



Hoopa Valley Tribal Council

P.O. Box 1348 • Hoopa, California 95546

PH: (530) 625-4211 • Fax: (530) 625-4594

website: www.hoopa-nsn.gov



LEONARD E. MASTEN JR
CHAIRMAN

January 14, 2013

Via E-Mail to recirculateddpeircomments@deltacouncil.ca.gov

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Recirculated Draft Programmatic Environmental Impact Report
and Final Draft Delta Plan

Dear Delta Stewardship Council:

Thank you for the opportunity to comment on your Final Draft Delta Plan and Recirculated Draft PEIR – Volume 3. The Hoopa Valley Tribe has commented at previous stages of the CEQA process and is disappointed to see that our comments have yet to be acknowledged or incorporated in your analysis. This process of commenting on Delta Stewardship Council documents does not protect our interests. We urge you to engage in formal government-to-government consultation with us and with our federal trustee, the U.S. Department of the Interior. We will oppose any action by the Stewardship Council for Bay Delta conservation planning that does not fully and timely account for the rights of our Tribe.

Enclosed are copies of our January 31, 2011 comments on scoping and our February 1, 2012 comments on the Draft EIR. As noted in our previous comments, the Bay Delta Conservation Plan portion of the Delta Stewardship Plan has the potential to seriously adversely affect the Trinity River on which the Hoopa Valley Tribe relies. Enclosed is our September 11, 2012 summary of issues concerning the impacts of the Plans on the Trinity River Basin. We urge you to consider, account for, and fully mitigate those impacts by revising the proposed action to avoid the impacts.

The final Draft Delta Plan (November 2012) mentions the Trinity River in passing in three places: “Water from [Trinity and other] rivers is now largely mandated to the environment by law, with the exception of diversions from the Trinity River to the Sacramento River for CVP supplies that are limited by federal law.” (page 77); “Supplemental water supplies are conveyed from wetter regions of California, primarily through diversions of . . . some water from the Trinity River in the north state.” (page 78); and “Congress authorized additional federal reservoirs and conveyance facilities [after 1940] including . . . Trinity River dam to provide additional water from the Trinity River into the Sacramento River for CVP operations.” (page 89). CEQA is not satisfied by the Plan’s mention of diversions from the Trinity without specifying the lawful limits on those diversions. CEQA instead requires a full analysis of the impact of existing and potential diversions.



Delta Stewardship Council

January 14, 2013

Page2

With specific reference to the Recirculated Draft PEIR – Volume 3, we would note that the volume appears to completely omit mention of the Trinity River and of the Hoopa Valley Tribe. For the reasons set forth in our enclosed and previously submitted comments, these omissions must be corrected.

Thank you for your consideration.

Sincerely,

HOOPAVALLEY TRIBAL COUNCIL

A handwritten signature in black ink, appearing to read "Leonard E. Masten, Jr.", written in a cursive style.

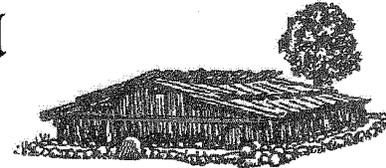
Leonard E. Masten, Jr., Chairman

cc: Ken Salazar, Secretary, Department of the Interior



Hoopa Valley Tribal Council

P.O. Box 1348 • Hoopa, California 95546
PH: (530) 625-4211 • Fax: (530) 625-4594
website: www.hoopa-nsn.gov



LEONARD E. MASTEN JR
CHAIRMAN

January 27, 2011

By email: deltaplanscoping@deltacouncil.ca.gov

Ms. Terry Macaulay
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814 32

Re: NOTICE OF PREPARATION DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE DELTA PLAN--Scoping Comments of Hoopa Valley Tribe

Dear Ms. Macaulay:

We are writing in response to the referenced notice to provide comments on the scope of the Environmental Impact Report (EIR) to be prepared for the Bay Delta Conservation Plan planning process.

The purpose of these comments is ensure that the Bay Delta Conservation Plan excludes all water developed by the Trinity Division of the Central Valley Project (CVP) that Federal and State law, regulations, contracts, permits and judicial and administrative decisions relating to the operation of the Trinity Division require be retained for use in the Trinity River Basin. (Collectively, these authorities constitute the Law of the Trinity River.)

Section 85023 of the Water Code established the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." Components of a Delta Plan include flow criteria for ecosystem protection, water supply conveyance facilities, and habitat restoration.

The notice states that the geographic scope of the EIR encompasses primary and secondary planning areas. The secondary planning area includes watersheds that contribute flows to the Delta, and specifically includes flows contributed by the Trinity River watershed.

Background

In its natural course, the Trinity River--the largest tributary of the Klamath River--flows through the Hoopa Valley Reservation. It is the source of the fishery on which the Hoopa Valley Tribe

has depended since time immemorial and in which it has vested property rights established under Federal statutes, judicial decisions and administrative action. The U.S. Bureau of Reclamation currently diverts an annual average 53 percent of the Trinity River's flow at Lewiston, CA from the Klamath basin, through the Trinity Division and into the Sacramento River watershed. Trinity Division diversions have made possible irrigation in both the Sacramento River Valley as well as south of the Delta in the San Joaquin River Valley. Those diversions have nearly destroyed the Trinity River fishery. As discussed below, the Secretary of the Interior is under a Federal mandate to restore the Trinity River fishery pursuant to the Federal trust responsibility for the Tribe's fishery resources.

The Law of the Trinity River makes the following separate and distinct volumes and uses¹ of Trinity River water unavailable for use in a Delta Plan.

1) Annual flow releases from CVP Trinity Division facilities, both as to volume and timing, provided for in the Trinity River Mainstem Fishery Restoration Record of Decision (ROD) issued December 2000 by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe pursuant to the Central Valley Project Improvement Act (CVPIA), Public Law 102-575 §3406(b)(23), the fishery restoration authority cited therein (Pub. L. 98-541 (1984) as amended by Pub. L. 104-143(1996)), and the Act of August 12, 1955, 69 Stat. 719, that authorized the Trinity Division (1955 Act).

2) Annual, scheduled releases from the Trinity Division of not less than 50,000 acre-feet to be made available to the County of Humboldt, CA and downstream water users, including the Hoopa Valley Tribe, as provided by: section 2 of the 1955 Act.

3) Storage in Trinity River Division facilities to ensure the maintenance of water temperatures required for the restoration, preservation and propagation of the Trinity River fishery.

4) The county of origin rights of Trinity County.

The following summarizes why those supplies are unavailable to the Delta planning process.

¹ In addition to the restrictions on diversion of water developed by the Trinity River Division, the waters of the Trinity River are subject to the rights of the Hoopa Valley Tribe under the federally reserved rights doctrine. The Tribe's reserved right vested at the creation of the Hoopa Valley Reservation. The right attaches to water to fulfill the present and future needs of the Hoopa Valley Reservation. To date the right has not been quantified or adjudicated. In this regard, the State Water Rights Board made all permitted uses of water by the Trinity Division in its 1959 Permit No. 11968 "SUBJECT TO VESTED RIGHTS."

A. Tribal Rights

The Hoopa Valley Tribe's Federal reserved fishing rights are associated with the ROD flow releases. Those rights are confirmed in:

- 1) Opinion M-36979 of the Solicitor, U.S. Department of the Interior (October 4, 1993) (The establishment of the Hoopa Valley Reservation included a reserved right to fishery resources.)
- 2) CVPIA section 3406(b)(23) (In order to meet the Federal trust responsibility to the Hoopa Valley Tribe develop and implement a fishery restoration program with the concurrence of the Hoopa Valley Tribe.)
- 3) National Oceanic and Atmospheric Administration (NOAA) Final Rule 58 Fed. Reg. 68063 (December 23, 1993) (Rule recognizing the Federal reserved fishing right of the Hoopa Valley Tribe as expressed in Opinion M-36979 is applicable law governing implementation of the Secretary of Commerce's fishery management responsibilities under the Magnuson Act.)
- 4) Parravano v. Masten, 70 F.3d 539 (9th Cir. 1995) (Upholding Opinion M-36979, the NOAA Final Rule, and reiterating the government-wide Federal trust responsibility for the Hoopa Valley Tribe's fishing rights.)
- 5) Westlands Water Dist. v. U.S. Dept. of Interior, 376 F.3d 853 (9th Cir. 2004) (Affirming the Trinity Restoration ROD). In Westlands, the court noted with approval the explicit statement of the Bureau of Reclamation's Federal trust responsibility for the fishing rights of the Hoopa Valley Tribe in section 3406(b)(23) of the CVPIA. 376 F. 3d 853, 877. (9th Cir. 2004).

As a part of its harms-balancing analysis, the district court concluded that "the government is also in breach of its general and specific independent federal trust obligation to the Hoopa and Yurok Tribes." Order, 275 F. Supp. 2d at 1232. It also stated that the purpose of the CVPIA § 3406(b)(23) was to "fulfill[] the federal government's trust obligation to the Indian Tribes." These statements are significant in that they provide support for the court's order implementing portions of the Preferred Alternative as injunctive relief.

Id. at 1234.

B. Trinity Division Authorization

Section 2 of the 1955 Act generally provides for the Trinity Division to be integrated operationally and financially (with respect to capital repayment and operation and maintenance costs) with the other units of the Central Valley Project. However, because the Trinity Division is the only unit of the CVP that imports water to the Central Valley, Congress included in section 2 unique area-of-origin protections for the Trinity River basin by including exceptions to the "integration" requirement. The first requires that the Secretary determine the flow releases to the Trinity River necessary for the preservation and propagation of Trinity River basin fish and wildlife, subject to a statutory minimum release. That proviso is a basis for the Trinity River ROD flows determined by the Secretary in 2000 with the concurrence of the Hoopa Valley Tribe as required by section 3406(b)(23) of the CVPIA. The ROD flows are a permanent limitation on diversions. They may not be changed without the consent of the Hoopa Valley Tribe.

The second exception of the 1955 Act states:

That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

That mandate requires the annual 50,000 acre-feet release from the Trinity Division to be made in such a way that the water will be available for use by Humboldt County and downstream users. In other words, the 50,000 acre-feet comes with the attributes of Trinity Division storage, regulation and scheduling.

C. State Water Board Permits

The State of California issued a number of permits for the Trinity Division. Permit 11968 includes 3 conditions that limit diversions.

1) Permit Condition 8 pertains to Trinity Division fishery flow releases.

2) Permit Condition 9 states "Permittee [Bureau of Reclamation] 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."

3) Permit Condition 10 states: "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."

D. Federal Contract

A June 19, 1959 contract between the Bureau of Reclamation and the County of Humboldt permanently memorializes the 50,000 acre-feet allocation and implements Permit Condition 9 above.

Discussion

First, it is not clear whether or how the Delta Plan planning process is accounting for the ROD flows and Trinity County's county of origin rights. Moreover, the Hoopa Valley Tribe is informed by the Bureau of Reclamation that in the Delta planning process, Reclamation and the State are assuming that the 50,000 acre-feet of water is available for diversion to the Central Valley. This is unlawful.

In 1979 the Solicitor of the Department of the Interior reviewed the legal status of the fishery flow releases and the 50,000 acre-feet of water developed and controlled by the Trinity Division. The Solicitor wrote:

On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress' usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

Memorandum opinion from the Solicitor to the Assistant Secretary, Land and Water Resources 3-4 (December 7, 1979) (1979 Opinion). Thus, under Federal law, the ROD flows and 50,000 acre-feet releases are unavailable for diversion to the Central Valley.

Second, the Federal agency status update (Update) about the Bay-Delta planning process published by the Department of the Interior on December 15, 2010, states that the Bay Delta's ecology, water infrastructure, and water management practices are "unsustainable" and have "reached a dangerous tipping point." Update at 2. However, to address this situation, the Update describes planning assumptions and proposed actions that are in conflict with the aforementioned limitations on exportation of Trinity River water to the Central Valley.

The Update announces that there have been “great strides to identify a science-based solution that calls for the separation of water needed to sustain the Bay-Delta itself from water conveyed to south-of-Delta farms and cities.” Update at 3. Then the Update states, with emphasis added:

The good news is that preliminary modeling results summarized in the State’s BDCP Highlights suggest that a new facility can be operated in a manner that would generate average annual water exports over the long term that are more reliable and greater, than the average annual exports that would be achievable under current constraints. For context, this modeling also suggests that these quantities may be comparable to the average annual Delta exports that have occurred since the Bay-Delta Accord, 15 years ago.

However, the Bay-Delta Accord predates the 2000 Trinity River Restoration Record of Decision (ROD), which diminishes Trinity River Division diversions by an annual average of 250,000 acre-feet. Moreover, neither the Bay-Delta Accord nor present CVP operations accounts for the 50,000 acre-feet of additional releases required by the Trinity Division Act of August 12, 1955, 69 Stat. 719. Thus, there are 300,000 acre-feet of CVP yield included in the Bay Delta Accord that will not be available for use in the new Plan. It is essential to clarify now what Trinity River water is unavailable for a Delta Plan. The need to do so is underscored by the recent efforts by the Central Valley cities of Woodland and Davis to obtain a permit from the State Water Resources Control Board for an allocation of 45,000 acre feet of water from the Sacramento River. On January 18, 2011 the Sacramento Bee reported that the allocation would have a value of \$325 million to the cities but added that

awarding a new water right to Woodland and Davis could have dire effects on the Sacramento-San Joaquin Delta downstream. Numerous fish species in the Delta and the Sacramento River are imperiled, including salmon.

A report last year, also by the State Water Resources Control Board, estimated that it might be necessary to double flows in the Sacramento River during some seasons to restore fish populations.

This would require many current water users to take less water from the river. And it could make new water rights very difficult to justify.

So long as the Delta Plan does not confirm that the 50,000 acre-feet entitlement for the Trinity Basin is unavailable to the Central Valley, what is now perceived as a 45,000 acre-feet issue effectively becomes a 95,000 acre-feet deficit for the Delta Plan.

Third, implementation of a Bay-Delta Conservation Plan will come at considerable cost. The Update at page 13 states, with emphasis added:

Current estimates place the costs of the new north Delta diversion and conveyance facility in the neighborhood of \$13 billion. The proposed plan would call for State and Federal water contractors to pay those costs. The State currently anticipates that the State and Federal governments would pay for certain elements of the habitat restoration program, for which the costs are currently estimated to be about \$3.3 billion. The Federal government must review the components of any proposed plan and understand the costs and benefits such a plan would have on Federal water resources in California and on Federal taxpayers.

We understand that the Plan's costs include those for conservation measures, including construction, operation, administration, and research.

In order for all levels of government to "understand the benefits and costs" of a Bay-Delta Plan, they need to know what financial obligations contractors already have. For that reason, we request that you ensure that any Delta Plan benefit-cost analysis fully accounts for, preserves, and enforces CVP contractors' statutorily required financial obligation for environmental restoration associated with construction and operation of the Trinity River Division. Of particular concern are the costs of Trinity River restoration activities. In 2007, the Secretary of the Interior, in consultation with the Tribe, determined that the annual cost of Trinity River restoration will be \$16.4 million through construction and \$11 million annually thereafter for so long as diversions of Trinity River water occur.

EIR Public Hearings

We request that of the hearings that may be scheduled by the Delta Stewardship Council for consideration of a Delta Plan at least one be held in the Trinity River basin.

Summary

No further planning for the Bay-Delta should occur that assumes the availability for diversion any Trinity River water resources that are committed by law to the Trinity River Basin and its communities. The EIR should preclude the availability for use in a Delta Plan water allocated to: the ROD flow releases; the 50,000 acre-feet of additional Trinity Division water for Humboldt County and downstream users; the carryover storage for preservation of temperatures needed for the Trinity River fishery; or the area of origin rights of Trinity County.

Sincerely,



Leonard E. Masten, Jr.

Chairman, Hoopa Valley Tribe

cc: Honorable Dianne Feinstein
Honorale Barbara Boxer
Honorale Mike Thompson
Secretary of the Interior
Secretary of Commerce
Director, Office of Management and Budget
Don Glaser, USBR
Ren Lohofener, USFWS
Amy Dutschke, BIA
Rod McInnis, NMFS
Will Stelle, NMFS
Don Chapman, Native American Affairs

79611.1:423250:00600



Hoopa Valley Tribal Council

P.O. Box 1348 • Hoopa, California 95546

PH: (530) 625-4211 • Fax: (530) 625-4594

website: www.hoopa-nsn.gov



LEONARD E. MASTEN JR
CHAIRMAN

January 31, 2012

Via E-Mail to aircomments@deltacouncil.ca.gov

Joe Grindstaff, Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Comments on Draft Environmental Impact Report

Dear Mr. Grindstaff:

These are the comments of the Hoopa Valley Indian Tribe on the Delta Stewardship Council's draft EIR. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery is integral to the customs, religion, culture, and economy of the Hoopa Valley Tribe and its members. The lower twelve miles of the Trinity River and a stretch of the Klamath River flow through the Hoopa Valley Reservation.

The federal government established the Hoopa Valley Reservation in 1864. The Hoopa Valley Reservation is located in the heart of the Tribe's aboriginal lands, lands the Tribe has occupied since time immemorial. The Hoopa Valley Tribe has fishing and water rights in the Klamath River Basin with a priority date of 1864, as recognized by the United States in the Memorandum from Solicitor of the Department of the Interior to the Secretary of the Interior (Oct. 4, 1993); and the Memorandum from Regional Solicitor, Pacific Southwest Region to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25, 1995) (collectively, "Solicitors' Opinions"); and by federal courts in, for example, *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995). Congress has recognized and confirmed, in the Central Valley Project Improvement Act, Public Law 102-575, Section 3406(b)(23) (Oct. 30, 1992), that the United States has a federal trust responsibility to restore and maintain the fishery trust resources of the Hoopa Valley Tribe to specified standards. Those standards are recognized in federal law and have become a legal mandate. The Hoopa Valley Tribe's rights are unique.



The fish and water resources of the Trinity River have been severely and adversely affected by the federal authorization, construction, and operation of the Central Valley Project. The dewatering of the Trinity River to export water to the CVP, despite the mandate of the Trinity River Division Act, Act of August 12, 1955, ch. 872, 69 Stat. 719, radically reduced the productivity of our fishery and contributed to the listing of the Southern Oregon/Northern California coast (SONCC) coho salmon and its critical habitat under the Endangered Species Act. The Record of Decision for Trinity River Mainstem Fishery Restoration (December 19, 2000), upheld in *Westlands Water District v. Hoopa Valley Tribe*, 376 F.3d 853 (9th Cir. 2004), reaffirmed the priority for water to be retained in the Trinity River, and placed additional limits on exporting water to the CVP.

At Section 3.3.4.1.1 the DEIR recites that since 1964 a portion of the flow from the Trinity River Basin has been exported. However, the asserted average of about 732,400 acre-feet is incorrect. That was the average in 1985-97. See Trinity ROD at 20. However, under the ROD the “long-term average water exports to the Central Valley would be 630,000 acre-feet.” *Id.* Please use the more up-to-date figure.

Section 4-1 of the DEIR describes the Study Area, which includes the Trinity River. However, there is no discussion regarding Trinity River Basin water obligations in either Existing Conditions or Other Alternatives. Since the Trinity is a source of water for the Delta, impacts to the Trinity from alternatives that would retain existing Delta pumping (or increase Delta pumping) should be discussed.

As noted above, the Trinity River ROD of December 19, 2000 establishes a priority for in-Basin Trinity water flows for fisheries purposes. In addition, the Trinity River Division is obligated by the Act of August 12, 1955, 69 Stat. 719, to release annually not less than 50,000 acre-feet of water and make it available to Humboldt County and downstream water users, including the Hoopa Valley Tribe. The Bureau of Reclamation’s failure to release that water has artificially augmented exports to the CVP and the Delta. The DEIR should discuss the likelihood that increasing water releases to the Trinity River, as required by law, will reduce inflow to the Delta. The Hoopa Valley Tribe and Humboldt County sent the attached letter to Secretary Salazar and Governor Brown on January 28, 2011, pointing out this omission, but no response has been forthcoming. It is unlawful to commit the 50,000 acre-feet obligated to the Trinity River Basin to the Central Valley or the Delta for any purposes, so the DEIR should not rely upon continuation of this practice.

Coho salmon of the Trinity River are a threatened species under federal and state law, but they are not mentioned in the document. This is another significant omission that should be corrected.

Trinity River temperature objectives to protect salmon and steelhead have been adopted by the North Coast Regional Water Quality Board and the State Water Resources Control Board. Temperature objectives are also set forth in the Trinity River ROD of December 19, 2000. The DEIR should discuss the requirement of compliance with Trinity River temperature objectives and affirm the requirement to maintain an adequate supply of cold water in Trinity Reservoir to preserve and propagate salmon and steelhead in the Trinity River.

Joe Grindstaff
January 31, 2012
Page 3

Thank you for the opportunity to comment.

Sincerely,

HOOPA VALLEY TRIBAL COUNCIL

A handwritten signature in black ink, appearing to read "Byron Nelson, Jr.", with a stylized flourish at the end.

Byron Nelson, Jr., Vice Chairman

Hoopa Valley Tribal Council

Hoopa Valley Tribe
P O Box 1348 • Hoopa, California 95546 • Phone (530) 625-4211 • Fax (530) 625-4594



Leonard E. Masten Jr
Chairman



BOARD OF SUPERVISORS
COUNTY OF HUMBOLDT
825 5TH STREET
EUREKA, CALIFORNIA 95501-1153 PHONE (707) 470-2390 FAX (707) 445-7299

By facsimile: (202) 219-2100
(916) 445-4633

January 28, 2011

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Jerry Brown
Governor
State Capitol
1st Fl.
Sacramento, CA 95814

RE: Interim Federal Action Plan Status Update for the California Bay-Delta: 2011 and Beyond

Dear Secretary Salazar and Governor-Elect Brown:

We are writing to express our concern about the present course of the Bay Delta Conservation Plan planning process. We recognize that in addressing the Bay Delta crisis the State and Federal governments are undertaking a mission of vital importance to the State and the Nation, but the resolution of that crisis should not come at the expense of the rights of the Hoopa Valley Tribe (Tribe) or Humboldt County (County).

The referenced Federal agency status update¹ (Update) about the Bay-Delta planning process published December 15, 2010, states that the Bay Delta's ecology, water infrastructure, and water management practices are "unsustainable" and have "reached a dangerous tipping point." Update at 2. However, to address this situation, the Update describes planning assumptions and proposed actions that are in conflict with long-established rights under Federal and State law regarding limitations on exportation of Trinity River water to the Central Valley. In addition, Federal officials and water contractors, as well as those public and private entities in California to whom Trinity River origin water may be transferred, are not meeting their statutory obligations to the Tribe, the County and the federal taxpayer. The following are specific comments on the Update about which we respectfully request your attention.

¹ <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=104334>

First, the Update announces that there have been “great strides to identify a science-based solution that calls for the separation of water needed to sustain the Bay-Delta itself from water conveyed to south-of-Delta farms and cities.” Update at 3. Then the Update states, with emphasis added:

The good news is that preliminary modeling results summarized in the State’s BDCP Highlights suggest that a new facility can be operated in a manner that would generate average annual water exports over the long term that are more reliable and greater, than the average annual exports that would be achievable under current constraints. For context, this modeling also suggests that these quantities may be comparable to the average annual Delta exports that have occurred since the Bay-Delta Accord, 15 years ago.

However, the Bay-Delta Accord predates the 2000 Trinity River Restoration Record of Decision (ROD), which diminishes Trinity River Division diversions by an annual average of 250,000 acre-feet. Moreover, neither the Bay-Delta Accord nor present CVP operations accounts for the 50,000 acre-feet of additional releases required by the Trinity Division Act of August 12, 1955, 69 Stat. 719.² Thus, there are 300,000 acre-feet of CVP yield included in the Bay Delta Accord that will not be available for use in the new Plan.

We request that the model be reviewed in consultation with us and revised as necessary to ensure that the following volumes of Trinity River water developed by the Central Valley Project’s (CVP) Trinity River Division are excluded from the water supplies on which the above mentioned modeling results are based:

- 1) Annual flow releases from Trinity River Division facilities, both as to volume and timing, provided for in the Trinity River Mainstem Fishery Restoration Record of Decision (ROD) December 2000;
- 2) In addition to and apart from the ROD flow releases, annual, scheduled releases from the Trinity River Division of not less than 50,000 acre-feet to be made available to the County of Humboldt and downstream water users, including the Tribe, as provided by: section 2 of the Trinity River Division; 1959 State Water permits for the Trinity Division; and the June 19, 1959 contract between the Bureau of Reclamation and the County.

² This was confirmed by a personal communication on December 29, 2010, in which the Bureau of Reclamation’s Bay-Delta Conservation Program Manager advised Hoopa Fisheries’ Senior Hydrologist that the Humboldt County 50,000 acre-feet was not assumed to be a release requirement at Lewiston Dam of the CVP’s Trinity River Division. See also References to the Trinity River do not include the 50,000 acre-feet in Table B-1 “CALSIM II Inputs “at http://www.baydeltaconservationplan.com/Libraries/Background_Documents/Appendix_B_Hydro_Model_Inputs.sflb.ashx

3) Reservation of sufficient storage in Trinity River Division facilities to ensure the maintenance of water temperatures required for the restoration, preservation and propagation of the Trinity River fishery.

Second, implementation of a Bay-Delta Conservation Plan will come at considerable cost. The Update at page 13 states, with emphasis added:

Current estimates place the costs of the new north Delta diversion and conveyance facility in the neighborhood of \$13 billion. The proposed plan would call for State and Federal water contractors to pay those costs. The State currently anticipates that the State and Federal governments would pay for certain elements of the habitat restoration program, for which the costs are currently estimated to be about \$3.3 billion. The Federal government must review the components of any proposed plan and understand the costs and benefits such a plan would have on Federal water resources in California and on Federal taxpayers.

We understand that the Plan's costs include those for conservation measures, including construction, operation, administration, and research.

In order for all levels of government to "understand the benefits and costs" of a Bay-Delta Plan, they need to know what financial obligations contractors already have. For that reason, we request that you ensure that any benefit-cost analysis fully account for, preserve, and enforce the contractors' statutorily required financial obligation for environmental restoration associated with construction and operation of the Trinity River Division. Of particular concern to the Tribe and the County are the costs of Trinity River restoration activities. In 2007, the Secretary of the Interior, in consultation with the Tribe, determined that the annual cost of Trinity River restoration will be \$16.4 million through construction and \$11 million annually thereafter for so long as diversions of Trinity River water occur.

Since 1992, Federal law has required CVP contractors to pay for Trinity River fishery restoration as a cost of service for and condition of delivery of CVP water to them. See Central Valley Project Improvement Act (CVPIA), Public Law 102-575 at §§3404(c) and 3406(b)(23). To date, however, no interim or new CVP contract includes a provision that binds the contractors to accept their obligation to pay for Trinity River restoration. CVP water and power contractors have taken the position that they have no further cost obligations for Trinity River restoration. See Central Valley Project Improvement Act Section 3406 Assessment prepared by CVP Water and Power Contractors at 11 (December 2005). There the contractors refer to a 1998 Solicitor's opinion which they admit "clearly states that Section 3406(b)(23) [Trinity River restoration] should be funded from O&M appropriations of the CVP." However, the Bureau of Reclamation's present rate setting policy document does not implement the operation and maintenance (O&M) cost mandates for Trinity River restoration. See Irrigation Ratesetting Document, Central Valley Project, California,

Description of the Component with Individual Contractor Deficits Ratesetting Method, 1988.³ Mid-Pacific Region staff report that this document is the current version; it has not been amended since 1988.

Under the present form of the Irrigation Ratesetting Document, the O&M component of the cost-of-service rates for CVP water consists only of the following: water marketing, storage and conveyance. There is recent evidence that the Bureau of Reclamation is not charging Trinity River Restoration costs as a cost of service to contractors. The Bureau of Reclamation's repayment contract with the Friant Unit's Arvin-Edison Water Storage District provides that the O&M component of the cost-of-service rates for CVP water consists only of the following: water marketing, storage and conveyance. By not making Trinity River restoration a fixed, annual cost of service component, the Bureau of Reclamation treats Trinity River fishery restoration as just one of a number of CVP activities, without regard to the trust responsibility to the Tribe in section 3406(b)(23) of the CVPIA or the conditions on diversions of Trinity River water in the 1955 Trinity Division authorization. If the CVPIA is to be implemented as Congress intended and as the CVP contractors concede is required, the Bureau of Reclamation should revise its Ratesetting Document write its water service and repayment contracts to conform to the requirements of the CVPIA.

In summary, the Bureau's actions in the operation of the Trinity River Division and implementation of the CVPIA have not been in compliance the 2000 ROD that was signed by the Tribe and the Secretary, or the CVPIA. The result has been subordination of Trinity River fishery restoration to other CVP program interests, chronic underfunding of the program, and failure to implement restoration program prescriptions for fishery restoration. In addition the Bureau of Reclamation has not complied with the right established in the 1955 Act to 50,000 acre-feet of the Trinity Division's yield for the benefit of the County and downstream users. That right is memorialized in 1959 State Water Board permits for the Trinity Division and the 1959 contract for CVP water between the Bureau of Reclamation and the County. In addition, the Department of the Interior may have shifted a substantial portion of the cost of Trinity River restoration from CVP contractors to other Federal program budgets whose expenditures may not be reimbursable.

We request an opportunity to address these matters with you at your earliest convenience and ask that no further planning for the Bay-Delta occur that assumes the availability of Trinity River water resources that are committed by law to the Trinity River Basin and its communities.

Sincerely,



Leonard E. Masten, Jr.

Chairman, Hoopa Valley Tribe

Mark Lovelace



Chairperson, Humboldt County Board of Supervisors

³ The document is listed on the The Bureau of Reclamation's Mid-Pacific website under CVP information/CVP Irrigation Ratesetting Policy.

cc: **Honorable Dianne Feinstein**
Honorable Barbara Boxer
Honorable Mike Thompson
Director, Office of Management and Budget

Hoopa Valley Tribal Council

Hoopa Valley Tribe

P.O. Box 1348 ~ Hoopa, California 95546 ~ Phone (530) 625-4211 ~ Fax (530) 625-4594



Leonard E. Masten Jr.
Chairman

Bay Delta Conservation Plan Trinity Basin Issues

September 11, 2012

The water operations planning for the Bay Delta Conservation Plan (BDCP) is subject to the Law of the Trinity River, which includes federal statutes, state permits, contracts and judicial decisions that govern the amount and timing of water that can be diverted from the Trinity River basin through the Trinity Division of the Central Valley Project.

Included in the Law of the Trinity River are several obligations that limit the amount of water that can be diverted through Trinity Division facilities to the Central Valley and points south.

1. Trinity River Mainstem Fishery Restoration Record of Decision (ROD)

The ROD was signed by the Secretary of the Interior with the concurrence of the Hoopa Valley Tribe in December 2000 as authorized by section 2 of Pub. L. 84-386 (1955), which authorized the Trinity Division of the CVP, and section 3406(b)(23) of the Central Valley Project Improvement Act. The ROD is a 20th Century treaty to protect and restore the Trinity River fishery. All CVP water operations are subject to meeting the requirements of the Trinity ROD. The ROD requires not only specified annual flow releases but also carryover storage in Trinity Division facilities for maintenance of temperature standards. All of that water has priority over Bay Delta and other CVP operations. The Law of the Trinity River also requires CVP water and power contractors to pay for the cost of Trinity ROD implementation for so long as water is diverted to the Central Valley.

2. Humboldt County Contract for 50,000 acre-feet of CVP developed Trinity Division water

Section 2 of Pub. L. 84-386 (1955) and a 1959 contract between the Bureau of Reclamation and Humboldt County further require that not less than 50,000 acre-feet of CVP water is to be released annually and made available to Humboldt County and downstream users from the Trinity Division. None of that water is subsumed in the ROD flow releases and none is available

for Bay Delta or CVP operations. All of that water has priority over Bay Delta and other CVP operations.

3. Trinity Division Flow releases for the Lower Klamath River

In addition to the ROD flows and Humboldt County contract entitlement, the Secretary is acting under section 2 of the 1955 Act to release a minimum of 48,000 acre-feet of Trinity Division water for lower Klamath fishery protection, thereby increasing the amount of water beyond that released for the Trinity mainstem ROD. A second increment of 48,000 acre-feet is also to be made available if a triggering event occurs. The Bureau of Reclamation has faced water shortage problems for the Lower Klamath fishery in 2002, 2004, 2005, 2010 and 2012. There is need of a long-term arrangement for supplemental lower Klamath River fishery flows from the Trinity Division and the Klamath Project. All such water has priority over Trinity River diversions to the Central Valley.

BDCP Hydrologic Computer Models

In January 2011 Humboldt County and the Hoopa Valley Tribe wrote to Secretary Salazar and Governor Brown expressing concern that the BDCP planning process was not accounting for the limits that the Law of the Trinity River places on diversions to the Central Valley. In March this year these concerns were proven to be well-founded. The environmental planning documents prepared by the state and federal agencies assumed that all of the 50,000 acre-feet of the Humboldt County allocation are available for diversion to the Central Valley. Moreover, BDCP planning is not accounting for the 96,000 acre feet identified as needed for lower Klamath River fishery protection

The Commissioner of Reclamation wrote to the Tribe and County on July 5, 2012, stating that no Trinity Division water is accounted for the BDCP modeling assumptions unless it is part of historic releases. This is unacceptable and unlawful.

In view of the foregoing requirements of the Law of the Trinity River, the BDCP should take into account up to 150,000 acre-feet of CVP Trinity Division releases over and above the Trinity ROD flow releases that are required to be retained in the Trinity River watershed.

BDCP financial planning

With respect to financing, there are two Trinity River impacts that should be taken into account. The first is that, from the CVP contractors' point of view, the financial feasibility of the BDCP conveyance project will be based on whether the contractors are able to profit from CVP water once they have paid all the charges associated with it. The added BDCP costs are widely understood to be high. We do not know whether the base costs for an acre foot of CVP water now include the ROD implementation costs pre-construction (\$16.4 million, October 2007 price levels) and post-construction (\$11.0 million, October 2007 price levels). The BDCP staff should determine whether they are accounted for.

Second, the 150,000 acre feet Trinity Division water that is required to be withheld from diversion to the Central Valley means that the unit cost of the remaining CVP water is going to increase, thus raising the potential that with the BDCP charge added will make its use by the CVP contractors financially unfeasible. In that case there may be political pressure to reduce or eliminate Trinity funding and minimize the water set aside in the Trinity Division for supplemental flows and the Humboldt County contract.

A collateral impact will be increased pressure on the Klamath Project and other Klamath sources (e.g. Salmon, Scott, and Shasta Rivers). If CVP contractors conclude that Trinity Division diversions can be increased by shifting short and long term lower Klamath fishery protection flows to the Klamath sources, they may oppose the KBRA, which so far seems not to leave any water available for that purpose.

Conclusion

Before Bay Delta Planning makes any more assumptions about water available from the Trinity River, the Secretary and the Governor should fully acknowledge their obligations under the Law of the Trinity River.