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Re: Hoopa Valley Tribe's Comments Concerning Delta-Mendota Canal Unit Draft
Environmental Assessment Long-term Contract Renewal (November 2004)

Dear Mr. Thompson:

On behalf of the Hoopa Valley Indian Tribe ("Tribe"), we submit the following comments concerning the Delta-Mendota Canal Unit Draft Environmental Assessment Long-term Contract Renewal ("DMC DEA") for twenty of the contractors that comprise the Delta Mendota Canal Unit ("DMC Unit").¹

The Tribe is extremely concerned about the failure of the DMC DEA and the twenty Long-term Contracts it reviews to clearly subordinate water deliveries to the legal requirements of the Central Valley Project Improvement Act ("CVPIA"), Pub. L. 102-575, 106 Stat. 4600 (1992), and in particular, to consider the Secretary's fiduciary duty pursuant to CVPIA § 3406(b)(23) to meet the instream fishery flow requirements of the Trinity River as specified in the Trinity River Flow Evaluation Final Report of June 1999 ("TRFEFR"). The Tribe also believes that the DMC DEA must take account for, and the twenty Long-term Contracts it reviews must specifically reference compliance with, applicable reasonable and prudent measures and terms and conditions relating to water deliveries provided in the two Biological Opinions on the Long-Term Central Valley Project and State Water Project Operations Criteria and Plan ("CVP-OCAP BiOp") (2004). For these and other reasons, a full environmental impact statement should be prepared. These comments reflect the Tribe's ongoing concern with

¹ The Tribe has provided comments concerning Central Valley Project Long-Term Renewals of Water Service Contracts for Delta-Mendota Canal (Delta Division), San Luis Unit, etc. (October 2004) in a separate letter. The comments provided to Richard Stevenson are incorporated by reference herein.

management of the CVP, which includes the Trinity River Division, and its effect on the federally-reserved fishing rights of the Tribe.

A. Nature of the Tribe's Interest

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 Hoopa Indians follow exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Hoopa culture and economies, and the Tribe holds property rights in the Trinity River Basin fishery. See Mem. from John D. Lesly, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), cited with approval, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), cert. denied, 518 U.S. 1016 (1996). The lower twelve miles of the Trinity River and a stretch of the Klamath River flows through the Hoopa Valley Reservation.

The CVP has a direct and dramatic effect on fisheries reserved for the Tribe. The Trinity River Division ("TRD"), which is part of the CVP, diverts water from the Klamath-Trinity River Basin by means of a system of dams and trans-mountain diversion works. Act of August 12, 1955 ("1955 Act"), 69 Stat. 719, Pub. L. 84-386 (authorizing construction and operation of the TRD). Water diverted by the TRD eventually flows into the Sacramento River and Delta, and becomes part of the supply available to satisfy CVP water service delivery contracts. As the DMC DEA acknowledges, Trinity River operations "impact flows on the Delta" and "the volume of water available for export." DMC DEA at 1-11.

Congress authorized the TRD after being advised that approximately 50% of the Trinity's flow would be diverted and that the balance of the Trinity's flow would remain in the Trinity-Klamath River system and basin. In section 2 of the 1955 Act, Congress expressly made diversion to the Central Valley subject to requirements for fish and wildlife preservation and propagation in the Klamath-Trinity River Basin. However, upon completion of the TRD in 1964, up to 90% of the Trinity's flow was diverted. TRFEFR at 8, 63-64. Fishery studies throughout the late 1970s and early 1980s determined that the operation of the TRD was the single greatest contributor to the Trinity fishery declines. The devastating effects on the anadromous fishery resulted in listing of Klamath-Trinity coho salmon under both State and Federal Endangered Species Acts.

Congress has enacted a number of laws intended to restore the Trinity River fishery, including: the 1955 Act, the Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541, 98 Stat. 2721 (1984), the Trinity River Basin Fish and Wildlife Management Reauthorization Act, Pub. L. 104-143, 110 Stat. 1338 (1996), and Section 3406(b)(23) of the CVPIA. In particular, CVPIA § 3406(b)(23) directed the Secretary to determine and, upon concurrence of the Tribe, implement permanent instream fishery flow requirements and operating criteria and procedures for the Trinity River Division to restore and maintain the

Trinity River fishery. This provision was one of many Congress added to the CVP authorizing legislation in 1992 in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources, mitigating fish and wildlife impacts, and providing water deliveries to irrigators and municipalities and industrial users. *See, e.g.*, CVPIA § 3406(a).

In accordance with the specific directive of CVPIA § 3406(b)(23), the Trinity River Flow Study was completed in June 1999. The Tribe concurred in the Flow Study results on December 18, 2000. Related environmental reviews were completed and, on December 19, 2000, the Secretary and the Tribe signed a record of decision ("ROD") implementing a suite of habitat improvement actions including instream fishery flow releases from the TRD commensurate with those recommended in the Flow Study.

The Tribe is committed to ensuring that Reclamation actions comply with applicable law, including the CVPIA, the Endangered Species Act ("ESA"), 16 U.S.C. § 1631 *et seq.*, and the government's trust responsibility to the Tribe. The Tribe is also fully committed to the timely implementation of the scientifically based fishery flow requirements set forth in the Trinity River Flow Study and mandated by the ROD. *See Westlands v. United States*, 275 F. Supp.2d 1157 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. July 13, 2004), *reh'g denied* (9th Cir. Nov. 8, 2004) (upholding the Trinity River EIS and concluding that "nothing remains prohibiting the full implementation of the ROD, including its complete flow plan for the Trinity River").

B. General Comments

1. Reclamation Should Issue an EIS Concerning the DMC Unit Long-term Contracts.

The purpose of an EA is to provide the agency with sufficient evidence and analysis to determine whether to prepare an environmental impact statement ("EIS") or to issue a FONSI. 40 C.F.R. § 1508.9. NEPA requires that an EIS be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (internal citations omitted).

As a threshold matter, the DMC DEA fails to convincingly explain why an EIS is not required. In the cover letter to the DEA, Reclamation notes that there is no significant impact to the quality of the human environment because, *inter alia*, renewal of the Long-term Contracts will not increase deliveries or water use. This fails to distinguish between the volume of current water deliveries and the larger volume to be authorized in the Long-term Contracts. There is no discussion of the adverse effects associated with continued withdrawals for another 25 to 40 years. Likewise, Reclamation admits that it is "currently consulting" with the U.S. Fish and Wildlife Service and NOAA Fisheries, and that these consultations "will be considered in finalizing" the DEA. Such speculation fails to provide an adequate basis for concluding that the proposed Long-term Contract renewal will not adversely affect threatened and endangered

species. Furthermore, this deferral of consideration of mitigation is impermissible under NEPA, as illustrated by the ruling in *Westlands*, 275 F. Supp.2d at 1182-85 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. 2004), *reh'g denied* (9th Cir. Nov. 8, 2004). In *Westlands*, the DEIS at issue did not adequately analyze the impact of the proposed action on certain ESA-listed species because consultation was ongoing. *Id.* at 1183. Further, the court found that the DEIS “did not consider or identify mitigation measures” for those effects, other than to “specify that mitigation for impacts . . . would consist of consulting with the Service on impacts and implementing any required conservation measures.” *Id.* As a result, the court concluded that Reclamation violated NEPA. The wait-and-see approach taken by Reclamation here “defers consideration of mitigation efforts” and “precludes the parties from meaningful analysis,” likely violating the mandate of NEPA. *Id.* at 1184.

In addition, the highly controversial nature of renewing the Long-term Contracts and the possible precedential effects of the DMC DEA require Reclamation to prepare an EIS. When deciding whether to prepare an EA or an EIS, Reclamation must consider whether the effects of the proposed action on the human environment are “likely to be highly controversial” and also whether the “possible effects . . . are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(4)-(b)(5). A proposal is highly controversial when there is “a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.” *Blue Mountains*, 161 F.3d at 1212 (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1993)). Put another way, a proposal can be considered controversial if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Anderson v. Evans*, 350 F.3d 815, 832 (9th Cir. 2003) (as amended). Here, there are “substantial questions” as to the significance of the effect on the local area and effects on the Tribe’s federally reserved fishing rights caused by the renewal of the Long-term Contracts, requiring a full EIS.

As the Ninth Circuit found in *Anderson*, a case almost directly on-point to the situation facing Reclamation here, the approval of the DMC Unit Long Term Contracts and, in fact, all the CVP Long-term Contracts “is sufficiently uncertain and controversial to require the full EIS protocol.” *Anderson*, 350 F.3d at 832 (noting that substantial questions exist as to the impacts of the proposed action on the environment, warranting an EIS). Any argument that the renewal of the Long-term Contracts is not controversial is belied by the sheer volume of the DMC DEA² and recent articles in California newspapers criticizing Reclamation’s decision to continue the status quo of water withdrawals from the CVP as an “Alice in Wonderland” fantasy. *See, e.g., L. Carter, Water Contract Cash Cow for Westlands*, FRESNO BEE (Dec. 1, 2004). Moreover, as discussed in more detail in Section C.5 *infra*, the DMC DEA’s scant discussion of “Indian trust assets,” which wholly ignores the water-related effects of continued irrigation withdrawals on the Tribe’s federally reserved fishing rights, is reason alone to require the preparation of an EIS. *Blue Mountains*, 161 F.3d at 1213 (ordering the Forest Service to prepare an EIS where the EA’s treatment of one important environmental factor was “cursory and inconsistent”).

² No matter how thorough, an EA can never substitute for preparation of an EIS. *Anderson*, 350 F.3d at 836 (citing *Sierra Club v. Marsh*, 769 F.2d 868, 874-76 (1st Cir. 1985)).

Buttressing the argument that an EIS must be prepared for the DMC Unit Long-term Contracts is the general rule that if the approval of a single action will establish a precedent for other actions which may cumulatively have a negative impact on the environment an EIS may be required. *See* 40 C.F.R. § 1508.27(b)(6); *Anderson*, 350 F.3d at 835 (holding that substantial uncertainty, the controversial nature of action, and its possible precedential effects require that an EIS be prepared). Approval of the DMC Unit Long-term Contracts will undoubtedly have a precedential effect, clearing the way for the approval of the other CVP Long-term Contracts through other inadequate NEPA documents. The mere possibility that 114 CVP water service contracts providing approximately 5.6 million acre-feet of CVP water may be renewed without sufficient NEPA analysis is reason alone to require an EIS here. *See* DMC DEA at 1-1. Therefore, Reclamation should prepare a full EIS considering in depth all of the environmental consequences related to renewing the DMC Long-term Contracts.

The requirement that Reclamation prepare an EIS to consider these and other Long-term Contracts has importance consequences furthering NEPA's purposes. Whereas an EA simply assesses whether there will be a significant impact on the environment, an EIS weighs any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS therefore ensures that decisionmakers know that there is a risk of significant environmental impact and that they take that impact into consideration. As such, an EIS is more likely to attract the time and attention of both policymakers and the public, and will permit much needed additional time for Reclamation to thoroughly consider the consequences of continued water withdrawals from the CVP at the same level for another 25 to 40 years.

2. The DMC DEA Fails to Review All DMC Unit Long-term Contracts.

The DMC DEA concludes that the renewal of water service contracts with twenty of the water service providers that comprise the DMC Unit will not significantly affect the quality of the human environment. However, the DMC DEA fails to provide an environmental review of all of the Long-term Contracts for the water service providers that receive water from the DMC Unit. This inexplicable oversight shows that the DMC DEA is impermissibly incomplete.

The DMC DEA does not address the Long-term Contracts for four contractors that receive DMC Unit water: Westlands, Pacheco, Panoche, and the southern portion of the San Luis Water District. DMC DEA at 1-5. These four contractors are served by facilities that are part of both the DMC Unit and the San Luis Unit. *Id.* Nevertheless, the DMC DEA indicates that these Long-term Contracts and those of the California Department of Fish and Game, and the cities of Avenal, Coalinga, and Huron, will be analyzed in a separate NEPA document – the San Luis Unit Environmental Impact Statement. *Id.* at 1.5 n.2. This sleight of hand is curious, as there is no explanation given for removing these four contractors from the purview of the DMC DEA. It is impossible for DMC DEA to meet the public disclosure purposes of NEPA without providing the information commenters need to understand all the environmental effects of the proposed action.

Since these four contractors receive water from both the DMC Unit and the San Luis Unit, it is arbitrary to exclude an analysis of their Long-term Contracts from the DMC DEA. The Long-term Contracts for Westlands, Pacheco, Panoche, and the southern portion of the San Luis Water District should be subject to environmental review under both the San Luis NEPA document and the DMC DEA. The DMC DEA should be revised to provide an environmental review of these four Long-term Contracts, at least with respect to the amount of deliveries to these contractors from the DMC Unit.

That an environmental review of the effects of these four Long-term Contracts should be included in the DMC DEA is highlighted by the fact that Westlands has filed a "Proposed Negative Declaration" under the California Environmental Policy Act concerning its proposed acquisition of all irrigable lands within the Broadview Water District. The proposed acquisition would make Broadview's 27,000 acre foot CVP allocation available to Westlands.³ See Long-term Renewal Contract Between the United States and Broadview Water District (Contract No. 14-06-200-8092-LTR1) ¶ 3(a). The Broadview Long-term Contract is construed by the DMC DEA, yet the effects of applying its 27,000 acre foot allocation within the San Luis Unit is not considered. The additional impact on San Luis drainage legal obligations and environmental effects must be fully displayed.

Despite this connection between Broadview and Westlands, the DMC DEA does not address the Westlands Long-term Contract at all. In addition, the DMC DEA's discussion of Broadview fails to acknowledge this pending acquisition and thereby fails to analyze its effects on the environment or the DMC Unit. Accordingly, the DMC DEA fails to take a "hard look" at the environmental consequences of renewing the Broadview contract in light of the Westlands proposed acquisition. See, e.g., *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992). Indeed, this failure is one aspect of an emerging troubling pattern concerning the NEPA documents purporting to review the CVP Long-term Contracts. The decision to release multiple NEPA documents staggered over a period of months that, like the DMC DEA, pass responsibility for reviewing certain contracts off to other pending NEPA documents is arbitrary and capricious and serves to confuse the public while avoiding consideration of the cumulative impacts of all the CVP Long-term Contracts on the natural environment.

³ The Tribe also notes that any sale, transfer, or exchange of Broadview's Project Water to Westlands must comply with the provisions of paragraph 9 of the Broadview Long-term Contract, including the preparation of "all appropriate environmental documentation, including but not limited to, documents prepared pursuant to the NEPA and ESA." Broadview Contract ¶ 9(a). Any transfer must also comply with "all applicable Federal, State, and local, or tribal laws and requirements imposed for protection of the environment and Indian Trust Assets." *Id.* ¶ 9(c)(v).

C. Specific Comments

1. The Statement of Purpose and Need is Unreasonably Narrow.

NEPA prohibits agencies from narrowing the scope of analysis and the range of alternatives through the selection of an artificially narrow statement of purpose and need. See *City of Carmel by-the-Sea v. United States DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997); 40 C.F.R. § 1502.13. Reclamation's statement of purpose and need in the DMC DEA fails this prohibition.

The DMC DEA provides that the purpose of the NEPA document is "to renew the DMC Unit long-term water service contracts, consistent with Reclamation authority and all applicable state and federal laws."⁴ DMC DEA at 1-3 (emphasis added). A plain reading of this statement indicates that the result of the DMC DEA is preordained – the renewal of all obligations in the twenty Long-term Contracts considered by the DMC DEA. *Id.* at 1-5. By preordaining the renewal of these contracts, Reclamation has unlawfully narrowed "the objective if its action artificially and thereby circumvent[ed] the requirement that relevant alternatives be considered." *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1988). The DMC DEA must be revised with a new statement of purpose and need indicating that renewal of all aspects of the DMC Unit Long-term Contracts is an option, not the only choice available to Reclamation.

The need to protect federally listed fish and wildlife, and the need to provide water sufficient to support the federally-reserved fishing right of the Tribe can, and should, cause a contract for CVP water not to be renewed. The decisions of the federal courts since the enactment of the CVPIA make clear that Reclamation can and should reduce quantities of water delivered when fishery needs demand greater allocations. See *O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1998) (holding that the CVPIA modified priority of water users and thus changed contractual obligations under pre-existing long-term water delivery contracts); *NRDC v. Houston*, 146 F.3d 1118, 1126 (9th Cir. 1998) (invalidating CVP renewal contracts for failure to comply with environmental requirements); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 1999) (recognizing Reclamation's responsibility to manage project operations to "meet the requirements of the ESA, requirements that override the water rights of the Irrigators"); *id.* at 1214 (holding that Reclamation has "a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators").

⁴ The cover letter to the DMC DEA provides a different statement of purpose and need as follows: "The Proposed Action is the execution of a 40-year long term Water Service Contract between Reclamation and the Contracts for the DMC Unit." This statement is false and misleading. First, not all of the Long-term Contracts for the DMC Unit are for 40 years. Rather, a number of the contracts are for agricultural irrigation withdrawals only that have a term of 25 years. See, e.g., Broadview Water District and West Stanislaus Irrigation District. Only water withdrawal contracts for municipal and industrial uses are for 40 years. Second, the DMC DEA considers 20 different Long-term Contracts, not "a 40-year long term Water Service Contract." (emphasis added). These errors must be corrected.

The need to consider reduced water deliveries is especially important because of the interrelationship, acknowledged by Reclamation, of the DMC Unit contracts and the Trinity River Mainstem Fishery Restoration EIS/EIS that mandates certain flow and related non-flow projects for the benefit of fish in the Trinity River. DMC DEA at 1-17 – 1-18. However, Reclamation's discussion of the Trinity River Flow Evaluation Study is insufficient and is not reflected in the heart of the environmental assessment. *Id.* Moreover, the DMC DEA's lip service to "[m]eeting federal trust responsibility to protect fishery Resources (Trinity River)" fails to make good on Reclamation's obligation to the Tribe. *Id.* at 1-8. Meeting Reclamation's trust responsibility to the Tribe is a hollow promise if Reclamation is not willing to consider subordinating contract deliveries to the needs of fish in the Trinity River, for example by evaluating reductions in contract amounts as a project alternative, as discussed below. The DMC DEA should analyze the effects of renewing the DMC Unit Long-term Contracts on the ability of Reclamation to maintain the ROD-mandated flows in the Trinity River. Despite the interrelationship between the CVP and the Trinity River, Reclamation in this DEA appears content to consider DMC Unit Long-term Contract renewal in a vacuum.

2. **The Range of Alternatives is Unreasonable.**

The DMC DEA is insufficient because it fails to provide a reasonable range of alternatives. As noted above, the full range of alternatives must be discussed in a draft environmental impact statement for the proposed action. The DMC DEA discusses four alternatives: so-called no action, the preferred alternative (a negotiated contract renewal), Reclamation's proposal to CVP water service contractors in November 1999, and the proposal presented by CVP water service contractors in April 2000. DMC DEA at 2-13. As Table 2-1 indicates, the differences between the alternatives are minor, and none of the alternatives provide for not renewing the contracts or reducing the contract delivery amounts. *See id.* at 2-3 – 2-8. This inadequate range of alternatives is likely the result of the DMC DEA's unreasonably narrow statement of purpose and need focused on the renewal of the DMC Unit Long-term Contracts.

In addition, the DMC DEA's alternatives section suffers from a number of other legal shortcomings. The DMC DEA fails to provide a true "No Action" alternative. The DMC DEA also completely fails to include an alternative that requires the contracts to provide for CVPIA-mandated fishery restoration flows as well as other requirements such as tiered pricing and water conservation. Finally, the DMC DEA wrongfully eliminates consideration of reasonable "nonrenewal" and "reduced delivery" alternatives based on flawed statutory analysis and speculative policy considerations.

a. No Action Alternative

The No Action Alternative adopts the Preferred Alternative of the CVPIA Programmatic Environmental Impact Statement ("PEIS") prepared in October 1999, which evaluated the impacts of implementing the CVPIA, including the renewal of existing long-term contracts. The Preferred Alternative of the PEIS presumed the renewal of long-term contracts at their full amount. DMC DEA at 2-14. Thus, the No Action Alternative of the DMC DEA also presumes

contract renewal at full levels and it ignores that the status quo involves contract deliveries much less than full contract amounts. This is legally impermissible.⁵

“No Action” means that the proposed activity (here, renewal of the DMC Unit Long-term Contracts) would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward. Thus, the proper “No Action” Alternative in the DMC DEA would allow the DMC Unit Long-term Contracts to expire at the end of their current term. The DEA would then evaluate the environmental effects of not renewing the contracts versus renewing the contracts. No such analysis occurs in the DMC DEA. Instead, Reclamation attempts to pass off a “status quo” alternative as “no action.” The DMC DEA must be revised to address a true “No Action” alternative within the meaning of NEPA.

b. CVPIA-mandated Fishery Restoration Flows Alternative

Second, the DMC DEA fails to include an alternative that includes language in the DMC Unit Long-term Contracts reflecting CVPIA-mandated fishery restoration flows.

The analysis of an alternative that provides for the renewal of the settlement contracts with specific terms and conditions protective of fish and wildlife is necessary. A new CVPIA-mandated fishery restoration flow alternative should be incorporated into the DMC DEA as the Preferred Alternative, including a contract term that must be included in the renewals of the negotiated contracts. If renewed, the DMC Unit Long-term Contracts will lock-in terms for another 25 years (for irrigation) or 40 years (for municipal and industrial (“M&I”) deliveries). While the contracts generally provide that deliveries (and by implication the diversions necessary to accomplish those deliveries) will comply with the requirements of federal law, the contract language does not specifically reference the requirements of federal law that require priority be given to providing sufficient flows to protect and restore specified anadromous fisheries, including those of the Trinity River. *E.g.*, Trinity River Act of 1955, Pub. L. 84-386, 69 Stat. 710 (1955); CVPIA § 3406(b)(23); *see also* Solicitor’s Opinion, “*Proposed Contract with Grasslands Water District*,” U.S. Dept. of Interior (Dec. 7, 1979). The DMC DEA should consider an alternative that amends the Long-term Contracts to specifically incorporate language referencing these obligations.

The Tribe suggests the addition of the following language to the Long-term Contracts, likely as a new provision in paragraph 3 (“Water to Be Made Available and Delivered to the Contractor”):

⁵ Besides ignoring existing conditions, the No-Action Alternative here fails to include a detailed description of the CVPIA PEIS Preferred Alternative. Nor has Reclamation described the status of the PEIS Preferred Alternative implementation and the potential environmental impacts of that alternative as described in the CVPIA PEIS, including specific ground water and water quality impacts in this region.

All water deliveries pursuant to this Contract are limited by and subordinate to the Secretary's fiduciary duty, referred to in section 3406(b)(23) of the Central Valley Project Improvement Act, to meet instream fishery flow requirements of the Trinity River as specified in the Trinity River Flow Evaluation Final Report (June 1999).

This language would make clear to CVP contractors that all water deliveries pursuant to the Long-term Contracts are limited by and subordinate to the Secretary's fiduciary duty, referred to in CVPIA § 3406(b)(23), to meet instream fishery flow requirements of the Trinity River. This request is narrowly tailored to require compliance with scientifically based fishery flow requirements set forth in the Trinity River Flow Study. Inclusion of such a clause in the DMC Unit Long-term Contracts not only makes sense as a practical matter, and its inclusion is mandated by both the CVPIA and Reclamation's own contracting policies. Mem. from Commissioner to Regional Directors, Irrigation Contracting Policies (Dec. 29, 1973); CVPIA § 3404(c)(2) ("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") (emphasis added).

Contract language acknowledging Trinity River restoration requirements reflects long-standing congressional directives that prioritize Trinity fishery releases over transbasin diversions to Central Valley contractors and is consistent with the federal government's trust responsibility to protect and preserve the Tribe's federally reserved fishing right. The Act authorizing the TRD specifically provided that in-basin flows determined by the Secretary to be necessary to meet in-basin needs "take precedence over needs to be served by out-of-basin diversion." Memorandum from the Solicitor to Assistant Secretary-Land and Water Resources, *Proposed Contract with Grasslands Water District* at 3 (Dec. 7, 1979).

Decisions of the federal courts since the enactment of the CVPIA also make clear that Reclamation can and should reduce quantities of water delivered when fishery needs demand greater allocations. See *O'Neill*, 50 F.3d at 686; *NRDC v. Houston*, 146 F.3d at 1126; *Patterson*, 204 F.3d at 1213. The Ninth Circuit has expressly recognized Reclamation's obligation to meet the water needs of vested tribal fishing rights. *Patterson*, 204 F.3d at 1214 (holding that the Bureau has "a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators"). Accordingly, the terms of the DMC Unit Long-term Contracts should expressly acknowledge these requirements, and the impacts of incorporating those requirements into the contracts should be assessed in a revised DMC DEA.

Express subordination of delivery obligations to fishery restoration needs is hardly unprecedented. *E.g., id.* Reclamation has historically included fishery restoration requirements as among the conditions on supply available to satisfy interim renewal contracts. For example, in *California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995), the court noted that an interim renewal contract for allocations from the New Melones Reservoir provided "a maximum of 75,000 acre-feet of water annually, subject to availability after the Bureau satisfied the water

needs of in-basin users and higher priority out-of-basin users.” *Id.* at 471. The “in-basin” needs given priority under that contract included those of “fish and wildlife resources” in the Stanislaus River Basin established under CVPIA § 3406(c)(2). *Id.* Given that precedent, Reclamation should consider an alternative heeding the command of CVPIA to meet their trust responsibility to the Tribe in the terms of the DMC Unit Long-term Contracts.

The only way to substantially reduce the risk of future controversy with water contractors over the Trinity River is to include a provision that specifically binds water contractors to the CVPIA § 3406(b)(23) mandate. The failure to include such an alternative that may provide for a reduction in contract amounts based on the CVPIA is related to Reclamation’s speculative, and erroneous, dismissal of an alternative that would provide for the renewal of contracts with a reduction in the amount of water provided. *See* DMC DEA at 2-22. Even though the DMC DEA mentions trust responsibility and the mandates of federal law, nowhere does Reclamation acknowledge that the federal laws at issue, including the ESA and the CVPIA, and federally reserved tribal fishing rights take precedence over the rights of irrigators.

c. No Contract Renewal Alternative

The rationale provided by Reclamation as to why a “Nonrenewal” alternative was rejected from consideration is incorrect as a matter of law. The DMC DEA provides that nonrenewal is “infeasible based on Section 3404(c) of the CVPIA . . . because Reclamation has no discretion not to renew the contracts.” DMC DEA at 2-22. This two-sentence rejection of a no renewal alternative is simply wrong.

CVPIA § 3404(c) does not mandate automatic contract renewal. CVPIA 3404(c) provides, in pertinent part, that “the Secretary shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of 25 years and may renew such contracts for successive periods of up to 25 years each.” The subsection goes on to impose conditions on renewal that may or may not be met. CVPIA § 3406(c) clearly provides that the Reclamation is not required by federal law simply to extend the old contracts.

No other provision of federal reclamation law requires that the contracts be renewed. The Act of June 21, 1963, Pub. L. 88-44 provides that the Secretary “shall, upon request of the other party to any long-term contract . . . include provision for renewal thereof subject to renegotiation . . .” Pub. L. 88-44, § 1 (emphasis added). By its plain language, this Act does not require contract renewal; rather, it simply required the Secretary include a provision for the renewal of the long-term contracts. Including a provision for renewal does not mean that the contracts must be renewed. Moreover, the fact that the Act requires renegotiation implies that either the contract terms may be changed or the contracts may not be renewed at all after the expiration of their original term.

Likewise, nothing in 43 U.S.C. § 485h mandates the renewal of any water delivery contract. Rather, 43 U.S.C. § 485h provides that “[t]he Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes.” 43 U.S.C.

§ 485h(c) (emphasis added). The authorization to enter into contracts does not equate to a requirement that contracts be entered into or that contracts, once created, must be renewed (at the same water delivery amount) in perpetuity. Likewise, 43 U.S.C. § 485h provides that “the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes.” 43 U.S.C. § 485h(e) (emphasis added). This too is not a mandate to issue, or renew, delivery contracts. Indeed, even the Long-term Contracts acknowledge that renewal is only an option, not a right. *See, e.g.*, Broadview Contract ¶ 2(b)(1) (making renewal “subject to Federal and State law” and ¶ 3(b) (acknowledging that the amount of Project Water “may be constrained . . . due to many factors including hydrologic conditions and implementation of Federal and State laws”).

Therefore, there is no basis in federal law for rejecting a “nonrenewal” alternative. Reclamation has not taken a “hard look” at a “nonrenewal” alternative. *E.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989).

d. Reduced Delivery Alternative

Reclamation’s objection to an alternative that considers renewing the DMC Unit Long-term Contracts, but with reduced delivery amounts, fails for the same reasons discussed above concerning its rejection of the “nonrenewal” alternative. *See* DMC DEA at 2-22. As a matter of federal law, Reclamation can, and must, reduce contract deliveries when necessary to provide increased flows for federally protected fish and to support the Tribe’s federally reserved fishing right. A reduced delivery alternative should be considered and a full analysis of its environmental effects performed in a revised DMC DEIS.

Reclamation’s policy objections to the “Reduced Delivery” alternative are insubstantial. First, Reclamation states that the alternative was eliminated from further consideration because “current and projected demands equal or exceed the current total contract amount.” *Id.* This is completely unsupported by any published Needs Analysis. The DEA says little about projected California increases in population and water use over the next 25-40 years. It does not discuss large water projects in the planning stages to meet this demand, projects which are far from certain of accomplishment. However, even if DMC irrigators have an insatiable thirst for water that does not provide a basis for renewing the contracts at the same levels. Reclamation has an obligation to review the current contract water delivery amounts and adjust them pursuant to federal law, which in the case of CVPIA § 3406(b)(23) requires a reduction in contract amounts if continued water demand will result in reduced flow available for restoration of the Trinity fishery.

Second, the DMC DEA baldly states that “reductions in contract quantities are not required for Reclamation to implement the CVPIA or any other statutory or water rights obligations.” *Id.* There is no support for this assertion in the DMC DEA. The statement is refuted by Reclamation’s inability to deliver full contract amounts in recent years while meeting other obligations. Simply saying that Reclamation can meet all of its obligations under the status quo fails to make it so. Such an assertion also belies the fact that Reclamation has recently been forced to use Trinity water to enhance flows in the Klamath River to offset low flows due to the

agency's over-commitment of water resources to Klamath Irrigation District irrigators. Finally, Reclamation's third basis for rejecting the "Reduced Delivery" alternative is speculative. Whether reducing contract deliveries will, *inter alia*, "reduce opportunities for contractors to make investments for good water management" is without any factual support in the document. *Id.* at 2-22 –2-23.

Reclamation's speculation as to what could happen highlights the importance of providing a full discussion of reducing contract quantities so that all the environmental, cultural, and socioeconomic effects of the contracts can be fully analyzed by the agency. See 40 C.F.R. § 1502.16 (discussing elements of environmental effects analysis of alternatives). Hypothetical discussions of what may happen does not provide reasoned grounds to dismiss an otherwise viable alternative within the jurisdiction of the agency, especially when such speculation is based on a bare record.

Accordingly, Reclamation should consider additional alternatives that do not simply continue the status quo. Alternatives addressing nonrenewal, renewal at reduced contract delivery amounts, and renewal including contract terms incorporating the CVPIA-mandated fishery restoration flows must be evaluated.

3. The DMC DEA Fails to Consider the Environmental Effects of the Proposed Actions.

The DMC DEA's discussion of the affected environment and environmental consequences associated with renewing the contracts under all the alternatives discussed in the DMC DEA is also rendered inadequate by the DEA's unreasonably narrow statement of purpose and need. By limiting the discussion of alternatives to only those that will renew the DMC Unit Long-term Contracts, Reclamation has avoided discussing the environmental consequences of either reducing contract deliveries or not renewing the Long-term Contracts at all. The DMC DEA should be revised to provide other alternatives. This, in turn, will require a comprehensive analysis of the environmental consequences, both positive and negative, of reducing or eliminating contract deliveries of CVP water to the DMC Unit. A comparative analysis of the different environmental effects of a full spectrum of alternatives to the proposed action must be undertaken in order to allow the public a meaningful opportunity to assess the proposed action.

The defective No Action Alternative, noted above, illustrates the problem because providing for delivery of the same nominal quantities in the contracts creates an opportunity for considerable increases in water use beyond the level of historical delivery under existing conditions. Reclamation data shows that the recent historic average (the 5-year average allocation) for south of Delta agricultural contracts is 61% of the nominal contract amount. Detailed historical data for the period 1977 to the present is found at http://www.usbr.gov/mp/cvo/vungvari/water_allocations_historical.pdf. In other words, creating contract rights to much greater water deliveries than occur under existing condition will produce new consequences that must be fully analyzed in a DEIS.

The requirements to manage federal agency actions to provide habitat and sufficient water to protect salmon populations, and correspondingly, the Tribe's livelihood, have been well known since the Hoopa Valley Reservation was created and the Tribe's federally-reserved fishing right was secured in 1864. The DMC DEA must take into account the effects of continued irrigation withdrawals, at substantially the same level for the next 25 or 40 years, will have on the federally-reserved fishing rights of the Tribe. In addition, a discussion of means to reduce or mitigate for the adverse effects on the Tribe's fishing rights should also be considered.

4. The DMC DEA Must Specifically Reference and Incorporate the CVP-OCAP BiOp.

Each of the twenty DMC Unit Long-term Contracts reviewed by the DMC DEA provide that "[t]he Contractor shall comply with requirements applicable to the Contractor in biological opinion(s) prepared as a result of consultation regarding the execution of this Contract undertaken pursuant to Section 7 of the [ESA] that are within the Contractor's legal authority to implement." *See, e.g.*, Broadview Contract ¶ 3(e). This oblique reference to "biological opinion(s)" is inadequate to describe the steps, and the environmental effects of taking those steps, to comply with the Reasonable and Prudent Measures ("RPMs") and terms and conditions of the CVP-OCAP BiOps specifically tailored to address the adverse effects of contract water deliveries on threatened and endangered species.

The CVP-OCAP NOAA BiOp discusses effects on threatened and endangered species by Reclamation's proposed action of renewing water delivery contracts. CVP-OCAP BiOp at 10 (noting that "under the ESA, NOAA Fisheries is still required to adequately analyze the impacts to listed fish species from unscreened diversions receiving contract water and the return of that water to the river"); *see also id.* at 40 (discussing water service contracts and deliveries as interrelated action). The CVP-OCAP NOAA BiOp specifically concludes that "facilities and operations of CVP and SWP contractors are not exempted from take included in this opinion unless specified in the incidental take statement." *Id.* This is due to the adverse effects water diversions have on threatened and endangered species. "The diversion and storage of natural flows by dams and diversion structures on Central Valley waterways have depleted stream flows and altered natural cycles by which juvenile and adult salmonids base their migrations." *Id.* at 69. The "impacts to flows and water temperatures" caused by CVP diversions "reduce the suitability and availability of habitat," may "kill[] salmonids through direct entrainment in Project diversions," and result in "changes in water quality." *Id.* at 89, 170; *see also id.* at 192.

Accordingly, the CVP-OCAP BiOps impose a number of RPMs and terms and conditions relevant to Reclamation's contracts for water delivery. The first NOAA RPM necessary to minimize the take of listed species requires Reclamation to "gather information regarding the effects of water temperatures and flow fluctuations" on listed species "and operate to water temperature objectives that will avoid or minimize effects to listed salmonids, consistent with meeting applicable conditions in CVP and SWP water rights permits." *Id.* at 212. Likewise, Reclamation "must comply or ensure compliance by [its] contractor(s)" with the first "non-discretionary" term and condition which implements the RPM. *Id.* at 216 (emphasis added). The terms and conditions implementing the first RPM noted above require Reclamation to monitor and provide written reports to NOAA Fisheries of incidental take of listed salmonids

associated with water deliveries. *Id.* Further, specific terms and conditions require Reclamation to make its February 15 forecast of deliverable water based on an estimate of precipitation and runoff at least as conservatively as the 90 percent probability of exceedence. *Id.* at 218.

In addition, the CVP-OCAP NOAA BiOp imposes discretionary “conservation recommendations.” *Id.* at 235. With respect to contract water deliveries, these recommendations include working to “minimize take from unscreened diversions that are a part of water contract renewals” by completing funding and construction of fish screens “to reduce entrainment of listed salmonids that receive CVP contract water” and providing information on the effects of agricultural return flows from CVP water contracts on listed salmonids “prior to the renewal of long-term contracts.” *Id.* at 236. None of the consequences of complying with these RPMs are discussed in the DEA, although they should be.

By simply referring to “biological opinion(s)” generally, the DMC Unit Long-term Contracts lack the specificity necessary for the contractors to know that they must abide by certain RPMs and terms and conditions of the CVP-OCAP BiOps. The failure of the DMC Unit’s Long-term Contracts is compounded by the DMC DEA’s failure to discuss the relationship between the DMC Unit Long-term Contracts and the CVP-OCAP BiOps. The DMC DEA’s oblique acknowledgement of the existence the OCAP provides a discussion of the consultation process and a broad overview of the OCAP biological assessments, not the Biological Opinions. DMC DEA at 3-170. The failure to include an analysis of, let alone a reference to, the CVP-OCAP BiOps is inexcusable, as the DMC DEA was released for public comment on November 15, 2004, well after the release of the CVP-OCAP BiOps.

The inadequate description of the effects of complying with the CVP-OCAP BiOps is underscored by the fact that the biological assessment and the biological opinions for the CVP-OCAP are clearly geared to existing deliveries and not the full contract amounts purportedly described in the DEA. *See* Long-term Central Valley Project and State Water Project Operations Criteria and Plan Biological Assessment at 1-10 (June 30, 2004). “Operationally, water development is constrained by the CVPIA, SWRCB water quality control plans, 1993 WRO and 1995 Delta Smelt Opinion, the COA, and many other agreements These constraints have now become the operating baseline for the CVP and SWP.” CVP-OCAP NOAA BiOp at 83. In other words, the DEA’s description of the environmental effects of complying with the requirements of the ESA is utterly inadequate.

5. The DMC DEA Fails to Consider Effects on Indian Trust Assets.

The DMC DEA provides two scant paragraphs on the effects of the proposed Long-term Contract renewal on “Indian Trust Assets.” DMC DEA at 4-2. The DMC DEA concludes that “No Indian lands of any type were found within the DMC Unit study area. Consequently, there are no conflicts of long-term DMC Unit contract renewals with Indian trust assets.” *Id.* As a practical matter, this statement is not true. The only reason why no Indian trust assets are present is because of the improperly narrow scope of the DEA’s study area – the service areas of the DMC Unit contractors and “portions of Fresno, Merced, San Joaquin, and Stanislaus Counties.” *Id.* at 1-6 (defining study area).

Moreover, the focus of the effects of Long-term Contract renewal should not be arbitrarily limited to Indian lands. Indian trust assets encompass far more. The DMC DEA fails to consider the impact of current water withdrawals on other parts of the CVP including the TRD and the Trinity River. Indeed, it is curious that the NEPA document reviewing the environmental effects of continued water withdrawals would ignore water-related Indian trust assets. Thus, the consideration of "Indian trust assets" completely fails to acknowledge the nature of water rights associated with tribal fishing rights. For example, the Tribe's federally reserved fishing right guarantees to the Tribe the right to a fishery that is supportive of a moderate standard of living. As has been repeatedly acknowledged by the federal courts, tribes are entitled to sufficient water in rivers flowing through their lands to support a fishery that will meet those needs despite the prospect of increasing state wide water demand. Accordingly, as the needs of the Tribe and the fishery change, so must the water delivery contracts affecting the ability to sustain that fishery. The DMC DEA's analysis of this issue is nonexistent and legally inadequate.

As such, the Tribe remains very concerned that contracting for vastly increased water deliveries, as specified in the twenty Long-term Contracts associated with the DMC DEA, will make it increasingly difficult for Reclamation to adequately protect tribal fishery resources. The limited supply that is available for fishery purposes will be subject to increasingly greater demands as a result of foreseeable drought, global warming, population growth, and urban development. The DMC DEA fails to adequately address the cumulative impacts of these various factors on Reclamation's ability to provide for and protect the fishery resources within its charge. *See, e.g.*, CVPIA § 3406 (b)(23) (identifying trust responsibility to protect the fishery resources of the Hoopa Valley Tribe as constraint on operation of CVP facilities).

6. The DMC DEA Fails to Analyze Drainage Problems.

Irrigated lands have been known to produce drain waters that threaten water supply as well as fish and wildlife resources. The drainage problems in the San Joaquin Valley are significant and are well known. DMC DEA at 3-152 (noting that "The San Joaquin Valley experiences drainage and soil salinity problems . . . as a result of irrigated agriculture in an area with shallow groundwater tables and little or no drainage outlet"). The DMC DEA also notes that irrigation mobilizes selenium causing further degradation of soils and groundwater resources. *Id.* at 3-153. Nevertheless, the DMC DEA's brief analysis of the environmental consequences of DMC Unit Long-term Contract renewal at the same contract delivery level on "Soils and Geology" concludes that renewal will have no adverse affect on drainage problems within the DMC Unit or on the San Joaquin drainage problem. *Id.* at 3-154 – 3-155. The discussion of "Groundwater" reaches the same conclusion. *Id.* at 3-159 – 3-160. These conclusions are erroneous.

The DMC DEA does not analyze drainage. Rather, through a sleight of hand, the DMC DEA analyzes the effects of Long-term Contract renewal on erosion. *Id.* at 3-154 – 3-155. Thus, based on the faulty assumption that continued irrigation will "support the beneficial impacts of current farming practices that encourage erosion control," the DMC DEA finds no significant impact without addressing the environmental consequences of contract renewal on

drainage capacity or the selenium problems caused by current irrigation practices. *Id.* at 3-155. Likewise, despite finding that “drainage conditions are inadequate” in portions of the San Joaquin region, the DMC DEA focuses on groundwater pumping activities, rather than drainage issues, when considering the environmental effects of Long-term Contract renewal on groundwater resources. *Id.* at 3-159. The lip-service paid to drainage concerns does not make up for the failure of the DMC DEA to analyze the effects of Long-term Contract renewal on continued drainage problems.

The DMC DEA’s no impact conclusion is also surprising given the severity of the current drainage problems, including problems in areas within the DEA study area. *Id.* at 3-152. The drainage problems are so substantial that it is questionable whether the existing level of agriculture on the westside of the Central Valley can be sustained. This makes the minimal discussion in the DMC DEA concerning this issue unacceptable, especially considering the DMC DEA’s acknowledgement of the harms caused by irrigation and its reference to the Grasslands Bypass Project that addresses some of these drainage problems.⁶ *Id.* at 1-40 – 1-41.

One of the issues impermissibly ignored by the DMC DEA is the San Luis Drainage Feature Re-evaluation Plan. *See San Luis Drainage Feature Re-evaluation and EIS* [/http://www.usbr.gov/mp/sccaosld/index.html](http://www.usbr.gov/mp/sccaosld/index.html) (last visited Nov. 23, 2004). This process, underway on the San Luis Unit, is a significant undertaking with the potential to help or harm San Joaquin Valley natural resources through land retirement and other alternatives that will free up CVP water for unmet needs and beneficial uses, such as those necessary to protect the Tribe’s federally reserved fishing right. The San Luis Unit serves 700,000 acres of irrigated agriculture and includes the Westlands, Pacheco, and Panoche Water Districts, and the southern portion of the San Luis Water District.⁷ The Long-term Contract for Broadview is analyzed as part of the DMC DEA. *See, e.g.*, DMC DEA at 3-2. Reclamation may need to expand the scope of the land retirement program and drainage improvement plan to include water districts outside of the San Luis Unit. Therefore, the DMC DEA should analyze the effects, if any, of the San Luis Drainage Feature Re-evaluation Plan on contract deliveries to, at least, the Broadview Water District under their Long-term Contract as part of this environmental review document.

⁶ The Grassland Bypass Project uses the Grassland Bypass Channel and the San Luis Drain to remove agricultural drainwater from wetland water supply channels. The Project represents a collaborative effort among water users, government agencies, and environmental organizations. A “Use Agreement” allows agricultural producers to drain to the San Joaquin River until 2009 with the understanding that they will continuously reduce the selenium load. Reclamation acknowledges that this project is related to the San Luis Drainage Feature Re-evaluation Plan. *See* <http://www.usbr.gov/mp/sccaosld/docs/Related%20Projects.pdf> (last visited Nov. 23, 2004).

⁷ Westlands, Pacheco, Panoche, and the southern portion of the San Luis Water District are served by facilities that are part of both the DMC Unit and the San Luis Unit. DMC DEA at 1-5. The total delivery to these four contractors by the DMC Unit depends on scheduling between the DMC Unit and the San Luis Unit. *Id.*

The DEA fails to adequately analyze land retirement and its effect on water needs, use, drainage, water transfers and assignments, and their consequent environmental effects. Currently there are plans in place or in advanced development to retire lands for irrigation in all or parts of Broadview, Mercy Springs, and other areas, and to transfer or assign the associated DMC Unit water to Westlands Water District. Westlands also has an agreement with Santa Clara and Pajaro Water District to allocate water derived from the DMC Unit. Some of these shifts take water outside the DMC Unit, outside the DEA's overly narrow study area, and out of basin. Westlands Water District also has drainage problems, including selenium, boron, and salt contamination, and asserts the right to "drainage service" under the San Luis Unit authorizing act. Reclamation has failed to properly and adequately disclose and analyze the effects of land retirement on water needs by DMC contractors and the environmental effects of shifting water freed up by land retirement. If this water were applied in other DMC areas or in Westlands or other San Luis Unit areas, for example, how would this impact drainage amounts and contamination, disposal of the drainage, the functioning of the San Luis Drainage Feature plan and project, and affected environmental resources? The DEA fails to take the requisite hard look at these consequences of the action.

The DEA is inadequate in failing to adequately disclose and analyze the environmental effects of selenium contamination that will result from the proposed contracts. Selenium contamination by irrigation and drainage of selenium-laden soils in the DMC Unit project area and nearby lands has been extensively documented, for example in the so-called "Rainbow" Report (1990). CVP contract water has been a principal source of water used to irrigate the problem lands. The biological effects of this contamination have been the subject of at least two recent USFWS biological opinions for effects on threatened species: on Reclamation's Grasslands Bypass Project, and on the EPA's Grasslands Water Quality Amendments. There is strong evidence that this selenium contamination reaches Suisun Bay, and causes high levels of contamination of benthic clams there. This contamination is the probable cause of toxic levels of selenium in benthic-feeding wildlife in the area, such as the Sacramento splittail and white sturgeon (USGS Open-File Report 00-416 (2000), Linville et al. 2002, Stewart et al 2004.) In addition, Reclamation's operation of the DMC transports substantial quantities of selenium to Mendota Pool, home to threatened giant garter snakes. Much of this "upstream" selenium ultimately ends up downstream in the Grasslands wetlands channels or in the San Joaquin River, Delta, and Suisun Bay, where it contributes cumulatively to selenium contamination from contract water drainage, and adds to the environmental effects.

Reclamation operates a variety of facilities that serve to deliver DMC contract water, including dams, levies, canals, and pumps. The operations and maintenance of these facilities have effects on the environment. These facilities are inextricably tied to the water service provided for the proposed contracts. For example, the DMC as now operated dumps substantial selenium load into Mendota Pool, which is both a source of diversion for DMC contractors and habitat for threatened species. The DMC DEA fails to adequately disclose or analyze these effects.

It will take a systematic and shared effort by all stakeholders in the San Joaquin Valley and those that receive CVP water to resolve current drainage problems. Reclamation has already acknowledged that reducing the amount of drainage water through creative and incentive-based measures such as land retirement, water conservation, improvements in irrigation efficiency and selective land fallowing can greatly improve the situation by reducing the quantity of drainage water. This acknowledgment is inconsistent with renewing the DMC Unit Long-term Contracts as if they have no impact on drainage.

A discussion of the San Luis Drainage Feature Re-evaluation Plan and its interrelationship with the Long-term Contracts at issue is a necessary component of the full environmental analysis required under NEPA. Absent such a discussion, the DMC DEA's effects analysis is inadequate and must be revised. Moreover, the Tribe understands that the San Luis Drainage Feature Re-evaluation Plan may not be complete until 2005 at the earliest. If this is the case, the effects of conforming the Long-term Contract for Broadview (and other contractors) cannot be adequately evaluated until completion of the San Luis Drainage Feature Re-evaluation Plan. In sum, the drainage and selenium problems associated with continued irrigation of the DMC project area require additional environmental analysis in a final EA or, preferably, in an EIS.

7. The DMC DEA Fails to Address the M&I Shortage Policy.

The DMC DEA does not discuss, let alone mention, Reclamation's proposed revised M&I Shortage Policy. The DMC DEA must be revised to reference and analyze the effects of implementing the M&I Shortage Policy in the proposed renewals of the twenty Long-term Contracts at issue.

The M&I Shortage Policy has been under development for a number of years and has yet to be completed or subjected to necessary review under NEPA or the ESA. The CVP-OCAP NOAA BiOp specifically states that any contract that does not specifically reference the revised policy will not be subject to its provisions. CVP-OCAP BiOp at 41. The DMC DEA does not discuss the revised policy, its impacts, or implications. In the event that the revised M&I Shortage Policy is completed prior to execution of these contracts, and the final Long-term Contracts are further revised to reflect the M&I Shortage Policy, recirculation or supplementation of the DMC DEA will be necessary in order to assess the effects of incorporating those revised shortage provisions into the Long-term Contracts.

D. Conclusion

The Tribe urges Reclamation to revise and recirculate the DMC DEA as a DEIS to address the myriad legal deficiencies noted above and to account for the need for operation of the CVP to protect the Tribe's federally reserved fishing rights. Thank you for the opportunity to comment on the DMC DEA. We trust that our comments will be appropriately considered and addressed in any final NEPA documentation for this proposed action.

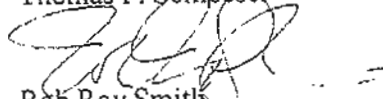
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Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW



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