



United States Department of the Interior



BUREAU OF RECLAMATION
Mid-Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825-1898

IN REPLY REFER TO:

MP-460
WTR 4.10

JAN 13 2010

Ms. Victoria Whitney
Deputy Director for Water Rights
Attn: Ms. Katherine Mrowka
State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Subject: Response to Allegations Presented in Protest of the Bureau of Reclamation's Petitions to Extension of Time to Put Water to Full Beneficial Use Filed on Behalf of California Sportfishing Protection Alliance, Permitted Applications 5625, 5626, 5627, 5628, 9363, 9364, 9365, 9366, 9367, 9368, 13370, 13371, 13372, 14662, 14858A, 14858B, 14859, 15374, 15375, 15376, 15764, 16767, 16768, 17374, 17375, 17376, 18115, 19303, 19304, 21542, 22316, 27319 for Integrated Operation of the Central Valley Project, California

Dear Ms. Whitney:

Reclamation has received a copy of the protest filed by Chris Shutes (Protestant) against Reclamation's petitions for extension of time (Petitions) for the subject permitted applications for integrated operation of the Central Valley Project (CVP) (Protest). Reclamation is also in receipt of a December 14, 2009, letter from the Deputy Director for Water Rights requesting that Reclamation respond to the allegations made in the Protest, with exception to numerous allegations as noted in the December 14 letter.

RECLAMATION'S RESPONSE TO PROTEST

Disclosure of Water Use:

Petitioner alleges that there is no accounting for how much water has been put to beneficial use under each permit and no accounting for how much water will be put to beneficial use in the future.

However, Reclamation has been diligently filing with the State Water Board its Progress Reports by Permittee for the subject permitted applications as soon as final operational and water use information are made available. Reclamation has been working hard to gather, process, and extensively report water diversion and use information in order to submit its progress reports to the Board in a timely fashion. However, Reclamation believes that it would be impractical and unnecessarily redundant for it to have attached to its Petitions all Progress Reports by Permittee submitted to the State Water Board over the many decades. These reports, which provide reservoir diversion and operational information along with CVP water delivery and use information, are public information that Reclamation understands to exist in the files at the State Water Board.

Protestant has not claimed in its Protest that it has sought out and has been unable to locate these reports in the State Water Board's files. Reclamation is not aware of any statutory or regulatory provision whereby an allegation of inconvenience in reviewing public records could form an acceptable basis for a

protest. More importantly, Protestant fails to describe how the diversion and use information actually presented in Reclamation's Progress Reports by Permittee could not support a finding of good cause to grant the extensions of time. Any request for additional permit-specific diversion information, that is, water diversion and use information beyond the type and format of information provided in Reclamation's Permittee Reports for CVP water rights, is not practical and is inconsistent with the nature of integrated CVP operations including the very purpose for the consolidated purposes and places-of-use approved by the State Water Board, with the Division of Water Rights' and State Water Board's understanding of CVP operations, and with agreed-upon accounting procedures for CVP operations.

Compliance with the California Environmental Quality Act (CEQA):

In its Petitions, Reclamation recognized the need for the State Water Board to comply with CEQA. Reclamation's understanding was that the State Water Board would inform Reclamation of the level of action required by the State Water Board for its compliance with CEQA.

In its Petitions, Reclamation suggested that the State Water Board refer to the information to be presented in the Bay Delta Conservation Plan Environmental Impact Report/Environmental Impact Statement (BDCP EIR/EIS), and stated that the need for completion of the BDCP EIR/EIS process as part of the environmental documentation could be necessary for approving the Petitions. Protestant alleges that although Reclamation suggested in its Petitions that the State Water Board use the BDCP EIR/EIS as an environmental document for the Petitions, reference to that document would be confusing and contradictory. Protestant provides no adequate basis for the assertion that the BDCP EIR/EIS should not be used as at least a reference document. To the contrary, Reclamation believes that use of information contained in the BDCP EIR/EIS would be helpful to the State Water Board in assessing future water use level use under the permitted applications in a consistent, authoritative approach.

Due Diligence and Good Cause:

Protestant generally alleges that Reclamation has not satisfied statutory requirements for the requested extensions of time.

The following provisions describe the authority for the State Water Board to grant an order approving Reclamation's Petitions for the subject permitted applications:

"The period specified in the permit for beginning construction work, for completion of construction work, for application of the water to beneficial use, or any or all of these periods may, for good cause shown, be extended by the board." (Cal. Water Code § 1398(a))

"An extension of time within which to complete an application, to commence or complete construction work or apply water to beneficial use will be granted only upon such conditions as the board determines to be in the public interest and upon a showing to the board's satisfaction that due diligence has been exercised, that failure to comply with previous time requirements has been occasioned by obstacles which could not reasonably be avoided, and that satisfactory progress will be made if an extension of time is granted. Lack of finances, occupation with other work, physical disability, and other conditions incident to the person and not to the enterprise will not generally be accepted as good cause for delay. The board may, in its discretion, require a hearing upon notice to the permittee and such other parties as the board may prescribe." (23 C.C.R. §844)

However, the CVP is fully constructed in order to divert and beneficially use water under the subject permitted applications. Reclamation's website at, http://www.usbr.gov/projects/Project.jsp?proj_Name+Central+Valley +Project describes the nature of the completed facilities of the CVP:

- Reaches some 400 miles, from the Cascade Mountains near Redding in the north to the Tehachapi Mountains near Bakersfield in the south.
- Consists of 20 dams and reservoirs, 11 powerplants, and 500 miles of major canals, as well as conduits, tunnels, and related facilities.
- Manages some 9 million acre-feet of water.
- Annually delivers about 7 million acre-feet of water for agricultural, urban, and wildlife use.
- Provides about 5 million acre-feet for farms – enough to irrigate about 3 million acres, or approximately one-third of the agricultural land in California.
- Furnishes about 600,000 acre-feet for municipal and industrial use – enough to supply close to 1 million households with their water needs each year.
- Dedicates 800,000 acre-feet per year to fish and wildlife and their habitat and 410,000 acre-feet to State and Federal wildlife refuges and wetlands, pursuant to the Central Valley Project Improvement Act (CVPIA).

Also, Reclamation has developed the capability to serve water within the place-of-use authorized for delivery and use of water. (See place of use maps on file with the State Water Board regarding the subject permitted applications.) During the requested extension of time period, Reclamation would continue to divert, store, and put water to beneficial use, including use of water for future environmental purposes, under the permitted applications in accordance with all applicable laws, permit terms and conditions, water right orders and decisions, biological opinions, and judicial decisions and orders.

Reclamation also has been diligently implementing a program for the successful execution of long-term renewal contracts throughout the various divisions of the CVP. The public may verify the execution of long-term water service contracts, as well as the negotiation of a few remaining renewal contracts, on Reclamation's public website at, http://www.usbr.gov/mp/cvpia/3404c/lt_contracts/index.html. Full beneficial use of water is expected to occur by the year 2030, consistent with the terms of the renewal contracts and full build-out within the CVP contractors' service areas. Reclamation envisions that prior to 2030, it may be necessary to request the State Water Board for adjustments in order to conform the authorized CVP places of use to match water use demands anticipated to exist at time of build-out, but that would be met with no changes in permitted diversion quantities, permitted diversion rates, or contract totals. Reclamation would prefer having any necessary place-of-use adjustments completed prior to licensing, and to have been serving water accordingly, rather than going to license sooner and for authorized places of use that may not reflect demands existing under the CVP contractors' future built-out conditions.

Protestant focuses on statements made in Reclamation's Petitions regarding uncertainty of future water use. Reclamation's statements regarding uncertainty of ultimate use were made to explain to the State Water Board why it was petitioning for extensions of time, rather than requesting that the State Water Board initiate licensing proceedings at that time. Reclamation is not aware of any statutory or regulatory requirement for a petitioner for an extension of time to identify with certainty its ultimate beneficial use, nor is it aware of any request for such information on the State Water Board's published forms for filing a petition for extension of time and for reporting water use by permittee. Reclamation understands that it need only identify in its Petitions the year it anticipates to make full beneficial use under the permitted applications, as it has so indicated in its Petitions. Reclamation also understands that a determination of ultimate water use is made by the State Water Board, not by the permittee, and is done through a State

Water Board investigatory process at the time of licensing following the end of an approved extension of time period.

Reclamation has been diligent in constructing the CVP, operating the CVP, meeting contractor demands, and entering agreements to meet present and future demands pursuant to the subject permitted applications. The Water Needs Assessments prepared for the execution of long-term contract renewals are based upon year 2030, ultimate demand levels. Protestant's allegation that it has not met the requirement for the requested extensions of time is therefore unfounded. Reclamation has shown due diligence and that it has the means, including infrastructure and contractual commitments, to make satisfactory progress if an extension of time is granted.

December 2000 Record of Decision:

Reclamation and other Interior agencies are directed, through the Trinity Management Council¹, to implement the Preferred Alternative as described in the Final Environmental Impact Statement/Environmental Impact Report for the Trinity River Mainstem Fishery Restoration and its associated December 2000 Record of Decision (Trinity ROD):

The Preferred Alternative provides for the continued operation of the Trinity River Division of the CVP, including the continued export to the Central Valley of a majority of the water flowing into the Trinity River Division (averaging 52%) and the continued generation of power. The Preferred Alternative, however, also conforms to the legal and trust mandates for the restoration and protection of the Trinity fishery which restrict the amount of water authorized for exportation to the Central Valley. (Trinity ROD, p.20)

Protestant requests that some of the subject permitted applications be amended to conform to the Trinity ROD. The Deputy Director's December 14, 2009, letter appears to express agreement with this suggestion. Protestant's vague suggestion does not provide any suggested specific language for Reclamation's review and comment. However, for purposes of this response letter, Reclamation will assume that Protestant is suggesting that Appendix B to the Trinity ROD, Lewiston Dam Releases to the Trinity River (FEIS, pages C-37 and C-38), should be made a permit term. Reclamation rejects this suggestion and finds it problematic. Such amendments would be both unnecessary and ill-advised.

Reclamation has consistently operated the CVP as described in the Trinity ROD, and will continue to do so during the requested extension period. Protestant has provided no information to the contrary. Reclamation's expectations are that the long-term average of diversion from the Trinity River system for the CVP should be near 53% of annual runoff.

Implementation of the preferred alternative in the Trinity ROD is an adaptive management program whereby program activities, including flow schedules, are subject to review based upon annual assessments. This approach conflicts with incorporation of fixed permit term language. Implementation of the preferred alternative as a fixed permit condition is inconsistent with the preferred alternative, the Trinity ROD, and the restoration goals:

Preferred Alternative: consists of the Flow Evaluation Alternative which includes increased variable annual instream flow releases from Lewiston Dam, a coarse sediment introduction program, 47 new channel projects (mechanical channel rehabilitation), and implementation of an adaptive management program. Additionally, this alternative includes a watershed restoration program identical to the watershed protection efforts identified in the Mechanical Restoration Alternative. (Trinity ROD p. 1) (emphasis added)

¹ Member Agencies are U.S. Bureau of Reclamation, California Resources Agency (DFG), U.S. Fish and Wildlife Service, USDA Forest Service, Hoopa Valley Tribe, NOAA Fisheries, Trinity County, and Yurok Tribe.

For these reasons and others noted elsewhere, the Preferred Alternative represents the appropriate action necessary to restore and maintain the Trinity River's anadromous fishery in accordance with the Department's statutory and trust responsibilities. (Trinity ROD p.18)

Adaptive Environmental Assessment and Management (AEAM) Program:

The Trinity Management Council will establish and guide implementation of an AEAM Program to monitor the physical and biological results of the implementation plan and guide the refinement of the flow schedules and other activities contained in this Decision/restoration plan to ensure that the ultimate goal of restoring the fishery resources of the Trinity River is achieved. Appendix C of the FEIS/EIR contains a detailed description of the AEAM.

The focus of the AEAM organization is the Trinity Management Council and an AEAM Team consisting of a Technical Modeling and Analysis Group and a Rehabilitation Implementation Group. The organization includes a support staff (AEAM Team) of engineers and scientists charged with assessing the Trinity River fishery restoration progress. The AEAM Team will coordinate independent scientific reviews of the AEAM organization and may recommend management changes based on annual assessments of the evaluation of rehabilitation and flow schedule activities. (Trinity ROD at p.15) (emphasis added)

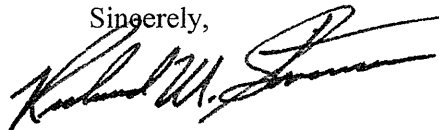
In rejecting the rigid "State Permit Alternative" approach, among other approaches, the Trinity ROD specifically contemplated the possibility of incorporating minimum flow levels in Reclamation's water right permits as the preferred alternative. However, in selecting the Flow Evaluation Alternative instead as the preferred alternative, which is an alternative utilizing higher flows than the State Permit Alternative, the Trinity ROD makes absolutely no mention of making increased annual instream flow releases a rigid permit condition. The Trinity ROD calls for no permit term modifications mandating minimum flow levels, but it instead requires evaluative flexibility. Nor does the Trinity ROD call upon Reclamation to request any water right permit term modification. In fact, where the Trinity ROD does generally address acquisition of any permits to implement the preferred alternative, it does so only to the extent such permits are necessary prior to implementing, and in order to implement, the preferred alternative. However, Protestant is not requesting the addition of any permit term that is necessary in order for Reclamation to implement, or continue to implement, the preferred alternative.

CONCLUSION:

Protestant has not put forth the required bases for its allegations. Therefore, the Protest is without merit and should be dismissed.

Reclamation has responded to the Deputy Director's request based upon its understanding of the December 14 letter laying out which allegations need no response. Please refer any requests for additional information to Mr. Bob Colella, Water Rights Specialist, at 916-978-5256.

Sincerely,



Richard J. Woodley
Regional Resources Manager

ACTING FOR

cc: See next page.

cc: Mr. Chris Shutes
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