406(b)(1)(D). There is a third provision of the CVPIA relating to funding, section 3410, which is a general authorization of appropriations to "carry out the provisions of" the CVPIA, including section 3406(b)(23), which itself provides that implementation costs of that paragraph of the CVPIA are reimbursable as operation and maintenance costs.

The second contention of the Water Authority and Westlands also fails. The Canyon Creek sites are among the Trinity River mainstem channel rehabilitation areas identified by the ROD as essential to fishery restoration. The degraded condition of the river channel at those sites is directly due to the construction and operation of the Trinity River Division which deprived the river of naturally occurring high flows that had maintained a

geomorphic structure to the channel that was conducive to fishery maintenance. See Canyon Creek Suite of Rehabilitation Sites Trinity River Mile 73 to 78 EIS/EIR Draft, pages 24 et seq. As such, work entailed by the Canyon Creek sites is “directed at rectifying the impacts sustained from operating” the Trinity River Division and has “a causal link to impacts of the [Central Valley] Project” for which Restoration Funds may be disbursed. Solicitor’s Opinion at footnotes 2 and 3. The Water Authority and Westlands challenged the restoration of these and other sites in proceedings in federal court which culminated in rulings conclusively adverse to them. See Westlands 9th Circuit Decision.

Summary and Conclusion

The draft Westlands contract language is in conflict with section 3404(c)(2) of the CVPIA and with the Bureau of Reclamation’s fiduciary duty to the Hoopa Valley Tribe’s fishery expressly set forth in section 3406(b)(23) of the CVPIA. It creates opportunities for present and future causes of controversy that can frustrate achievement of the goals and mandates of environmental restoration that are the obligation of every CVP contract beneficiary. To the extent that similar language as that in section 36 quoted above or other language in the Westlands and other forms of CVP contracts have the effect described here regarding sections 3404(c)(2), 3406(b)(23) and 3407, those contracts are subject to the same criticism. For these reasons and the long standing antagonism of Westlands and the Water Authority to Trinity River restoration, the Tribe requests the Department not to renew the water service contracts of the Water Authority, Westlands and other CVP contractors until they:

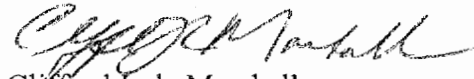
- 1) agree to be bound by the 9th Circuit Decision and the ROD;
- 2) agree that all water deliveries to them are subject to the limitations and requirements regarding Trinity River water set forth in federal laws, contracts, administrative decisions, and permits, including, but not limited to, the ROD, the CVPIA, and Public Law 98-541 as amended and extended by Public Law 104-143, the 1955 Act authorizing the TRD, and contracts and permits related to the 1955 Act;
- 3) agree not to interfere in the performance of the Secretary’s trust responsibility to meet instream flow requirements and fishery restoration goals for the Trinity River as specified in:
 - a) Section 3406(b)(23) of the CVPIA,
 - b) the Trinity River the Trinity River Flow Evaluation Final Report (June 1999), and
 - c) the 2000 ROD.).

Finally, the Office of Management and Budget is preparing to review the Department’s performance in implementing the Trinity ROD and other programs initiated pursuant to

the Central Valley Project Improvement Act. Pursuant to its government-to government relationship with the United States, on April 14, 2006, the Tribe presented its preliminary views on the status of TRRP implementation to the Office of Management and Budget. We would appreciate the opportunity to meet and confer about this matter with you at your earliest convenience.

Your attention to this is appreciated.

Sincerely,



Clifford Lyle Marshall
Chairman

Attachment

cc: Honorable Dianne Feinstein
Honorable Barbara Boxer
Honorable Mike Thompson
Deputy Assistant Secretary Jason Peltier
Solicitor
Kirk C. Rodgers, Mid-Pacific Regional Director, USBR
Doug Schleusner, Trinity River Restoration Program
Hide Wenham, Range Planner, U. S. Forest Service
Eric Hansen, Office of Management and Budget
Trinity Management Council