



Eric N. Robinson

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July 11, 2013

The Honorable Sally Jewell
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
(VIA FEDERAL EXPRESS)

David Murillo, Regional Director
Mid-Pacific Region
U.S. Bureau of Reclamation
2800 Cottage Way, Mail Code MP-100
Sacramento CA 95825-1898
(HAND DELIVERED)

Michael L. Connor, Commissioner
U.S. Bureau of Reclamation
1849 C Street, N.W., Mail Code 91-00000
Washington, D.C. 20240
(VIA FEDERAL EXPRESS)

Re: 60-Day Notice of Violations of the Endangered Species Act

Dear Secretary Jewell, Commissioner Connor and Regional Director Murillo:

This letter is to provide each of you with notice of violations of the federal Endangered Species Act (“ESA”), pursuant to section 11(g) of the ESA, 16 U.S.C. section 1540(g). These violations arise from the failure to complete ESA section 7 consultation on the effects to listed species and their critical habitat from using releases of Central Valley Project (“CVP”) water from the Trinity River Division (“TRD”) to augment flows in the Lower Klamath River in August and September this year.

On December 19, 2000, Secretary of the Interior Bruce Babbitt approved a Record of Decision (“ROD”) specifying amounts of CVP water to be released from the TRD in different hydrologic year types for the restoration, propagation and maintenance of the mainstem Trinity River’s fall-run Chinook salmon fishery. The Hoopa Valley Tribe concurred in the ROD’s fishery flow release schedule, which became permanent and final under section 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA) (Pub. L. 102-525 [October 1992]). As we have explained in previous correspondence, the proposed releases for fishery purposes are unlawful for multiple reasons, including that they will cause the total volume of releases for fishery purposes in 2013 to exceed the 453,000 acre-foot limit established by the ROD. This letter focuses on the violations of the ESA associated with the proposed releases.

The ROD was approved based, in part, on two biological opinions. On October 12, 2000, the National Marine Fisheries Service (“NMFS”) issued its “Biological Opinion for the

Trinity River Mainstem Fishery Restoration EIS and its Effects on Southern Oregon/Northern California Coast Coho Salmon, Sacramento River Winter-run Chinook Salmon, Central Valley Spring-run Chinook Salmon, and Central Valley Steelhead” (“NMFS BiOp). The NMFS BiOp concluded, among other things, that release of CVP water from the TRD to carry out the ROD’s fishery flow release schedule was likely to adversely affect Sacramento River winter-run Chinook salmon, which are listed as endangered. The NMFS BiOp did not analyze the ROD’s effects on green sturgeon, which was listed as threatened in 2006 (71 Fed. Reg. 17757 [April 7, 2006]; *see* 74 Fed. Reg. 52300 [October 9, 2009])[designating critical habitat]).

On October 12, 2000, the U.S. Fish and Wildlife Service (“FWS”) issued its “Reinitiation of Formal Consultation Biological Opinion of the Effects of Long-term Operation of the Central Valley Project and State Water Project as Modified by Implementing the Preferred Alternative in the Draft Environmental Impact Statement/Environmental Impact Report for the Trinity River Mainstem Fishery Restoration Program and Request for Consultation on the Implementation of this Alternative on the Threatened Northern Spotted Owl, Northern Spotted Owl Critical Habitat, and the Endangered Bald Eagle within the Trinity River Basin, and Where Applicable, Central Valley Reservoirs” (“FWS BiOp”). The FWS BiOp concluded, among other things, that release of CVP water from the TRD to carry out the ROD’s fishery flow release schedule was likely to adversely affect Delta smelt, which are listed as threatened.

The existing biological opinions did not analyze the effects of supplemental releases in August and September on listed species. The U.S. Bureau of Reclamation’s (“Reclamation”) augmentation of flows in the Lower Klamath River in August and September by releasing more CVP water from the TRD than is authorized by the ROD’s flow release schedule is likely to adversely affect listed species, including winter-run Chinook salmon, and to adversely modify their designated habitat. These releases will result in unusually high and cold flows in the Trinity River in August and September, conditions that these species would not experience under natural conditions, nor under the typical flow regime since operations of the TRD began, or under the flow regimes analyzed for the ROD.

Further, these releases will diminish the resources available to maintain water temperatures for listed species in the Trinity River and the Sacramento River. Using additional CVP water from the TRD to augment Lower Klamath River flows in these months without prior completion of ESA section 7 consultation would be unlawful. Furthermore, using additional CVP water from the TRD to augment Lower Klamath River flows without an incidental take statement resulting from prior completion of section 7 consultation addressing the effects of such releases on listed species would violate the take prohibition of ESA section 9. Before making the proposed August and September releases, Reclamation must initiate and complete ESA section 7 consultation regarding the effects of such releases on any and all listed species in the Trinity River and Sacramento River watersheds that may be affected by such an action.

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This notice is on behalf of the San Luis & Delta-Mendota Water Authority (“Authority”) and Westlands Water District (“Westlands”) (collectively, “Contractors”), and the water users and communities within their service areas who depend on reliable water supply deliveries from the CVP. The Authority is a joint powers authority formed pursuant to California Government Code section 6500 *et seq.*, consisting of 29 member public agencies that contract with the Bureau of Reclamation (“Reclamation”) for water supply from the CVP. The CVP water delivered to the Authority’s members is used within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara counties, California. Westlands is a California water district formed pursuant to California Water Code section 34000 *et seq.* Westlands is a member of the Authority. Westlands provides water to an area of approximately 600,000 acres in Fresno and Kings Counties on the western side of the San Joaquin Valley.

Thank you for your attention to this matter. The Contractors would welcome an opportunity to meet and discuss your agencies’ willingness to avoid or rectify the violations described above. If you are interested in doing so, please contact Dan Nelson or Tom Birmingham.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation



Eric N. Robinson
Attorneys for the San Luis & Delta-Mendota Water
Authority and the Westlands Water District

ENR/tw

cc: Dan Nelson (SLDMWA)
Thomas Birmingham (WWD)

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