



United States Department of the Interior



FISH AND WILDLIFE SERVICE

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In reply refer to:
1-1-07-I-1405

AUG 20 2007

Memorandum

To: Chief, Resource Management Division, U.S. Bureau of Reclamation, South Central California Area Office, Fresno, California (Attn.: Kathy Wood)

From: *Susan P. Jones*
Field Supervisor, Sacramento Fish and Wildlife Office, Sacramento, California

Subject: San Luis Unit Interim CVP Water Service Contract Renewal for the Period January 1, 2008 through February 29, 2011

This memorandum is in response to your July 17, 2007, memorandum (Memo) requesting initiation of formal consultation pursuant to section 7(a) of the Endangered Species Act of 1973 (ESA), for the execution of 26-month Interim Water Service Contracts on behalf of the Bureau of Reclamation (Reclamation) and seven Central Valley Project (CVP) co-applicants: the California Department of Fish and Game (DFG), the cities of Avenal, Coalinga and Huron, Panoche Water District (Panoche), San Luis Water District (San Luis), and Westlands Water District (Westlands). We received your memorandum on July 18, 2007. The action includes the interim renewal of water service contracts in the San Luis Unit (SLU) of the CVP involving three agricultural and municipal & industrial (M&I) contracts (e.g., Westlands, Panoche, and San Luis Water Districts), and M&I contracts (cities of Avenal, Coalinga, and Huron and to DFG). The current Westlands contract expires at the end of this year (2007). The other San Luis Unit contracts expire at the end of 2008. The renewal terms of the contracts are described in the initiation memo as: Westlands interim contract would expire in 2010, the remaining SLU contracts would expire in 2011.

Reclamation has requested initiation of formal consultation under the ESA based on the information provided for the SLU long term contract renewal (LTCR) consultation (2004 Biological Assessment, two responses to insufficiency memoranda, and additional information generated by the Endangered Species Recovery Program). The proposed action is the execution of Interim water service contracts in the amount of 1,385,590 acre-feet (af) for SLU contractors that provides for delivery of "a maximum quantity of water subject to hydrological and regulatory constraints for the full contract periods", as described in Reclamations September 2005 Memo and attachments. The Service finds there are still substantive questions regarding

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the description of the action to be considered and a description of the specific area that may be affected by SLU Interim Contract renewals that warrant further discussion with and clarification from our Regional Solicitors before we can proceed with the initiation of consultation on this project. We therefore, are not commencing initiation of formal consultation at this time but will proceed informally until these issues are resolved.

Your Memo notes, that, "Reclamation has determined, in consultation with the contractors and with the U.S. Fish & Wildlife Service, that the proposed action may adversely affect species listed under the Endangered Species Act..." This differs from the conclusion in the September 14, 2004 Biological Assessment for SLU LTCR (BA), which concluded that renewal of the SLU Interim water service contracts is not likely to adversely affect (NLAA) listed plants or wildlife, and would not result in changes to or alterations of habitat used by listed species either known to occur or with the potential to occur in the SLU service area. We do not concur with Reclamations NLAA determination in the SLU LTCR BA and believe SLU Interim Contract renewals could result in adverse effects to listed species. The SLU LTCR BA bases the NLAA determination on the assumption that the environmental baseline for listed and proposed species and designated critical habitat potentially occurring within the action area would not change with the implementation of the proposed action of renewing the long-term water service and repayment contracts between Reclamation and the eight SLU contractors (page 95 of BA).

Consultation on reauthorization of ongoing actions is one of the more complex areas of section 7 consultation. Our approach to baseline in water contract consultations is that the environmental baseline represents environmental conditions/species' status prior to the renewal of the contract; impacts of future water deliveries are not part of the environmental baseline. The effects of the action on the protected species present in the action area (San Joaquin kit fox (*Vulpes macrotis mutica*, Federal status: endangered), California least tern (*Sterna antillarum* [= *albifrons*] *browni*, Federal status: endangered), Giant garter snake (*Thamnophis gigas*, Federal status: threatened), Blunt-nosed leopard lizard (*Gambelia silus*, Federal status: threatened), California Jewelflower (*Caulanthus californicus*; Federal status: endangered), San Joaquin Woolly-threads (*Monolopia* [= *Lembertia*] *congdonii*; Federal status: endangered)) are determined based on the effects of water deliveries over the Interim contract period, including continuation of any ongoing actions. In short, we view them as effects from a proposed Federal action that have not undergone section 7 consultation. We therefore intend to address the effects of future implementation of Interim contracts, including the effects of interrelated and interdependent actions, as effects of the Federal action, not as part of the environmental baseline. The jeopardy analysis will compare the environmental baseline that exists at the time of the Federal action to the adverse effects of the Federal action projected into the future, starting at the time the Federal action is taken, including the effects of interrelated and interdependent actions.

Outstanding Issues Affecting the Base Conditions

The following information, issues, and questions need to be resolved before the environmental baseline conditions for the listed San Joaquin kit fox and giant garter snake can be established.

The renewal of San Luis Unit contracts for an interim 26 month period also raises a number of questions on how we can proceed in light of other interrelated unresolved issues (e.g., OCAP, water quality, and drainage) without receiving clarification from our respective Counsels.

There are also several outstanding issues with respect to drainage which are unresolved:

1. First, for all the agricultural districts except Westlands, the Service completed a biological opinion in 2001 on a program for drainage management in those (and some other) districts called the Grassland Bypass Project (GBP BO). The time period covered in that opinion was September 2001 through December 2009. Due to incomplete implementation of terms and conditions of the GBP BO and to potential effects to giant garter snake not addressed in the 2001 BO, the Service has recommended that reinitiation of this consultation is warranted. Reclamation needs to clearly define and analyze the effects of drainage management on giant garter snake and kit fox from 2008 through 2011 for the northern SLU districts. What drainage management will occur, and what effects will those specific measures have on giant garter snake and kit fox.
2. On March 16, 2006 we completed a biological opinion (BO) of the effects on listed species of Reclamations San Luis Drainage Feature Reevaluation (SLDFR) proposed plan to manage, treat and dispose drainage from the San Luis Unit agricultural districts. The species being evaluated for both projects are virtually identical. Since that time, the Service has learned that several of the assumptions that we predicated our BO and Fish and Wildlife Coordination Act Report (CAR) upon have not proven to be true; and much of the mitigation and contingency planning for SLDFR for our consultations was deferred to the Feasibility Planning phase (which is currently ongoing). Reclamation has not consulted with FWS on mitigation or contingency planning since the FEIS went public in May 2006. In addition; the Service has found new information on high concentrations of mercury in drainwater in the project area (which was not considered a constituent of concern in the NEPA/ESA for San Luis Drainage and was also not evaluated in the EIS/BA for the long term contracts). Again Reclamation needs to clearly define and analyze the effects of drainage management, including the effects of mercury, on giant garter snake and kit fox from 2008 through 2011 for the SLU districts.
3. The draft interim contracts include the following language with respect to water quality effects of these contract renewals, "The Contractor shall be responsible for compliance with all State and Federal water quality standards applicable to surface and subsurface agricultural drainage discharges generated through the use of Federal or Contractor facilities or Project Water provided by the Contractor within the Contractor's Service Area." In the initiation materials for SLU long term contract renewals that Reclamation provided the Service in September 2005, Reclamation noted the following, (Attachment B, page 22) , "As the contracts contain the requirement that the contractors comply with all applicable laws regarding water quality there is no reason to presume that those laws will be violated. As described in the September 13, 2004 BA all of the water quality objectives in the area are being met, and therefore there is no anticipated effects from the minimal groundwater movements that might be expected to occur in the area. This information is the best available information and is the basis of Reclamation's assessment of continued

deliveries of up to full contract quantities within the range of deliveries and frequencies described in the OCAP studies." Unfortunately, this is not an accurate assessment of the effects of these contract renewals to downstream surface water quality. Water quality standards for the Grassland Wetland Supply Channels have been exceeded numerous times since the Grassland Bypass Project EIS/EIR was completed in 2001. The Central Valley Regional Water Quality Control Board (RWQCB) established and EPA approved a 2 µg/L monthly mean selenium water quality objective for the Grassland Wetland Channels (RWQCB 1996). The RWQCB established total maximum daily loads (TMDL) to meet the monthly selenium water quality objective for the Grasslands supply channels and Salt Slough (RWQCB 2000). Failure to meet those TMDL resulted in the State Water Resources Control Board (SWRCB) listing of the Grassland wetland supply channels and Mendota Pool as impaired for selenium on their triennial review of the California 303(d) list of impaired water bodies with an approved TMDL that was not being met. Further, the SWRCB also issued a Cease and Desist order against Reclamation and DWR with respect to failure to comply with the salinity standards at Vernalis and the south Delta. Reclamation has since filed litigation protesting that Cease and Desist order, arguing that the salt in the lower San Joaquin River (LSJR) is largely out of their control. But the RWQCB has clearly identified the source of salt loading in the San Joaquin River as largely coming from west-side CVP irrigation (San Luis Unit and DMC), "The Grassland Sub-area contains some of most salt-affected lands in the LSJR watershed. This sub-area is also the largest contributor of salt to the LSJR (approximately 37% of the LSJR's mean annual salt load)." How do we proceed with Interim contract renewals when we know that compliance with State and Federal water quality standards has not been met, and exceedences of some of these standards are associated with water deliveries to SLU contractors? Reclamation in the materials they have provided to the Service for long term contract renewals to date, has not yet adequately addressed the effects this issue will have on giant garter snake and kit fox from 2008 through 2011 for the SLU districts.

Other Outstanding Issues Related to Interim Contract Renewal

1. How can we (FWS and Reclamation) proceed with a 26 month interim contract renewal, when the Federal Courts have effectively invalidated our OCAP biological opinion for delta smelt? Reclamation notes that, "Reclamation is currently reconsulting with Service on the OCAP, and will continue to comply with the current OCAP BO, any successor BO's, any court rulings, and other regulatory determinations and documents relevant to OCAP."
2. Relevant Conservation Measures: We have not yet received information regarding the status of Encroachment Mitigation (a requirement of the State Water Board with respect to Reclamation's water right permit for CVP) including information on how Reclamation will comply with mitigation requirement for Westlands WD encroachment by 2010. It is likely that insufficient acreage is available to meet the mitigation requirement, and Reclamation and the Service is not aware of any recent substantial progress on acquisitions. These acres, and their location is crucial to the survival of the kit fox, and we need to understand Reclamation's specific plan to meet this obligation in order to properly characterize the environmental baseline for this consultation. Further, in the material provided for SLU long term contract renewals,

Reclamation assumed that no new lands would be brought into agricultural production or other undeveloped, non-urban land would not be converted to urban uses. It is unclear how such a commitment would be enforced or which entity or agency would be responsible for such enforcement. What would the consequences be if this commitment was breached? We do have a letter from the San Luis WD that commits to not delivering water to areas for M&I development unless Reclamation has provided ESA clearance. That commitment should be included in the project description for this consultation.

Conclusion

The Service finds there are still substantive questions regarding the SLU long term contract renewals that warrant further discussion with and clarification from our Regional Solicitors before we can proceed with the initiation of consultation on this project. We therefore, are not commencing initiation of consultation at this time. We look forward to continuing to work with you on this project. If you have any questions or concerns about these comments please contact Michael Welsh or Joy Winckel of my staff at the letterhead address or at (916) 414-6600.