STATE OF CALIFORNIA Edmund G. Brown, Jr., Governor

**NATIVE AMERICAN HERITAGE COMMISSION**
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October 30, 2015

VIA EMAIL

BDCPComments@icfi.com

BDCP/WaterFix Comments
P.O. Box 1919
Sacramento, CA 95812

Re: Native American Heritage Commission's Comments, Bay Delta Conservation Plan/California WaterFix, Recirculated Draft Environmental Impact Report (RDEIR)/Supplemental Draft Environmental Impact Statement (SDEIS)

On behalf of the Native American Heritage Commission (NAHC)[1], I wish to comment on the Bay Delta Conservation Plan/California WaterFix Recirculated Draft Environmental Impact Report (RDEIR)/Supplemental Environmental Impact Statement (SDEIS). The NAHC's comments are based on the following legal, axiomatic and factual premises.

The legal premise is Public Resources Code section 5097.991, which states, "It is the policy of the State of California that Native American remains and associated grave artifacts shall be repatriated." The axiomatic premise is that no agency can ever know more about a tribe's cultural resources than the tribe itself. The factual premise is that the Feather River West Levee Project was an abject failure in addressing tribal concerns regarding tribal cultural resources, in particular Native American burial sites, and that we should learn from that failure. It is with these premises in mind that the NAHC requests that the following be incorporated as conditions of approval of the final environmental documents and included in the cultural resources mitigation measures.

1. Require Tribal Monitors for All Ground-Disturbing Activities

Despite the acknowledged high sensitivity of the project footprint for Native American human remains, the extensive list of tribes which tribal consultation was held, and the admission that many areas within the project footprint have not been assessed for cultural resources, there is no provision for the required use of tribal monitors for all ground-disturbing activities. Given the breadth of the project and numerous tribes affected, the tribal knowledge of all culturally affiliated tribes as to the presence and

[1] The Native American Heritage Commission is considered a trustee agency for Native American cultural resources. See *Environmental Protection Information Center (EPIC) v. Johnson* (1985) 170 Cal.App.3d 604; see generally Kostka and Zischke, *Practice under the California Environmental Quality Act* (2015) (CEB) § 20.101 ("If a project is located on a site containing an archaeological site, the Native American Heritage Commission is a trustee agency that must be consulted by the lead agency in connection with the preparation of an EIR or negative declaration.")

identification of their cultural resources will be as indispensible, if not more so, than the knowledge of archaeologists. Tribal monitors, preferably those from tribes that are culturally affiliated to the project footprint, should be required for all ground-disturbing activities, and the pace, depth and location of any controlled grading protocols should be with the consent of tribal monitors.

2. Most Likely Descendants Should Determine What Are or Are Not Burials and Associated Grave Artifacts

One of several problems of the Feather River West Levee Project was the role that archaeologists were allowed to play in unilaterally determining what were or were not grave artifacts. Public Resources Code section 5097.98 provides that associated grave artifacts must be repatriated along with Native American human remains and treated with the same appropriate dignity. The appropriation of associated grave goods by the U.S. Army Corps of Engineers on that project under the sole determination of its archaeologists as to what constituted burials and associated grave artifacts on non-federal and non-tribal land caused a great deal of emotional turmoil for the United Auburn Indian Community, one of the Most Likely Descendants for that project. The NAHC submits that Native Americans know their own burial practices best and should be determine, in their sole discretion in their role as Most Likely Descendants, what are or are not Native American burials and associated grave goods.

3. Reinterment of Native American Remains by the Department of Water Resources, If Required, Must Be Done On the Property Where the Remains Are Found With Appropriate Dignity and In A Location Not Subject to Further and Future Subsurface Disturbance

Appendix A, Chapter 18, Page 18-8 provides:

> If the NAHC fails to identify the MLD or if the parties cannot reach agreement as to how to reinter the remains as described in California PRC Section 5097.98 (e), the landowner will reinter the remains at a location not subject to further disturbance.

This is a slightly incorrect recitation of the requirements of Public Resources Code section 5097.98 (e) that should be corrected. Public Resources Code section 5097.98 (e) provides in relevant part:

> Whenever the commission is unable to identify a descendant, or the descendants identified fail to make a recommendation, or the landowner or his or her authorized representative rejects the recommendation of the descendants and the mediation provided for in subdivision (k) of Section 5097.94, if invoked, fails to provide measures acceptable to the landowner, the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American human remains with appropriate dignity on the property in a location not subject to further and future subsurface disturbance.

Therefore, reinterment of Native American remains subject to the provisions of Public Resources Code section 5097.98 (e) requires reinterment specifically "with appropriate dignity on the property in a location not subject to further and future subsurface disturbance." Determinations as to what is "appropriate dignity" should be determined by the Most Likely Descendant if the Most Likely Descendant is involved. If not, "appropriate dignity" should comport with socially accepted norms for the treatment and disposition of human remains in general. Moreover, reinterment by the landowner must be on the property where the remains are discovered, not any location of the landowner's choosing. Finally, the reinterment site must not be subject to further and future disturbance so that the Most Likely Descendant will not be required to reinter the remains more than once. The location of future subsurface disturbance must be taken into account when determining where to reinter Native American remains.

4. Treatment of Multiple Burials in Accordance with Public Resources Code section 5097.98 (f)

Appendix A, Chapter 18, Page 18-8 states that DWR will ensure that the protections prescribed in Public Resources Code section 5097.98 (e) will be performed should Native American remains be discovered. Mitigation Measure CUL-4 states that state and federal law governing human remains will be followed if human remains are discovered. It should be clarified in the Appendix A, Chapter 18 and Mitigation Measure CUL-4 that Public Resources Code section 5097.98 (f) must also be followed in the event that multiple Native American burials are discovered. Public Resources Code section 5097.98 (f) provides:

> Upon the discovery of multiple Native American human remains during a ground disturbing land development activity, the landowner may agree that additional conferral with the descendants is necessary to consider culturally appropriate treatment of the multiple Native American human remains. Culturally appropriate treatment of the discovery may be ascertained from a review of the site utilizing cultural and archaeological standards. Where the parties are unable to agree on the appropriate treatment measures the human remains and items associated and buried with the Native American human remains shall be reinterred with appropriate dignity, pursuant to subdivision (e).

This clarification should be made to both Appendix A, Chapter 18 and the Mitigation Measure CUL-4.

5. Burial Treatment Agreements with Culturally Affiliated Tribes

Given the large number of tribes that are culturally affiliated with the project area footprint, it would be in the best interest of all involved for the Department of Water Resources (DWR) to at least attempt to enter into burial treatment agreements, as opposed to burial treatment plans, with those tribes. A lesson learned from the Feather River West Levee Project was that the prototypical Section 106 burial treatment plan did not equal a burial treatment agreement under Public Resources Code section 5097.98 because the burial treatment plan did not require the assent of the tribe and was therefore not an agreement. By entering into burial treatment agreements with all of the tribes that could potentially be named Most Likely Descendants for any Native American human remains discovered during the project, DWR will be able to expeditiously and respectfully commence the process of treatment and disposition of inadvertently discovered Native American human remains should one of the culturally affiliated tribes be named Most Likely Descendant. The NAHC does not make advance determinations of Most Likely Descendants for yet-to-be discovered Native American human remains.

6. No Data Recovery for Native American Remains Without the Most Likely Descendant's Permission

Under Public Resources Code section 5097.98 (e), only the landowner or his agent and the Most Likely Descendant can reach an agreement on treatment and disposition of ancient Native American human remains. In the absence of any agreement, the default is reinterment on the property where the remains were found. There is no provision for the landowner, or his agent, to unilaterally perform data recovery on ancient Native American human remains and, as the Advisory Council on Historic Preservation noted in its letter regarding the Feather River West Levee Project, under certain circumstances, data recovery is not the sole means of mitigation for purposes of Section 106. The NAHC submits that no data recovery should be performed on Native American human remains that are subject to Public Resources Code section 5097.98 without the Most Likely Descendant's consent, and that data recovery should not be considered the sole means of mitigation for damage to Native American human remains pursuant to Section 106. We incorporate by reference the Advisory Council on Historic Preservation's letter on this issue with respect to the Feather River West Levee Project.

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7. Tribal Assent to Programmatic Agreements and Historic Property Treatment Plans

One of the many failures of the Feather River West Levee Project was the failure to adequately address tribal concerns in the Programmatic Agreements and Historic Property Treatment Plans. DWR should seek the assent of culturally affiliated tribes as concurring parties to any Programmatic Agreements or Historic Property Treatment Plans.

In conclusion, the NAHC is more than willing to be of assistance in DWR's anticipated efforts to protect Native American cultural resources within this project's footprint.

Yours very truly,

Terrie L. Robinson, General Counsel
Native American Heritage Commission

cc: Cynthia Gomez, Executive Secretary, Native American Heritage Commission

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Preserving America's Heritage

March 31, 2015

Ms. Alicia E. Kirchner
Chief, Planning Division
U.S. Army Corps of Engineers
Sacramento District
1325 J Street
Sacramento, CA 95814-2922

Ref.: Resolution of Adverse Effects for Eight Prehistoric Archaeological Sites
Feather River West Levee Project, Contract C
Sutter and Butte Counties, California

Dear Ms. Kirchner:

The Advisory Council on Historic Preservation (ACHP) has been contacted by the United Auburn Indian Community (UAIC) regarding the resolution of adverse effects from the Feather River West Levee Project (FRWLP) to a number of archaeological sites encountered as post-review discoveries during a phase of the undertaking implemented in 2014. UAIC has objected to the archaeological data recovery being carried out and has proposed that the entire archaeological assemblage recovered from the sites be considered human remains and associated grave goods. The tribe has requested that the archaeological assemblage not be subject to further analysis of any kind and should be turned over to the tribe for appropriate reburial. In response, the Corps has indicated that it is obliged, in order to comply with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR 800), to accomplish some aspects of the analysis associated with the data recovery agreed to for resolution of adverse effects to these archaeological sites. In considering this disagreement, the ACHP would like to offer a number of observations regarding the requirements of Section 106 as they relate to this undertaking, the importance of tribal concerns regarding the presence, significance, and treatment of human remains in archaeological sites, and the potential to use alternative mitigation to resolve adverse effects in cases like this.

A central issue in the dispute is the Corps' belief that it is obligated to carry out data recovery in order to resolve the adverse effect of the undertaking because the archaeological sites have been determined eligible under Criterion D for inclusion in the National Register of Historic Places (National Register). As part of the Section 106 review, it is important that federal agencies consider carefully the criteria of eligibility that are applicable for each of the historic properties identified in the Area of Potential Effects (APE) of the undertaking. The significance and characteristics that make a historic property eligible under each criterion of eligibility should inform the federal agency's assessment of effects and the consultation to develop appropriate resolution of adverse effects. A federal agency, however, is not required to ensure that the resolution of adverse effects specifically addresses each criterion of eligibility applicable for an historic property that is adversely affected; nor that it even specifically addresses each historic property adversely affected.

Rather, the appropriate resolution of adverse effects is that set of measures which consulting parties agree upon. Further, the ACHP's Section 106 Archaeology Guidance (available online at www.achp.gov/archguide) clarifies that human remains, associated funerary objects, and the sites where they are found possess values beyond their importance as sources of information about the past. Thus, federal agencies should be aware that even when a property has been determined eligible for the National Register only under Criterion D, the special nature of burials, which are widely recognized in law and practice as having special qualities, may also possess a value to living groups that extends beyond the interests of archaeological research. Burial sites may be considered properties of traditional religious and cultural significance to Indian tribes or Native Hawaiian Organizations, which could make such sites eligible for the National Register under other criteria of eligibility in addition to Criterion D. Further, data recovery is not the only option to resolve adverse effects to an archaeological site found eligible under Criterion D. The ACHP is supportive of the use of reasonable alternative mitigation strategies that may not include archaeological data recovery and may not even focus directly on the historic properties that are affected or the locations or time periods represented by historic properties affected by an undertaking. This is particularly the case when alternative mitigation strategies are found to be appropriate by the consulting parties.

The UAIC, determined to be "Most Likely Descendent" (MLD) associated with the human remains by the California Native American Heritage Commission (NAHC), has concluded, based on oral history and ethno-historical information, that the burial practices of their ancestors often included cremation of the deceased with items of material culture that resulted in dispersal of fragmentary human remains and associated funerary objects throughout middens associated with their ancestral village sites. From the UAIC's perspective, the entire archaeological assemblage from each archaeological site and the soil matrix should be considered burial related and the archaeological sites should be considered cemeteries. Accordingly, the UAIC have requested that the Corps return all human remains and the entire archaeological assemblage to the tribes without any analysis or further disturbance. The Corps has turned over approximately one-half of the archaeological assemblage, prior to analysis, from the excavated sites, consisting of the portion not found in excavation unit levels in which human remains have been identified as well as excavation unit levels above and below such levels. The Corps, however, believes that it is obligated to follow through on some level of analysis for the remaining portion of the archaeological assemblages from the data recovery excavations in order to resolve the adverse effects of the undertaking to those sites because they were determined eligible under Criterion D.

The ACHP's "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects," states that human remains should not be knowingly disturbed unless absolutely necessary. If circumstances require that they must be disturbed, the remains should be removed carefully, respectfully, and in a manner developed in consultation with the consulting parties, including those who ascribe significance to the remains. In a case such as this, when human remains and associated funerary objects are dispersed throughout midden remains, the recovery can become extremely difficult. In reaching decisions about appropriate treatment measures, federal agencies should weigh a variety of factors, including the significance of the historic property, its value and to whom, and associated costs and project schedules. Since mitigation decisions are reached through consultation and represent the broader public interest, they should be considered appropriate so long as they are legal, feasible, and practical. By considering alternatives to data recovery, the federal agencies can address how the community or the general public will benefit from the expenditure of public funds for preservation treatments.

At the request of UAIC, and as provided for by state law, following the issuance of an investigative report on March 19, 2015, and a public hearing on March 20, 2015, the NAHC has determined that a geographical area identified as the "Wollock Prehistoric Archaeological District and Cultural Landscape," which includes the archaeological sites identified as post-review discoveries adversely affected by the FRWLP, constitutes a sanctified cemetery and associated resources as defined in Public Resources Code

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(PRC) Sections 5097.97, 5097.94(g), 5097.9. The NAHC has also determined that if an agreement regarding appropriate treatment and disposition of the human remains and associated funerary material pursuant to state law is not reached between the Corps, the project proponent, and the UAIC by April 6, 2015, the NAHC will proceed with seeking injunctive relief pursuant to PRC 5097.94(g) and applicable statutes. It is apparent that the project proponent, the Sutter Butte Flood Control Agency (SBFCA), is a public agency carrying out a project on public land and thus subject to state law regarding treatment of human remains and the decisions of NAHC. The ACHP would like to remind the Corps that when human remains are encountered on non-federal or non-tribal land during review or implementation of projects subject to Section 106 review, the federal agencies involved should consider the obligations of project proponents under state law as well as their own obligations to comply with state law regarding the treatment and disposition of human remains.

It is clear that the FRWLP is a very important project intended to address public safety concerns, and its implementation should not be delayed unreasonably. We understand that the project proponent and the Corps do not believe that there are alternatives to the proposed methods for repairing and enhancing the levees that would enable avoidance of archaeological sites like the ones adversely affected in Contract C of the FRWLP. However, considering the significance of the sites to the UAIC and other tribes in the region, the Corps should reevaluate the alternatives for future phases of the project. Based on the information provided to us, a number of proposals for alternative mitigation in addition to or in place of data recovery have been considered including: (1) analysis of other archaeological site assemblages already in curation from nearby locations; (2) ethnohistoric / ethnographic study of these types of sites and their importance, to further clarify eligibility under other criteria; (3) development of future methods of identification and treatment for these types of sites that involve the tribes earlier and more directly in the review process. These are all reasonable proposals for resolving the adverse effect of the undertaking, which the Corps and consulting parties should give serious consideration to.

Finally, as the NAHC has suggested that all the archaeological sites determined to be adversely affected in Contract C of the FRWLP are part of a sanctified cemetery that extends throughout a proposed "Wollock Prehistoric Archaeological District and Cultural Landscape," the ACHP encourages the Corps to consider focusing on a resolution of adverse effects that further explores the relationship of the archaeological sites in the APE for the undertaking to such a property, and the tribal beliefs and burial practices that are the foundation of such an extensive property. The Corps should consider the criteria of eligibility that may be applicable, and protocols that may be appropriate for treatment of archaeological sites containing human remains when they cannot be avoided during implementation of future phases of the undertaking.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely

Charlene Dwin Vaughn

Charlene Dwin Vaughn, AICP
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs

RECIRC 2560

**From:** Robinson, Terrie@NAHC <terrie.robinson@nahc.ca.gov>
**Sent:** Friday, October 30, 2015 12:06 PM
**To:** BDCPcomments
**Subject:** Native American Heritage Comments, Bay Delta Conservation Plan/California WaterFix RDEIR/SDEIS
**Attachments:** NAHCBDCPComments_10_30_15.pdf

**Importance:** High

To Whom It May Concern,

Attached please find the Native American Heritage Commission's comments on the Bay Delta Conservation Plan/California WaterFix RDEIR/SDEIS in PDF form with an attachment that is incorporated by reference.

Yours very truly,

Terrie L. Robinson

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**From:** Gorsen, Maureen <Maureen.Gorsen@alston.com>
**Sent:** Friday, October 30, 2015 12:01 PM
**To:** BDCPcomments
**Subject:** comment letter on recirculated draft EIR/EIS
**Attachments:** friant - comment ltr on revised and recirculated BCDC doc.pdf

Please accept this comment letter submitted on behalf of Friant Water Authority.

Please confirm receipt. Thanks.

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October 30, 2015

Via Electronic and First Class Mail

BDCP/California WaterFix Comments
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Re: Friant Water Authority's comments on the Recirculated Draft EIR/EIS for the Bay Delta Conservation Plan.

Dear Sir/Madam:

Friant Water Authority ("Friant") appreciates the opportunity to comment, on behalf of itself and its 14 member agencies, on the Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement ("Current Draft" or "RDEIR/SDEIS") for the proposed Bay Delta Conservation Plan ("BDCP" or "Project" or "Plan").

## I. Introduction

Friant recognizes the need for water supply stability in California, as well as a comprehensive plan to manage and restore the Delta ecosystem. Unfortunately, however, the Cal Water Fix Project as described in the environmental documents does not improve water supply reliability as this State so desperately needs. Friant previously commented on the draft EIR/EIS and outlined the serious flaws contained in the Plan itself as well as the environmental analysis.[1] Friant recognizes the enormous task that the Department of Water Resources ("DWR") and the Bureau of Reclamation ("Reclamation") (collectively, the "Lead Agencies") have undertaken in attempting the Project, and appreciates that the DWR recognized that the earlier EIR/EIS ("Prior Draft") required significant revisions. However, the Current Draft does not address any of the issues on which Friant previously commented. Instead, the division of the Project into two separate efforts – the "California

[1] See letter dated July 29, 2014, from Alston & Bird, LLP, on behalf of Friant.

WaterFix"[2] and the "EcoRestore"[3] – introduces a set of new problems and issues that are not sufficiently analyzed in the Current Draft.

The BDCP is being prepared to allow Reclamation and the DWR to obtain incidental take permits under the California and Federal Endangered Species Acts (collectively, "C/ESA"). To implement the BDCP's stated "coequal goals" of increasing water supply reliability and restoring the Delta ecosystem, the BDCP requires take coverage for its "covered activities." (BDCP, Sec. 4.2.) The Prior Draft identified the preferred alternative as Alternative 4, a "conservation measure" that would have involved the construction of massive new water conveyances in the form of 35-mile long tunnels under the Delta and ancillary infrastructure. (BDCP, Sec. 3.4.1.1.) Now, however, the Current Draft identifies a new preferred alternative: Alternative 4A. Because 4A differs so significantly from the Prior Draft, the environmental review is essentially of an entirely different project. Accordingly, the Lead Agencies must undertake a full and thorough review of the environmental impacts of Alternative 4A, and should not limit themselves to recirculating only a portion of the Draft EIR/EIS.

As described in greater detail below, the Current Draft is legally infeasible because it violates applicable water laws. The newly segmented Project, consisting of the WaterFix tunnel construction on the one hand and the scaled down restoration project dubbed EcoRestore on the other, further confuses the project description and hinders the environmental analysis. Biological impacts are worsened by this project segmentation. Additionally, the alternatives analysis, which considers no alternatives to the tunnels, is inadequate under CEQA, NEPA and the Delta Reform Act.

Friant is optimistic that many of these issues can be remedied by the development of realistic Project description, further revisions to the DEIR/DEIS, and a willingness to look at a broader range of alternatives. Regrettably, however, Friant cannot support the Project as it is described and analyzed in the Current Draft.

## II. The Unstable Project Description Results in Piecemealing, Undermining of Project Objectives, and Vague Impacts Analysis.

### A. The Project's Two Components Hinder Analysis.

Alternative 4A, the preferred alternative, splits the Project into two new components which separate the conveyance facility and habitat restoration measures into two separate efforts: California WaterFix and California EcoRestore. "California WaterFix" envisions a new intake scenario in the North Delta. An undefined group of water contractors supposedly would fund the new conveyance system and associated mitigation. While the Current Draft suggests that Alternative 4A reduces footprint and

[2] www.californiawaterfix.com

[3] www.resources.ca.gov/ecorestore

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construction issues related to the conveyance system significantly, it does nothing to improve water supply or reliability. The "EcoRestore" component results in much less habitat restoration than Prior Draft. It envisions a 5-year plan to purportedly restore more than 30,000 acres of Delta habitat, but in reality only commits to restoring approximately 15,600 acres..[4]

The Current Draft considers a new regulatory approach to biological resource issues. Previously, under the BDCP, restoration was to have been undertaken pursuant to Section 10 of the Federal Endangered Species Act (ESA), with implementation of a NCCP under the state regulatory scheme. Now, however, the Project anticipates proceeding under Section 7 of the ESA and obtaining a section 2081 permit under the state permitting scheme. The effect of this change is that take assurances are less certain under the Current Draft. Considering the Lead Agencies' statement that they are also no longer seeking 50-year coverage for potential take, there is significant uncertainty connected to take coverage required by the Project. The potential impacts of this uncertainty with respect to biological resources are discussed in greater detail below, but the uncertainty is a direct result of the unstable project description.

As with the Prior Draft, the Current Draft fails to accurately describe the Project. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR."[5] The project description purports to describe the entire Project. However, the approach to Delta restoration has changed so significantly between the Prior and Current Drafts, without appropriate revision of all sections of the Prior Draft despite the fact that the Project no longer proposes a conservation plan, that determining what is part of the Project and what is no longer part of the Project is nearly impossible. Portions of the prior document are incorporated by reference, but it is unclear to the reader which portions of the prior Project description have been superseded and which are still valid. Since the description of the Project's features is so difficult to discern, the Project's potential impacts likewise cannot be determined.

B. Separate Project Components Leads to Piecemealing.

Additionally, by splitting the Project into separate components and analyzing the impacts accordingly, the Current Draft improperly segments the environmental review. This is particularly true as the Water Fix and EcoRestore projects proceed down separate permitting paths. The Lead Agencies have already applied for a permit with the Army Corps Engineers ("Corps") to begin construction of the California WaterFix component. In theory, the granting of that permit would rely for its environmental review on the certified EIR/EIS for the Waterfix. However, in reality, the analysis of the permit impacts

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[4] See July 13, 2015 media call with DWR director Mark Cowin (unofficial transcript available at: http://mavensnotebook.com/2015/07/13/media-call-director-mark-cowin-on-the-revised-environmental-documents-for-california-water-fix/).

[5] *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 192 (1977).

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will not fully take into account all of the information that should be part of a final EIR/EIS, given the timing.

For example, the public comment period on the Corps permit ends less than two weeks after the comment period on this Current Draft. Because members of the public – including agencies and stakeholder groups – will not have the benefit of reviewing a final EIR/EIS, complete with responses to comments and other relevant information the Lead Agencies may provide, it will be exceedingly difficult to comment meaningfully on the Corps permitting process. By accelerating the Waterfix component of the Project, the Lead Agencies are not only acting prematurely, but they are foreclosing meaningful public participation in another arena. Under CEQA, the "whole of the project" includes subsequent permitting actions, like the Corps permit, and the Lead Agencies cannot improperly segment the Project in a way that prevents the public and decision-makers from fully understanding the impacts of the Project. Nonetheless, that is precisely what the Lead Agencies are doing by seeking the Corps permit.[6]

C. Project Impacts are Obscured by a Vague Project Description.

The vague Project description also means that details necessary to understanding Project impacts are not provided. For instance, although the Project provides a general description of how the new intakes will operate, the level of specificity is inadequate to inform the public and decision-makers when, at what rates, and how, exactly, the water will flow through the tunnels. The modeling conducted for the Prior Draft, which was deeply flawed,[7] has not been adequately updated to account for the new Project. Because an engineering undertaking of this magnitude has never been attempted, an accurate model is absolutely critical. Without an accurate model, it is not possible to determine and assess the impacts of an operating plan. Without an accurate operating plan, the environmental analysis cannot consider reasonable alternatives to the Project, analyze and allocate costs, or assess program or project-level impacts.

In addition to inaccurate or misleading modeling of the WaterFix, the new EcoRestore component drastically reduces the habitat restoration to be undertaken pursuant to the Project. In the Prior Draft, the Project proposed restoring approximately 100,000 acres. Now, however, the restoration component of the Project only encompasses 30,000 acres. Between the 40 percent increase in construction time and the two-thirds reduction of habitat restoration, the Project in the Current Draft is almost unrecognizeable from that in the Prior Draft – except for the ever-present component of

[6] Similarly, although the Lead Agencies' petition to the SWRCB for a change in water rights is currently proceeding under a longer timeframe, the danger of precluding meaningful public review exists there as well, depending on the completion and adequacy of the EIR/EIS.

[7] See Friant's comment letter on the Prior Draft; the same concerns are reiterated here for the record. Additionally, given that there has not been thorough or accurate modeling of Alternative 4A, similar flaws are likely to exist, including erroneous baseline conditions and flawed assumptions on which the model is based.

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the tunnels, as discussed in greater detail in the alternatives section below. This reduced habitat restoration is inadequate to offset environmental harm from construction of the twin tunnels. And yet the Lead Agencies continue to accelerate the WaterFix component. The WaterFix permitting should proceed at a pace which allows for sufficient monitoring to assess the effectiveness of habitat restoration measures, which will need to extend beyond the initial permitting period. Without doing so, it is impossible to evaluate the effectiveness of the proposed conservation measures.

## III. The Current Draft is Legally Infeasible Because It Violates Water Rights.

The Current Draft does not remedy, nor even address, the fundamental issue of whether the Project is even legally feasible in light of the infringement on water rights held by various stakeholders, including Friant. Friant's member agencies have been determined to be legal users of the water the Central Valley Project delivers to the Friant Division. The priorities of these water rights have been interpreted by the courts and cannot merely be "readjusted" by the Lead Agencies without regard to the impact those actions would have on the existing legal users of that water. Nonetheless, that is what would happen if the California WaterFix proceeds as currently planned. The tunnels planned under both the Prior Draft and the Current Draft incorporate complex changes to water flow and diversions by making changes to the operations of the Central Valley Project ("CVP") and State Water Project ("SWP"). Friant has raised this issue several times in the past,[8] but the Project continues to proceed without regard to water rights and the injuries to legal users of water within the Friant Division.

In fact, the Lead Agencies have not only taken steps to accelerate the Project with its infringing components, but they have admitted through their actions that the Project and Current Draft would, at present, violate existing water rights. On August 25, 2015 the Lead Agencies jointly submitted to the State Water Resources Control Board ("SWRCB") a petition "for a change to the water rights necessary to allow for the implementation of key components of the State's 'California WaterFix' program."[9] While the petition ostensibly concerns only those water rights held by the Lead Agencies, these changes implicate numerous water rights holders and legal users of water delivered by the CVP and the SWP. The proceedings to change water rights take time, and often invite litigation. Here, the SWRCB does not anticipate holding a hearing on the petition until approximately April 2016.[10] (In fact, representatives of DWR have indicated that

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[8] See Friant's comment letter, Attachment B, Memorandum to Donald R. Glaser (Reclamation) from Jennifer Buckman, Esq. (Friant), re BDCP Issues and Concerns, dated November 30, 2012.

[9] Available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/docs/ca_waterfix_petition.pdf (last accessed October 18, 2015).

[10] See http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/change_petition_updates.shtml (last accessed October 18, 2015).

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they expect the SWRCB will act on the petitions without even going through the protest procedure that is normally part of the application for a change in water rights.) The Current Draft, like the Prior Draft, makes bold assumptions about the Project's ability to simply reallocate long-established water rights priorities, regardless of the impact on legal users of water. While the public may be better informed of the water rights issues by the conclusion of the SWRCB hearing, that hearing alone is not likely to resolve outstanding water rights infringements if the Project proceeds as written.

BDCP violates California water rights laws, and the priority of the Friant Division contractors in particular, as it has been adjudicated by the courts. In so doing, the BDCP not only undermines its stated purpose of improving water supply reliability, but it is simply illegal and cannot proceed as written. Friant reiterates all of the issues and concerns it previously brought to the Lead Agencies' attention in its prior correspondence, and urges the Lead Agencies to substantially revise the Project so that it will not illegally infringe on established water rights.

## IV. The Significant Changes to the DEIR/DEIS Require Complete Recirculation.

Given the significant changes made to the Project, partial recirculation of the document is improper here. If the revisions or additions triggering the need for recirculation are limited to a few chapters or portions of the EIR, the lead agency need not recirculate the entire final report. It may instead circulate only the chapters or portions of the EIR that have been modified. 14 Cal Code Regs §15088.5(c); *Vineyard Area Citizens for Responsible Growth v City of Rancho Cordova* (2007) 40 Cal.4th 412, 449. That is not the case here. As described below, the changes are so fundamental, and so extensive, that the entire document should have been revised and recirculated.

As discussed in greater detail above the Project Description, in the guise of Alternative 4A, has changed so fundamentally that it is likely to affect every chapter of the EIR/EIS. However, not every chapter was revised, suggesting that the Lead Agencies did not do a sufficiently thorough inquiry into the potential impacts of Alternative 4A. The Project also now anticipates a construction period of 14 years instead of the 10 years described in the Prior Draft. This is 40 percent longer, and the impacts are likely to increase in all areas accordingly.

While much of the scientific analysis that has gone into the Prior Draft is no doubt relevant to the analysis of Alternative 4A, the changes are significant enough that each chapter of the DEIR/DEIS should be revised and recirculated.

For example, Chapter 2 – Project Objectives – was not revised in light of the new preferred alternative – even though the preferred alternative *splits the previously described BDCP Project into two and eliminates the conservation plan aspect entirely.*

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CEQA requires a "statement of the objectives sought by the proposed project."[11] Similarly, NEPA requires that an EIS include a statement of "purpose and need" to which the federal agency is responding in proposing the alternatives, including the proposed action.[12] In the Current Draft, a fundamental component of Alternative 4A is that, under this alternative, the Lead Agencies do not seek a 50-year permit for a Habitat Conservation Plan ("HCP")/Natural Communities Conservation Plan ("NCCP"). Considering that both the Project objectives, and the purpose and need, in Chapter 2 included furthering the coequal goals of increasing water supply reliability *and* restoring the Delta ecosystem,[13] the decision not to seek a 50-year permit either does not meet Project objectives, or the Project objectives have changed. The failure to update the Project objectives to reflect the very significant changes to the proposed Project suggests that the two components of Project do not, in fact, have independent utility and cannot proceed independently of each other – which means that the division of the Project is impermissible piecemealing. For all these reasons, the Project Objectives section of the document is vague and misleading and should be thoroughly revised to reflect the changes in the Project Description since the BDCP Draft.

Additionally, Chapter 29 – Climate Change – was not revised at all, despite the fact that construction under the Current Draft has increased by 40 percent. While climate change was addressed in other chapters of the Prior Draft, Chapter 29 specifically addressed the question of how BDCP alternatives would affect the resiliency and adaptability of the Plan Area (the area 37 covered by the BDCP) to the effects of climate change.[14] The chapter specifically discussed the purported benefits of the Prior Draft's alternatives in the face of expected climate change. Given that the Current Draft now includes three additional alternatives, one of which is the Project, the climate change analysis is now incomplete and misleading. While the climate change analysis is not required by CEQA or NEPA, where it is included, the analysis cannot be misleading.[15]

Chapter 4 - Approach to the Environmental Analysis – should also have been revised and recirculated. This chapter discusses project versus program level analysis; alternatives; and tools and analytical methods, including modeling. Friant has commented extensively on the flaws in the Prior Draft's modeling. An updated and revised Chapter 4 should be included in the Current Draft. Many of the other chapters that have, in fact, been revised, barely touch on the new alternatives, including the new Project. Section 2

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[11] 14 Cal. Code Regs. § 15124(b).

[12] 40 CFR 1502.13.

[13] DEIR/DEIS at 2-1 to 2-2.

[14] DEIR/DEIS at 29-1.

[15] *Hughes River Watershed Conservancy v. Glickman* (4th Cir. 1996) 81 F.3d 437, 446-48 ("it is essential that the EIS not be based on misleading economic assumptions"); *Johnston v. Davis* (10th Cir. 1983) 698 F.2d 1088, 1094-95 (disapproving of misleading statements resulting in "an unreasonable comparison of alternatives" in an EIS).

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of the Current Draft purports to summarize the substantive changes to the EIR based on analysis of the new alternatives. However, by separating analysis of the new alternatives from the previously examined alternatives, the Current Draft hinders a clear comparison of the alternatives. Furthermore, since the EcoRestore portion of the Prior Project has been removed from the Project Description, it is no longer appropriate to rely on the unrevised project objectives of the Prior Draft to eliminate alternatives to the proposed Cal Water Fix Project. At minimum, all of these chapters should be revised to specifically address potential impacts of Alternative 4A.

Failure to adequately analyze each chapter of the DEIR/DEIS in light of the significant changes to the Project also results in impermissible piecemealing of the Project.[16] For purposes of CEQA coverage, a "project" is defined as comprising "the whole of an action" that has the potential to result in a direct or reasonably foreseeable indirect physical change to the environment.[17] Even where, as here, a project requires multiple approvals prior to implementation, a lead agency must evaluate the impacts of the ultimate development authorized by that approval. This prevents agencies from considering a larger project in only discrete individual portions, each with a minimal impact on the environment, to avoid full environmental disclosure.[18] Here, failure to recognize the pervasive changes to the Project has the effect of piecemealing and segmenting the Project.

## V. The Alternatives Analysis is Inadequate and Must be Revised.

Alternatives are crucially important in this Project. Indeed, even after years of environmental analysis (for which an outrageous $248 million supposedly has been charged to the Project proponents) and a recirculated DEIR/DEIS, new alternatives are emerging, and one of these new alternatives has been selected as the new Project. Friant has commented extensively on the Prior Draft's alternatives analysis, and the Current Draft does not allay Friant's earlier concerns. First, the project description has continued to shift, as evidenced by the selection of a new *and significantly different* alternative as the Project. The shifting project description makes it difficult to select meaningful alternatives to the Project for analysis. Second, the alternatives evaluated in both the Prior and Current Drafts all include massive conveyance infrastructure in the form of the tunnels. Given the stated objectives and need for the Project, the analysis should have considered alternatives that could feasibly improve water supply reliability and the Delta ecosystem without undertaking a massive and expensive engineering project premised on an as-yet untested biological hypothesis and an uncertain regulatory framework.

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[16] As discussed in greater detail below, the potential for piecemealing is further compounded by dividing the project into two separately pursued components: the "California Waterfix" and the "EcoRestore."

[17] 14 Cal. Code Regs §15378(a).

[18] See 14 Cal Code Regs §15003(h); *Bozung v LAFCO* (1975) 13 C3d 263, 283, 118 CR 249, superseded in part by statute as stated in *California Unions for Reliable Energy v Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 CA4th 1225, 1243 n8.

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The alternatives analysis provided in the Current Draft does not meet the robust inquiries required by CEQA and NEPA. The CEQA alternatives analysis has been described as "the core of an EIR."[19] Under CEQA, an EIR must describe a reasonable range of alternatives to the proposed project that would feasibly attain most of the Project's basic objectives while reducing or avoiding any of its significant effects, and must evaluate the comparative merits of those alternatives.[20] An EIR's analysis of alternatives and mitigation measures must focus on those alternatives with the potential to avoid or lessen a project's significant environmental effects.[21] The alternatives discussed in an EIR should be ones that offer substantial environmental advantages over the proposed Project.[22]

Similarly, the NEPA alternatives analysis has been identified as the "heart of the environmental impact statement."[23] An EIS must look to the core goals of the project to define reasonable alternatives and cannot exclude reasonable alternatives simply because an applicant desires a project to have certain features.[24]

Like the Prior Draft, the Current Draft does not consider any true alternatives to the tunnel construction. Of the sixteen alternatives included, all (except the No Action Alternative) are variations on the construction of massive water conveyance infrastructure: a through-Delta alternative, a canal option, and alternatives for intakes anywhere from 0 up to 5, different operating capacity from 3000 to 15,000 cfs, and variations on acreage of habitat restoration. Not one alternative considers innovative water conservation, stormwater capture, or water recycling projects as suggested in prior comments, which seem to have simply been ignored. Nor does the Recirculated EIR/S include any alternative with significant habitat restoration, even though the Project objectives have not been revised and habitat restoration in the Delta is still one of the identified Project objectives. Clearly, the applicant desires a project that includes the massive tunnel infrastructure, and the segmentation of the Project into a large tunnel component and a smaller restoration component suggests that construction of the tunnels is a top priority. However, NEPA requires consideration of a reasonable range of alternatives, and that range cannot be dictated or limited by a desired component such as the tunnels.

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[19] *Citizens of Goleta Valley v Board of Supervisors* (1990) 52 Cal.3d 553, 564.

[20] 14 Cal. Code Regs. §15126.6(a).

[21] Pub. Resources Code §21002; 14 Cal. Code Regs. §15126.6(a)-(b).

[22] *Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at 566. See also Friant's comment letter on the Prior Draft, which provides examples of how an alternatives analysis could have proceeded under CEQA.

[23] 40 C.F.R. Part 1502.14.

[24] *Sierra Club v. Marsh* (1989) 714 F. Supp. 539, 577-78.

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The Delta Reform Act states that "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency."[25] The Act specifically requires the BDCP to include a comprehensive review and analysis of "[a] reasonable range of flow criteria, rates of diversion, and other operational criteria . . . necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses,"[26] as well as a "reasonable range of Delta conveyance alternatives, including through-Delta," and both "dual conveyance" and " isolated conveyance alternatives."[27] As numerous CVP contractors have repeatedly noted to the Lead Agencies, the Current Draft does not even include an actual operations plan to explain how the SWP and CVP would be operated with the proposed Project's features in place. Thus, the Current Draft has not included any of the "operational criteria" under which the Project would be operated; those are left to be developed at some future time, after the Project facilities are built. *This is exactly the sort of uninformed agency decisionmaking that CEQA and NEPA were intended to prevent.* The Current Draft does not provide the required of analysis, in violation of CEQA, NEPA, and the Delta Reform Act.

Where, as here, "the information in the . . . EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide 'a reasonable, good faith, and objective presentation of the subjects required by NEPA.'"[28] The Delta Plan mandates co-equal goals of enhanced water supply and ecosystem restoration. At an estimated construction cost of $60 billion dollars (this is the updated cost figure included in the Current Draft), it is imperative to consider actual alternatives, not "straw man" alternatives. The Current Draft should have included a range of reasonable alternatives "sharply" defining the issues and providing a clear basis for choice among options required by 40 C.F.R. § 1502.14 instead of just variations on the same type of conveyance project. (For an example of the type of alternatives analysis a proposed water supply project should provide, please see the Davis-Woodland Water Supply Project EIR.) The Current Draft lacks this clarity of choice in its range of alternatives, and it should be further revised and recirculated in order to provide the public and decision-makers a clear, hard look at the Project and alternatives.

VI. Biological Resources Will Be Unacceptably Adversely Impacted.

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[25] Cal. Water Code § 85021.

[26] Cal. Water Code § 85320(b)(2)(A).

[27] Cal. Water Code § 85320(b)(2)(B).

[28] *Animal Def. Council v. Hodel* (1988) 840 F.2d 1432, 1439 (quoting Johnston v. Davis, 698 F.2d 1088, 1095 (10th Cir.1983)), amended by 867 F.2d 1244 (9th Cir.1989).

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The new Project still has major biological impacts which are unacceptable given the lack of reasonable alternatives considered. The segmentation of the Project into the WaterFix and EcoRestore components already results in a significant reduction of restored habitat, which is now only one-third of what the Project in the Prior Draft proposed.

The effects of less water south of Delta in dry years are already being felt by the species that rely on water delivered south of Delta, and/or cropland and farmland in the San Joaquin Valley, for their habitat. Earlier in 2015, the San Joaquin River hatchery was evacuated because insufficient water deliveries south of Delta reduced available Friant water supplies and drove the water temperatures above 70 degrees, levels considered lethal for salmonids.[29] Other fisheries and hatcheries are facing similar threats.[30] Likewise, terrestrial species south of Delta faced significant impacts due to the loss of orchards and farmland that provide habitat for them. In the community of Terra Bella alone, one-half of the planted trees have been lost in the last two years due to the CVP operations in 2014 and 2015. Decisions such as these have foreseeable results on burrowing owls and other birds of prey and terrestrial species that rely on this habitat. These impacts are likely to worsen under the Project because the Project anticipates that, during dry years, *even less water will reach south of Delta areas*.[31] This is a function, in part, of the Project's impermissible proposal to short senior water rights – and injure existing users of water – in dry years, in order to increase supplies for the CVP and SWP in wet years.[32] One simple and feasible mitigation measure that the Project proponents could adopt to avoid these impacts is: "In implementing this Project and any operations plan developed under it, DWR and Reclamation shall not modify, amend or impair the rights and obligations of the parties to any existing water service, repayment, settlement, purchase, or exchange contract with the United States, including but not limited to the

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[29] Angelo Moreno, *Trout in trucks: Drought forces evacuation of San Joaquin Hatchery,* Fresno Bee, August 12, 2015 (available at: http://www.fresnobee.com/sports/outdoors/article30944496.html, last accessed October 19, 2015).

[30] Evacuation of American River and Nimbus Fish Hatcheries also took place earlier this summer. See Dan Bachus, *Draining of Folsom Lake forces evacuation of American River and Nimbus Fish Hatcheries,* June 25, 2015 (available at: http://www.dailykos.com/story/2015/06/26/1396676/-Draining-of-Folsom-forces-evacuation-of-American-River-and-Nimbus-Fish-Hatcheries, last accessed October 19, 2015).

[31] See, e.g., RDEIR/SDEIS at 4.3.7-98, admitting adverse impacts to the federally threatened spring-run Chinook salmon: "Under Alternative 4A (including climate change effects), there are flow and storage reductions, as well as temperature increases in the Sacramento River that would lead to biologically meaningful increases in egg mortality rates and overall reduced habitat conditions for spawning spring-run and egg incubation." See also 4.3.7-296, conceding adverse impacts to green sturgeon, a species of special concern: "In general, Alternative 4A would reduce the quantity and quality of rearing habitat for larval and juvenile green sturgeon relative to Existing Conditions."

[32] It is not clear to Friant how the Lead Agencies can conclude that taking water from water users operating under senior water rights in dry years to increase supplies of junior water rights holders in wet years meets the Project objective of "improving water supply reliability." Rather, this feature of the Project merely seems to redistribute the regulatory pain in a way that does not comply with California's long-established law of prior appropriation.

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obligations and commitments of the United States to utilize the water available from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta to first satisfy the requirements of the San Joaquin River Exchange Contract so long as it is legally and reasonably physically possible to satisfy these requirements and to not voluntarily impair the delivery of water from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta required to satisfy those requirements." However, the Current Draft contains no such mitigation measure and makes no effort to mitigate the known water supply and other impacts that will occur in the Friant Division as a result of the Project. If the Lead Agencies take the time to consider a range of alternatives, or at least some mitigation measures, which avoid disturbing the south of Delta water rights priorities, impacts on south of Delta biological resources would likely be lessened as well.

Aside from the foreseeable impacts to species, the Project is also in danger of procedural violations of the ESA and NEPA. Approval of the WaterFix project would violate the procedural requirements of the ESA because Reclamation has not evaluated its proposed action "at the earliest possible time" to determine whether its action may affect listed species or critical habitat and has not entered into formal consultation with the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS").[33] Likewise, approval of the Project would violate the procedural requirements of NEPA because the BDCP Draft EIR/EIS and Water Fix RDEIR/SDEIS have not been prepared "concurrently with and integrated with" Biological Assessments and Biological Opinions required by the ESA.[34] Again, the Biological Assessments and Biological Opinions, though required, do not exist, as acknowledged in the Current Draft.[35] These Biological Assessments and Biological Opinions, are essential to any meaningful public review and comment on a project that is supposed to be responsive to sensitive species in the Delta, including declining fish populations. Completion of these documents is likewise crucial as the WaterFix proceeds with its permitting application at the Corps and petition to the SWRCB.

## VII. Summary considerations

### A. Certification of the RDEIR/SDEIS Would Violate Due Process.

"Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest."[36] Friant's members, as the recognized legal users of water rights potentially affected by the Project, are concerned that certification of the Current Draft, and approval of the Project, would violate their due process rights. It is apparent from the prior modeling the Friant water

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[33] 50 C.F.R. § 402.14.

[34] 40 C.F.R. § 1502.25 (a).

[35] RDEIR/SDEIS at 1-15.

[36] *Horn v. County of Ventura* (1979) 24 Cal 3d 605, 612.

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users' rights would be injured by the Project's operations in dry years. However, the project description and environmental analysis are so vague, with significant components deferred to the final document, that Friant has insufficient notice of how, exactly, its members' property interests would be infringed upon by the Project. A realistic project description including an operations plan must be developed, then the modeling must be updated, the Current Draft significantly revised, and water rights and other applicable laws accorded appropriate respect, in order to avoid a potential due process violation upon approval of the Project.

B. The Comment Period Should Be Extended.

Finally, while Friant is grateful for the initial extension of the comment period to October 30, 2015, we join the group of California congressional representatives and other interested parties in requesting that the comment period be extended by 60 days until at least until January 2016.[37] The current draft adds more than 8,000 pages of analysis, and thoroughly reviewing the new material requires revisiting much of the original 40,000 pages. Extending the comment period would allow the public to conduct a more informed review.

Friant appreciates the opportunity to comment on the RDEIR/SDEIS. However, given the continued potential for adverse impacts on the Friant water users, Friant is, regrettably, unable to support the Project. Friant respectfully requests that the Lead Agencies take the necessary time to reevaluate and significantly revise the both the Project description and this RDEIR/SDEIS so that we can continue to work productively and cooperatively towards improving water supplies for users who are dependent upon water diverted at the Delta.

Sincerely,

Maureen F. Gorsen



[37] See letter dated September 11, 2015 signed by various representatives of the California Congressional delegation. The California Natural Resources Agency responded on October 6, 2015 that the comment period would not be extended; nonetheless, we hope that the Lead Agencies will reconsider extending the comment period.

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