SOUTH DELTA WATER AGENCY

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Mr. Brad Hubbard
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825

Re: Draft Environmental Impact Statement/Environmental Impact Report for Long-Term Water Transfers, Central Valley and Bay Area, California

Dear Mr. Hubbard:

The following comments and the attached comments are submitted on behalf of the South Delta Water Agency and the Central Delta Water Agency. Each of these agencies are charged with, and the surrounding lands dependent on good quality water in Delta channels for the protection of agricultural and other beneficial uses. Operations of the Central Valley Project and the State Water Project adversely affect flows, circulation, levels, and quality of water in the channels to the detriment of agricultural and other beneficial water users. By statute, regulation and permit, the United States Bureau of Reclamation ("USBR") and the Department of Water Resources ("DWR") are supposed to fully mitigate their impacts on such other uses as well as maintain various water quality standards intended to protect the Delta estuary and in-Delta users. The projects fail to meet these obligations on a regular basis and the proposed Long Term Transfer Project ("Project") may exacerbate DWR and USBR's continued failure to meet their obligations. SDWA and CDWA represent various water right holders who may be affected by the Project. 1

1. The Project in significant part appears to violate the language and spirit of CVPIA, the controlling federal statute for CVP-related water transfers.

In 1992, Congress passed and the President signed into law the Central Valley Project Improvement Act, commonly known as "CVPIA" or Public Law 102-575. The provisions of CVPIA fundamentally altered the operation of the CVP, requiring a dedication of water for fish and wildlife purposes, significant habitat and fish population goals and mandates and set forth new criteria for water transfers. CVPIA defined "Central Valley Project water" as "all water that is developed, diverted stored, or delivered by the Secretary in accordance with the statutes authorizing the Central Valley Project and in accordance with the terms and conditions of water rights acquired pursuant to California law." This broad description of CVP water importantly uses the word "or" to include virtually any water that gets from one place to another via the CVP, notwithstanding any water right under which the water might originally derive. 2

CVPIA also specifies the terms and conditions under which transfers of CVP water can be made. Section 3405 of the Act allows transfers of any CVP water "under water service or repayment contracts, water rights settlement contracts or exchange contracts. . . ." Thus, any individual or district which receives CVP water can transfer its CVP water if they or it comply with Section 3405.

Section 3405 (a)(1)(I) limits the transfers "to water that would have been consumptively used or irretrievably lost to beneficial use during the year of years of the transfer." The purpose of this provision is to ensure that a transfer of water does not increase the total amount of water consumed, rather it allows for the shifting of water use from one party to another. This is an important distinction. The transfers are meant to facilitate the movement of water to the highest use, or that use which can afford it especially in dry times. If the transfer criteria allowed the seller to continue to consume the same amount of water, then the system as a whole would be consuming more water during dry times; an obviously counter-productive policy.

The Project being contemplated by USBR and others specifically allows the sellers to replace the transferred water through ground water substitution (see for example ES.3 - ES.4). Hence, the Project is by definition, at least in part contrary to the controlling statute under which the transfers are being contemplated. In the abstract, one could evaluate any transfer wherein the seller replaced the transferred water with another source and estimate the impacts and potentially mitigate the impacts. However, CVPIA as an expression of Congressional intent, has already made the determination that transfers dealing with CVP water shall not result in any total increase in use. Thus the draft EIS/R's analysis of what the impacts of such substitution might be and how they might be mitigated is irrelevant. No transfers which allow the seller to continue to consume any portion of the amount of water being transferred are legal.

It does not matter that the Project intends to allocate a portion of the transfer water to instream or ground water replacement. Any of the Project's transfers which are based on substituting ground water (or any other source) are prohibited under Public Law 102-575.

2

2. <u>Transfers under the Project which allow ground water substitution appear to violate CVPIA's mandate that any transfer have no significant impact on the seller's ground water.</u>

CVPIA Section 3405 (a)(1)(J) states that no transfer shall be approved unless it is determined that "such transfer will have no significant long-term adverse impacts on groundwater conditions in the transferor's service area." Although the draft EIS/R includes an analysis of impacts to ground water in proposed sellers' areas (see attachment hereto criticizing the DEIS/R analysis), it clearly concludes that specific impacts are not susceptible to determination. Therefore the Project proposes significant monitoring to evaluate the actual effects on ground water levels, and subsequent measures to insure protection of the underlying basins. However, planning to evaluate the impacts of ground water substitution (or other methods of "funding" transfers) is clearly not a determination that any such transfer will have no significant long-term effects on the underlying basins. To comply with the provision of CVPIA, the Bureau would have to arrive at some level of certainty that actions like ground water substitution will indeed not adversely affect the transferor's basin. Future efforts at determining whether or not the basin will be affected are inadequate under the statute. Future mitigation does not insure no harm.

3

3. The Project is contrary to and does not examine CVPIA's mandate to restore anadromous fish populations.

Another provision of CVPIA requires the establishment of an anadromous fish restoration program, or AFRP. This program was developed and adopted by the Fish and Wildlife Service in consultation with the Bureau and other state and federal agencies. The program must double the populations of certain specified fish species. (see webpage http://www.fws.gov/sacramento /fisheries/ CAMP-Program/Home/Documents/Final_Restoration_Plan_for_the_AFRP.pdf) This program includes recommended higher flows on many rivers including various small and all the main tributaries to the Sacramento and San Joaquin Rivers (see webpage http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/docs/sjrf_spprtinfo/afrp_1995.pdf)

The amounts of flows recommended by the AFRP are significantly higher than currently mandated flows and would necessitate significant "new" sources of water. Since the precipitation in any particular year is finite, to get the increased flows for the AFRP program the Bureau (or FWS or NMFS) would need to purchase water from upstream interests, including not only those who operate other dams on various tributaries, but also current CVP contractors who claim rights to some of that additional supply.

The Project anticipates the transfer of water from the same supply from which AFRP water must come. Hence, the Bureau is moving forward with a program that will prevent it from meeting its federally mandated obligation to double anadromous fish. Although the Bureau may be allowed to move forward on numerous projects and activities at the same time, undertaking a "voluntary" project that will preclude it from meeting a federally mandated obligation is not proper or legal. At a bare minimum, the DEIS/R must examine how the proposed Project will, and to what extent, affect the success of the AFRP. Absent a detailed analysis of this renders the DEIS/R insufficient.

4

4. The Project is contrary to and does not examine its effects on compliance with other federal law.

In 2004, Congress passed and the President signed into law the "Water Supply, Reliability, and Environmental Improvement Act" (hereinafter "2004 Act") commonly referred to as HR 2828 or Public Law 108-361 (see webpage https://www.govtrack.us/congress/bills/108/hr2828/text). This statute mandates various duties to the Bureau and other federal agencies with regard to water issues and uses in California.

The 2004 Act required the Bureau to develop a plan to meet all existing water quality standards and objectives for which the(CVP) has responsibility (2004 Act Section 103 (d)(2)(D)(I)). The Bureau (which holds the State issued permits to operate the CVP in California) is assigned the responsibility for meeting numerous water quality standards/objectives. These objectives include not only Delta outflow or X2, but also water flow and quality standards on the San Joaquin River and in the southern Delta. The Bureau must meet fishery flow standards measured at Vernalis during various times of the year, and must meet salinity (measured in electrical conductivity, or EC) standards at Vernalis and at three locations in the southern Delta all year round. [The three interior compliance stations are Brandt Bridge on the San Joaquin, Old River at Middle River, and Old River at the Tracy Blvd. Bridge.] These

5

various standards are set forth in the State Water Resources Control Board Decision D-1641 (see webpage http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1641_1999dec29.pdf).

Compliance with the fishery flow standards requires more water than the Bureau allocates from its reservoirs on the San Joaquin and its tributaries and thus compliance is dependent on there being water purchases. Compliance with the salinity standards also, to varying degrees, is dependent on flows in the river in excess of the amounts the Bureau allocates from its reservoirs. The 2004 Act states that as part of the Program to Meet Standards

> "The Secretary shall incorporate into the program the acquisition from willing sellers of water from streams tributary to the San Joaquin River or other sources to provide flow, dilute discharges of salt or other constituents, and to improve the water quality in the San Joaquin River below the confluence of the Merced River . . . and to reduce the reliance on New Melones Reservoir for meeting water quality and fishery flow objectives." (Section 103 (d)(2)(D)(v))

The Bureau has undertaken no effort to investigate, discuss or identify any willing sellers of water to comply with the above mandates of the 2004 Act nor done any environmental review of such mandatory transfers. Just as it has ignored the AFRP mandates, the Bureau has ignored these mandates and is now identifying potential sellers on the San Joaquin System to transfer water for export to CVP contractors. Again, the finite amount of water produced each year means that the Bureau is acting in a manner which precludes it from meeting federally mandated obligations contained in the 2004 Act. The DEIS/R make no analysis of how the Bureau intends to meet its permit obligations contained in D-1641 or how the Project might affect its ability to meet those obligations. As will be seen below, since the Bureau regularly violates its obligations to meet water quality standards its efforts associated with the Project are clearly frustrating not only the law, but in violation of the Bureau's permit and statutory obligations.

5

5. <u>By undertaking the Project, the Bureau is choosing to not meet is permit obligations to meet water quality standards, contrary to the assumptions in the DEIS/R.</u>

Since 2007, California has experienced two significant dry periods. 2007 and 2008 were a dry and an critical year. 2009 started off as being another critical dry year until some rains, especially in February eased the situation. 2012 was a below normal year with 2013 being one of the driest years on record. Those extremely dry conditions continued through 2014. In each of these dry periods, the Bureau (and DWR) were unable to meet their permit conditions for fishery and other water quality standards. The full extent of the hydrological conditions, reservoir operations and the lack of compliance with specific project obligations is too voluminous to repeat here. Reviewing the relevant SWRCB documents (see attached TUCP, http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/orders/wro2009.shtml) and the attached correspondence between CDWA and SWRCB provides a much more detailed summary. With that said, the following summarizes recent failures of the Bureau to meet its obligations. After a two year drought from 2007-2008, the Bureau, according to its own petition before the SWRCB, had insufficient water in storage to fully supply its highest priority contractor (the Exchange Contractors) and was unable to meet Delta outflow (X2) requirements beginning in early 2009. After a below normal year in 2012 and six months of virtually no precipitation in 2013, the Bureau was unable to meet and sought relief from it obligations to meet the Western Delta agricultural standard and the cold water requirements for Sacramento River fisheries. In 2014, as the drought continued, the Bureau was unable to meet outflow (X2), unable to meet cold

6

water requirements, unable to meet the spring Vernalis fishery pulse flow standard, unable to meet the Vernalis salinity standard, unable to meet the three interior southern Delta salinity standards and unable to meet the fall Vernalis fishery pulse flow standard. [See for example attached Notices of Violation and EC data from DWR webpage.] 6

This "drought-related" problem is unfortunately not just a function of droughts. The Bureau has also failed to meet the spring fishery pulse flow at Vernalis on a number of occasions and most every year violates the salinity standard at Old River at Tracy Blvd. Bridge. [See attached DWR 2013 and 2014 Water Quality Data] The underlying reason for the Project is to find additional supplies for CVP contractors during years when they do not get enough water under their CVP contracts. It is precisely those years that the Bureau is incapable of meeting its permit obligations to maintain water quality standards. However, instead of taking actions to meet its obligations, the Bureau instead embarks upon a program to find water to provide additional exports. Thus the Bureau has unlawfully elevated export contractor desire for additional water above the Bureau's existing obligations to protect fisheries and other beneficial uses. Although the Bureau's permits condition the delivery of water to its contractors on compliance with all other permit conditions, the Bureau consistently fails to do so. By undertaking the Project, the Bureau is insuring that not only will it not be able to meet its obligations in following years, but it is also making compliance even less likely and violations more severe. There is only so much water in the system. When the Bureau seeks to facilitate transfers of portions of the limited supply to satisfy contractor desires, it necessarily decreases the amount of water available to meet standards. It is important to note that in precisely the years when there is insufficient water to meet permit and other obligations for the protection of water quality, the Project will increase the consumptive use as a whole by allowing sellers to substitute their water supply to fund a transfer. 7

The DEIS/R purports to examine the Project's effects on stream flow and other waters, but it makes no analysis of how the Project will affect Bureau (and DWR) mandated obligations to meet water quality standards. The DEIS/R, like so many other environmental documents simply assumes that standards will bet met and ignores the reality of the water supply. As we have seen so clearly in the past 8 years, DWR and the Bureau operate to not meet the standards.

6. <u>The DEIS/R does not adequately examine the effects of the additional pumping on southern Delta water levels, quality or circulation.</u>

Export pumping at the SWP and CVP facilities in the southern Delta adversely affects flows, water levels and quality in the southern Delta and central Delta. [See attached 1980 Report of Effects of CVP]. The DEIS/R reasons that as long as the Bureau and DWR comply with their existing permit conditions and applicable SWRCB orders, no party is harmed. Thus additional projects, like the contemplated Project will also not cause third party harm. That is to say, if the current regulations on exports protects third parties, those same regulations will prevent any harm from any exports done under altered, but allowed exports. DWR and the Bureau intend to continue compliance with the regulatory scheme. Such assertions are incorrect. 8

Operations under current CVP permit conditions do cause harm. The SWRCB has *partially* addressed some of these third party impacts caused by the CVP and SWP in a Cease and Desist order issued against the projects (and subsequently amended). The Cease and Desist Order is WR Order 2006-0006 and its modification is WR Order 2010-0002, both can be found at http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/orders/wro2006.shtml. This Order places limits on export operations, including those wherein the Bureau would use

SWP facilities as is contemplated in the Project. The 2006/2010 Order requires the Bureau and DWR to develop water level and quality response plans, the latter of which requires the agencies to give notice of anticipated water quality violations and of actions undertaken to avoid such violations. The Order specifically lists the purchase of additional water for flow on the San Joaquin River as one potential mechanism to meet the standards. The Order also requires those agencies to give notice of actual violations and specify what actions were indeed taken to correct or minimize the violation. To date, DWR and USBR have generally failed to give the appropriate required notice and have taken no additional actions to prevent or minimize violations of water quality standards. The standards are regularly violated. 8

Levels.

The hydraulics of the southern Delta channels are very complicated and difficult to understand. In general, the operation of the SWP and CVP export pumps draw down local water levels to the point where it affects the ability of local diverters to operated their diversion pumps or siphons. The extent of the effects at any particular time are dependent on how much export pumping is occurring, inflow from the San Joaquin River, tidal flows, when (during the tidal cycle) the pumping is occurring, the existence of the temporary tidal barriers[1] and the depth and capacity of any particular channel. Although there is a "water level response plan" as required by the CDO as referenced above, that response plan only applies to times when the CVP is using the SWP pumps or vice versa (this use of the other's facilities is known as joint point of diversion, or JPOD). There is no response plan during other times, yet exports continuously adversely affect local diverters as the barriers are not a complete mitigation and are not installed and operated at all times. Even during times when the response plan is in effect, the practice of the Bureau and DWR is to operate in a manner that harms local diverters.

As can be seen in email and modeling charts provide by DWR/USBR in just this last month (see attached JPOD information), rather than comply with the mandatory seven-day notice requirement in the response plan, the projects "asked" to implement JPOD sooner than the mandated seven days. The modeling provided indicated that they intended to go forward with the JPOD since the water levels would be too low (adversely affect local diverters) anyway, and thus the JPOD was only a minor additional harm, and not significant. It is SDWA's position that when water levels are at the point where they adversely affect local diversions, no additional export pumping should be allowed as it only adds to the harm. None of this is mentioned must less analyzed in the DEIS/R. 9

This adverse impacts on levels from export pumping is graphically evidenced this past summer. When exports were at historic lows this summer, diverters along Tom Paine Slough had adequate water levels in the Slough. In all prior years, when exports were significantly higher, the Slough did not fully fill on the incoming tide and the diverters were often times incapable of diverting when needed. [See attached Tom Paine Slough data.] Under the Project, additional export pumping will occur, but the impacts to southern Delta diversions is completely unexamined. The DEIS/R is therefore insufficient for two reason. The first is that it makes no inquiry into how increased exports might affect southern Delta diverters ability to divert, and

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[1] Three rock barriers are installed in the South Delta each year from approximately April through November. These barriers are meant to mitigate export effects on water levels by allowing incoming tides to fill the channels but then preventing the ebb tide from lowering water levels.

second, it wrongfully assumes that existing compliance with regulatory limitations on export pumping means there is no harm caused by current export pumping levels. 9

Quality.

It is a similar situation with regards to water quality. First, the DEIS/R makes no mention of the impacts to EC at any of the three interior southern Delta compliance stations where the SWRCB Water Quality Control Plan objectives are measured. The DEIS/R does give information about changes at Vernalis, but again, ignores the three objectives downstream of Vernalis. As stated before, the hydraulics of the area are complicated. Southern Delta salinity (measured in EC) is a function of the salt which flows into the area from the San Joaquin River, local use, riverine evapo-transpiration, incoming tidal flows (and the salt contained therein), and flow changes due to export pumping. As referenced above and in the attached materials, the salinity standard measured at Old River at Tracy Blvd. Bridge is commonly violated.[2] The DEIS/R seems to accept these violations as a base case or accepted practice. By assuming this, the DEIS/R does not fully explain how the current conditions are causing harm to third parties or what or how the incremental effects of the project may also cause harm. The DEIS/R simply assumes current exports and additional exports under the Project do not affect third parties. 10

Importantly, the DEIS/R notes in Table 3.2.26 that water quality is sometimes worse under the Project at Clifton Court Forebay, the intake for the SWP export facility. If water quality is worse at this location, that means the dilution benefits of the incoming tide are less and the water quality upstream (where the three interior south Delta salinity standards are measured) is necessarily worse, and the resulting impacts unknown.

Circulation.

The DEIS/R has no analysis of how any changes in San Joaquin River flows or export levels will affect flow pattern in the southern Delta. As stated above, flows in the area are a function of many things including exports and inflow from the San Joaquin River. Even small changes in either one of these can have significant effects on flow patterns. This is true even during times when the tidal barriers are installed an operating. The barriers are designed and operated in a manner that provides the maximum protection from decreased water levels while also trying to minimize salt from concentrating in the area. The barriers are most efficient at certain levels of inflow as that inflow helps determine how much diluting tidal inflow will enter the area. A complete explanation of these issues is contained in the DWR documents at http://baydeltaoffice.water.ca.gov/sdb/tbp/index_tbp.cfm (The temporary barrier project site) and http://baydeltaoffice.water.ca.gov/sdb/sdip/index_sdip.cfm (The South Delta Improvement Program site which includes the final EIS/EIR for that project). The documents at these sites are incorporated herein as the underlying technical background of how the southern Delta flow is understood and barrier operations occur. 11

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[2] The attached Salinity Measurements material shows DWR information indicating the measured EC at the four compliance stations as well as the 30-day running average. The standard is a 30-day running average of 1.0 EC (September - March) and 0.7 EC (April - August). Thus, any time the 30-day running average in the attached materials exceeds 1.0 EC from September - March or 0.7 EC from April - August there is a water quality violation.

7. The DEIS/R does not adequately examine the impacts of transfers from the San Joaquin River system or how diversions of such transfers upstream of the Delta affect third parties.

Table 3.2.25 on page 3.2.38 of the DEIS/R shows decreases in San Joaquin River flow under certain modeling conditions for various months in differing year types. Initially it must be noted that these numbers are averages for the year types. Though potentially helpful in analyzing impacts (assuming the modeling is correct and reliable) any average result is misleading because it mixes the lowest flow with the highest. Thus we cannot see what the lowest flow in any month is only the average of all flows from a set of years for that month. Impacts at these lower flows are therefore not examined and no conclusions should therefore be made about how the project may or may not injure third parties. 12

The information provided indicates that in some years San Joaquin River flows can decrease (for example) under the Project by up to 84 cfs in June and up to 81.3 cfs in March. These decreases can be significant in that flows on the River are sometimes very low. In the past year alone, Vernalis flow has dropped to 219 cfs in July (see attached DWR Flow Export data). Any change in such low flow would be very significant. Although the decreases in Table 3.2.25 are shown in above normal years, not knowing the flows in all years prevents us from determining if there are decreases in River flow during drier times under the Project.

The project also anticipates potential diversions of transfer water upstream of Vernalis and between Vernalis and the Delta proper (the later at the diversion of the Banta-Carbona District intake). The DEIS/R makes no real analysis of how such diversions would affect flow or water quality when the water enters the Delta (downstream of the Banta-Carbona intake). The San Joaquin River suffers from decreased flows (see 1980 Report attached hereto) and severe salinity problems due to drainage (surface and subsurface) from the CVP service area (see 1980 Report and Salinity in the Central Valley at www.waterboards.ca.govcentralvalley/water_issues/salinity/central.

Much of the salt entering the San Joaquin River occurs upstream of the River's confluence with the Merced River. Generally, the Merced and other tributary flows downstream provide some dilution to the saline San Joaquin. Depending on where and when the Project might allow diversions along the River (of transferred water) determines the effects on the water quality of the water which eventually enters the Delta. As we have seen, the water quality standards in the Delta are often violated, which means that any change in salinity and flow could affect water quality especially at the locations where the violations occur. Both the amount of inflow and the load of salt are important given the manner in which the CVP and SWP cause salt to collect and concentrate in the southern Delta. In addition, New Melones dam/reservoir on the Stanislaus is used to control salinity on the San Joaquin River at Vernalis through releases. However, New Melones is not operated to meet the standards in the southern Delta. The DEIS/R must examine how any changes in flows due to diversions of transferred water upstream of the Delta (at Banta Carbona's intake and above) affect releases from New Melones and how it may affect interior southern Delta water quality. The DEIS/R does neither. 13

It is important to note that although the salinity standards are measured at four compliance locations, the standards apply throughout the channels at all locations (see SWRCB 2006 Water Quality Control Plan at page 10; http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/2006wqcp/index.shtml

The DEIS/R does not even cover New Melones storage impacts which might occur due to changes in San Joaquin River flows or quality. Since the 2004 Act requires the Bureau to decrease New Melones use for meeting water quality standards, the DEIS/R is clearly incomplete and inadequate. 13

8. The DEIS/R is an improper "piecemealing" of a project under CEQA and NEPA.

According to the November 2013 Draft EIR/EIS for the Bay Delta Conservation Plan (BDCP), "Conveyance of transfer water by Authorized Entities is a covered activity provided that the transfers are consistent with the operational criteria described in CM1 and the effects analysis described in BDCP Chapter 5, Effects Analysis." (BDCP DEIR/EIS, p. 3-120; see excerpts enclosed herewith.) Because the BDCP will not only facilitate CVP water transfers, but will expressly include them as "covered activit[ies]," under CEQA and NEPA those transfers must be evaluated within the EIR/EIS for the BDCP and not in a separate, independent EIR/EIS.

With regard to CEQA, as the court explains in *Orinda Assn v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, at page 1171:

> A public agency is not permitted to subdivide a single project into smaller individual sub-projects in order to avoid the responsibility of considering the environmental impact of the project as a whole. "The requirements of CEQA, 'cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial.' [Citation.]"

As the court in *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, similarly explains: 14

> There is no dispute that CEQA forbids "piecemeal" review of the significant environmental impacts of a project. This rule derives, in part, from section 21002.1, subdivision (d), which requires the lead agency . . . to "consider[] the effects, both individual and collective, of all activities involved in [the] project."

Moreover, in a similar vein, as the California Supreme Court explains in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, at page 396:

> We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.

CVP water transfers are indeed a "reasonably foreseeable consequence" of the BDCP (for among other reasons, they are in fact a "covered activity" under the BDCP), and those transfers will indeed "likely change the scope or nature of the initial project or its environmental effects." With regard to the latter, the November 2013 Draft EIR/EIS for the BDCP itself acknowledges that the scope of the BDCP would indeed change if CVP water transfers were added to the scope of that EIR/EIS. As that Draft EIR/EIS explains: "[T]he withdrawal of transfer waters from source areas is outside the scope of the covered activity." (BDCP Draft EIR/EIS, p. 3-120; see

excerpts enclosed herewith.) Hence, if such withdrawal of transfer waters were included within that scope, it would undisputedly constitute a (significant) change of the scope of the BDCP Draft EIR/EIS (and, hence, its environmental effects).

For these reasons, the instant EIS/EIR is contrary to both CEQA and NEPA. The environmental analysis of the CVP transfers must be undertaken within the pending EIR/EIS for the BDCP and not separately from that EIR/EIS.

14

9. The DEIS/R incorrectly assumes there will be no transfers from 2015-2014 absent the Project.

On page 2-6 (section 2.3.1) and other places in the DEIS/R is it noted that the Base Case/No Action Alternative assumes no transfers during 2015 - 2024. There is no support for this assumption. Even in this second year of significant drought, the Bureau and DWR conducted JPOD operations of transfer water (see attached JPOD). If such transfers occur under current conditions they will certainly occur sometime in the next 10 years under the Base Case. I note that per the language of CVPIA, any water that moves via CVP facilities is considered "CVP water" and thus comes under both the Project and CVPIA limitations.

15

10. The DEIS/R is inadequate in that it is impossible to determine water savings under the crop shifting method of supplying transfer water.

One of the methods of supplying transfer water is to account for the amount of water saved by a seller due to a shift of one crop to another that consumes less water. Since transfers are to provide supply in drier times, there is no way to know if the seller would have shifted to that crop anyway because of such drier times. In this past year the SWRCB curtailed all post-1914 water rights and publically considered curtailing pre-1914 water rights, riparian rights and even CVP and SWP contract rights (deliveries). Hence, the pressures of drought can and do affect farming decisions in all areas, including those identified as potential sellers under the Project. There is no method to accurately determine if a seller would have shifted to a different crop absent a transfer, which makes the Project incapable of analysis and precludes any calculation of "how much water was saved."

16

This issue also is affected by the DEIS/R's failure to review water rights issues associated with any seller. If a seller is getting water from the CVP under a settlement or exchange contract, is the water he uses from his right or from the contract? Is he getting contract water in excess of what his underlying water right would provide under "natural conditions?" Is he making decisions on acreage and crops based on the contract or underlying water right? Does the decision on water use depend on what right is used? Until this morass of issues is resolved, there is no method by which one can determine if a crop shift actually results in more water being available.

11. The DEIS/R incorrectly assumes the CV-SALTS process will decrease salt entering the southern Delta.

One of the assumptions used to minimize, ignore or not examine the Project's impact on southern Delta salinity is that the CV-SALTS process will decrease the amount and concentration of salts entering the San Joaquin River. This indicates a misunderstanding of the CV-SALTS process. CV-SALTS is a joint SWRCB, CVRQWCB and stakeholder effort to address the valley/River salt problems. Although the process is developing Basin Plan amendments which can/could limit discharges of salt, the main thrust of the effort is to find a way to get the valley

17

salts out to the Bay and Ocean. Hence, rather than decrease salt loads, the implementation of the Basin Plan will be through a real time monitoring/discharge program already being developed by the Bureau and stakeholders. Under such a program, Highly concentrated salts will be discharged to the River during times when the River is of better quality than the discharge, and such mixing will not exceed the standard. Hence, the plan is to spread the salts out over time so that times of better water quality will be degraded, not improved. The times when the concentration is already too high will not be affected as New Melones currently dilutes the River regardless of the salt concentration. In sum, the San Joaquin River will not improve under the CV-SALTS program, the salts will simply be spread out, degrading the River at all times. The same amount of salts will enter the south Delta as do now. Whether or not those salts will leave the area or be adequately diluted for local use remains unknown, unexamined and unplanned. (See webpage www.cvsalts.com.) 17

12. Additional comments and analysis are attached.

Attached hereto are more specific comments relating other portions of the DEIS/R, and a technical analysis done by E-Pur, LLC (engineering consultants) focusing mainly on the ground water/surface water modeling done in support of the DEIS/R. Each indicate that the DEIS/R inaccurately analyzes the impacts Project and/or does not use the best science available.

Very truly yours,

JOHN HERRICK

Long-Term Water Transfer Public Draft EIS/R Comments

EIS/R Document Comments

- Pg ES-1, par3 – There is no evidence to support or assure that Buyer's use will be beneficial. Application of water to lands with particularly high latent levels of selenium or boron which further directly degrade the San Joaquin River or cause degrading accretions to the San Joaquin River would not be beneficial.. 18
- Pg ES-1, par3 – There is no evidence to support or assure that the transfer water is not going to "service any new demands". Water used to irrigate new plantings of permanent crops or even an annual crop not yet planted is serving a new demand. As permanent crops mature water demand generally increases and constitutes a new demand. For M&I type uses new connections and increases in use of existing connections adds new demand. 19
- Pg ES-1, par4 – SLDMWA is the state lead agency. The SWP operations and facilities are an integral part of the proposed project implementation. DWR must operate the SWP to accommodate these transfers and will be responsible for identifying when excess capacities exist to create the transfer opportunity in the first place. DWR is also the permit holder for the right to operate the SWP that mitigate for the SWP operations. SLDWMA assistance in negotiating transfer agreements between parties is hardly a superior qualification for them as lead agency over DWR who has to operate the system to make the transfers happen. DWR should be the state lead agency. 20
- Pg ES-2, par2 – Other concurrent transfers must be considered for the projects affects on those operations, both directly and indirectly as well as in combination and cumulatively with them, e.g. Lower Yuba River Accord water transfers from YCWA. 21
- Pg ES-2, par4 - The Purpose and Need limits the consideration to transfers from upstream of the Delta to water users south of the Delta and in the San Francisco Bay. This improperly limits the objective consideration of all reasonable alternatives. Measures other than transfers and measures including transfers within the Buyer area or other parts of the State present reasonable alternatives.. 22
- Pg ES-2, par6 – Water transfers are only one potential method to meet supplemental water supply objectives. Water recycling, water conservation, and within water buyer district local conjunctive use, transfers, and land retirement are all other reasonable and effective alternative methods to satisfy this objective. 23
- Pg ES-2, par8 – The premise that the water transfers will occur to make up for regulatory constraint impacts on water supplies is fundamentally flawed. The failure of the projects to develop sufficient supplies to meet regulatory requirements, senior obligations and project contractor desires is the driver. Buyer's desire to acquire through water transfers water which is not truly surplus to the needs within the watersheds of origin. 24
- Pg ES-3, figure ES-1 – New Melones storage facilities and the Stanislaus River are identified as a potential conveyance for the proposed project, but no potential sellers have been identified in this watershed and no "Area of Analysis" (Table ES-2) was included for this geographic area. 25

Without a willing seller identified with New Melones water rights or water rights in the Stanislaus River basin, the New Melones facilities and the Stanislaus River should not be involved in the proposed project. This was not disclosed in the EIS/R. Since this geographic area and facility was not analyzed or impacts disclosed, the New Melones facilities and the use of the Stanislaus River cannot be covered under this environmental document or for agency decisions or permits issued based on this document. 25

- Pg ES-3, figure ES-1 – The figure and project description fail to identify the water conveyance routes that could be utilized (and which could precipitate different environmental impacts. Without identifying the route in which surface water flows would be affected by the project, there cannot be a proper project level impact analysis. Such impacts have not been adequately identified, characterized, evaluated, quantified, mitigated or disclosed. 26
- Pg ES-5, par ES 2.2 – The willing sellers are not described in any detail (like the buyers were), they were only included on a list. The map of willing sellers is not sufficiently detailed to determine who is where. As an example, the area south of the town of Davis cannot be determined as to who the land owner(s) may be. Regardless, no conveyance route to deliver the water for a transfer is identified or analyzed for this water transfer so the impacts for the transfers from this property are not disclosed in or covered by this environmental document. 27
- Pg ES-8, par ES 3.2 – Alternatives should have included all reasonable measures, including land retirement, within the Buyer area as well as areas of the State other than upstream of the Delta.. 28
- Pg ES-9, Table ES-3 – Crop shifting – crop shifting and idling appear to be used interchangeable in the document in terms of creating water supply, but the environmental impacts of them are significantly different in kind and magnitude. The analysis must clearly separate the location, timing, and magnitude of each of these water conservation strategies and address their separate types and magnitudes of impacts. 29
- Pg ES-9, Table ES-3 – Even with the improperly limited alternatives there should have been an alternative 5 which included all other water supply source concepts except seller service area crop idling and shifting so seller service area agricultural impacts from the water transfers could have been identified, characterized, quantified and disclosed. As the alternatives stand, all of the alternatives, except the no action, included seller service area agricultural conservation. This alternative must be included in the revised EIS/R so these impacts can be isolated and quantified and compared to the other alternatives. 30
- Pg ES-9, Table ES-3 – Even with the improperly limited alternatives there should have been an alternative 6 which included all other water supply sources except reservoir releases so reservoir release impacts from the water transfers could have been identified, characterized, quantified and disclosed. Isolating the impacts of storing and conveying water is essential to complying with the requirements of the Warren Act Contract assessment. As the current analysis stands, all of the alternatives except the No Action/No Project included reservoir releases so these CVP reservoir-related water wheeling related impacts cannot be separated from the other project impacts in order to satisfy Warren Act analysis requirements. 31

- Pg ES-9, Table ES-3 – Since most willing sellers identified are part of the CVP and SWP, these contractors will also be short on water allocations in years in which the buyers would want to do water transfers. Since the sellers would be short on water supply in these years, they would already be doing the feasible water conservation actions, shifting to less water consumptive crops, idling farmland and utilizing groundwater as an alternative water supply to their surface water rights. Therefore, the proposed project and other alternative which rely upon seller service area water conservation, crop fallowing, crop shifting and use of alternative groundwater water supply assumptions are fundamentally flawed and unrealistic. Much of the water saving that the project is going to take credit for transfer would already be happening (switching to lower consumptive crops, idling land and switching to groundwater), so the project is claiming false credit for water conservation. The EIS/R must show, defensibly, how the water claimed as saved is actually saved, above and beyond what was going to happen absent the project. 32
- Pg ES-9,ES 4 par 2 – "The biological opinions on the Coordinated Operations of the CVP and SWP (U.S. Fish and Wildlife Service [USFWS] 2008; National Oceanic and Atmospheric Administration Fisheries Service [NOAA Fisheries] 2009) analyze transfers through the Delta from July to September (commonly referred to as the "transfer window") that are up to 600,000 AF in dry and critically dry years. For all other year types, the maximum transfer amount is up to 360,000 AF." This statement is correct as to the USFWS OCAP BO, but the NMFS OCAP BO has no similar provision or language. This erroneous assumption/representation distorts the EIS/EIR analysis of impacts to species covered in the NMFS OCAP BO. 33
- FWS OCAP BO pg 229, p1, "Water transfers would increase Delta exports by 0 to 360,000 acre-feet (AF) in most years (the wettest 80 percent of years) and by up to 600,000 AF in Critical and some Dry years (approximately the driest 20 percent years). Most transfers will occur at Banks (SWP) because reliable capacity is not likely to be available at Jones except in the driest 20 percent of years. Although transfers can occur at any time of year, the exports for transfers described in this assessment would occur only in the months July-September." The proposed project transfers from April through June are not covered in the FWS OCAP BO impact assessment of water transfers so the proposed project water transfers that would occur in April through June must seek ESA consultation from FWS. 34
- FWS OCAP BO pg 229, p1, "Delta smelt are rarely present in the Delta in these months, so no increase in salvage due to water transfers during these months is anticipated, but as described above, these transfers might affect delta smelt prey availability." This is why the FWS OCAP BO analysis of impacts of CVP and SWP water transfers in July through September are covered by the current take permits and any other months are not. 35
- FWS OCAP BO pg 229, p4, "The pumping capacity calculated is up to the allowable E:I ratio and is limited by either the total physical or permitted capacity, and does not include restrictions due to ANN salinity requirements with consideration of carriage water costs." So the transferred water is allowed to degrade water quality because the flows to maintain salinity standards would cost too much? 36
- FWS OCAP BO pg 230, p1, "For all other study years (generally the wettest 80 percent) the available capacity at Banks for transfer ranges from about 0 to 500 TAF (not including the additional 60 TAF accruing from the proposed permitted increase of 500 cfs at Banks. But, over the course of the three months July-September other operations constraints on pumping and 37