



July 19, 2021

Eileen Sobeck, Executive Director
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

*Transmitted via email to: eileen.sobeck@waterboards.ca.gov; Erik.Ekdahl@waterboards.ca.gov
diane.riddle@waterboards.ca.gov;*

RE: Request for Immediate Remediation of Violations of the State Water Resources Control Board's Approval of Shasta Temperature Management Plan under Water Rights Order 90-5

Dear Ms. Sobeck:

On behalf of the Natural Resources Defense Council, I am writing to request that the State Water Resources Control Board ("Board") take immediate action to remediate ongoing violations of the Board's approved Shasta Temperature Management Plan submitted by the Bureau of Reclamation ("Reclamation") under Water Rights Order 90-5 ("Shasta TMP"). We request that you immediately direct Reclamation to cease any releases from Shasta or Keswick Dam that are for the purpose of Project water deliveries pursuant to the Sacramento River Settlement Contracts (including any Project water that may be transferred), in order for Reclamation to meet the terms of your June 10, 2021 Order approving the Shasta TMP and Order 90-5.

You approved the Shasta Temperature Management Plan on June 10, 2021, requiring that Reclamation meet an end-of-September storage level in Shasta Reservoir of at least 1.25 million acre-feet.¹ On July 9, 2021, Ms. Kristin White notified you that Reclamation would not meet this requirement, stating that Shasta "storage of 1.25 MAF may not be met on September 30" and that Reclamation currently "anticipates an end of September storage of 1.1 MAF."² While Ms. White claims that the source of this violation is "depletions upstream of Freeport which is beyond the reasonable control of Reclamation and has been higher than assumed in May," it is simply false that Reclamation has no reasonable control over ongoing and anticipated releases

¹ Letter from Eileen Sobeck to Kristin White re Order 90-5 Sacramento River Draft Temperature Management Plan at 4 (June 10, 2021) (https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/6-10-21_final_tmp_response.pdf).

² Email from Kristin White to Eileen Sobeck re Notice of Deviation from the Final TMP (July 9, 2021) (https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/notice_of_tmp_deviation.pdf).

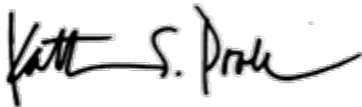
Request for Remediation of Violations of Reclamation's Shasta Temperature Management Plan under Water Rights Order 90-5
July 19, 2021

from Shasta and Keswick Dams and the end-of-September storage level of Shasta Reservoir. Among other things, Reclamation is continuing to make Project water deliveries to the Sacramento River Settlement Contractors from Shasta. Those deliveries amount to approximately 200,000 acre-feet in July, August and September, an amount greater than the shortfall in Reclamation's anticipated EOS storage compliance.

As explained in the attached letter sent to Reclamation's attorneys on July 14, 2021, the United States has previously admitted that Reclamation has both the discretion and the obligation to reduce Project water deliveries under the Sacramento River Settlement Contracts when necessary to meet legal obligations. Your June 10, 2021, order under Order 90-5 is one such legal obligation. Reclamation's reservoir releases to make Project water deliveries to Sacramento River Settlement Contractors are plainly "within the reasonable control" of Reclamation pursuant to Order 90-5, and the failure to reduce these releases to meet the requirements of the June 10, 2021 Order violates Order 90-5. Nevertheless, Reclamation's attorneys confirmed on July 19, 2021, that the agency has no intention of reducing these deliveries to zero. *See* Attachment 2.

We request that you immediately notify Reclamation of its obligation to cease any and all Project water deliveries from Shasta Reservoir unless and until it comes into compliance with your June 10, 2021 Order, as required by Order 90-5.

Sincerely,



Katherine S. Poole
Senior Director, NRDC

Atts: (1) Letter from B.J. Chisholm to Lesley Lawrence-Hammer and Nicole Smith re Sacramento River Settlement Contract Project Water (July 14, 2021)
(2) Email from Nicole Smith to B.J. Chisholm (July 19, 2021)

cc: Kristin White, Bureau of Reclamation (knwhite@usbr.gov)
Amy Aufdemberge, Bureau of Reclamation (Amy.Aufdemberge@sol.doi.gov)

Attachment 1

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PARTNER EMERITUS
SPECIAL COUNSEL

PETER D. NUSSBAUM
PARTNER EMERITUS

ELIZABETH VISSERS
FELLOW

July 14, 2021

Via Electronic Mail

Lesley Lawrence-Hammer
U.S. Department of Justice
Environment & Natural Resources Division
999 18th St. - S. Terrace, Ste. 370
Denver, CO 90202
Lesley.Lawrence-Hammer@usdoj.gov

Nicole M. Smith
U.S. Department of Justice
Environment & Natural Resources Division
150 M St. NE
Washington, D.C. 20002
Nicole.M.Smith@usdoj.gov

Re: Sacramento River Settlement Contract Project Water

Dear Ms. Lawrence-Hammer and Ms. Smith:

We write on behalf of Plaintiff Natural Resources Defense Council to demand that the U.S. Bureau of Reclamation (Reclamation) immediately reduce the July, August, and September project water allocations to the Sacramento River Settlement (SRS) Contractors to zero. Because this demand relates to ongoing litigation regarding the 2019 Biological Opinions and coordinated operations of the Central Valley Project (CVP) and State Water Project, we are writing to you as legal counsel to Reclamation.

On July 10, 2021, you confirmed that, despite a documented likelihood of 100% temperature-dependent mortality of endangered winter run chinook salmon this year, Reclamation has not reduced the SRS project water allocations to zero. Reclamation's publicly posted contract allocation information indicates that it is delivering project water to the SRS Contractors at 75% of their contracted amounts (see <https://www.usbr.gov/mp/cvp-water/docs/cvp-allocation.pdf>). We understand that the SRS Contractors may be selling a portion of their total allocation, rather than taking direct delivery of the water. Even 75% of project water diversions by the SRS Contractors total in excess of 270,000 acre-feet¹ of water.

¹ See Sacramento River Settlement Contract Renewal Final Environmental Impact Statement, Table 2-2 at p. 2-7, https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=1229.

The CVP project water which Reclamation, in its discretion, is releasing and delivering this summer could provide critical flexibility to Reclamation in addressing the current and worsening crisis—including by increasing the ability of Reclamation to store water and increase the survival chances of endangered fish species, such as juvenile winter-run Chinook salmon in the Sacramento River that are currently projected to suffer almost complete mortality this year.²

That Reclamation has not already taken steps to reduce the allocation of project water is astounding and is at odds with its obligations under the Endangered Species Act (ESA) to avoid actions that are likely to lead to the extinction of endangered and threatened species. As you are aware, the SRS Contracts include a shortage provision, Article 3(i), that expressly allows Reclamation to reduce project water allocations to comply with legal obligations, including the ESA.³ Reclamation has repeatedly represented in federal court that it can reduce project water to protect endangered species. For instance, Reclamation previously assured the Ninth Circuit that “Reclamation can reduce ‘project water’ under Article 3(i) of the SRS Contracts to comply with the ESA.” *See NRDC v. Jewell*, 9th Cir. Case No. 09-17661, Entry 49-1 at 49 (Reclamation’s Dec. 10, 2010 Brief). In this regard, Article 3(i) is effectively identical to the shortage provisions in other CVP water service contracts pursuant to which Reclamation regularly reduces water deliveries to protect listed species.⁴ Reclamation has acknowledged this in federal court, asserting: “Should it ever prove necessary for project water under the SRS contracts to be reduced to meet legal obligations under the ESA to benefit the delta smelt or other listed species, Article 3(i) gives Reclamation the same ability to do so as it has under the [Delta Mendota Canal] contracts.” *Id.* at 50. Yet during this year’s catastrophic drought, when almost all CVP water service contractors have had their allocations reduced to zero, Reclamation has failed to reduce the SRS Contractors’ project water allocations to zero. There is no legal basis for this special treatment of the SRS Contractors, particularly in light of the catastrophe facing the Chinook salmon this year.

Even if the SRS Contractors are diverting just 65% of their contracted project water amounts this year (see https://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/sacramento_river/docs/2021/wro90/2021-04-21_item_07_2021-04-21_presentation_for_swrcb_workshop.pdf at 7), that still amounts to more than 230,000 acre-feet of water.

² *See, e.g., Dire drought warning: California says ‘nearly all’ salmon could die in Sacramento River*, *The Sacramento Bee* (July 8, 2021) (California Department of Fish and Wildlife predicts that the temperature-dependent fatality rate will approach 100%, up from the U.S. Fish and Wildlife’s prior estimate of 88%), <https://www.sacbee.com/news/california/water-and-drought/article252650328.html>

³ Article 3(i) provides: “[I]f there is a shortage of Project Water because of actions taken by [Reclamation] to meet legal obligations, then ... no liability shall accrue against the United States ... for any damage, direct or indirect, arising therefrom.”

⁴ *See, e.g.,* Article 12(b) in the Delta Mendota Canal water service contracts.

Lesley Lawrence-Hammer & Nicole M. Smith

July 14, 2021

Page 3 of 3

Reclamation's failure to take the obvious and available step of zeroing out project water, thereby freeing a substantial amount of water that could have appreciable benefits to endangered species in the Sacramento River, is counter to Reclamation's ESA obligation not to jeopardize endangered species and an abuse of the agency's discretion. *See* 16 U.S.C. §1536(a)(2). Please confirm by Monday, July 19, 2021 whether Reclamation will reduce the SRS Contractors' remaining project water allocations to zero.

Sincerely,



B.J. Chisholm

cc: Christopher Keifer, U.S. Department of Commerce
Daniel Cordalis, U.S. Department of the Interior

Attachment 2

Cooper, Ashley

From: Smith, Nicole M. (ENRD) <Nicole.M.Smith@usdoj.gov>
Sent: Monday, July 19, 2021 1:00 PM
To: BJ Chisholm; Lawrence-Hammer, Lesley (ENRD)
Cc: christopher.keifer@noaa.gov; Daniel.Cordalis@sol.doi.gov; Hal Candee (external); Poole, Kate
Subject: RE: Sacramento River Settlement Contract Project Water

BJ:

Thank you for your correspondence. On July 14, 2021 you wrote: "to demand that the U.S. Bureau of Reclamation (Reclamation) immediately reduce the July, August, and September project water allocations to the Sacramento River Settlement (SRS) Contractors to zero." Consistent with our July 10, 2021 email, Reclamation has confirmed that it does not plan to reduce the SRS Contractors' remaining project water allocations to zero.

Please let us know if you have any further questions.

Best,
Nicole Smith



Nicole M. Smith
TRIAL ATTORNEY
U.S. DEPARTMENT OF JUSTICE
Environment and Natural Resources Division | Wildlife & Marine Resources Section
150 M St NE | Washington, DC 20002
(202) 305-0368

From: BJ Chisholm <bchisholm@altshulerberzon.com>
Sent: Thursday, July 15, 2021 12:42 AM
To: Smith, Nicole M. (ENRD) <Nicole.M.Smith@usdoj.gov>; Lawrence-Hammer, Lesley (ENRD) <Lesley.Lawrence-Hammer@usdoj.gov>
Cc: christopher.keifer@noaa.gov; Daniel.Cordalis@sol.doi.gov; Hal Candee <hcandee@altshulerberzon.com>; Poole, Kate <kpoole@nrhc.org>
Subject: Sacramento River Settlement Contract Project Water

Lesley and Nicole,
Please see the attached correspondence.
Thanks,
BJ

Barbara J. Chisholm
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