United States Department of the Interior

OFFICE OF THE SOLICITOR

December 23, 2014

M-37030

Memorandum

To: Secretary

From: Solicitor

Subject: Trinity River Division Authorization's 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County

Introduction

This memorandum responds to the Bureau of Reclamation's request for a legal interpretation of section 2 of the 1955 Act[1] that established the Trinity River Division (TRD) and the corresponding 1959 contract between the Bureau of Reclamation (Reclamation) and Humboldt County (1959 Contract). The request stems in part from a September 2010 letter from the Chairman of the Humboldt County Board of Supervisors seeking to "reaffirm the County's contractual right to not less than 50,000 acre-feet annually from the Trinity Reservoir" based on section 2 of the 1955 Act.[2]

Concerns regarding fishery needs in the lower Klamath River, below the confluence with the Trinity River to the Pacific Ocean, and actions that Reclamation took in the late summer the past three years have further heightened interest in this matter.[3] Over the past twelve years, the Department--particularly Reclamation--has faced increasing pressure to address conditions in the lower Klamath River in order to prevent a fish die-off, such as the one that occurred in September 2002. In five of the past twelve years, Reclamation has responded by releasing additional water from the TRD--first through purchase from willing sellers in 2003 and 2004, and then in 2012 and 2013 under the authority of the 1955 Act to protect the fishery. This year, Reclamation also released flows on an emergency basis, again citing the 1955 Act, to address rapidly deteriorating conditions related to the severe drought. The more recent releases spurred Central Valley Project (CVP) water users to file a lawsuit challenging Reclamation's actions.[4]

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[1] Act of August 12, 1955, 69 Stat. 719.

[2] September 7, 2010 Letter from Humboldt County Chairman Clendenen to Commissioner Connor re: Humboldt County Central Valley Project Contract. *See also infra* note 11.

[3] *See, e.g.*, July 19, 2013 Letter from Congressmen Huffman, Thompson, and Miller to Secretary Jewell (discussing efforts to protect the fishery in 2012 and 2013 and previous requests by Humboldt County and others to utilize section 2 of the 1955 Act); October 2, 2014 Letter from Congressman Huffman to Acting Commissioner Pimley (discussing the desire for Reclamation to address the obligation to make water available under section 2 of the 1955 Act).

[4] Reclamation cited Proviso 1 of the 1955 Act for the TRD supplemental flows (*i.e.* in addition to the volumes established in the 2000 ROD) released in 2012, 2013, and 2014 to protect Klamath and Trinity fish stocks against

During the period since 2002, as well as previously, Humboldt County officials and other interested parties also urged Reclamation to release additional TRD water to support instream flows for salmon.[5]

In response to these concerns, Reclamation is developing a long-term management strategy regarding instream flows in the lower Klamath River. This memorandum provides legal analysis of one of the authorities that Reclamation is considering in developing a long-term augmentation plan.

As discussed in more detail below, I conclude that the two provisos in section 2 of the 1955 Act--one regarding the maintenance of Trinity River flows and other appropriate measures to ensure the preservation and propagation of fish and wildlife (Proviso 1), and the other requiring that not less than 50,000 acre-feet be released annually and made available for Humboldt County and downstream water users (Proviso 2)--represent separate and independent limitations on the TRD's integration with, and thus diversion of water to, the CVP. Accordingly, I conclude that the water envisioned in Proviso 2 does not necessarily fall within the volumes released pursuant to Proviso 1. Additional releases to the Trinity River may also be required pursuant to Proviso 2 in response to proper requests and applicable law.

The legal analysis in this memorandum includes a review of Reclamation's past interpretation of the 1955 Act as well as prior memoranda from the Regional Solicitor's office. The prior interpretations generally deemed water to satisfy Humboldt County and downstream water users under Proviso 2 as being subsumed within the fishery releases of Proviso 1. It is my conclusion that these interpretations may not be consistent with the distinct purposes of the two provisos. I conclude instead that the better reading of the statute is that the two provisos authorize and may require separate releases of water as requested by Humboldt County and potentially other downstream users pursuant to Proviso 2 and a 1959 Contract between Reclamation and Humboldt County.

Relevant Statutory Provisions

Section 2 of the 1955 Act reads:

> Subject to the provisions of this Act, the operation of the Trinity River division shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project, as presently authorized and as may in the future be authorized by Act of Congress, in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available: *Provided*, That the Secretary is authorized and directed to adopt appropriate measures to insure the

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potential disease outbreaks, such as occurred in 2002 in the lower Klamath River. Central Valley water users sought to enjoin this action in 2013. Although the court did not prevent Reclamation from making such augmentation flows in 2013 or 2014, the court's recent ruling questioned Reclamation's ability to rely upon Proviso 1 as authority for the 2013 releases. *San Luis & Delta Mendota Water Authority, et al. v. Jewell, et al.*, Case No.: 1:13-CV-01232-LJO-GSA (E.D. Cal., Oct. 1, 2014). The Department of Justice will be filing a protective notice of appeal on behalf of the Department.

[5] *See, e.g., supra* notes 2 and 3; *infra* note 11 and accompanying text.

preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months July through November and the flow of Clear Creek below the diversion point at not less than fifteen cubic feet per second unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish life and propagation thereof; the Secretary shall also allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the costs of constructing the Trinity River development and of operating and maintaining the same, such costs to be non-reimbursable **[Proviso 1]**: *Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users **[Proviso 2]**.

Setting and Background

TRD Authorization and Contract with Humboldt County

The Trinity River originates in the Salmon-Trinity Mountains (also known as the Trinity Alps) of northwest California. *See* Attachment 1 (Map). The Trinity River drains approximately 2,965 square miles and flows generally southward until Lewiston, where it then flows northwesterly, joining the Klamath River in Humboldt County near the boundary of the Hoopa Valley Indian Reservation. From this point, the lower Klamath River continues in a northwesterly direction, flowing through Humboldt County and the Yurok Indian Reservation before reaching the Pacific Ocean just south of the California-Oregon border. Reclamation's TRD facilities include Trinity Dam and Reservoir and Lewiston Dam and Reservoir on the Trinity River in Trinity County, and while the facilities allow a portion of the water from the Trinity River to flow to its confluence with the Klamath River, since the completion of the TRD, the facilities have diverted a significant volume of the Trinity River outside of the Trinity River basin and into the Sacramento River Basin to the east, making it available for delivery to Reclamation's CVP contractors.

Plans to divert Trinity River water to the Central Valley began in the 1930s under California's Water Plan.[6] The Department subsequently provided Congress with reports and findings on a plan of development in the early 1950s. Based on the reports, Congress concluded that water "surplus" to the present and future needs of the Trinity and Klamath Basins--estimated at approximately 700,000 acre-feet per year and considered "wasting to the Pacific Ocean"--could be diverted to the Central Valley "without detrimental effect to the fishery resources."[7] Congress authorized the TRD on August 12, 1955 (1955 Act).[8] Attachment 2.

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[6] The *California Water Plan* (Plan), a State document, provides a framework for water managers, legislators, and the public to consider options and make recommendations regarding California's water future. The Plan, which is updated every five years, presents basic data and information on California's water resources--including water supply evaluations and assessments of agricultural, urban, and environmental water uses--to quantify the gap between water supplies and uses. The first Plan was the State Water Plan of 1930, transmitted on January 1, 1931.

[7] H. Rep. No. 84-602, at 4-5 (1955); S. Rep. No. 84-1154, at 5 (1955).

[8] Pub. L. No. 84-386, 69 Stat. 719-21.

Congress authorized the TRD as an integrated component of the CVP in order to increase water supplies for irrigation and other beneficial uses in the Central Valley. Proviso 2 specified that "not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users."

In recognition of Proviso 2, a 1959 water delivery contract between Reclamation and Humboldt County states as follows:

> The United States agrees to release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.[9]

Attachment 3. In addition, Reclamation's water permits from the State of California similarly include a distinct condition related to Humboldt County and downstream users.[10]

As discussed more fully below, the Department and Reclamation have previously asserted a view that these two provisos be read as addressing the same block of water notwithstanding the separate statutory provisos, the contract language (which mirrors Proviso 2), and the state water permit terms. Humboldt County has asked Reclamation to provide water pursuant to its contract to protect Klamath and Trinity River fish stocks in 2012, 2013, and 2014 as well as in previous years.[11] The Hoopa Valley Tribe joined in these requests. Reclamation has also received letters from water users supporting Reclamation's prior interpretation of these provisos.[12]

Initial TRD Operations and Subsequent Efforts to Restore and Protect Fish and Wildlife

Following the completion of the TRD in the early 1960s, Reclamation released into the Trinity River 120,500 acre-feet per year, which included the minimum fishery releases set by Proviso 1

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[9] 1959 Contract Article 8.

[10] *See infra* at 50-52.

[11] *See, e.g.*, March 13, 2013 Letter from Humboldt County Board of Supervisors Chairperson Bass and Hoopa Valley Tribe Chairman Masten to Secretary of the Interior Salazar and California Governor Brown re Prompt Action Requested to Protect Klamath River from Catastrophic Fish Kill; August 14, 2013 Letter from Humboldt County Board of Supervisors Chairman Sundberg and Hoopa Valley Tribe Chairman Masten to Secretary of the Interior Jewell re *San Luis & Delta Mendota Water Authority v. Jewell*, Case No. 1:13-CV-01232-LJO-GSA – Urgent Request for Telephone Conference. April 16, 2014 Letter from Hoopa Valley Tribe Chairwoman Vigil-Masten to Secretary of the Interior Jewell re Central Valley Project operations in violation of Law of the Trinity River; July 22, 2014 Letter from Humboldt County Board of Supervisors Chairman Bohn to Secretary of the Interior Jewell re Request for augmentation flows in lower Klamath River; August 14, 2014 Letter from Hoopa Valley Tribe Chairwoman Vigil-Masten to Secretary of the Interior Jewell re Salmon Fishery and Water Crisis. *See also, e.g., supra* note 3.

[12] *See, e.g.*, January 18, 2011 Letter from San Luis & Delta Mendota Water Authority Executive Director Nelson to Commissioner Connor re 1959 contract between Humboldt County and Reclamation for 50,000 acre-feet of Trinity River Division water.

and as further established by the TRD permits issued by the State Water Board.[13] For the first ten years of full operations, TRD diversions to the Central Valley averaged nearly 90 percent of the upper Trinity Basin inflow--exporting to the Central Valley on average 1,234,000 acre-feet annually from the 1,396,000 acre-feet total average inflow into Trinity Lake.[14] Construction of Trinity and Lewiston Dams also resulted in the loss of upstream spawning and rearing habitat and the degradation of fish habitats below the dams. The river's salmon and steelhead populations declined significantly as a result of these combined effects.[15]

A 1980 Environmental Impact Statement (EIS) estimated fish population reductions of 60 to 80 percent and habitat loss to be 80 to 90 percent since completion of the TRD. The EIS attributed the depletion of fish populations to three causative factors--inadequately regulated harvest, excessive streambed sedimentation, and insufficient streamflows--but concluded that insufficient streamflows represented the most critical limiting factor to fishery restoration. Based on the 1980 EIS, the 1955 Act, and trust obligations to the Hoopa Valley and Yurok Tribes, Secretary Andrus directed the U.S. Fish and Wildlife Service to complete a 12-year study to assess the effectiveness of flow and habitat restoration efforts and make recommendations on measures necessary to address the fishery impacts attributable to the TRD consistent with the Department's obligations.[16] Secretary Andrus increased fishery releases--ranging from 140,000 acre-feet in critically dry years to 340,000 acre-feet in normal years--and directed that these releases not be "permanently allocated" to any other purpose until the Secretary could act on the completed report and determine the needs of the Trinity River fishery.[17]

Congress enacted subsequent legislation aimed at addressing the growing problems facing the Trinity River. In 1980, Congress enacted the Trinity River Stream Rectification Act,[18] aimed at controlling sand deposition problems resulting from the degraded Grass Valley Creek watershed. In 1984, Congress passed the Trinity River Basin Fish and Wildlife Management Act,[19] which made findings similar to those in the 1980 EIS and directed the Secretary to develop a program to restore fish and wildlife populations to levels approximating those that existed immediately before TRD construction began.[20] In 1992, Congress enacted the Central Valley Project

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[13] Testimony before the State Water Rights Board on the permits for the TRD established that the water Congress directed to be released in Proviso 1 (150 cfs for July through November and 15 cfs at Clear Creek) would result in 46,000 acre-feet of releases. *In re Applications 5627, 5628, 15374, 15375,15376, 16767, 16768, 17374, United States of America, Bureau of Reclamation*, Before the Water Rights Board, State of California, Dec. 29, 1958 at 31 (1958 Testimony). Condition 8 of the TRD permit then sets out the balance of releases that add up to 120,500 acre-feet per year. *See infra* note 50; *see also* 1958 Testimony at 24.

[14] 2000 ROD at 5. Trinity Lake was formerly known as Trinity Reservoir or Clair Engle Reservoir.

[15] *Id.*

[16] Secretarial Issue Document, Trinity River Fishery Mitigation (January 1981).

[17] *Id.*

[18] Pub. L. No. 96-335.

[19] Pub. L. No. 98-541.

[20] Amendments to the 1984 Act redefined its restoration goals so that the fishery restoration would be measured not only by returning anadromous fish spawners, but also by the ability of dependent tribal and non-tribal fishers to participate fully in the benefits of restoration through meaningful in-river and ocean harvest opportunities, and also expanded the scope of the habitat restoration efforts beyond Weitchpec and the immediate Trinity River Basin to include the lower Klamath River downstream of its confluence with the Trinity River. Trinity River Fish and Wildlife Management Reauthorization Act of 1995, Pub. L. No. 104-143 (May 15, 1996).

Improvement Act [redacted][21]

In 2000, Secretary Babbitt, with the concurrence of the Hoopa Valley Tribe, issued the 2000 ROD, which relied upon the multi-year Trinity River Flow Evaluation Study (TRFES) completed in 1999 and its associated EIS.[22] In addition to stream modifications, infrastructure improvements, sediment management, and other recommendations, the 2000 ROD adopted a variable annual instream flow regime for the mainstem Trinity River below the TRD, based on the annual forecasted hydrology for the basin, ranging from 369,000 acre-feet in critically dry years to 815,000 acre-feet in extremely wet years.[23] The regime mimics the natural spring snowmelt hydrograph for the basin, with higher flows focused in the spring and early summer months and relatively low base flows from July through March. The flows established in the 2000 ROD also address various habitat requirements of the Trinity River fishery, including spawning and rearing needs, migration cues, temperature conditions, and associated river-maintenance considerations. The 2000 ROD focused on the flow and habitat requirements of the Trinity River mainstem and did not consider the lower Klamath River below its confluence with the Trinity River.

Thus, although efforts were previously made to determine necessary TRD fishery releases, not until completion of the TRFES Final Report and EIS did the Secretary have a fully informed understanding of the biological and physical needs of the fishery based on the best available science, including TRD releases that must be dedicated to ensure the restoration and maintenance of the Trinity River fishery within the mainstem Trinity River.[24] Since 2001 and implementation of the 2000 ROD, flows in the Trinity River have averaged just over 630,000 acre-feet annually

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[21] Secretary Lujan set the minimum release to be "at least" 340,000 acre-feet per year for the remainder of the flow study process to ensure the integrity of the study because five of the first six years had been dry water years.

[22] The TRFES and EIS, and thus the 2000 ROD, focused on measures necessary to restore habitat conditions within the 40 miles of Trinity River mainstem immediately below Lewiston Dam, concluding that the detrimental effects of TRD construction and operation were particularly severe within this area. EIS § 1.3; *see also id.* § 1.2 (discussing purpose and goal of the TRFES as focused on restoration and maintenance of the mainstem Trinity River and its fishery); TRFES fig. 5.1 (showing study area extending from Lewiston Dam to the Hoopa Valley); 2000 ROD at 8.

[23] Central Valley water and power users challenged implementation of the 2000 ROD. The Ninth Circuit affirmed the 2000 ROD, noting that restoration of the Trinity River was "unlawfully long overdue." *Westlands Water District v. Dep't of the Interior*, 376 F.3d 853, 878 (9th Cir 2004). Moreover, the Ninth Circuit specifically rejected Plaintiffs' complaint that the Department impermissibly constrained the action's geographic scope to the Trinity River mainstem, recognizing that "the federal agencies were within their discretion in focusing the EIS on mainstem rehabilitation as a part of promoting fishery basin-wide." *Id.* at 866-67.

[24] As discussed in the final TRFES report, the science supporting the fishery flow volumes and regimes established both as part of the 1955 Act and the 1981 Secretarial Decision focused primarily on single-species management (Chinook salmon) and, initially, only on one life stage of that species (spawning). Trinity River Flow Evaluation Final Report at 1-2, 8 (June 1999).

and diversions to the CVP have averaged nearly 690,000 acre-feet annually.[25]

50,000 acre-foot Proviso and Previous Interpretations

Prior to passage of the 1955 Act, in-basin users became concerned that the TRD authorization would deprive them of water essential for their needs. [redacted] Statements in the Congressional Record also note that the inclusion of Proviso 2 as an amendment during debate on the House floor, after the committee reported the bill out containing only Proviso 1, was "to assure to Humboldt County, Calif., an *additional* 50,000 acre-feet of water from the rivers concerned[.]"[26]

Since the TRD's authorization, offices and bureaus within the Department have asserted a view that Proviso 2 should be read in conjunction with Proviso 1 and not as a separate release requirement. In 1958, Reclamation argued to the State Water Rights Board (State Water Board or Board)[27] that the 1955 Act's section 2 provisos required only a single permit condition. Although the State Water Board included two separate conditions in the TRD permits (*see* Attachment 4) and Reclamation entered into a contract with Humboldt County in 1959 that references Proviso 2, Reclamation sent a letter to the State Water Board on the same day as the contract's execution, noting that it entered the contract "on the basis of our firm position that the 50,000 acre-feet made available thereby is not additive to the 120,000 acre-feet annually released from Lewiston Dam."[28]

Later, in 1974 and 1977, the Regional Solicitor's Office examined the two provisos in the 1955 Act in two separate memoranda. The 1974 memorandum from the Assistant Regional Solicitor to Reclamation's Regional Director, although focused primarily on the issue of whether the 1955 Act authorized "flood control or other purposes generally beneficial to downstream interests" (concluding in the negative), also addressed the issue of an "interpretation of the last proviso of section 2 of the Act as it relates to releases authorized for fish preservation." Attachment 5.[29] With respect to Proviso 2, the 1974 memorandum briefly concluded, without any in-depth analysis:

> The water released for fishery purposes is not consumed, but remains available later for use by other downstream users. In addition, the term "downstream water user" is not specific, but appears to refer to all downstream users generally, including the fishery.

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[25] Trinity River releases during this period have included not only fishery releases pursuant to the 2000 ROD, but also occasional safety-of-dam releases (including more than 400,000 acre-feet in 2006), biennial tribal ceremonial releases, and additional late-summer fishery releases (*see supra* note 4 and *infra* note 35 and accompanying text).

[26] 101 Cong. Rec. H7962 (1955) (emphasis added).

[27] The State Water Rights Board was the predecessor to the State Water Resources Control Board, the entity presently charged with issuing and administering water rights in the State of California.

[28] June 19, 1959 Letter from Regional Director Bellport to California State Water Rights Board.

[29] July 1, 1974 Memorandum from Assistant Regional Solicitor to Reclamation Regional Director re Request for opinion re authority of the Secretary of the Interior to alter present functions and accomplishments of Trinity River Division, Central Valley Project, at 1-3.

> Therefore it is my opinion that since the purpose of the [TRD] is to provide as much water as possible to the Central Valley . . . the 50,000 acre-feet referred to in the last proviso of Section 2 should be construed to include the water necessary to maintain minimum specified instream flows for fish preservation and propagation rather than being considered to be in addition to such flows.[30]

Thus, the 1974 memorandum interpreted the section 2 provisos together rather than as authorizing separate or additional releases to meet the purposes of each proviso.

In 1977, in response to a request from the Field Supervisor for the U.S. Fish and Wildlife Service, the Regional Solicitor "reconsidered" the interpretation of section 2 as set out in the 1974 memorandum. Attachment 6.[31] The 1977 memorandum agreed with the prior interpretation that the section 2 provisos were "not necessarily conflicting purposes," and disagreed with the Service's view that the 1955 Act provided or intended "separate and distinct 'blocks of water' for fish preservation and propagation purposes[.]" The 1977 memorandum also recognized, however, that "diversions made by downstream users" could "caus[e] harm to fish resources" and that [redacted]. Accordingly, the Regional Solicitor "amended" the 1974 memorandum's concluding paragraph (quoted above) by adding the following text:

> [H]owever, it should be noted that the proviso quoted above [Proviso 2] does not limit downstream use to 50,000 acre-feet annually. Rather . . . the Secretary has discretionary authority to release additional water for the purpose of preserving or propagating fish resources.[32]

Humboldt County, Trinity County, the Hoopa Valley Tribe, and other downstream interests have raised this issue periodically over the past few decades. In response to Trinity County's scoping comments on the Sacramento River Water Contracting EIS, Reclamation replied in 1988 that "the 50,000 acre-feet requirement can be made available from the river flow established for fisheries and accretions to the river."[33] In response to Trinity County's request to Secretary Babbitt to use the water for recreation and community development, Reclamation replied in 1995 that Proviso 2:

> was intended for consumptive uses that may develop and require additional releases. As such, the contract with Humboldt County was executed . . . on the basis that the 50,000 acre-feet is included within the total quantity of water provided for in the fishery releases

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[30] *Id.* at 5 (internal citations omitted).

[31] January 21, 1977 Memorandum from Regional Solicitor to Field Supervisor, USFWS, re Trinity River Division, CVP – Reconsideration of July 1, 1974 Memorandum to Regional Director, Bureau of Reclamation, Concerning Section 2 of the Trinity River Division Act.

[32] *Id.* at 2.

[33] January 29, 1988 Letter from Reclamation Regional Director Houston to Chairman Patricia Garrett, Trinity County Board of Supervisors.

and is not additive to that quantity *as long as* reservoir releases, accretions, and tributary flows are sufficient to supply the 50,000 acre-feet required for downstream uses.[34]

Over the past decade, Humboldt County and the Hoopa Valley Tribe made several requests to the Department to make releases pursuant to Proviso 2, primarily to avoid fish die-offs like the one that occurred in the lower Klamath River below its confluence with the Trinity in 2002. Instead, Reclamation has either acquired water from CVP contractors to provide late-season releases into the Trinity River in addition to those included in the 2000 ROD or made releases pursuant to Proviso 1.[35]

Analysis

After a thorough review of the record available to us, I believe the two provisos in section 2 of the 1955 Act address separate and distinct conditions on the TRD's integration with the CVP. Under the 1955 Act and related permits issued by the State Water Board [redacted] This obligation is not subsumed within the obligation to release water pursuant to Proviso 1. Accordingly, additional releases from the TRD under Proviso 2 may be required in response to proper requests from Humboldt County or other downstream users.

In reaching this conclusion, I recognize there could be implications for Reclamation when altering its past practice to conform with this opinion. I believe, however, that if additional review and evaluation leads us to the conclusion that the past interpretation is erroneous, whether based on further legal review or changed circumstances, then the Department has an obligation to change its interpretation.[36] My reasoning follows.

1955 Act

Prior analyses of the 1955 Act emphasized the intent to develop facilities in the Trinity River Basin to provide additional water supplies to the Central Valley. As noted in the 1974 memorandum, section 1 of the 1955 Act authorized the TRD for the "principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley[.]" Likewise, section 2 provided that the TRD "shall be integrated and coordinated" with the CVP "in such a manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available[.]"

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[34] January 30, 1995 Letter from Reclamation Regional Director Patterson to Chairman S.V. Plowman, Trinity County Board of Supervisors, re Federal Reserved Water Right to 50,000 Acre-Feet From the Trinity Division of the Central Valley Project (re: Your Letter Dated November 16, 1994) (emphasis added).

[35] These releases occurred during the pendency of, and immediately following the conclusion of, the CVP water and power users' lawsuit challenging the 2000 ROD. *See supra* note 23. In an April 2003 order, Judge Wanger specifically authorized the 2003 supplemental releases, up to 50,000 acre-feet, during the litigation and pending appeal in order to minimize the potential die-off of salmon as occurred in the lower Klamath River in 2002.

[36] *See Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir. 1976) ("We note initially that an administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding.").

Section 2, however, expressly restricted this integration. The opening clause specifically states that the TRD's integration and coordination with the CVP shall be "[s]ubject to the provisions of this Act[.]" Section 2 then included two provisos:

> [redacted]
> the maintenance of flows at certain specified minimum levels]; *Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

These provisos set forth two separate and distinct limitations on the integration of the TRD with the CVP.

Proviso 1 refers generally to the preservation of fish and wildlife, whereas Proviso 2 refers to releases of water made available for downstream entities. Proviso 1 thus requires releases for distinct purposes, whereas Proviso 2 has no restriction on uses for the released water, instead specifying the entities that will be using the water. Proviso 1 requires a release for instream purposes, while Proviso 2 appears to allow any beneficial use contemplated by "Humboldt County and downstream water users," including diversions for consumptive use, most likely the use envisioned at the time the language was developed.[37] Thus, a conclusion that water uses under Proviso 2 are always incorporated into and subsumed within the releases in Proviso 1 is at odds with the separate purpose and stand-alone nature of each proviso of the 1955 Act.

An interpretation that Proviso 2 is always subsumed within Proviso 1 strains the practical operation of Proviso 2 because Humboldt County and other downstream users would, under such an interpretation, have to rely on instream flows provided for the fishery, by design water released at specific times and specific volumes to *remain* instream and not be used for consumptive purposes. The instream fishery flows may not necessarily meet the needs or uses of those downstream users or be "available" to those users at the time it is needed as envisioned by Proviso 2.[38] In other words, a reading that establishes that the releases for use by Humboldt County are necessarily part of the fish releases would mean that the fishery would be shorted any time Humboldt County or other downstream water users diverted 50,000 acre-feet or used it in some other way that did not support the fishery. Such an outcome is inconsistent with the language and structure of the 1955 Act, and I conclude that the better reading is that the two provisos address separate releases of water. Indeed, the language in Proviso 2 states that 50,000 AFY "shall be released annually . . . and made available. . ." to Humboldt County and other downstream users. This wording on its face ensures that on an annual basis a certain amount of water be made available to local and downstream communities, particularly in those

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[37] In fact, the Humboldt County Board of Supervisors adopted Resolution No. 827 in April 1955, in which the Board agreed not to oppose the bill that became the 1955 Act if it guaranteed that the County could "divert up to 100,000 acre feet of water yearly for its use in irrigation, commercial, residential and industrial purposes" and also ensured minimum Trinity River flows. As later agreed and then enacted, Proviso 2 specifies instead "not less than 50,000 acre-feet" annually for the County and downstream users and does not articulate any particular use.

[38] As a corollary concern, if downstream users were to divert water released for preservation of fish and wildlife, then the intent of Proviso 1 may not be met.

circumstances when releases under Proviso 1 or other appropriate authorities are not a viable means for delivering such water.

Thus, Provisos 1 and 2 are stand-alone provisos that restrict the operative effect of the 1955 Act's principal purpose, *i.e.*, the integration of the TRD with the CVP. *See Cox v. Hart*, 260 U.S. 427, 435 (1922) (the purpose of a proviso "is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached"); *Wayman v. Southard*, 23 U.S. 1, 30 (1825) (provisos are "generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause"). The conclusion of these cases is consistent with *Sutherland's Statutory Construction*, which describes the purpose of statutory provisos as "restricting the operative effect of statutory language to less than what its scope of operation would be otherwise."[39] In other words, the 1974 memorandum reached its conclusion that *the* "purpose" of the TRD was "to provide as much water as possible to the Central Valley" without a careful examination of this settled principle regarding provisos, the 1955 Act, its legislative history, or contemporaneous events such as the state permit issuance and proceedings and Reclamation's contract with Humboldt County.

In 1979, Solicitor Krulitz, in construing whether general categories of priorities under CVP authorizations should be accorded equal priority in critically dry years, contrasted the general nature of the CVP with the specific provisions of the TRD's authorization. In doing so, Solicitor Krulitz noted that both provisos provide a limitation on the integration of the TRD with the CVP:

> On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutory prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out of basin diversion. *See* Pub. L. No. 84-386, § 2. In that case, Congress' usual direction that the Trinity River Division be integrated in the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the *provisos* that follow giving direction to the Secretary regarding in-basin needs.[40]

Attachment 7. My position herein, that both provisos authorize separate and distinct limitations on the ability of Reclamation to import water into the Central Valley, is consistent with and builds on Solicitor Krulitz's opinion that the requirements of section 2 must be met before water may be exported from the Trinity River Basin.

Legislative History

Further support for my interpretation can be found in the legislative history of the 1955 Act. In addition to generally supportive statements in committee reports, statements regarding both

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[39] Sutherland § 47:08.

[40] Memorandum from the Solicitor to the Assistant Secretary – Land and Water Resources, *Proposed Contract with Grasslands Water District* at 3-4 (December 7, 1979) (emphasis (italics) was underlined in original) (1979 Grassland Memorandum).

Proviso 2 and the general intent of the legislation can be found in the Congressional Record and other contemporary sources.

As an initial matter, the bill that led to the 1955 Act, H.R. 4663, originally only included the fishery proviso in section 2. Inclusion of Proviso 2 occurred in order to secure congressional support for the legislation in the face of downstream opposition, including opposition from representatives of Humboldt County who were concerned that sufficient study had not been done regarding their water needs and that the TRD would not provide for the future needs of the basin.[41]

The bill, as reported by the House committee, emphasized:

> that there is available for importation from the Trinity River, water that is surplus to the present and future water requirements of the Trinity and Klamath River basins, and that surplus water, in the amount proposed in the Trinity division plan, can be diverted without detrimental effect to the fishery resources.[42]

The House subsequently took up H. Res. 263, the Rules Committee's terms for consideration of H.R. 4663.[43] The rules specifically allowed floor amendments to the bill. During an exchange regarding the resolution, Congressman Ellsworth specifically noted the intent to offer an amendment to address downstream concerns:

> [I]t is also my understanding informally that another amendment will be offered by the committee which will probably satisfy the opposition to the bill by another representative

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[41] *See* Hearing on H.R. 4663, *H. Subcomm. on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 84th Cong. 104-06 (Statements of Cong. Scudder), 169-70 (Statements of Richard Denbo, Humboldt County Chamber of Commerce) (April 13, 1955) [hereinafter *April 13, 1955 Hearing*]. After the hearing, the Humboldt County Board of Supervisors adopted Resolution No. 827, which the Board submitted to Congress and the Executive Branch and which promised no opposition to the TRD's authorization if (1) H.R. 4663 were amended to include specific quantities to Humboldt County for irrigation, commercial, and other purposes and (2) river flows were maintained below the TRD at certain specified levels. *See supra* note 37.

[42] H. Rept. No. 84-602, at 4 (1955).

The legislative history of the 1955 Act supports a more expansive view of Proviso 2. In addition to the language quoted above that emphasizes how only water "surplus to the present and future water requirements of the Trinity *and Klamath River basins*" would be available for export, other portions of the legislative history provide further support. For example, in advocating for the TRD, the Administration emphasized how TRD diversions from the "coastal basins" (the Trinity River itself does not touch the coast) to the Central Valley "would not affect future development of either the Trinity River Basin or the Klamath River Basin[.]" *April 13, 1955 Hearing* at 4, 10. Moreover, downstream opposition to the bill came specifically from representatives from the "Klamath River" or "Klamath Basin," including specific reference to Humboldt County as part of that group, and not just Trinity Basin interests. *See, e.g., id.* at 26 (exchange between Cong. Dawson and witness Murray); *id.* at 104-06 (referencing concerns of both Humboldt and Del Norte counties re effects to north coast communities); April 16, 1955 Redding Hearing at 71-72 (quoting concerns raised by Yurok Princess Brantner, from the lower Klamath River strip of the Reservation (which ran along the lower 20 miles of the Klamath River before it enters the Pacific Ocean), regarding fish spawning, logging, and other resource issues on the lower Klamath River affected by the bill); *see* Hearing on H.R. 4663, *S. Subcomm on Irrigation and Reclamation of the Comm. on Interior and Insular Affairs*, 84th Cong. at 18 [hereinafter *July 14, 1955 Senate Hearing*] (letter from Cong. Scudder noting objections of Humboldt and Del Norte county residents and how the Proviso 2 language will satisfy the concerns of downstream users).

[43] 101 Cong. Rec. 7,961 (1955).

> from California [Congressman Scudder]. As I understand it, this amendment will be offered to assure Humboldt County, Calif., an *additional* 50,000 acre-feet of water from the rivers concerned, which should properly take care of the neighboring area.[44]

Two weeks later, a colloquy between Congressmen Scudder and Engle, the bill's sponsor, secured the inclusion of the new Proviso 2 in order to ensure "water for people downstream[.]"[45] The Senate took up the amended bill and noted the inclusion of Proviso 2 as necessary to avoid downstream opposition.[46]

Thus, the legislative history, explaining the amendment that added Proviso 2, supports my interpretation that Proviso 2 should be interpreted as not being subsumed within Proviso 1. Rather, Proviso 2 was included to meet separate and distinct concerns from the in-basin communities and set aside an "additional" volume of water to address these concerns. This interpretation would also be consistent with the rule of statutory construction to give meaning to all legislative language within an enactment and to avoid "surplusage."[47]

State Water Board, TRD Permits, Reclamation's Contract with Humboldt County, and Federal and State Law Considerations

Between 1957 and 1959, the State Water Board held hearings on Reclamation's permit application for the TRD. Reclamation argued for one permit condition to capture both provisos found in section 2 of the 1955 Act.[48] Conversely, Humboldt County and California's Department of Fish and Game (CDFG) argued that the Board should adopt separate permit conditions to address each proviso because they contained distinct and potentially exclusive purposes for the water release and were included for distinct purposes.[49] The Board rejected Reclamation's interpretation and adopted a condition for each proviso, Condition 8[50] for Proviso

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[44] *Id.* at 7,962 (emphasis added).

[45] 101 Cong. Rec. 8,888 (1955).

[46] *July 14, 1955 Senate Hearing* at 11 (Statement of Sen. Kuchel), 18 (Letter from Cong. Scudder).

[47] *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

[48] *See, e.g., In the Matter of Applications 5627, 5628, 15374, 15375, 15376, 16767, 16768 and 17374, United States of America, Bureau of Reclamation, Applicant, California Department of Fish and Game (CDFG), Protestant, Trinity River, Trinity County, Before the Water Rights Board, State of California, Sacramento, California*, at 10-11 (written testimony that the 120,500 acre-feet released as specified in Proviso 1 would "satisfy the requirements for fish culture and the quantity set forth in Section 2 . . . that not less than 50,000 acre-feet be released annually . . . and made available to Humboldt County and downstream water users"), 23 (objecting to separate condition that would make second proviso "additive" to the water released under first proviso) (December 29, 1958).

[49] *Id.* at 18-19 (noting CDFG's concerns that use by downstream users not "cut into" water releases for fish), 28-30 (detailing County's position that Proviso 2 requires a separate release from TRD to be made available for downstream users and that the legislation clearly distinguishes this release from those for the fishery), 97-98 (reiterating County's position and requesting inclusion of separate condition in Reclamation's TRD permits).

[50] Condition 8 states:

> Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream;
>
> | | |
> |---|---|
> | October 1 through October 31 | 200 cfs |
> | November 1 through November 30 | 250 cfs |

1 and Condition 9[51] for Proviso 2, in the permits issued to Reclamation.[52] Those 1959 permits are still in effect today. The Board's inclusion of two separate conditions reflects adoption of CDFG's interpretation at the time. Although not wholly dispositive of the issue, this contemporaneous construction of the State's position is consistent with the statutory and legislative history analysis above.

The language of the 1959 Contract with Humboldt County, which is still valid and in effect today, does not alter this analysis. The 1959 Contract cites the 1955 Act and essentially restates Proviso 2. The Contract states in Article 8:

> The United States agrees to release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.

On the same day that this 1959 Contract was signed, Reclamation sent a letter to the Board stating:

> This contract has been executed on the basis of our firm position that the 50,000 acre-feet made available thereby *is not additive* to the 120,500 acre-feet annually to be released from Lewiston Dam as provided in an agreement between the United States and the State Department of Fish and Game dated March 27, 1959, copies of which have been furnished to you.[53]

Although the contemporaneous statement made in the cover letter reflects the Regional Director's interpretation at the time, a rationale for the statement was not included.

Lastly, while I believe that federal law sets forth the legal framework for the analysis of whether the two provisos are independent and separate conditions on the TRD's integration with the CVP, I also believe the interpretation set forth in this memorandum is consistent with state water law principles. The 1902 Reclamation Act, incorporated in both the 1955 Act and the 1959 Contract, directs the Secretary to defer to state law regarding the "control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" to the extent not inconsistent with federal law.[54] Here, Congress specifically limited the integration of the TRD with the rest of the CVP in the 1955 Act by recognizing that in-basin needs for Humboldt

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December 1 through December 31	200 cfs
January 1 through September 30	150 cfs

Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule.

[51] Condition 9 states:

Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.

[52] State Water Permits under Application Nos. 5627, 15374, 15376, 16767 and 16768 (September 16, 1959).

[53] June 19, 1959 Letter from Regional Director Bellport to California State Water Rights Board. (Emphasis added).

[54] Act of June 17, 1902, 32 Stat. 388; *see, e.g., California v. United States*, 438 U.S. 645 (1978).

County and downstream users, as well as the responsibilities to preserve fish and wildlife, take precedence over the needs to be served by out-of-basin diversions.[55] As discussed above, the State Water Board then included a separate permit condition, contrary to Reclamation's position at the time, which reflected the language of Proviso 2 and required releases for beneficial use by Humboldt County and other downstream users.[56] Interpreting the two provisos of the 1955 Act's section 2 as independent obligations is consistent with state water law principles and is consistent with the TRD permit conditions.

Implementation

Based upon this legal analysis, it is recommended that Reclamation conduct an appropriate level of analysis in response to a request for a release of water under Proviso 2 to determine the potential uses to which this water might be put, any other applicable legal requirements that must be addressed prior to releasing said water, whether existing operations or other authorities can fulfill the pending request, and then determine what additional actions may be appropriate under the circumstances. For example, Humboldt County may anticipate future consumptive uses that would be incompatible with instream fishery purposes; releases for such beneficial uses likely should not be made under Proviso 1 but as additional releases under Proviso 2. Conversely, the County or other downstream users could request releases that would be consistent with or duplicative of releases already being made pursuant to Proviso 1; under those circumstances, releases as requested under Proviso 2 may not be required. To the extent Proviso 1 water is not available, the Proviso 2 water, which may be put to any beneficial use, should be available to satisfy the articulated use. In addition, as stated at the outset of this opinion, a release made under Proviso 2 may also be part of the long-term management strategy regarding instream flows in the lower Klamath River.

Conclusion

Based on the analysis above, I conclude that the legislation authorizing the TRD contains separate and independent limitations on the TRD's integration with, and thus diversion of water to, the CVP. To the extent prior memoranda of the Solicitor's Office could be interpreted to reach contrary conclusions in this regard, those memoranda are hereby superseded.

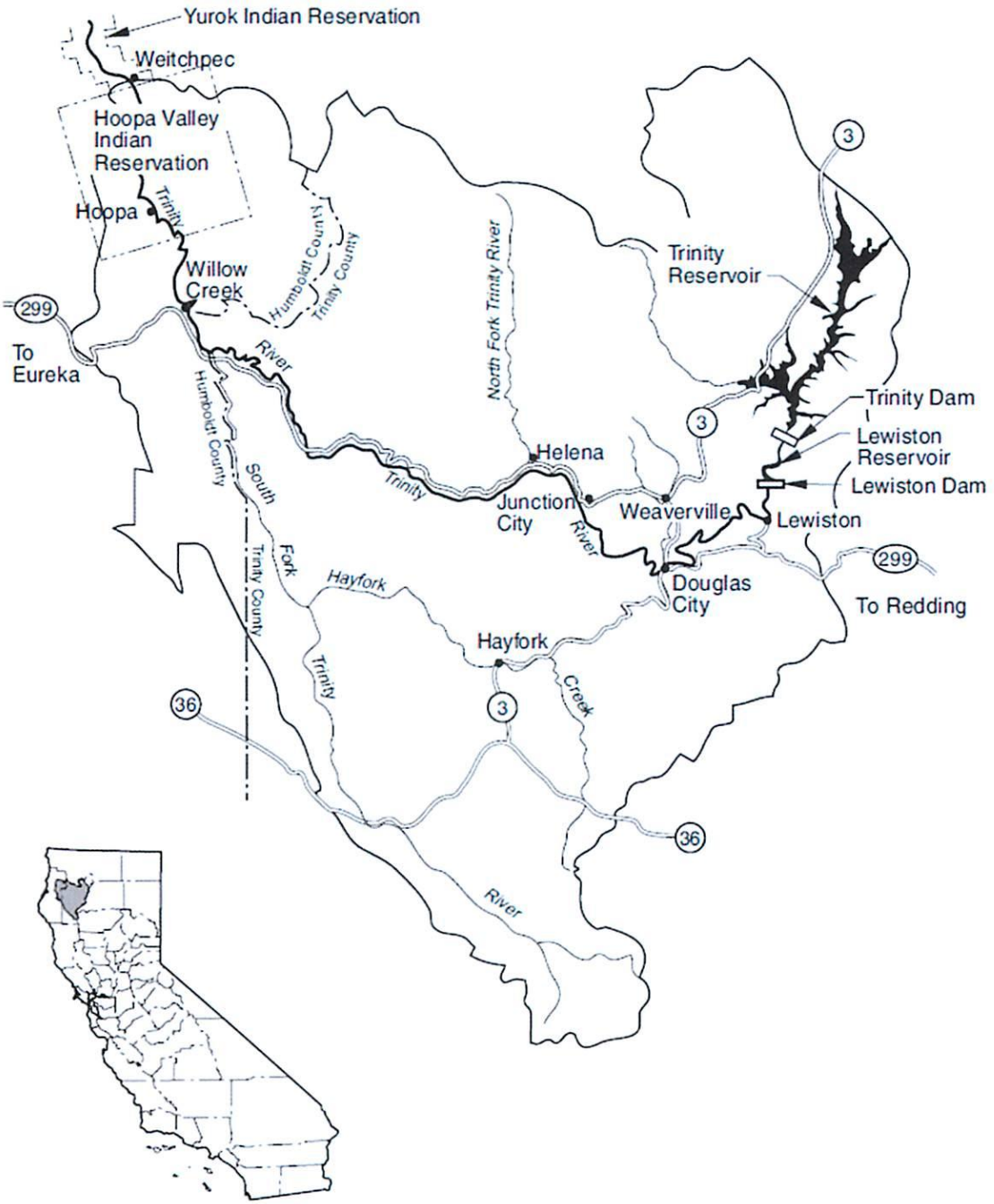
Attachments

Hilary C. Tompkins

[55] 1979 Grasslands Memorandum, *supra* at 3-4; 2000 ROD at 6, 25.

[56] The State Water Board also included a separate condition for Trinity County (Condition 10) in the TRD permits to allow for use in the County as provided in California Water Code Section 10505.

ATTACHMENT 1


Yurok Indian Reservation
Weitchpec
Hoopa Valley Indian Reservation
Hoopa
Trinity
Willow Creek
Humboldt County
Trinity County
299
To Eureka
River
Humboldt County
South Fork
Trinity County
North Fork Trinity River
Trinity Reservoir
3
Trinity Dam
Lewiston Reservoir
Lewiston Dam
Helena
Trinity
Junction City
River
Weaverville
Lewiston
299
To Redding
Douglas City
Hayfork
Trinity
Creek
3
36
36
River

ATTACHMENT 2

Public Law 386 CHAPTER 872

AN ACT

August 12, 1955
[H. R. 4663]

To authorize the Secretary of the Interior to construct, operate, and maintain the Trinity River division, Central Valley project, California, under Federal reclamation laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California, the Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), is authorized to construct, operate, and maintain, as an addition to and an integral part of the Central Valley project, California, the Trinity River division consisting of a major storage reservoir on the Trinity River with a capacity of two million five hundred thousand acre-feet, a conveyance system consisting of tunnels, dams, and appurtenant works to transport Trinity River water to the Sacramento River and provide, by means of storage as necessary, such control and conservation of Clear Creek flows as the Secretary determines proper to carry out the purposes of this Act, hydroelectric powerplants with a total generating capacity of approximately two hundred thirty-three thousand kilowatts, and such electric transmission facilities as may be required to deliver the output of said powerplants to other facilities of the Central Valley project and to furnish energy in Trinity County: *Provided*, That the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water and, not later than eighteen months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress. The works authorized to be constructed shall also include a conduit or canal extending from the most practicable point on the Sacramento River near Redding in an easterly direction to intersect with Cow Creek, with such pumping plants, regulatory reservoirs, and other appurtenant works as may be necessary to bring about maximum beneficial use of project water supplies in the area.

Central Valley project, Calif.
Trinity River division.

43 USC 371 note.

SEC. 2. Subject to the provisions of this Act, the operation of the Trinity River division shall be integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project, as presently authorized and as may in the future be authorized by Act of Congress, in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available: *Provided*, That the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife, including, but not limited to, the maintenance of the flow of the Trinity River below the diversion point at not less than one hundred and fifty cubic feet per second for the months July through November and the flow of Clear Creek below the diversion point at not less than fifteen cubic feet per second unless the Secretary and the California Fish and Game Commission determine and agree that lesser flows would be adequate for maintenance of fish life and propagation thereof; the Secretary shall also allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the

16 USC 661-666c.

costs of constructing the Trinity River development and of operating and maintaining the same, such costs to be non-reimbursable: *Provided further*, That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users.

SEC. 3. The Secretary is authorized to investigate, plan, construct, operate, and maintain minimum basic facilities for access to, and for the maintenance of public health and safety and the protection of public property on, lands withdrawn or acquired for the development of the Trinity River division, to conserve the scenery and the natural, historic, and archeologic objects, and to provide for public use and enjoyment of the same and of the water areas created by these developments by such means as are consistent with their primary purposes. The Secretary is authorized to withdraw from entry or other disposition under the public land laws such public lands as are necessary for the construction, operation, and maintenance of said minimum basic facilities and for the other purposes specified in this section and to dispose of such lands to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon such terms and conditions as will best promote their development and operation in the public interest. The Secretary is further authorized to investigate the need for acquiring other lands for said purposes and to report thereon to the Committees on Interior and Insular Affairs of the Senate and House of Representatives, but no lands shall be acquired solely for any of these purposes other than access to project lands and the maintenance of public health and safety and the protection of public property thereon without further authorization by the Congress. All costs incurred pursuant to this section shall be nonreimbursable and nonreturnable.

Report to Congress.

SEC. 4. Contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws: *Provided*, That a first preference, to the extent of 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Trinity County, California, for use in that county, who are ready, able and willing, within twelve months after notice of availability by the Secretary, to enter into contracts for the energy: *Provided further*, That Trinity County preference customers may exercise their option on the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less than eighteen months prior to said date.

Payments to Trinity County, Calif.

SEC. 5. The Secretary is authorized to make payments, from construction appropriations, to Trinity County, California, of such additional costs of repairing, maintaining, and constructing county roads as are incurred by it during the period of actual construction of the Trinity River division and as are found by the Secretary to be properly attributable to and occasioned by said construction. The Secretary is further authorized and directed to pay to Trinity County annually an in-lieu tax payment out of the appropriations during construction and from the gross revenues of the project during operation an amount equal to the annual tax rate of the county applied to the value of the real property and improvements taken for project purposes in Trinity County, said value being determined as of the date such property and improvements are taken off the tax rolls.

Payments to public-school districts.

Payments to the public-school districts in the project area affected by construction activities shall be made pursuant to existing law.

SEC. 6. There are hereby authorized to be appropriated for construction of the Trinity River division $225,000,000, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the type of construction involved herein, and, in addition thereto, such sums as may be required to carry out the provisions of section 5 of this Act and to operate and maintain the said development. Appropriation.

Approved August 12, 1955.

Public Law 387 CHAPTER 873

AN ACT

To reemphasize trade development as the primary purpose of title I of the Agricultural Trade Development and Assistance Act of 1954.

August 12, 1955
[S. 2253]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That section 103 (b) of the Agricultural Trade Development and Assistance Act of 1954 is amended by striking out "$700,000,000" and inserting in lieu thereof "$1,500,000,000. This limitation shall not be apportioned by year or by country, but shall be considered as an objective as well as a limitation, to be reached as rapidly as possible so long as the purposes of this Act can be achieved within the safeguards established." Agricultural trade development. 68 Stat. 456. 7 USC 1703 (b).

SEC. 2. Section 106 of such Act is amended by adding the following: "The Secretary of Agriculture is also authorized to determine the nations with whom agreements shall be negotiated, and to determine the commodities and quantities thereof which may be included in the negotiations with each country after advising with other agencies of Government affected and within broad policies laid down by the President for implementing this Act." 68 Stat. 457. 7 USC 1706.

Approved August 12, 1955.

Public Law 388 CHAPTER 874

AN ACT

To amend the Federal Property and Administrative Services Act of 1949 to make temporary provision for making payments in lieu of taxes with respect to certain real property transferred by the Reconstruction Finance Corporation and its subsidiaries to other Government departments.

August 12, 1955
[H. R. 6182]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the table of contents contained in the first section of the Federal Property and Administrative Services Act of 1949 is hereby amended by inserting immediately below "Sec. 605. Effective date." the following: Federal property transferred from RFC. 63 Stat. 377; 64 Stat. 583. 40 USC 471 note.

"TITLE VII—PROPERTY TRANSFERRED FROM THE RECONSTRUCTION FINANCE CORPORATION

"Sec. 701. Declaration of Policy.
"Sec. 702. Definitions.
"Sec. 703. Property transferred by the Reconstruction Finance Corporation.
"Sec. 704. Limitations.
"Sec. 705. Effective date."

ATTACHMENT 3

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Central Valley Project, California

CONTRACT BETWEEN THE UNITED STATES AND HUMBOLDT COUNTY

1. THIS CONTRACT, made this 19th day of June 1959, in pursuance generally of the act of Congress approved June 17, 1902 (32 Stat. 388), and all acts of Congress amendatory thereof or supplementary thereto, including the act of Congress approved August 12, 1955 (69 Stat. 719), all of which are commonly known and referred to as the Federal reclamation laws, between THE UNITED STATES OF AMERICA, hereinafter referred to as the "United States," represented by the officer executing this contract, and HUMBOLDT COUNTY, a political subdivision of the State of California, duly organized and existing pursuant to the laws thereof, with its principal place of business in the town of Eureka, State of California, hereinafter referred to as the "County";

WITNESSETH, THAT:

EXPLANATORY RECITALS

2. WHEREAS, the Bureau of Reclamation, of the United States Department of the Interior, has been duly authorized to construct and operate the Trinity River Division of the Central

Valley Project, which Division will include Trinity and Lewiston Dams and appurtenant works, for the purpose of the conservation of water resources, which dams are to be located respectively in the County of Trinity, State of California, on the Trinity River, at or about N. 34° 42' E., 2,308 feet from the Southwest corner of Section 15, T. 33 N., R. 8 W., M.D.B.&M., and at or about N. 73° 56' E., 3,777 feet from the Southwest corner of Section 8, T. 33 N., R. 8 W., M.D.B.&M., and which dams will affect flows of the Trinity River; and

3. WHEREAS, the County has appeared as an interested party at the hearing on the 29th day of December 1958, before the State Water Rights Board of the State of California with reference to the issuance of permits on Applications No. 5627, 5628, 15374, 15375, 15376, 16767, 16768, and 17374 for the appropriation of unappropriated water of the Trinity River, which have been filed by the United States; and

4. WHEREAS, Section 8 of the said Reclamation Act of June 17, 1902, provides as follows:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of

any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

and

5. WHEREAS, the said act of August 12, 1955, provides in Section 2 thereof in part as follows:

". . . That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users."

and

6. WHEREAS, it is desired to establish by terms of this contract operating criteria the observance of which will not impair rights to the reasonable and beneficial use of water originating above Trinity Dam;

NOW, THEREFORE, in consideration of the provisions hereinabove set out and in compliance with the hereinabove quoted provisions of the said acts, it is hereby agreed by and between the parties hereto as follows:

7. The United States shall have the right to divert and store the waters of the Trinity River and its tributaries, and the right to use the water so stored for beneficial use for irrigation and other purposes and for the generation of electric energy in connection with the Central Valley Project.

8. The United States agrees to release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.

9. Authorized representatives of the County shall have access at all reasonable times during office hours to records and computations pertaining to releases from said reservoirs and, upon reasonable request, shall be furnished copies of such records and computations.

EFFECT OF WAIVER OF BREACH

10. The waiver of a breach of any of the provisions of this contract shall not be deemed to be a waiver of any other provisions hereof or of a subsequent breach of such provisions.

RESPONSIBILITY FOR INTERRUPTION

11. In the event the performance, in whole or in part, of the obligations of the respective parties under this contract is hindered, interrupted, or prevented by war, strikes, lockouts, fires, acts of God, or by other similar or different acts of civil or military authorities, or by any cause beyond the control of the respective parties hereto, whether similar to the causes herein specified or not, such obligations of the respective parties under this contract shall be suspended to the extent and for the time that performance thereof is prevented or affected by such hindrance,

interruption, or prevention, but due diligence shall be observed by the respective parties hereto, so far as lies in their power, in performing their respective obligations under this contract.

OFFICIALS NOT TO BENEFIT

12. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

SUCCESSORS AND ASSIGNS BOUND

13. This contract shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties hereto, by their respective officers thereunto duly authorized, have duly executed these presents on the day and year first hereinabove written.

THE UNITED STATE OF AMERICA

By _____
Regional Director, Region 2
Bureau of Reclamation

ATTEST:

_____
County Clerk of the County of Humboldt

HUMBOLDT COUNTY

By _____
Chairman of the Board of Supervisors

BOARD OF SUPERVISORS, COUNTY OF HUMBOLDT, STATE OF CALIFORNIA

Certified copy of portion of proceedings, Meetings of May 1, 1959

IN THE MATTER OF EXECUTING CONTRACT BETWEEN DEPARTMENT OF THE INTERIOR, BUREAU OF RECLATION, AND THE COUNTY OF HUMBOLDT:

Upon the motion of Supervisor Pettersen, seconded by Supervisor Robertson, Sam B. Merryman, Jr., Chairman of this Board of Supervisors, is hereby authorized and directed to sign a contract between the United States Department of the Interior, Bureau of Reclamat on, and the County of Humboldt regarding the Trinity River Division of the Central Valley Project.

AYES: Supervisors— Lindley, Robertson, Pettersen, Merryman
NOES: Supervisors— None
ABSENT: Supervisors— Bareilles

STATE OF CALIFORNIA, County of Humboldt } ss.

I, FRED J. MOORE, JR., County Clerk of the County of Humboldt, State of California, and ex-officio Clerk of the Board of Supervisors of the County of Humboldt, do hereby certify the foregoing to be full, true and correct copies of the original orders made in the above entitled matters by said Board of Supervisors, at a meeting held in Eureka, California, on May 1, 1959 and as the same now appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Board of Supervisors, this 4th day of May, 1959

County Clerk and ex-officio Clerk of the Board of Supervisors of the

ATTACHMENT 4

Permit No. 11973

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 1500 cubic feet per second by direct diversion from January 1 to December 31 of each year; all as more explicitly set forth under Paragraph 2 of the supplement to this approved application. The amount of water directly diverted under this permit and permits issued pursuant to Applications 5628, 15374 and 15375 shall not exceed a total of 3200 cubic feet per second.

2. The maximum amount herein stated may be reduced in the license if investigation so warrants.

3. Construction work shall be completed on or before December 1, 1964.

4. Complete application of the water to the proposed use shall be made on or before December 1, 1990.

5. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

6. All rights and privileges under this permit including method of diversion, method of use and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of said water.

7. Permittee shall maintain a daily record of inflow into and outflow from Trinity Reservoir, volumes in storage and water surface elevations. Permittee shall maintain like records with respect to Lewiston Reservoir. Permittee shall provide and maintain such measuring facilities as may be necessary for the formulation of said records. Permittee shall make said records of inflow, outflow, volumes in storage and water surface elevations available to the State Water Rights Board and shall allow authorized representatives of said Board access to its project works and properties for the purpose of securing supplemental information.

8. Permittee shall at all times bypass or release over, around or through Lewiston Dam the following quantities of water down the natural channel of Trinity River for the protection, preservation and enhancement of fish and wildlife from said dam to the mouth of said stream:

L. K. Hill
L. K. Hill
Executive Officer

October 1 through October 31 - 200 cfs

November 1 through November 30 - 250 cfs

December 1 through December 31 - 200 cfs

January 1 through September 30 - 150 cfs

Any water released through said Lewiston Dam for use in the fish hatchery now under construction adjacent thereto shall be considered as partial fulfillment of the above schedule.

9. Permittee shall release sufficient water from Trinity and/or Lewiston Reservoirs into the Trinity River so that not less than an annual quantity of 50,000 acre-feet will be available for the beneficial use of Humboldt County and other downstream users.

10. This permit shall be subject to the prior rights of the county in which the water sought to be appropriated originates to use such water as may be necessary for the development of the county, as provided in Section 10505 of the Water Code of California.

11. The Board retains continuing jurisdiction for the purpose of coordinating terms and conditions with other applications of the United States in furtherance of the Central Valley Project including but not limited to Applications 5625, 5626, 9363, 9364, 9365, 9366, 9367, 9368 and 10588, when acted upon, and for a period of two years thereafter, which period may be extended upon hearing and further order of the Board.

12. Subject to the existence of long-term water delivery contracts between the United States and public agencies and subject to the compliance with the provisions of said contracts by said public agencies, this permit is further conditioned as follows:

(a) The right to the beneficial use of water for irrigation purposes, except where water is distributed to the general public by a private agency in charge of a public use, shall be appurtenant to the land on which said water shall be applied,

L. K. Hill
L. K. Hill
Executive Officer

subject to continued beneficial use and the right to change the point of diversion, place of use, and purpose of use as provided in Chapter 10 of Part 2 of Division 2 of the Water Code of the State of California and further subject to the right to dispose of a temporary surplus.

(b) The right to the beneficial use of water for irrigation purposes shall, consistent with other terms of this permit, continue in perpetuity.

L. K. Hill

L. K. Hill
Executive Officer

ATTACHMENT 5

United States Department of the Interior
OFFICE OF THE SOLICITOR
SACRAMENTO REGION
2800 COTTAGE WAY
ROOM E-2753
SACRAMENTO, CALIFORNIA 95825

Cat.

July 1, 1974

Memorandum

To: Regional Director, Bureau of Reclamation, Sacramento

From: Assistant Regional Solicitor

Subject: Request for opinion re authority of the Secretary of the Interior to alter present functions and accomplishments of Trinity River Division, Central Valley Project

I.

The question has been raised by your office as to whether operations of the Trinity River Division might legally be altered to provide flood control benefits downstream from Trinity and Lewiston Dams.

Any authority of the Secretary of the Interior to release water from Trinity or Lewiston Dams for the purpose of flood control downstream must be found in the statutory grant of power to the Secretary to operate the Trinity River Division. Federal Trade Comm. v. Raladam, 283 U.S. 643. It is my opinion that such authority cannot be found in the purpose of the Trinity River Division Act, nor in its integration into the Central Valley Project either directly through the operational provisions of Section 2 of the Trinity River Division Act, or indirectly through incorporation of the stated purposes of the Central Valley Project Act, and that no such releases of water can lawfully be made.

Section 1 of the Trinity River Division Act, 69 Stat. 719 (P.L. 386, 84th Cong., 1st Sess.), gives the purpose of the Division as ". . . increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California . . . ." (emphasis supplied). All other provisions of the Act are wholly consistent with this purpose. The Division is authorized "as an addition to and an integral part of the Central Valley Project." (Section 1, 69 Stat. 719) whose purpose is to provide benefits specifically to the Central Valley of California, and the integration is directed to be made in the "fullest, most beneficial, and most economic" (Section 2, 69 Stat. 719) manner possible. Utilizations

of water benefitting the Trinity Basin, on the other hand, are set forth as exceptions to full integration. The release of water into the Trinity River Basin does not further the stated purpose of use in the Central Valley and is, therefore, not authorized by the purpose clause of the Division Act.

Moreover, the specifically authorized downstream releases provided for in Section 2 of the Act do not give any authorization for other generally beneficial releases. The maxim of statutory construction is that express mention of one thing excludes all unmentioned things from the scope of the legislation. The enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. Herzberg v. Finch, 321 F.Supp. 1367 (S.D.N.Y., 1971).

The lack of Congressional intent to authorize general beneficial releases downstream, especially for flood control, is accurately reflected in the legislative history of the Trinity River Division Act. No significant flood control benefit had been foreseen at any time since the Project was originally conceived. State Water Plan of 1931, Bulletin No. 25 (Engle, Central Valley Project Documents, Vol. I, pp. 282-284, 295-297) (Trinity Dam Project excluded from flood control element of State Water Plan); Finding of Feasibility, House Document No. 53, 83d Cong., 1st Sess. (Engle, Central Valley Project Documents, Vol. I, p. 853) (no allocation of cost to flood control benefit due to the Project); Hearings before the Subcommittee of the Committee on Interior and Insular Affairs, House of Representatives, 84th Cong., 1st Sess., on H.R. 4663, pp. 51-52 (Testimony that any flood control benefits would be so minor that they could be ignored); Report of House Committee on Interior and Insular Affairs, House Report No. 602, 84th Cong., 1st Sess., p. 5 (no recognition of flood control benefits, though other nonreimbursable costs are cited); Report of Senate Committee on Interior and Insular Affairs, Senate Report No. 1154, 84th Cong., 1st Sess., p. 6 (no recognition of flood control benefits, though other nonreimbursable costs are cited). In the committee reports and in debate the only concern expressed for downstream interests was that they receive a minimum adequate supply of water for their needs, not that they be protected from any overabundance. Report of House Committee on Interior and Insular Affairs, House Report No. 602, 84th Cong., 1st Sess., pp. 5, 9; Report of Senate Committee on Interior and Insular Affairs, Senate Report No. 1154, 84th Cong., 1st Sess., p. 8; 101 Cong. Rec. 8880-8881, remarks of Representative Scudder (Humboldt-Del Norte); 101 Cong. Rec. 12315, remarks of Senator Kuchel (California). Therefore, any omission of mention of flood control releases or other releases beneficial to downstream interests from the downstream releases authorized by the Act would appear to be entirely conscious and intentional.

Section 2 of the Act provides for the manner in which the operation of the Trinity River Division is integrated into the Central Valley Project. It directs that "the operation of the Trinity River Division shall be integrated and coordinated . . . with the other features of the Central Valley Project . . . in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available." Section 2, 69 Stat. 719 (P.L. 386, 84th Cong., 1st Sess.) The words "fullest, most beneficial, and most economic utilization" describe the manner of integration with the Central Valley Project, not the general utilization of the impounded water. The directive does not authorize any use or any manner of use of water which is not or cannot be integrated into the Central Valley Project, hence no authorization for flood control in the Trinity Valley.

Even if the purposes of the Central Valley Project as a whole are incorporated into the Trinity River Division authorization by the language of integration, the flood control purposes set forth in the Central Valley Project Act, 50 Stat. 844 (P.L. 392, 75th Cong., 1st Sess.) still would not authorize flood control in the Trinity River Basin. The legislative history of the Central Valley Project indicates clearly that the flood conditions meant to be corrected by the Project were those occurring in the Sacramento and San Joaquin River Basins, not flood conditions existing generally in the State. This intention is reflected in the total lack of discussion of flood problems in other basins, the detailed discussion of the causes and possible solutions to the problem of floods in the Central Valley, and the fact that the Trinity Dam Project was never seen to contribute any flood control benefit at all to the Project. State Water Plan of 1931, Bulletin No. 25 (Engle, Central Valley Project Documents, Vol. I, pp. 281-284, 294-297); Finding of Feasibility, House Doc. No. 53, 83d Cong., 1st Sess. (Engle, Central Valley Project Documents, Vol. I, p. 853).

Therefore, since no statutory source of power can be found for the Secretary to alter operation of the Division for flood control or other purposes generally beneficial to downstream interests, it is my conclusion that the Secretary has no authority to make such releases of water.

II.

Your office has also requested interpretation of the last proviso of Section 2 of the Act as it relates to releases authorized for

fish preservation. The proviso reads:

> ". . . That not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." Section 2, 69 Stat. (P.L. 386, 84th Cong., 1st Sess.)

The water released for fishery purposes is not consumed, but remains available later for use by other downstream users. In addition, the term "downstream water user" is not specific, but appears to refer to all downstream users generally, including the fishery.

Therefore, it is my opinion that since the purpose of the Division is to provide as much water as possible to the Central Valley, Section 1, 69 Stat. 719 (P.L. 386, 84th Cong., 1st Sess.) the 50,000 acre-feet referred to in the last proviso of Section 2 should be construed to include the water necessary to maintain minimum specified flows for fish preservation and propagation rather than being considered to be in addition to such flows.

Rita Singer

Rita Singer
Assistant Regional Solicitor
Sacramento Region

JGoldsmith:RSinger:br

ATTACHMENT 6

SACRAMENTO REGION
2800 COTTAGE WAY
ROOM E-2753
SACRAMENTO, CALIFORNIA 95825

WPRS INTERPRETATION OF PL 84-386 REF 50,000 AF SET ASIDE FOR DOWN STREAM USERS.

JAN 21 1977

Memorandum

To: Field Supervisor, Division of Ecological Services
USFHS, Sac.

From: Regional Solicitor

Subject: Trinity River Division, CVP - Reconsideration of July 1, 1974 Memorandum to Regional Director, Bureau of Reclamation, Concerning Section 2 of the Trinity River Division Act

Pursuant to your December 13, 1976 request, I have reconsidered this office's previous interpretation of Section 2 of the Trinity River Division Act (69 Stat. 719; P.L. 84-386) as set forth in the memorandum identified above (copy attached). That Act clearly states that the Trinity River Division was intended to serve multiple purposes including (1) enhancement of fish and wildlife resources by maintaining the flow of the Trinity River below the applicable point of diversion (i.e. Clear Creek Tunnel) at a minimum of 150 c.f.s. and by maintaining the flow of Clear Creek below the applicable point of diversion (i.e. Spring Creek Tunnel) at a minimum of 15 c.f.s.; and (2) providing a water supply to Trinity River users downstream from Trinity Reservoir by making a minimum annual release from that Reservoir of 50,000 acre-feet. As stated in our July 1, 1974 memorandum to the Regional Director, these are not necessarily conflicting purposes. Rather, releases from Trinity Reservoir for downstream use coincides with the requirement to maintain flows downstream from the diversion points set forth above. It is possible, however, that the flow of the Trinity River will drop below the 150 c.f.s. minimum at points downstream from diversions made by downstream users, thereby causing harm to fish resources. However, should that reduction in the flow of the Trinity River occur, the Act grants the Secretary of the Interior broad authority to increase the size of the releases

from the Trinity facilities should such additional releases be deemed necessary in order to serve fish and wildlife enhancement purposes. (See our December 6, 1973 memorandum to the Regional Director concerning this issue, a copy of which is attached.)

In summary, we cannot find specific terminology in the Act itself or any reference in the legislative history relating to the Trinity River Division Act which supports the premise stated in your memorandum of December 13, 1976 that the Act does or was intended to provide separate and distinct "blocks of water" for fish preservation and propagation purposes and we cannot, therefore, support your interpretation. We do, however, find the authority mentioned hereinabove whereby the Secretary may make such additional releases for this purpose as he deems necessary.

In order to clarify treatment of this issue in our July 1, 1974 memorandum to the Regional Director, it is hereby amended by addition of the following at the end of the last paragraph on page 4 of that memorandum:

> ; however, it should be noted that the proviso quoted above does not limit downstream use to 50,000 acre-feet annually. Rather, as pointed out in our memorandum of December 6, 1973, the Secretary has discretionary authority to release additional water for the purpose of preserving or propagating fish resources.

Charles R. Renda
Regional Solicitor
Sacramento Region

Enclosures - 2

cc: Regional Director, Bureau of Reclamation (w/o encl.)

JETurner/cb

ATTACHMENT 7

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 7 1979

Memorandum

To: Assistant Secretary, Land and Water Resources

From: Solicitor

Subject: Proposed Contract with Grasslands Water District

A question has been raised whether the Department may amend its contract with the Grasslands Water District in the Central Valley Project (CVP) to provide that, in critically dry years, the District be accorded equal priority with agricultural contractors. The District is usually delivered 50,000 acre-feet of water primarily for waterfowl management, under the terms of the Act of August 27, 1954, Pub. L. No. 83-674, 68 Stat. 879, 16 U.S.C. § 695d, et seq., which was recently amended by the Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3115.

The question is whether equal priority is consistent with the applicable CVP authorizations which establish general categories of priorities for CVP operations, as follows: (1) river regulation, improvement of navigation, and flood control; (2) irrigation and "domestic uses;" (3) power; and (4) fish and wildlife and "other beneficial uses."1/

The 1954 Act provides that the "entire Central Valley Project" theretofore authorized and reauthorized, "is hereby reauthorized and declared to be for the purposes set forth in said acts, and also for the use of the waters thereof for fish and wildlife purposes, subject to such priorities as are applicable [under previous authorizations]." One of my predecessors held that the express reference to the use of waters for fish and wildlife in the 1954 Act is "simply a more definitive specification" of "other beneficial uses" which were an authorized project purpose (and lowest priority) ever since the 1937 reauthorization of the project. See 50 Stat. 844, 850; Opinion by Acting Solicitor Armstrong, "Allocations for fish and wildlife conservation on Central Valley Project," Nov. 15, 1954, p. 3. The Solicitor went on to point out: "The condition in [section 1 of] Public Law 674 that the use

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1/ See Pub. L. No. 75-392, 50 Stat. 844 (Aug. 26, 1937).

of such waters for wildlife conservation purposes shall be subject to such priorities as are applicable under prior authorizations also is simply a specific recognition by the Congress of the existence of the priorities originally specified."

I agree with and reaffirm this opinion. It does not, however, directly address the question here presented. For the same reason, the provisions of section 6 of the 1954 Act, which authorized contracts to supply CVP water to certain wildlife areas on an "if and when available" basis, begs the question presented here of how much water can be made "available" by the Secretary under general CVP priorities. As noted above, the 1954 Act was amended in 1978, but in a way not relevant here.

A narrow, technical reading of the CVP statutory priorities might suggest that in every situation throughout the CVP deficiencies shared equally by irrigation and fish and wildlife are unlawful; in other words, to require that a higher priority must be totally satisfied before a lower one can be met. I am unaware of any legislative history of CVP statutory authorities which supports such a theory.

The Secretary has never applied the priorities or operated the project that way. Rather, the allocation of relative shortages or benefits among priorities in any specific situation has been regarded as a discretionary matter within the Secretary's judgment.

For example, this kind of narrow interpretation — placing total emphasis on flood control (the highest priority) — would reduce water storage in reservoirs for irrigation. Maximizing flood protection would dictate that reservoirs be kept nearly empty certain times of the year in the event massive precipitation and runoff occurred. Operation that way would limit storage of water for irrigation and other uses later in the year. But reservoirs are not operated to wring every conceivable bit of flood storage capability out of the storage space; instead, they are operated according to Corps of Engineers criteria which strike a reasonable balance between the need for stored water and the remote possibility of huge storms.

To give a specific example, the Folsom Reservoir on the American River above Sacramento is not sufficient, in the judgment of the Corps of Engineers and the Bureau, to protect Sacramento from the worst conceivable flood (the so-called "standard project flood"). Additional flood control is one justification for the proposed Auburn dam, authorized to be built upstream from Folsom. Yet Folsom reservoir is not, in advance of completion of the Auburn dam, kept at its lowest possible storage level in the spring even though additional protection from

an unexpected, and highly improbable, standard project flood (estimated to occur once every thousand years) might be obtained if it were.2/

To take another example, many CVP contracts provide that municipal and industrial uses are cut in critically dry years after irrigation is cut, even though irrigation and "domestic uses" are of equal statutory priority. To take a third, more immediate example, in the 1976-77 drought Grasslands was delivered water on an equal priority with municipal and industrial users, and ahead of irrigators, because of very serious threat to migratory waterfowl.

Operating a huge, multi-purpose project like the CVP is a complicated undertaking, which precludes applying the order of priorities in any individual situation in an absolute, inflexible way. Rather, the Bureau has strived to coordinate disparate functions in a way which serves them all in the project as a whole, while maintaining a balance which fairly reflects the authorized priorities of purpose. The fact that Congress has typically provided, in adding new features to the project, that the new features shall be integrated into the overall project reinforces this view that it is the project as a whole which supplies the context for applying the statutory priorities.3/

On occasion the Congress has specifically limited the Secretary's discretion in meeting the general CVP priorities. For example, in authorizing the Trinity River Division of the CVP in 1955, Congress specifically provided that in-basin flows (in excess of a statutorily prescribed minimum) determined by the Secretary to be necessary to meet in-basin needs take precedence over needs to be served by out-of-basin diversion. See Pub. L. No. 84-386, §2. In that case, Congress'

2/ While Congress specifically provided that the Auburn Project be operated for flood control in accordance with Corps of Engineers criteria, 43 U.S.C. § 616bbb, Congress made no such direction in the Folsom authorization. See 58 Stat. 900.

3/ See, e.g., Pub. L. No. 84-386, 69 Stat. 719 (Aug. 12, 1955) (Trinity River Division authorization), § 2, 43 U.S.C. § 616bbb; Pub. L. No. 89-161, 79 Stat. 615 (Sept. 2, 1965) (Auburn-Folsom South Unit authorization), § 2. The Auburn-Folsom South provision is typical, providing in pertinent part that the unit be "integrated and coordinated, from both a financial and an operational standpoint, with the operation of other features of the Central Valley project . . . in such manner as will effectuate the fullest, most beneficial, and most economic utilization of the water resources hereby made available." 43 U.S.C. § 616bbb.

usual direction that the Trinity River Division be integrated into the overall CVP, set forth at the beginning of section 2, is expressly modified by and made subject to the provisos that follow giving specific direction to the Secretary regarding in-basin needs.

Applying the general statutory priorities in the context of the project as a whole accords both with past practice and Congress' intent. The priorities have meaning in the sense that it would be improper for the Secretary to devote most CVP-stored water primarily to power production or fish and wildlife protection while shorting other purposes of a higher priority. The record shows that the vast bulk of the CVP yield of nearly 8 million acre-feet is devoted to irrigation and other uses of a higher statutory plane than fish and wildlife protection. Thus the statutory priorities are fairly being met, even if they have not slavishly dictated every individual decision in the thousands of operating judgments that must be made in a project this large and complex.

In short, the congressional priorities must not be applied in the context of a single contract or a single small facet of an enormous project, but from the perspective of project operation as a whole. For this reason, it is plain that the Grasslands contract is consistent with the statutory priorities.

(sgd) Leo Krulitz

SOLICITOR