TR3 Hoopa Valley Tribal Council

Hoopa Valley Tribal Council
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LEONARD E. MASTEN JR
CHAIRMAN

January 31, 2012

Via E-Mail to eircomments@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. — TR3-1

Response to comment TR3-1

Comment noted.

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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. TR3-1

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. TR3-2

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. TR3-3

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. TR3-4

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. TR3-5

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. TR3-6

Response to comment TR3-2

In response to this comment, the last sentence on page 3-17, lines 10 and 11, of the Draft Program EIR has been deleted; see Section 5, Revisions to the Draft Program EIR, of this FEIR. Please also see response to Comment TR3-3 below.

Response to comment TR3-3

In response to this comment, please see text change(s) in Section 5 in this FEIR. Please also see Master Response 5.

Response to comment TR3-4

The proposed Delta Plan will not impact Trinity River flows, including the potential for an additional 50,000 acre-feet to be made available within the Trinity River basin identified in the 1955 Act referenced in your comment.

Response to comment TR3-5

In response to this comment, please see text change(s) in Section 5 in this FEIR.

Response to comment TR3-6

Please refer to the response to comment TR3-3.

Thank you for the opportunity to comment. TR3-7

Sincerely,

HOOPA VALLEY TRIBAL COUNCIL

Byron Nelson, Jr., Vice Chairman

Response to comment TR3-7

Comment noted.

Hoopa Valley Tribal Council
Hoopa Valley Tribe
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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 update[1] (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

No comments

- n/a -

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

No comments

- n/a -

> 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,

No comments

- n/a -

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.

No comments

- n/a -

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

No comments

- n/a -