

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. Box 2000, Sacramento, CA 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

## PROTEST

### CALIFORNIA WATERFIX HEARING

**California Department of Water Resources and U.S. Bureau of Reclamation**  
The Public Hearing scheduled to commence on **Thursday, April 7, 2016**

I (We) have carefully read the notice (state name): **Friant Water Authority and its participating members identified on the Attachment**

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Address, email address and phone number of protestant or authorized agent:

*This information for Friant Water Authority and its participating members is provided on the Attachment.*

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Attach supplemental sheets as needed. To simplify this form, all references herein are to protests and protestants although the form may be used to file comments on temporary urgent changes and transfers.

**Protest based on ENVIRONMENTAL OR PUBLIC INTEREST CONSIDERATIONS (Prior right protests should be completed in the section below):**

- the proposed action will not be within the State Water Resources Control Board's jurisdiction
- not best serve the public interest
- be contrary to law
- have an adverse environmental impact

State facts which support the foregoing allegations

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Under what conditions may this protest be disregarded and dismissed? (Conditions should be of a nature that the petitioner can address and may include mitigation measures.)

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**Protest based on INJURY TO PRIOR RIGHTS:**

To the best of my (our) information and belief the proposed change or transfer will result in injury as



envelopes would be deposited with the U.S. Postal Service that same day, with first class postage thereon fully prepaid, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing shown in this proof of service.

\_\_\_ **BY FEDERAL EXPRESS.** I placed such envelope for deposit in a Federal Express drop box for service by Federal Express delivery, with postage thereon fully prepaid.

\_\_\_ **BY FACSIMILE/ELECTRONIC TRANSMISSION.** I caused such document to be delivered by facsimile/electronic transmission to the addressee(s) on the service list.


\_\_\_ **BY PERSONAL SERVICE:**

\_\_\_ I delivered such envelope by hand to the offices of the addressee(s).

\_\_\_ I caused such envelope to be delivered by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the states of California and Arizona that the above is true and correct.

Executed on January 5, 2016 at Phoenix, Arizona.

  
\_\_\_\_\_  
Gregory L. Adams

**SERVICE LIST**

California Department of Water Resources  
c/o James Mizell  
1416 Ninth Street, Room 1104  
Sacramento, California 95818

VIA U.S. MAIL

U.S. Bureau of Reclamation  
c/o Amy Aufdemberge  
U.S. Department of Interior  
Office of Regional Solicitor, Pacific Southwest Region  
2800 Cottage Way  
Sacramento, California 95825

VIA U.S. MAIL

State of California  
State Water Resources Control Board  
**DIVISION OF WATER RIGHTS**  
**P.O. Box 2000, Sacramento, CA 95812-2000**  
Info: (916) 341-5300, FAX: (916) 341-5400, Web: <http://www.waterboards.ca.gov/waterrights>

**ATTACHMENT TO PROTEST  
OF FRIANT WATER AUTHORITY AND ITS PARTICIPATING  
MEMBERS**

**CALIFORNIA WATERFIX HEARING**  
**California Department of Water Resources and U.S. Bureau of Reclamation**  
The Public Hearing scheduled to commence on **Thursday, April 7, 2016**

**Summary**

The Petitioners cannot demonstrate a likelihood that the changes proposed in the Petition will not injure the Friant Water Authority's members, all of which are legal users of water. The Petition does not commit to delivery of the full amount of substitute water necessary to satisfy the terms of the Exchange Contract and allow the exchange to be accomplished, thereby exposing the Friant members to the Exchange Contractors' exercise of reserved rights to the San Joaquin River to make up the shortfall in deliveries. The Petition would require increased Delta outflow and impose enhanced instream flows, while recognizing that in dry years there would be reduced deliveries to Central Valley Project contractors south of the Delta. The cumulative impact of the changes sought by the Petition will be a shift of water supply from Friant member contractors whose rights were vested before this Board approved the permits for the Central Valley Project and State Water Project that the Petitioners now seek to change. These points are explained in detail below. The Petition must be denied.

**I. Background**

**A. Parties to this Protest**

The parties to this Protest are:

**Friant Water Authority**  
c/o Jennifer T. Buckman, General Counsel  
1107 9<sup>th</sup> Street, Suite 640  
Sacramento, California 95814  
(916) 382-4344 (office)  
(916) 804-0173 (mobile)  
[jbuckman@friantwater.org](mailto:jbuckman@friantwater.org)

**Arvin-Edison Water Storage District**

c/o Steven C. Collup  
Engineer-Manager  
Post Office Box 175  
Arvin, California 93203-0175  
(661) 854-5573

**City of Fresno**

c/o Thomas Esqueda  
Director of Public Utilities  
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(559) 621-8600  
[thomas.esqueda@fresno.gov](mailto:thomas.esqueda@fresno.gov)

**Hills Valley Irrigation District**

c/o Dennis R. Keller  
Consulting Engineer  
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Visalia, California 93279-0911  
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[kelweg1@aol.com](mailto:kelweg1@aol.com)

**Kaweah Delta Water Conservation District**

c/o Mark Larson  
General Manager  
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Farmersville, California 93223  
(559) 747-5601 (office)  
(559) 909-1554 (mobile)  
[mlarsen@kdwcd.com](mailto:mlarsen@kdwcd.com)

**Kern-Tulare Water District**

c/o Steven C. Dalke  
General Manager  
5001 California Avenue, Suite 102  
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**Lindmore Irrigation District**

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General Manager  
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[mhagman@lindmoreid.com](mailto:mhagman@lindmoreid.com)

**Lindsay-Strathmore Irrigation District**

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General Manager  
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**Orange Cove Irrigation District**

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(559) 280-7382 (mobile)  
[fmorrissey@orangecoveid.org](mailto:fmorrissey@orangecoveid.org)

**Porterville Irrigation District**

c/o Sean P. Geivet  
General Manager  
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(559) 361-5523 (mobile)  
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**Saucelito Irrigation District**

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**Southern San Joaquin Municipal Utility District**

c/o Roland Gross  
General Manager  
11281 Garzoli Avenue  
Delano, California 93215  
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**Terra Bella Irrigation District**

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Terra Bella, California 93270-9695  
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**Tulare Irrigation District**

c/o J. Paul Hendrix  
General Manager  
6826 Avenue 240  
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**1. The Interest of the Friant Water Authority**

Friant Water Authority (“Authority”) is a joint powers authority duly organized, existing and acting pursuant to the laws of the State of California. As such, it is a public entity separate from the parties to the Joint Powers Agreement.<sup>1</sup> CAL. GOV. CODE § 6507 (West, WestlawNext current with all 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2<sup>nd</sup> Ex. Sess.).<sup>2</sup> The Authority’s members entered into the Joint Powers Agreement in part “to provide for the joint exercise, through the Authority, of powers common to each of the parties to acquire, protect, preserve and enhance water supplies and water rights, . . . preserve and protect the rights and benefits of the parties in the Central Valley Project, and such other purposes as are incidental, necessary and convenient to the mutual benefit and interest of such purposes and of the members, including, but not limited to, acceptance of an assignment of the Contract<sup>[3]</sup> as set forth herein.”<sup>4</sup> The Joint Powers Agreement gave the Authority “the power to take any action to carry out the purposes of this Agreement.”<sup>5</sup> “The Authority is authorized, in its own name, to do all acts necessary for the

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<sup>1</sup> Joint Powers Agreement, Friant Water Authority, effective Jan. 19, 2004.

<sup>2</sup> The parenthetical information for all California statutes cited in this document by reference to “West” is the same and will not be repeated.

<sup>3</sup> Article I(f) of the Joint Powers Agreement defines the term “Contract” as “the contract between the United States Bureau of Reclamation and the Friant Water Users Authority, which provides for operation and maintenance of the Friant-Kern Canal system.” See *infrat* at n.7.

<sup>4</sup> Joint Powers Agreement, Art. II, § 2.03.

<sup>5</sup> *Id.* at § 2.04.

exercise of said powers, including, but not limited to, any and all of the following: . . . to sue and be sued in its own name . . . .”<sup>6</sup>

The Authority succeeded to the rights and responsibilities of the Friant Water Users Authority related to operation and maintenance of the Friant-Kern Canal and associated works.<sup>7</sup> In this Protest the amended agreement governing those rights and responsibilities is referred to as the “Friant-Kern Canal Transfer Agreement.” The Secretary of the Interior (“Secretary”) acknowledged in the amendment to this Agreement “that material changes in Project operations affecting the quantity of water to be delivered or in Project finances may affect the ability of the Authority to carry out its obligations under this Agreement. Under such circumstances, the parties will meet and confer as to emergency measures available to reduce the economic hardship to the Authority, the Water Delivery Contractors, and/or Parties Entitled to Utilize or Receive Other Water.”<sup>8</sup>

The Authority also succeeded to the rights and responsibilities of the Friant Water Users Authority related to facilities operated and maintained by the San Luis & Delta-Mendota Water Authority.<sup>9</sup> In this Protest the First Amended and Restated Memorandum of Understanding governing those rights and responsibilities is referred to as the “Friant/SLDMWA MOU.” Article IV.A of the Friant/SLDMWA MOU requires the Friant Water Authority to allocate to Friant Division contractors, and collect, the operation, maintenance and replacement costs allocated to the “Settlement Contractors” identified on Exhibit A to the MOU, and pay those funds to the San Luis & Delta-Mendota Water Authority.<sup>10</sup> Among the Settlement Contractors are the “Exchange Contractors” discussed in more detail infra at 9-10. Additional contractors listed on Exhibit A to the Friant/SLDMWA MOU are shown to have a combined entitlement to 43,277 acre feet per year (“South of Delta Settlement Contractors”). Thus, the total amount of

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<sup>6</sup> *Id.*; see also CAL. GOV. CODE § 6508 (West).

<sup>7</sup> See Agreement To Transfer the Operation, Maintenance and Replacement and Certain Financial and Administrative Activities Related to the Friant-Kern Canal and Associated Works, Contract No. 8-07-20-X0356, effective March 1, 1998, as amended by the Amendment to Agreement To Transfer the Operation, Maintenance, and Replacement and Certain Financial and Administrative Activities Related to the Friant-Kern Canal and Associated Works, Amendatory Contract No. 8-07-20-X0356, effective Feb. 25, 2003; Assignment of Agreement, Acceptance Thereof, and Consent Thereto, Assignment No. 1, Contract No. 8-07-20-X0356, effective June 30, 2004.

<sup>8</sup> Amended Article 11(i) found in § 1 of the Amendment to Agreement To Transfer the Operation, Maintenance, and Replacement and Certain Financial and Administrative Activities Related to the Friant-Kern Canal and Associated Works, Amendatory Contract No. 8-07-20-X0356, effective Feb. 25, 2003.

<sup>9</sup> See First Amended and Restated Memorandum of Understanding Between Friant Water Users Authority and San Luis & Delta-Mendota Water Authority Relating to Allocation, Collection and Payment of Operation, Maintenance & Replacement Costs for Water Delivered Through Certain Central Valley Project Facilities, effective September 1, 2002; Amendment To Agreement To Transfer The Operation, Maintenance, and Replacement and Certain Financial and Administrative Activities Related to the San Luis and Delta-Mendota Canals, Tracy Pumping and O’Neill Pumping/Generating Plant, San Luis Drain and Associated Works, Amendatory Contract No. 8-07-20-X0354, effective Feb. 18, 2003; Agreement for Assignment to Friant Water Authority of First Amended and Restated Memorandum of Understanding Between Friant Water Users Authority and San Luis & Delta-Mendota Water Authority Relation [sic] to Allocation, Collection, and Payment of Operation, Maintenance & Replacement Costs for Water Delivered Through Certain Central Valley Project Facilities, effective June 30, 2004.

<sup>10</sup> See also Recitals 4 and 5 and §§ I, VIII.B and VIII.H of Exhibit B, of the Friant/SLDMWA MOU; amended Article 11(f) found in § 1 of the Amendment to Agreement To Transfer the Operation, Maintenance, and Replacement and Certain Financial and Administrative Activities Related to the Friant-Kern Canal and Associated Works, Amendatory Contract No. 8-07-20-X-0356, effective Feb. 25, 2003.



water needed for the United States to meet its obligations to the Exchange Contractors and the South of Delta Settlement Contractors is approximately 883,000 acre feet per year, except in Shasta critical years, plus the losses associated with deliveries to meet these obligations. *See* infra at n.41.

## **2. Members of Friant Water Authority Are Legal Users of Water.**

The Friant Water Authority members participating in this Protest are listed in the following table, along with the number of the contract<sup>11</sup> between the member and the United States Department of the Interior, Bureau of Reclamation, and the quantities of Class 1 Water and Class 2 Water to which the member is entitled, subject to the terms of the member's contract.

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<sup>11</sup> *See* Contract Between the United States and Arvin-Edison Water Storage District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 14-06-200-229AD (Nov. 1, 2010) (“Arvin-Edison Contract”); Contract Between the United States and City of Fresno Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 14-06-200-8901D (Dec. 22, 2010) (“City of Fresno Contract”); Agreement for Partial Assignment of Lewis Creek Water District Water Service and Facilities Repayment Contract to Hills Valley Irrigation District, Contract No. 14-06-200-1911E (April 12, 2013) (“Lewis Creek/Hills Valley Partial Assignment”) (*see* n.16 for full citation to Lewis Creek Water District Contract) , and Agreement for Partial Assignment of Porterville Irrigation District Water Service and Facilities Repayment Contract to Hills Valley Irrigation District, Contract No. 175r-4309E (April 14, 2013) (“Porterville/Hills Valley Partial Assignment”); Contract Between the United States and Kaweah Delta Water Conservation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-180AD (Dec. 10, 2010) (“Kaweah Contract”); Agreement for Partial Assignment of Southern San Joaquin Municipal Utility District Water Service and Facilities Repayment Contract to Kern-Tulare Water District, Contract No. 11r-1460A (May 25, 2012) (“Southern San Joaquin Municipal Utility District/Kern-Tulare Partial Assignment”); Contract Between the United States and Lindmore Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-1635D (Nov. 17, 2010) (“Lindmore Contract”); Contract Between the United States and Lindsay-Strathmore Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-1514D (Nov. 17, 2010) (“Lindsay-Strathmore Contract”); Contract Between the United States and Orange Cove Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-1672D (Nov. 18, 2010) (“Orange Cove Irrigation Contract”); Contract Between the United States and Porterville Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-4309D (Dec. 29, 2010) (“Porterville Contract”); Contract Between the United States and Saucelito Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-2604D (Dec. 7, 2010) (“Saucelito Contract”); Contract Between the United States and Southern San Joaquin Municipal Utility District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 11r-1460D (Nov. 24, 2010) (“Southern San Joaquin Municipal Utility District Contract”); Contract Between the United States and Terra Bella Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-2446D (Dec. 16, 2010) (“Terra Bella Contract”); Contract Between the United States and Tulare Irrigation District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 175r-2485D (Dec. 16, 2010) (“Tulare Irrigation Contract”).

| <b>Friant Water Authority Members Participating in this Protest</b> | <b>Contract No.</b>                        | <b>Quantity of Class 1 Water (Acre Feet)</b> | <b>Quantity of Class 2 Water (Acre Feet)</b> |
|---|--|--|--|
| Arvin-Edison Water Storage District                                 | 14-06-200-229AD                            | 40,000                                       | 311,675                                      |
| City of Fresno  | 14-06-200-8901D                            | 60,000                                       | 0  |
| Hills Valley Irrigation District                                    | 14-06-200-1911E;<br>I75r-4309E             | 1,250  | 0  |
| Kaweah Delta Water Conservation District                            | I75r-180AD                                 | 1,200  | 7,400  |
| Kern-Tulare Water District  | I1r-1460A                                  | 0  | 5,000  |
| Lindmore Irrigation District  | I75r-1635D                                 | 33,000                                       | 22,000                                       |
| Lindsay-Strathmore Irrigation District                              | I75r-1514D                                 | 27,500                                       | 0  |
| Orange Cove Irrigation District                                     | I75r-1672D                                 | 39,200                                       | 0  |
| Porterville Irrigation District                                     | I75r-4309D,<br>as amended by<br>I75r-4309E | 15,000                                       | 30,000                                       |
| Saucelito Irrigation District                                       | I75r-2604D                                 | 21,200                                       | 32,800                                       |
| Southern San Joaquin Municipal Utility District                     | I1r-1460D, as<br>amended by<br>I1r-1460A   | 97,000                                       | 45,000                                       |
| Terra Bella Irrigation District                                     | I75r-2446D                                 | 29,000                                       | 0  |
| Tulare Irrigation District  | I75r-2485D                                 | 30,000                                       | 141,000                                      |
| <b>TOTALS</b>   |  | <b>394,350</b>                               | <b>594,875</b>                               |

The Bureau of Reclamation holds rights, including riparian and appropriative rights, to all water in the Central Valley Project. *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133, 1149, 1170-71, 1173, 1175 (E.D. Cal. 2001) (*Westlands VI*), *aff'd*, 337 F.3d 1092 (9<sup>th</sup> Cir. 2003) (*Westlands VII*). The Bureau's rights for the Friant Division hold priorities of March 27, 1915<sup>12</sup>; January 19, 1916<sup>13</sup>; September 26, 1919<sup>14</sup>; and July 30, 1927.<sup>15</sup> The Bureau, as the Secretary's duly authorized representative, pledged to "make reasonable efforts to protect the water rights and other rights described in the fifth (5th) Explanatory Recital of this [Friant member's] Contract and to provide the water available under this Contract." Art. 3(j) of the Friant members' contracts.<sup>16</sup> The Bureau also committed to "make all reasonable efforts to maintain sufficient flows and levels of water in the Friant-Kern Canal to deliver Project Water to the Contractor at specific turnouts established pursuant to subdivision (a) of this Article . . . ." *Id.* Art. 5(b).<sup>17</sup> The Bureau must "make all reasonable efforts to optimize delivery of the Contract Total subject to: (i) the authorized purposes and priorities of the Project; (ii) the requirements of Federal law and the Settlement<sup>18</sup>]; and (iii) the obligations of the United States under existing contracts, or renewals thereof, providing for water deliveries from the Project." *Id.* Art. 12(a).<sup>19</sup> The Bureau must "use all reasonable means to guard against a Condition of Shortage in the quantity of water to be made available to the Contractor pursuant to this [Friant member's] Contract." *Id.* Art. 13(a).<sup>20</sup>

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<sup>12</sup> State Water Resources Control Board License 1986.

<sup>13</sup> State Water Resources Control Board Permit 11885.

<sup>14</sup> State Water Resources Control Board Permit 11886.

<sup>15</sup> State Water Resources Control Board Permit 11887.

<sup>16</sup> See Arvin-Edison Contract at 18; City of Fresno Contract at 17-18; Contract Between the United States and Lewis Creek Water District Providing for Project Water Service From Friant Division and for Facilities Repayment, Contract No. 14-06-200-1911D ("Lewis Creek Contract") (partially assigned to Hills Valley Irrigation District) at 19; Kaweah Contract at 18 (in this contract the reference is to the "fourth (4<sup>th</sup>) Explanatory Recital"); Lindmore Contract at 18; Lindsay-Strathmore Contract at 18; Orange Cove Irrigation Contract at 18; Porterville Contract at 19; Saucelito Contract at 19; Southern San Joaquin Municipal Utility District Contract at 18; Terra Bella Contract at 18; Tulare Irrigation Contract at 18.

<sup>17</sup> See Arvin-Edison Contract at 25; City of Fresno Contract at 23-24; Lewis Creek Contract at 25; Kaweah Contract at 25; Lindmore Contract at 25; Lindsay-Strathmore Contract at 25; Orange Cove Irrigation Contract at 25; Porterville Contract at 25; Saucelito Contract at 25; Southern San Joaquin Municipal Utility District Contract at 25; Terra Bella Contract at 25; Tulare Irrigation Contract at 25.

<sup>18</sup> Article 1(gg) of the Friant members' contracts defines "Settlement" as "the Stipulation of Settlement dated September 13, 2006, the Order Approving Stipulation of Settlement, and the Judgment and further orders issued by the Court pursuant to the terms and conditions of the Settlement in *Natural Resources Defense Council, et al. v. Rodgers, et al.*, No. CIV-S-88-1658 LLJ/GGH." See Arvin-Edison Contract at 12; City of Fresno Contract at 11; Lewis Creek Contract at 12; Kaweah Contract at 12; Lindmore Contract at 12; Lindsay-Strathmore Contract at 12; Orange Cove Irrigation Contract at 12; Porterville Contract at 12; Saucelito Contract at 12; Southern San Joaquin Municipal Utility District Contract at 12; Terra Bella Contract at 12; Tulare Irrigation Contract at 12.

<sup>19</sup> See Arvin-Edison Contract at 45; City of Fresno Contract at 42; Lewis Creek Contract at 45-46; Kaweah Contract at 45; Lindmore Contract at 45; Lindsay-Strathmore Contract at 45; Orange Cove Irrigation Contract at 45; Porterville Contract at 45-46; Saucelito Contract at 45-46; Southern San Joaquin Municipal Utility District Contract at 45; Terra Bella Contract at 45; Tulare Irrigation Contract at 45.

<sup>20</sup> See Arvin-Edison Contract at 46; City of Fresno Contract at 43; Lewis Creek Contract at 47; Kaweah Contract at 46; Lindmore Contract at 46; Lindsay-Strathmore Contract at 46; Orange Cove Irrigation Contract at 46; Porterville Contract at 47; Saucelito Contract at 47; Southern San Joaquin Municipal Utility District Contract at 46; Terra Bella Contract at 46; Tulare Irrigation Contract at 46.

The entitlements Reclamation holds for the use of the Friant Water Authority's members are senior in priority to those of some other contractors. *See, e.g., Westlands Water Dist. v. Patterson*, 864 F. Supp. 1536, 1547-48 (E.D. Cal. 1994) (*Westlands III*). Furthermore, most appropriative water rights of the Central Valley Project are senior to the rights of the State Water Project. *Westlands VI*, 153 F. Supp. 2d at 1144; *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 131 n.25, 227 Cal. Rptr. 161, 188 n.25 (1986). Reclamation must respect California's appropriative water rights hierarchy. *See Westlands VI*, 153 F. Supp. 2d at 1171.<sup>21</sup>

The United States acquired certain water rights to the San Joaquin River in 1939.<sup>22</sup> The "Vendors" in that transaction reserved rights to specific rates of the natural flow of the San Joaquin River, varying by month.<sup>23</sup> The Vendors and the United States also entered into a Contract for Exchange of Waters, which later was superseded by the Second Amended Contract for Exchange of Waters.<sup>24</sup> As a result of these agreements, the Exchange Contractors hold riparian and pre-1914 appropriative rights to the San Joaquin River. *Id.* at 1146. The Exchange Contractors' cooperation enabled construction of Friant Dam, which impounds Millerton Lake and enables diversion of the San Joaquin River flow into the Friant-Kern Canal. *Id.* at 1146-47 & n.17, 1168. The Exchange Contractors agreed, in Article 4.a of the Exchange Contract,<sup>25</sup> that the United States could store, divert or dispose of water of the San Joaquin River upstream of their diversions, "so long as, and only so long as, the United States does deliver to the Contracting Entities by means of the [Central Valley] Project or otherwise substitute water in conformity with this contract." This expressly reserved some of the Exchange Contractors' riparian and pre-1914 appropriative rights to the San Joaquin River. *Westlands VI*, 153 F. Supp. 2d at 1152. To perform the exchange, the United States is required to deliver "substitute water" to the Exchange Contractors to replace the San Joaquin River water they otherwise would be entitled to divert. The Exchange Contract contemplated that "most if not all of the substitute water" provided to the Exchange Contractors would be delivered via the Delta-Mendota Canal. Article 5.a. This term "provides notice that the Bureau contractually selected the Sacramento River, Delta, and Delta-Mendota Canal as the primary source of substitute water." *Westlands VI*, 153 F. Supp. 2d at 1154; *see also id.* at 1166. Substitution of water from those sources in place of San Joaquin River water "was a part of the whole plan proposed by the Secretary of Interior and approved by the President and authorized by Congress." *Wolfsen v. United States*, 162 F. Supp. 403, 406 (Ct. Cl.), *cert. denied*, 358 U.S. 907 (1958). "[T]he President has approved and the Congress has confirmed the commitment by the United States to the obligation to replace the waters of the San Joaquin River with waters from the Sacramento River . . . . The United States cannot withdraw from that commitment with impunity . . . ." *Id.*, 162 F. Supp. at 408. The obligation to provide the Exchange Contractors substitute water was an express congressional mandate. *Westlands VI*, 153 F. Supp. 2d at 1167; *see also id.* at 1177. If the United States was

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<sup>21</sup> This Board previously filed pleadings in federal court acknowledging that federal courts, like state courts, have concurrent jurisdiction to adjudicate California water rights. These federal court determinations of the priority of these rights are entitled to precedential effect.

<sup>22</sup> Contract for Purchase of Miller & Lux Water Rights (July 27, 1939).

<sup>23</sup> *Id.* Art. IX.

<sup>24</sup> Second Amended Contract for Exchange of Waters, Contract Ilr-1144, Second Amendatory (Sept. 15, 1967; rev. Dec. 6, 1967; executed Feb. 14, 1968) ("Exchange Contract") at Art. I. The "Exchange Contractors" are parties to the Exchange Contract, or their successors in interest.

<sup>25</sup> *See supra* at n.24.

unable to deliver substitute water to the Exchange Contractors temporarily, Article 4.b of the Exchange Contract granted the Exchange Contractors a federal contractual right to the San Joaquin River water, as they reserved under the contract. *Id.* at 1152. Article 4.c declared that if the United States was unable to deliver substitute water to the Exchange Contractors permanently, the United States would release the Exchange Contractors' reserved waters at Friant Dam.

By 1959, Reclamation had constructed the Friant Division, the Delta-Mendota Canal had been constructed, those facilities were fully operational, and the exchange was being performed regularly. At that point Reclamation proposed to add the San Luis Unit to the Central Valley Project, and filed a petition to consolidate and enlarge the place of use of the CVP. These actions by the United States raised concern among Friant Division contractors about the United States' ability to continue to supply the required amount of substitute water to the Exchange Contractors from the Sacramento River and Sacramento-San Joaquin Delta. In response to those concerns, the Bureau's Regional Director, H.P. Dugan, issued a letter dated December 29, 1959 that discussed the effect of the pending petition to the State Water Resources Control Board on the United States' ability to meet the Exchange Contractors' entitlement to substitute water. In part, Regional Director Dugan's letter stated:

Under the Exchange Contract, it is provided in part as follows:

It is anticipated that most if not all of the substitute water provided the Contracting Entities hereunder will be delivered to them via the aforementioned Delta-Mendota Canal . . . . [page 6]

The very foundation of the Central Valley Project was predicated on the transportation of water of the Sacramento River and its tributaries in the Sacramento-San Joaquin Delta, and the use thereof in, the San Joaquin Valley in order that the use of water originating [above] Friant Dam could be made in the areas to be served by the Friant-Kern and Madera Canals (see p. 575, Vol. 1, CVP Documents).

Therefore, I confirm to you that it has been, is, and will continue to be the policy and practice of the United States to utilize the water available to it or made available to it under the above-numbered applications from the Sacramento River and its tributaries and the Sacramento-San Joaquin Delta to first satisfy the requirements of the Exchange Contract and Schedule 2 of the Purchase Contract so long as it is legally and reasonably physically possible for it to satisfy these requirements; provided that the United States has not, and will not, voluntarily impair the delivery of water required to satisfy these requirements.

Shortly thereafter, the Friant Division contracts with the United States were amended to formalize the United States' prior "policy and practice" by incorporating Article 3(n) of the Friant contracts.<sup>26</sup> *Id.* at 1156-57; *Westlands III*, 864 F. Supp. at 1546-47. Article 3(n) states:

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<sup>26</sup> See Arvin-Edison Contract at 21; City of Fresno Contract at 20; Lewis Creek Contract at 21; Kaweah Contract at 21; Lindmore Contract at 21; Lindsay-Strathmore Contract at 21; Orange Cove Irrigation Contract at 21; Porterville Contract at 21; Saucelito Contract at 21; Southern San Joaquin Municipal Utility District Contract at 21; Terra Bella Contract at 21; Tulare Irrigation Contract at 20-21.

The rights of the Contractor under this Contract are subject to the terms of the contract for exchange waters, dated July 27, 1939, between the United States and the San Joaquin and Kings River Canal and Irrigation Company, Incorporated, et al., (hereinafter referred to as the Exchange Contractors), Contract No. 11r-1144, as amended. *The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until required by the terms of said contract, and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under Schedule 2 of the Contract for Purchase of Miller and Lux Water Rights (Contract 11r-1145, dated July 27, 1939).*

(emphasis added).

Subsequently, during the hearing leading to this Board's adoption of D-990, the United States submitted evidence describing the "water requirements" of the Central Valley Project and the "availability of water" for the CVP based upon the CVP meeting seven principal requirements including, inter alia, the following:

(No. 5) Requirements to be served through the Delta-Mendota Canal including the Amended Exchange Contract, estimate of requirements for rights described in Schedule 2 of the Purchase Contract, canal and operating losses, present contractual obligations and contemplated future deliveries limited to 4,600 cfs, the capacity of the canal.

As the Board is already aware, the entire record of the D-990 hearing as well as the D-990 decision itself were incorporated into the hearings leading to D-1020. Thus, in prior proceedings before the Board relative to the very permits the Petition now seeks to change, the United States expressly acknowledged that its obligations to deliver substitute water to the Exchange Contractors and other south of Delta contractors are senior to any obligation it has to the "certain [CVP contractor] members of the San Luis Delta Mendota Water Authority" that are the intended beneficiaries of the Cal WaterFix project, as those parties are identified in the RDEIR/SDEIS at 1-9.

Friant Dam diverts the water of the San Joaquin River upstream of the location where the Exchange Contractors diverted and used water under their historic water rights; the United States stores that water in Millerton Lake. The San Joaquin River water is then distributed for use either to the north via the Madera Canal or to the south via the Friant-Kern Canal. *Westlands VI*, 153 F. Supp. 2d at 1147. The San Joaquin River water impounded by Friant Dam is fully dedicated to use by the Friant Division contractors. *Id.* at 1167. If and to the extent that the Exchange Contractors exercise their reserved riparian or pre-1914 appropriative rights to San Joaquin River water, as permitted by Articles 4 and 16 of the Exchange Contract, that water is unavailable for contractors served by the Friant-Kern and Madera Canals. Exercise of the

Exchange Contractors' reserved rights to the San Joaquin River significantly interferes with operation of the Central Valley Project and causes hardship to contractors and to the public who rely on municipal and power generation uses from the Friant Division. *Id.* at 1178; *Westlands III*, 864 F. Supp. at 1549, 1550-51.

The Bureau announced in May 2014 its release of water from Friant Dam to help meet its contractual obligations to the Exchange Contractors.<sup>27</sup> It did so again in July 2015.<sup>28</sup> These releases depleted the water source on which the Friant Water Authority's members rely, yielding the very hardship the *Westlands III* and *Westlands VI* decisions foresaw. The Bureau advised that Water Year 2016 began on October 1, 2015 with Millerton Lake at 37% of capacity.<sup>29</sup>

## II. The Petition

The Petition for Change dated Aug. 25, 2015 ("Aug. 25 Petition") was amended and supplemented by a Petition for Change dated September 11, 2015 ("Sept. 11 Petition"). The Petitions seek to "add points of diversion and redirection contained in water rights permits held by DWR and Reclamation to allow SWP and CVP water to move through the intakes identified by Alternative 4A (California WaterFix) of the Bay Delta Conservation Plan/California Water Fix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement, if ultimately constructed." Aug. 25 Petition, Environmental Information for Petitions, at 1; Sept. 11 Petition, Environmental Information for Petitions, at 1.<sup>30</sup> The Petition specifically seeks to add points of diversion and redirection within the Sacramento/San Joaquin Delta Estuary for Department of Water Resources permits 16478, 16479, 16481 and 16482 for the State Water Project, and Reclamation permits 11315, 11316, 12721, 12722, 12723, 11967, 11968, 11969, 11971, 11973 and 12364 for the Central Valley Project. *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 1. The permits and license to operate the Friant Division are not mentioned in the Petition, but the Petition does cite permits and licenses the United States uses as sources of substitute water for the Exchange Contractors.

"Alternative 4A includes the construction of three fish-screened intakes on the east bank of the Sacramento River between Clarksburg and Courtland, each with a capacity of 3,000 cfs. Each intake would be from 1,403 to 1,674 feet in length along the river bank, depending on

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<sup>27</sup> Bureau of Reclamation press release entitled "Reclamation Makes Historic Releases of Water from Friant Dam to the San Joaquin River Exchange Contractors Due to Drought," and dated May 13, 2014, <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=46887> (last visited Jan. 3, 2016).

<sup>28</sup> Bureau of Reclamation press release entitled "Reclamation Releases Water from Friant Dam to the San Joaquin River Exchange Contractors," undated.

<sup>29</sup> Bureau of Reclamation press release entitled "Central Valley Project Begins Water Year 2016 with 2.9 Million Acre-Feet of Storage," dated Oct. 6, 2015, <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=50655> (last visited Jan. 3, 2016).

<sup>30</sup> Selection of Alternative 4A as the preferred alternative is provisional and subject to change. Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement ("RDEIR/SDEIS") at 1-6. The RDEIR/SDEIS is available at [http://baydeltaconservationplan.com/2015PublicReview/PublicReviewRDEIRSDEIS/PublicReviewRDEIRSDEIS\\_508.aspx](http://baydeltaconservationplan.com/2015PublicReview/PublicReviewRDEIRSDEIS/PublicReviewRDEIRSDEIS_508.aspx) (last visited Jan. 3, 2016). This Protest challenges Alternative 4A as the current preferred alternative. The parties to this Protest request leave to supplement this Protest should the final environmental impact report/final environmental impact statement contain materially different information than the Draft EIR/EIS or the RDEIR/SDEIS, or designate a different preferred alternative.

location, and would consist of a reinforced concrete structure subdivided into individual bays that can be isolated and managed separately. Specific discussions of the components of Alternative 4A most relevant to the attached water rights change petition can be found within the Partially Recirculated Draft EIR / Supplemental Draft EIS” at designated sections. Sept. 11 Petition, Environmental Information for Petitions, at 1. Alternative 4A contemplates dual conveyance, providing for continued use of existing State Water Project/Central Valley Project south Delta export facilities as well as the new diversions. *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 9. Diversions at the north Delta intake would be greatest in wetter years, and lowest in drier years when south Delta diversions would provide the majority of the Central Valley Project and State Water Project south of Delta exports. *Id.*

According to the Petition, Alternative 4A is designed to achieve compliance with the Endangered Species Act of 1973, 16 U.S.C §§ 1531 et seq., through § 7 of that Act, 16 U.S.C. § 1536. *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 8; *see also id.* at 12. It also is designed to achieve compliance with the California Endangered Species Act, CAL. FISH & GAME CODE §§ 2050 et seq. (West), through § 2081(b) of that Act. *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 8; *see also id.* at 12.

The Petition asserts that it “leaves intact all existing places of use, manner of use, other existing points of diversion, quantities of diversion and other water rights terms and conditions identified in Water Rights Decision 1641 (D-1641). The instream flow issues under consideration in the State Water Board San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan (WQCP) update process are separate from the issues germane to this Petition.” *Id.* at 9. Nevertheless, “Alternative 4A proposes a range of spring outflows above D-1641,” *id.* at 13, though “the exact flows proposed in Alternative 4(a) [sic] will be determined using science based adaptive management process.” *Id.* at 14. Specifically,

March, April, May: To ensure maintenance of longfin smelt abundance, initial operations will provide a March–May average Delta outflow bounded by the requirements of Scenario H3, which are consistent with D-1641 standards, and Scenario H4, which would be scaled to Table 3-24 in Chapter 3, Section 3.6.4.2 of the Draft EIR/EIS. Over the course of the 2081(b) permit term the longfin smelt indices of annual recruitment based upon the 1980–2011 trend in recruitment relative to winter-spring flow conditions will be used to evaluate the effect of operations on longfin smelt (i.e., evaluate positive cohort over cohort population growth). Adjustments to the criteria above and these outflow targets may be made using the Adaptive Management Process and the best available scientific information available regarding all factors affecting longfin smelt abundance.

RDEIR/SDEIS at 4.1-9 (footnote omitted). Footnote 17, cited at the conclusion of the entry quoted immediately above, states: “For example, if best available science resulting from collaborative scientific research program shows that Longfin Smelt abundance can be maintained in the absence of spring outflow, and DFW concurs, an alternative operation for spring outflow



could be to follow flow constraints established under D-1641.” *Id.* at 4.1-9 n.17. Footnote 17 leaves no doubt that Alternative 4A proposes an upward departure from D-1641 that would deprive Central Valley Project water right holders of water in March, April and May.

The Petition represents that “existing obligations will continue to be met and beneficial uses in the Delta will not be negatively impacted by operations with the new point of diversion.” *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 19. “[O]perations both now and in the future will not impact the quantity of water available for water users in the watershed because these demands are accounted for prior to diversions to storage or export.” *Id.* “[T]he requested changes to points of diversion/redirection identified in Alternative 4A would not detract from the ability of the SWP/CVP to meet current or future criteria or objectives.” *Id.* at 10. “[T]here are no requested changes to the SWP or CVP quantity or timing of diversion, place of use, return flows, or consumptive uses of water. Furthermore, this Petition does not request any modification of D-1641 obligations.” *Id.* at 19. “In addition to the priority system, water rights that are in the Area of Origin are protected by existing state law which provides that the CVP and SWP can only export water that is surplus to the legitimate water needs of the Bay-Delta watershed. The Petitioners operate the Projects consistent with the priority system and Area of Origin protections.” *Id.* at 20. “Deliveries to the CVP Settlement, Refuge, and Exchange Contractors . . . will continue to be made under the terms of those agreements. This Petition does not propose any changes to any contractual obligations.” *Id.* at 21.

“Alternative 4A . . . is the CEQA preferred alternative, and the NEPA preferred alternative.” *Id.* at 22.

As noted above, the Petition proposes to implement Alternative 4A as described in the RDEIR/SDEIS. The RDEIR/SDEIS amended and supplemented the Draft Environmental Impact Report / Environmental Impact Statement, Bay Delta Conservation Plan (“Draft EIR/EIS”).<sup>31</sup> See generally RDEIR/SDEIS at ES-2-3. Alternative 4A contemplates Operational Scenario H3+, an operational scenario that includes a criterion for spring outflow bounded by the criteria associated with Operational Scenarios H3 and H4 described in the Draft EIR/EIS at § 3.6.4.2 (see pages 3-202 et seq.). RDEIR/SDEIS at 4.1-5. Operational Scenario H3+ is evaluated as Scenarios H3-H4 at Early Long-Term. *Id.* The RDEIR/SDEIS describes the operation of Alternative 4A in the following general terms:

Operational components of the water conveyance facilities under Alternative 4A would be similar, but not identical, to those described under Scenario H in Chapter 3, Section 3.6.4.2 of the Draft EIR/EIS. Alternative 4A starting operations will be determined through the continued coordination process as outlined in the Section 7 consultation process and 2081(b) permit prior to the start of construction. An adaptive management and monitoring program, as described below, will be implemented to develop additional science during the course of project construction and operation to inform and improve conveyance facility operational limits and criteria. Additionally, operational elements associated with

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<sup>31</sup> Available at <http://baydeltaconservationplan.com/EnvironmentalReview/EnvironmentalReview/2013-2014PublicReview/2013PublicReviewDraftEIR-EIS.aspx> (last visited Jan. 3, 2016).

Fremont Weir modifications would not be incorporated as part of this alternative, because Yolo Bypass improvements contemplated in the BDCP (under CM2) would not be implemented as part of Alternative 4A; instead, they would be assumed to occur as part of the No Action Alternative because they are required by the existing BiOps (see below). For a detailed characterization of operational criteria, please refer to Table 4.1-2.

RDEIR/SDEIS at 4.1-5-6 (footnote omitted). Table 4.1-2, RDEIR/SDEIS at 4.1-7-10, lists new and existing criteria included in Alternative 4A.

One of the purposes of Alternative 4A is to

[r]estore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis Delta Mendota Water Authority, and other existing applicable agreements.

*Id.* at 1-9. The RDEIR/SDEIS elaborated on this statement of purpose:

The above phrase—*restore and protect the ability of the SWP and CVP to deliver up to full contract amounts*—is related to the upper limit of legal CVP and SWP contractual water amounts and delineates an upper bound for development of EIR/EIS alternatives, not a target. It is not intended to imply that increased quantities of water will be delivered under the proposed project. As indicated by the “up to full contract amounts” phrase, alternatives need not be capable of delivering full contract amounts on average in order to meet the project purposes. Alternatives that depict design capacities or operational parameters that would result in deliveries of less than full contract amounts are consistent with this purpose.

*Id.* at 1-9-10.

The Petitioners do not request a decision on the Petition until they have provided final environmental documents, *Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 2, which they intend to do during the course of the hearing on the Petition, *id.* at 1-2.

### III. The Petition Must Be Denied.

#### A. Standard for Granting a Petition

The Petitioners must 1) provide all information reasonably available to them, or that can be obtained from the Department of Fish and Game, concerning the extent, if any, to which fish and wildlife would be affected by the change, and a statement of any measures proposed to be taken to protect fish and wildlife in connection with the change, and 2) include sufficient information to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water. CAL. WATER CODE §§ 1701.2(c) & (d) (West). The Petitioners must establish to the Board's satisfaction, and the Board must find, that the change will not operate to the injury of any legal user of the water involved. CAL. WATER CODE § 1702 (West). While § 1702 does not expressly require a finding that the change will not unreasonably affect fish, wildlife or other instream beneficial uses, the statutes governing change petitions support the conclusion that the State Water Resources Control Board must consider the potential impacts to fish, wildlife or other instream beneficial uses in determining whether and under what conditions to approve a change petition. *In re Applications 31487 & 31488 Filed by U.S. Bureau of Reclamation, & Petitions to Change License 3723 (Application 5169) of Washoe County Water Conservation District, License 4196 (Application 9247) of Truckee Meadows Water Authority, & Permit 11605 (Application 15673) & License 10180 (Application 18006) of U.S. Bureau of Reclamation Truckee River Watershed*, Decision 1651, 2012 WL 5494093 at \*11 n.12 (Cal. St. Wat. Res. Control Bd. Oct. 16, 2012) (“Decision 1651”).

The effect of the proposed change on the rights of others is the controlling consideration in the “no injury” inquiry. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4<sup>th</sup> 674, 740, 39 Cal. Rptr. 3d 189, 242, *cert. denied*, 549 U.S. 889 (2006). Determining that effect requires resolution of two questions: 1) Does the objecting party have a right to the water involved? 2) Will the proposed change have an injurious effect on that right, whatever the source of that right may be? *See id.*, 136 Cal. App. 4<sup>th</sup> at 740, 805, 39 Cal. Rptr. at 242, 293; *see also In re Petition for Reconsideration by Truckee-Carson Irrigation District, City of Fallon, & Churchill County Regarding Water Right Decision 1651*, Order WR 2013-0009, 2013 WL 492576 at \*5 (Cal. St. Wat. Res. Control Bd. Feb. 5, 2013). The term “legal user of water” employed in CAL. WATER CODE § 1702 is not limited to the holder of an appropriative water right, but encompasses any person who legally uses the water involved, including one who uses the water pursuant to a contract with the appropriative right holder. *State Water Resources Control Bd. Cases*, 136 Cal. App. 4<sup>th</sup> at 804, 39 Cal. Rptr. 3d at 293; Decision 1651, 2012 WL 5494093 at \*14.

The Petition does not satisfy these requirements, as explained below, and therefore must be denied.

## **B. Injury to Friant Members' Right to Water**

### **1. Petitioners Cannot Demonstrate a Reasonable Likelihood that the Changes They Propose Will Not Injure Any Other Legal User of Water.**

The RDEIR/SDEIS declared that the “Friant Kern Division” [sic] of the Central Valley Project is unaffected by the BDCP alternatives. RDEIR/SDEIS at 5-41; *see also id.* at 1-9 (“The purposes of the proposed actions are to achieve the following. . . . 4. Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts . . . [under] water delivery contracts held by SWP contractors and certain members of the San Luis Delta Mendota Water Authority, and other existing applicable agreements.”). While it is true that Friant members do not receive water from the Sacramento River or the Delta, the Exchange Contractors are entitled to substitute water from those sources under the Exchange Contract. *See supra* at 9-10. Anything that diminishes the delivery of substitute water to the Exchange Contractors from the Sacramento River or the Delta injures the Friant members’ water rights under the contractual web described *supra* at 9-10, because in the event that the United States’ delivery of substitute water is interrupted temporarily, the Exchange Contractors are entitled to receive water from the San Joaquin River up to the amount of flows set forth in the schedule reserving their San Joaquin River water rights. *See Westlands Water Dist. v. Patterson*, 900 F. Supp. 1304, 1317 n.13 (E.D. Cal. 1995) (*Westlands IV*), *rev’d on other grounds*, 100 F.3d 94 (9<sup>th</sup> Cir. 1996) (*Westlands V*).

The Petitioners are unable to demonstrate a reasonable likelihood that the proposed change will not injure any other legal user of water, because as noted *supra* at 14-15, they disclosed no operations plan to be evaluated. Indeed, there is no operations plan to disclose. Rather, “Alternative 4A starting operations will be determined through the continued coordination process as outlined in the Section 7 consultation process and 2081(b) permit prior to the start of construction. An adaptive management and monitoring program, as described below, will be implemented to develop additional science during the course of project construction and operation to inform and improve conveyance facility operational limits and criteria.” RDEIR/SDEIS at 4.1-5. The parties to this Protest have no obligation to trust the Petitioners to choose the correct but as yet undefined course of action. This is a fundamental and critical deficiency in the Petition and in the environmental documents prepared to satisfy the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000 et seq. (West) (“CEQA”). Faced with uncertainty, the preparer of an environmental impact report may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives, and discloses the significant foreseeable environmental effects of each alternative and mitigation measures to minimize each adverse effect. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4<sup>th</sup> 412, 434, 150 P.3d 709, 722 (2007); *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, 190 Cal. App. 4<sup>th</sup> 316, 341, 118 Cal. Rptr. 3d 182, 201 (2010). The preparer may not simply ignore or assume a solution to the problem. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4<sup>th</sup> at 430-31, 150 P.3d at 720; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, 190 Cal. App. 4<sup>th</sup> at 341, 118 Cal. Rptr. 3d at 200.

**2. Petitioners Did Not Describe Accurately the Existing Conditions Or the Circumstances Under the No Action Alternative, Rendering Them Incapable of Demonstrating a Reasonable Likelihood that the Changes They Propose Will Not Injure Any Other Legal User of Water.**

The RDEIR/SDEIS states that there will be shortages in delivery of Sacramento River water and Delta water to south of Delta contractors in comparison to Existing Conditions.<sup>32</sup> It represents that there will be no shortages in delivery of Sacramento River water and Delta water in comparison to what it characterizes as the No Action Alternative, however.<sup>33</sup> According to the RDEIR/SDEIS, the No Action Alternative assumes that the facilities and operations of the State Water Project and Central Valley Project would continue to be similar to Existing Conditions, with the following exceptions:

- Effects of sea level rise and climate change on system operations as discussed in Section 5.3.1.1 of the Draft EIR/EIS.
- An increase in demands and the buildout of facilities associated with water rights and CVP and SWP contracts of about 443 TAF [thousand acre feet] per year, north of Delta at the future level of development. This is an increase in CVP Municipal and Industrial (M&I) service contracts (253 TAF per year) and water rights (184 TAF per year) related primarily to urban M&I use, especially in the communities in El Dorado, Placer, and Sacramento Counties.
- An increase in demands associated with SWP contracts, up to full contract amounts, south of Delta at the future level of development. SWP M&I demands, which under the existing level of development vary on hydrologic conditions between 3.0 and 4.1 MAF [million acre feet] per year, under the future condition are at maximum contract amounts in all hydrologic conditions. This represents a potential 25% increase on

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<sup>32</sup> Alternative 4A's "Existing Conditions" baseline, for analysis under CEQA, is the same as the baseline described in the Draft EIR/EIS. RDEIR/SDEIS at 4.1-42. That baseline includes existing facilities, assumptions related to the State Water Project and Central Valley Project, ongoing programs and policies by governmental and non-profit entities, and assumptions related to annual actions that vary every year that could be affected by implementation of the proposed project and alternatives. These are measured as of February 13, 2009, the publication date of the Notice of Preparation and Notice of Intent. See Draft EIR/EIS at 3D-5. As explained *infra* at 20, CEQA does not mandate reliance on the publication date to define Existing Conditions. "[T]he date for establishing baseline cannot be a rigid one." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4<sup>th</sup> 99, 125, 104 Cal. Rptr. 2d 326, 345 (2001).

<sup>33</sup> The No Action Alternative analysis for Alternative 4A is found in the RDEIR/SDEIS because Alternative 4A was first introduced in that document. RDEIR/SDEIS at 4.1-42. Alternative 4A contemplates a shorter permit period for project implementation than alternatives studied in the Draft EIR/EIS, so the RDEIR/SDEIS employs the "No Action Alternative Early Long-Term" as the point of comparison for purposes of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. ("NEPA"). RDEIR/SDEIS at 4.1-42. The RDEIR/SDEIS refers to the modeling scenario for the No Action Alternative Early Long-Term as "NAA\_ELT". *Id.* at 4.3.7-1. The Early Long-Term is modeled at 2025. *Id.* at 4.2-1 n.1. The assumed construction period for Alternative 4A facilities is 14 years, *id.* at 4.3.8-25, so the Project would not be operable before 2030 at the earliest.

average in south of Delta demands under SWP M&I contracts between existing and future levels of development due to assumed additional development and demographics.

- New urban intake/Delta export facilities:
  - Freeport Regional Water Project (see Appendix 5A, *BDCP EIR/EIS Modeling Technical Appendix*, of the Draft EIR/EIS for information on additional EBMUD demand of about 26 TAF/YR on average with increased demand in dry years)
  - 30 million-gallon-per-day City of Stockton Delta Water Supply Project
  - Delta-Mendota Canal–California Aqueduct Intertie
  - Contra Costa Water District Alternative Intake and 55 TAF/YR increased demand
  - South Bay Aqueduct rehabilitation, to 430 cfs capacity, from the junction with California Aqueduct to Alameda County Flood Control and Water Conservation District Zone 7.
- An increase in supplies for wildlife refuges including Firm Level 2 supplies of about 8 TAF per year at the future level of development. In addition, there is a shift in refuge demands from south to north (24 TAF per year reduction in south of Delta and 32 TAF per year increase in north of Delta).
- Implementation of the Fall X2 RPA action (see Appendix 5A, *BDCP EIR/EIS Modeling Technical Appendix*, of the Draft EIR/EIS), which requires maintenance of X2 at specific locations in wet and above normal years in September and October, plus releases in November to augment Delta outflow dependent on hydrology.
- Increased demands for cross-Delta water transfers, with the frequency of such transfers increasing from about 52 percent of years to 68 percent of years, and average annual transfer volume increasing from 146,000 acre-feet to 280,000 acre-feet compared to existing conditions.

*Id.* at 4.2-3-4. Several of these exceptions erroneously assume an increasing diversion of water in comparison to Existing Conditions that would interfere with deliveries to Central Valley Project contractors. Others should have been embodied in the Existing Conditions.

As the Board is already aware, water was made available to the City of Stockton Delta Water Supply Project under CAL. WATER CODE § 1485 (West). *In re Petition for*

*Reconsideration of Approval of Application 30531A & Issuance of Permit 21176 to City of Stockton*, Order No. WR 2006-0007, 2006 WL 684394 at \*8 (Cal. St. Wat. Res. Control Bd. March 8, 2006). That statute authorizes a municipality, government agency or political subdivision disposing of treated wastewater in the San Joaquin River to apply for a permit to appropriate an equal amount of water, less diminution by seepage, evaporation, transpiration or other natural causes between the point of discharge and the point of recovery, downstream of the disposal plant and out of the San Joaquin River or Sacramento-San Joaquin Delta. This caps Stockton's Delta Water Supply Project diversions at an amount it is replacing with treated wastewater. It is incorrect to assume that this project will reduce flows below Existing Conditions.

Likewise, there is no legal basis for assuming a shift in location or timing of refuge deliveries pursuant to the Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706 (Oct. 30, 1992) ("CVPIA"). Section 3406(d)(1) of the CVPIA, 106 Stat. at 4722, restricts the quantity and delivery schedules of water to wetland habitat areas to those described in accordance with Level 2 of the "Dependable Water Supply Needs" table for those habitat areas set forth in the Refuge Water Supply Report<sup>34</sup> and two-thirds of the water supply needed for full habitat development for those habitat areas identified in the San Joaquin Basin Action Plan/Kesterson Mitigation Action Plan Report.<sup>35</sup> There is no legal basis for assuming that the location or timing of deliveries to the refuge contractors may be changed absent amendment of the CVPIA.

Similarly, there is no legal basis for the assumption of the RDEIR/SDEIS that increased demands for cross-Delta water transfers will reduce the amount of CVP water available to CVP contractors. Section 3405(a)(1)(H) of the CVPIA, 106 Stat. at 4711, expressly prohibits the Secretary from approving a transfer otherwise authorized by that statute unless he or she determines that the transfer "will have no significant adverse effect on the Secretary's ability to deliver water pursuant to the Secretary's Central Valley Project contractual obligations or fish and wildlife obligations under this title because of limitations in conveyance or pumping capacity." Future transfers therefore cannot be assumed to diminish deliveries to Central Valley Project contractors because it would be unlawful for the Secretary to approve such transfers.

Moreover, "in appropriate circumstances an existing conditions analysis may take account of environmental conditions that will exist when the project begins operations . . . ." *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority*, 57 Cal. 4<sup>th</sup> 439, 452, 304 P.3d 499, 509 (2013). "Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun." *Communities for a Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4<sup>th</sup> 310, 328, 226 P.3d 985, 997 (2010); see

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<sup>34</sup> See Bureau of Reclamation, Report on Refuge Water Supply Investigations, Central Valley Hydrologic Basin, California (March 1989) at Tables IV A-1, IV B-1, IV C-1, IV D-1, IV E-1, IV F-1, IV G-1, IV H-1, IV I-1, IV J-1, IV K-1, IV L-1, IV M-1, IV N-1, and IV O-1, available at [http://www.usbr.gov/mp/cvpia/3406d/resc\\_docs/Report%20on%20Refuge%20Water%20Supply%20Investigations%20\('89%20Report\).pdf](http://www.usbr.gov/mp/cvpia/3406d/resc_docs/Report%20on%20Refuge%20Water%20Supply%20Investigations%20('89%20Report).pdf) (last visited Jan. 3, 2016).

<sup>35</sup> See Bureau of Reclamation et al., San Joaquin Basin Action Plan / Kesterson Mitigation Plan, Merced County, California (Dec. 1989) at 17-18, 23-24, 29-30, 34-35, 40-41, 46, 47, 48, 49 and 50.

also *Pfeiffer v. City of Sunnyvale City Council*, 200 Cal. App. 4<sup>th</sup> 1552, 1570-71, 135 Cal. Rptr. 3d 380, 395 (2011). The Court in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* posed a hypothetical directly relevant to inclusion of several of the cited projects in the Existing Conditions: “[I]n an EIR for a new office building, the analysis of impacts on sunlight and views in the surrounding neighborhood might reasonably take account of a larger tower already under construction on an adjacent site at the time of EIR preparation.” 57 Cal. 4<sup>th</sup> at 453, 304 P.3d at 509.

The Draft EIR/EIS was made available for public comment in December 2013. *See* 78 Fed. Reg. 75,939 (Dec. 13, 2013). The Freeport Regional Water Project Intake Facility grand opening occurred in April 2010.<sup>36</sup> The grand opening of the Vineyard Surface Water Treatment Plant, which treats water withdrawn from the Sacramento River through the Intake Facility and related pipeline, occurred in October 2011.<sup>37</sup> The Delta-Mendota Canal—California Aqueduct Intertie construction began in 2010<sup>38</sup> and was completed in April 2012.<sup>39</sup> The Contra Costa Water District Alternative Intake was completed in 2010. RDEIR/SDEIS at 3D-54. The South Bay Aqueduct rehabilitation was completed in 2012.<sup>40</sup> All of these projects were completed before (in some cases years before) the Draft EIR/EIS was completed. Their omission from the Existing Conditions for purposes of CEQA only confuses the analysis of the proposed action’s actual effect.

Their omission from the Existing Conditions also distorts the comparison between Existing Conditions and the No Action Alternative. For example, “annual Delta exports would be reduced in almost all years under the No Action Alternative (ELT) as compared to Existing Conditions.” *Id.* at 4.2-8. Delta exports for State Water Project and Central Valley Project deliveries under the No Action Alternative (ELT) are predicted to decline by 14%. *Id.* at 4.2-10; *but see id.* at 4.2-8 (“Average annual Delta exports (SWP and CVP exports through Banks and Jones Pumping Plants) under the No Action Alternative (ELT) would be reduced by about 416 TAF (8%) as compared to Existing Conditions . . . .”). “[T]he decreases in project deliveries (and consequential increase in transfer demand) are caused by (1) an increase in demands associated with water rights, the buildout of planned facilities, and greater use of existing CVP and SWP contracts which cumulatively result in about 443 TAF per year additional consumptive use per year north of Delta at the future level of development; (2) climate change and sea level rise; and (3) depending on alternative, assumption of certain added Delta outflows to benefit fish.” *Id.* at 4.2-10. The RDEIR/SDEIS describes the future upstream and in-Delta water

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<sup>36</sup> *See* <http://www.freeportproject.org/nodes/explore/timeline.php> (last visited Jan. 3, 2016).

<sup>37</sup> *See*

[http://www.pio.saccounty.net/Press%20Releases/sac\\_029771.pdf#search=vineyard%20surface%20water%20treatm ent%20plant](http://www.pio.saccounty.net/Press%20Releases/sac_029771.pdf#search=vineyard%20surface%20water%20treatm ent%20plant) (last visited Jan. 3, 2016).

<sup>38</sup> *See* Bureau of Reclamation, Draft Delta-Mendota Canal/California Aqueduct Intertie, Central Valley Project, California, Cost Allocation Information Report (Dec. 2013), Attachment A at 3, available at [http://www.usbr.gov/mp/intertie/docs/2013\\_12\\_19\\_Final\\_DRAFT\\_DMC-CA\\_CostAllocation\\_Report.pdf](http://www.usbr.gov/mp/intertie/docs/2013_12_19_Final_DRAFT_DMC-CA_CostAllocation_Report.pdf) (last visited Jan. 3, 2016).

<sup>39</sup> *See* <http://www.usbr.gov/mp/intertie/> (last visited Jan. 3, 2016).

<sup>40</sup> *See* Preliminary Administrative Draft North-of-the-Delta Offstream Storage Project Environmental Impact Report / Environmental Impact Statement (Dec. 2013) at 2-14, available at [http://water.ca.gov/storage/docs/NODOS%20Project%20Docs/NODOS\\_Prelim\\_Admin\\_Draft\\_EIR/02-Alternatives\\_Analysis\\_prelim\\_admin\\_draft\\_Dec2013\\_w\\_figures.pdf](http://water.ca.gov/storage/docs/NODOS%20Project%20Docs/NODOS_Prelim_Admin_Draft_EIR/02-Alternatives_Analysis_prelim_admin_draft_Dec2013_w_figures.pdf) (last visited Jan. 3, 2016).



demand as senior in priority to State Water Project and Central Valley Project rights. *Id.* at 4.2-11; 4.2-12.

Thus, the Petition assumes expanded demands at the expense of exports to satisfy deliveries to CVP contractors. However, the Petitioners do not identify the water rights or existing Central Valley Project or State Water Project contracts that supposedly are senior to these obligations of the United States. Nor do they identify the legal basis on which the alleged priority rests. This is yet another instance in which the Petitioners failed to demonstrate a reasonable likelihood that the proposed changes will not injure any other legal user of water. The parties to this Protest and the State Water Resources Control Board are not obliged to accept the Petitioners' characterization of the quantity of expanding demands or their priority in relation to the rights of CVP contractors.

The Exchange Contractors hold "vested, senior, contractual water rights" to substitute water, which has been supplied from the Sacramento River and Delta. *Westlands VI*, 153 F. Supp. 2d at 1158; *see also id.* at 1163, 1165-66. "[I]t is a vested first-in-time contractual *priority* right that reserves, for the purpose of establishing relative rights under California water law, the Exchange Contractor's superior status . . . as of the date of the original Exchange Contract, July 27, 1939 . . ." *Id.* at 1175 (footnote omitted). Later-in-time contracts for Central Valley Project service are subordinate. *Id.* at 1176. Whatever impact the anticipated expanding water rights and contractual use might have on Central Valley Project contractors generally, they are not senior to the Exchange Contractors' right to substitute water. The United States is bound by agreement with the Friant Division contractors not to determine itself voluntarily and knowingly incapable of delivering the substitute water to which the Exchange Contractors are entitled from water available to it from the Sacramento River and its tributaries or from the Delta. *See supra* at 9-10. It was therefore improper for the United States to submit this Petition, which contemplates delivery of less than 840,000 acre feet per year to the Exchange Contractors in other than Shasta critical years, *see infra* at 23.

### **3. Alternative 4A Would Diminish the Friant Members' Access to Water.**

The Petition, if granted, would reduce the delivery of substitute water to the Exchange Contractors and hinder the United States' ability to perform the exchange, thereby causing the Exchange Contractors to exercise their reserved rights to San Joaquin River water more often. In addition, it would increase the demand on San Joaquin River flow to maintain downstream water quality and fish habitat. These outcomes, individually and in the aggregate, would injure the Friant Division contractors, who are legal users of the San Joaquin River water under their contracts and the permits and rights held by the United States.

#### **a. Alternative 4A Would Diminish the Delivery of Substitute Water to the Exchange Contractors.**

The Petition represents that "[d]eliveries to the CVP Settlement, Refuge, and Exchange Contractors . . . will continue to be made under the terms of those agreements. This Petition does not propose any changes to any contractual obligations." *Supplemental Information for Petition*

for *Change in Point of Diversion* (Aug. 25, 2015) at 21. However, the RDEIR/SDEIS then predicts that under Alternative 4A, deliveries to the Central Valley Project Exchange Contractors would “remain” at 814,000 acre feet<sup>41</sup> for “Dry and Critical Annual (Mar-Feb)” under Existing Conditions, No Action Alternative (ELT), Alternative 4 H3 (ELT) and Alternative 4 H4 (ELT). RDEIR/SDEIS at B-40. The United States’ obligation under the Exchange Contract has never been 814,000 acre feet, nor does the delivery of 814,000 acre feet satisfy the 883,000 acre feet the United States must provide to meet its substitute water supply obligations to the Exchange Contractors and South of Delta Settlement Contractors (except in Shasta critical years).

The Petition does not reveal the source of deliveries to the Exchange Contractors, *e.g.*, Sacramento River and Delta water or San Joaquin River water or a combination of those sources. It also does not explain why deliveries to the Exchange Contractors in dry years would not meet their entitlement of 840,000 acre feet, or disclose whether deliveries to the additional South of Delta Settlement Contractors identified on Exhibit A to the Friant/SLDMWA MOU would occur, and if so, in what amount. Finally, it appears to ignore the assumed losses Reclamation used in the past when determining diversions required to meet its Exchange Contract delivery obligation. *See supra* at n.41.

The RDEIR/SDEIS projects Central Valley Project south of Delta agricultural deliveries under Alternative 4A for “Annual (Mar-Feb)” will fall short of the Existing Conditions:

Existing Conditions – 967,000 acre feet  
No Action Alternative (ELT) – 848,000 acre feet  
Alternative 4 H3 (ELT) – 949,000 acre feet  
Alternative 4 H4 (ELT) – 910,000 acre feet

RDEIR/SDEIS at B-40; *see also id.* at 5-44.

The RDEIR/SDEIS recognized that the “addition of the north Delta intakes and changes to Delta regulatory requirements under Alternative 4A change SWP and CVP Delta exports as compared to Delta exports under Existing Conditions and the No Action Alternative. *Delta exports would either remain similar or increase in wetter years and decrease in drier years under Alternative 4A as compared to exports under No Action Alternative* depending on the capability to divert water at the north Delta intakes during winter and spring months. *Total long-term average annual Delta exports under Alternative 4A would decrease as compared to exports under Existing Conditions* reflecting changes in operations due to less negative OMR [Old and Middle River] flows, implementation of Fall X2 and/or spring outflow under Alternative 4A, and sea level rise and climate change. The incremental change in Delta exports under Alternative 4A as compared to No Action Alternative would be caused by the facility and operations assumptions of Alternative 4A. Delta exports would either remain similar or increase in wetter

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<sup>41</sup> Article 8 of the Second Amended Contract for Exchange of Waters, Contract Ilr-1144, dated Feb. 14, 1968, entitles the Exchange Contractors to substitute water in an amount not to exceed 840,000 acre feet in all calendar years other than those defined as critical, and to an amount not to exceed 650,000 acre feet in critical calendar years. Reclamation in the past assumed a 10% loss in deliveries to the Exchange Contractors. *See* Bureau of Reclamation, San Luis Unit, West San Joaquin Division, Central Valley Project (Ultimate Plan), Appendix, Import Water Supply (May 1954) at 00308, 00311-12.

years and remain similar or decrease in the drier years under Alternative 4A as compared to the conditions without the project.” *Id.* at 4.3.1-4 (emphasis added).

As noted *supra* at 18, Alternative 4A is based on the assumption that increasing municipal and industrial demand north of the Delta will diminish the water available to Central Valley Project contractors south of the Delta:

Alternative 4A and the Early Long Term also assume that there would be an increase in M&I water rights demands north of the Delta, which would increase overall system demands and reduce the amount of CVP water available for export south of the Delta.

Consequently, SWP M&I deliveries under Alternative 4A are projected to increase due to increased capacity for Delta exports, while in some cases CVP deliveries south of Delta are projected to decrease due to increased water rights demands north of Delta. Consequently, SWP M&I deliveries under Alternative 4 are projected to increase due to increased Delta exports, while in some cases CVP deliveries are projected to decrease due to increased water rights demands. See Section 4.3.1., *Water Supply*, of this RDEIR/SDEIS for more detail on changes in Delta exports and SWP and CVP deliveries under Alternative 4A.

*Id.* at 4.3.26-4.

Total CVP M&I deliveries to all regions would decrease under both Alternative 4A scenarios: under Scenario H3 they would decrease by 10 TAF [thousand acre feet], and under Scenario H4 CVP M&I deliveries would decrease by 10 TAF compared to Existing Conditions. *CVP agricultural deliveries would decrease by 215 TAF under Scenario H3, and would decrease by 243 TAF under Scenario H4.*

Based on the information above, under Alternative 4A Scenario H3, net SWP and CVP deliveries would decrease by 2025. This decrease in supply is in contrast to projected increases in demand for the hydrologic regions assuming the Current Trends demand scenario. *Under Alternative 4A Scenario H4, net SWP and CVP deliveries would decrease by 2025 compared to Existing Conditions.* This decrease in supply is in contrast to projected increases in demand for the hydrologic regions assuming the Current Trends demand scenario.

*Id.* at 4.3.26-6 (emphasis added).

Alternative 4A would not alter M&I deliveries “for the Sacramento River, South Coast, South Lahontan and Colorado River regions because there are no affected CVP contractors located in these regions. Compared to Existing Conditions, Scenarios H3 and H4 would decrease deliveries to the other hydrologic regions . . . .” *Id.* at 4.3.26-4.

Since the supporting documents demonstrate that Alternative 4A would deliver 814,000 acre feet rather than the 883,000 acre feet needed to satisfy the United States’ substitute water

supply obligations to the Exchange Contractors and South of Delta Settlement Contractors, the available water supply is reduced by 69,000 acre feet, to the detriment of Friant Division contractors.

**b. Alternative 4A Would Diminish San Joaquin River Flows at Vernalis in Comparison to Existing Conditions.**

Modeling of Alternative 4A's impact on San Joaquin River mean flows at Vernalis in comparison to Existing Conditions predicts less flow at critical times of the year. That much is clear. The specifics of the prediction, as they are explained in the RDEIR/SDEIS, are materially inconsistent.

**Mean San Joaquin River Flows at Vernalis Under Alternative 4A, Scenario H3\_ELT:** *Id.* at 4.3.7-186 (mean flows generally would be similar to Existing Conditions during the period of February through May “with few exceptions (up to 12% lower),” mean flows would be lower than those under Existing Conditions in August and September (up to 14%), but similar to flows under Existing Conditions for the remaining three months); *id.* at 4.3.7-292 (in March, April and June, the mean flows of the San Joaquin River at Vernalis under that scenario generally would be up to 16% lower than those under Existing Conditions); *id.* at 4.3.7-318 (stating that March and April flows would be up to 12% lower); *id.* at 4.3.7-387, 4.3.7-412 (stating that “flows” would generally be similar or slightly lower than Existing Conditions in April and May and September through November, similar to or up to 23% lower than Existing Conditions in June, July and August); *id.* at 4.3.7-397 (flow generally would be similar to or slightly lower than Existing Conditions during March through June except in March of below normal and dry years, when flow would be 11% and 12% lower, respectively, and in June of wet and dry years when flow would be 16% and 11% lower, respectively); *id.* at 4.3.7-379 & 4.3.7-379 (in June of wet and dry years, mean flow under this scenario would be 16% and 12% lower, respectively); *id.* at 4.3.7-402 (flow would generally be similar to or slightly lower than Existing Conditions in April and May); *id.* at 4.3.7-414, 4.3.7-422, 4.3.7-428, 4.3.7-434 (flows would generally be similar to or slightly lower than Existing Conditions in April and May and September through November, similar to or up to 23% lower than Existing Conditions in February, March and June through August, and similar to or up to 11% greater than Existing Conditions in December and January).

**Mean San Joaquin River flows at Vernalis under Alternative 4A, Scenario H4\_ELT:** *Id.* at 4.3.7-251 (in March and April these flows would be up to 12% lower than Existing Conditions); *id.* at 4.3.7-393, 4.3.7-398-99 (flow would be generally similar to or slightly lower than Existing Conditions during March through June, except in March of below normal and dry years when the flow would be 11% and 12% lower, respectively, and during June of wet and dry years when flow would be 16% and 12% lower); *id.* at 4.3.7-403 (flow would generally be similar to or slightly lower than Existing Conditions in April and May); *id.* at 4.3.7-415 (San Joaquin River flows at Vernalis under this scenario would generally be lower (up to 16% lower) than Existing Conditions); *id.* at 4.3.7-415-16, 4.3.7-423, 4.3.7-429, 4.3.7-435-36 (flow would generally be similar to or slightly lower than Existing Conditions in January, April, May and September through November, similar to or up to 23% lower than Existing Conditions in February, March and June through August, and similar to or 12% higher (wet years) in

December); *id.* at 4.3.7-228 (mean flows would be up to 23% lower during June through August, depending on the year type, than flows under Existing Conditions).

The RDEIR/SDEIS, in evaluating the cumulative impact of Alternative 4A on covered fish species, acknowledged that the alternative would reduce river flows. As the following quotation indicates, its response was to couple Alternative 4A with Mitigation Measure AQUA-78d:

Under Alternative 4A, there are modeled flow reductions, but the changes can be mitigated by slight shifts in the timing of Shasta, Folsom, and/or Oroville Reservoir releases that would not fundamentally change the alternative, but that would ameliorate changes in instream flows that would cause an adverse effect on fall-run Chinook salmon. Based on the timing of the modeled flow fluctuations, it is expected that adjustments to minimize drastic changes in releases during operations among various months in which there are increases and decreases in flow, will minimize or avoid substantial reductions in flow without effects on existing applicable regulations or operations. Mitigation Measure AQUA-78d is included in Alternative 4A (Impact AQUA-78). Combined with ongoing CVP operations, and other activities that have the potential to reduce in-stream flows, there is a potential for a cumulative effect from Alternative 4A. However, Mitigation Measure AQUA-78d would ensure that Alternative 4A's contribution to this cumulative effect is not considerable.

*Id.* at 5-116. Measure AQUA-78d is inapplicable to the San Joaquin River. *Id.* at 4.3.7-193.

**c. Alternative 4A Would Result in Deteriorating Water Quality Downstream, and Would Impose Increased Delta Outflow and Instream Flow Requirements.**

“Relative to Existing Conditions, Alternative 4A would result in an increase in the number of days the Bay-Delta WQCP [Water Quality Control Plan] EC [electrical conductivity, an indication of salinity] objectives would be exceeded in the Sacramento River at Emmaton, and in the San Joaquin River at San Andreas Landing.” *Id.* at 4.3.10-2. “Relative to the No Action Alternative (ELT), the percent of days exceeding EC objectives or percent of days out of compliance would increase at the Sacramento River at Emmaton, San Joaquin River at San Andreas Landing, and Old River near Middle River and at Tracy Bridge . . . . The increase in percent of days exceeding the EC objective would be 5% or less at these locations, depending on the operational scenario (i.e., H3 or H4). The increase in percent of days out of compliance would be 7% or less at these locations, depending on the operational scenario.” *Id.* at 4.3.10-3.

More generally,

[t]he periodic changes in flows in the Sacramento River, Feather River, and American River associated with modified reservoir operations, and the increased diversion of Sacramento River flows at north Delta intakes associated with Alternative 4A would affect salinity, water temperature, dissolved oxygen levels,

turbidity, contaminant levels and dilution capacity in these rivers and Delta waterways. . . . Potentially substantial increases in electrical conductivity (salinity) are predicted for the west Delta and Suisun Marsh as a result of these changed water operations. These salinity changes may alter the plant composition of riparian habitats along the lower Sacramento and San Joaquin Rivers and west Delta islands. The severity and extent of these salinity changes would be complicated by anticipated sea level rise and the effects of downstream tidal restoration over the life of the Project.

*Id.* at 4.3.8-20-21; *see also id.* at 4.3.8-117, 4.3.8-120.

Alternative 4A incorporates not only existing criteria from the 2008 and 2009 BiOps (including Fall X2), but “adds additional criteria for spring outflow and new minimum flow criteria at Rio Vista from January through August.” *Id.* at 4.1-6.<sup>42</sup> Obviously the San Joaquin River contributes inflow to the Delta. *Id.* at 4.1-10. The RDEIR/SDEIS acknowledged that increasing the Delta outflow objective as part of the Bay-Delta Water Quality Control Plan Update process could impact State Water Project and Central Valley Project water users. *E.g.*, *id.* at 5-38, 5-64, 5-69. There is no reason to assume that increasing the Delta outflow as part of Alternative 4A would have a different outcome.

#### **4. Alternative 4A Would Defeat the Priority of Friant Division Contractors’ Entitlement to Water.**

The Petitioners, through a combination of an erroneous definition of Existing Conditions, an improper assumption of expanding uses, and an arbitrary prediction of future Delta outflow requirements, launched a process that, if permitted to go forward, would effectively nullify the priority of Friant Division entitlements by improperly reducing deliveries of substitute water to the Exchange Contractors. The Exchange Contractors are entitled to exercise their reserved water rights under specified conditions if the United States fails to meet its obligation under the Exchange Contract. As noted *supra* at 23, the RDEIR/SDEIS makes clear that Alternative 4A does not contemplate full satisfaction of the Government’s obligation to the Exchange Contractors, and appears not to have even taken into account the United States’ obligation to the South of Delta Settlement Contractors: the RDEIR/SDEIS claims that, when the proposed project is implemented, the United States will be able to deliver only 814,000 acre feet to satisfy all these claims, instead of the 883,000 acre feet necessary to satisfy these prior vested claims. Thus, according to the Petitioners’ own documents and the United States’ prior admissions, the project as currently proposed will result in a shortfall to the Exchange Contractors and South of Delta Settlement Contractors of more than 69,000 acre feet in years that are not Shasta critical years, without even accounting for the losses associated with delivery of the required substitute water. *See supra* at n.41. The net effect of these components of the proposed project is to shift water entitlement from the senior Friant Division contractors to junior users in the Central Valley Project and State Water Project, because the shortfall in deliveries of substitute water to the Exchange Contractors would render the United States temporarily unable to perform its

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<sup>42</sup> The Petition’s inclusion of new instream flow and Delta outflow standards belies its contention that it “does not pre-ordain or preclude any outcomes” in the Bay/Delta Water Quality Control Plan update process. *See Supplemental Information for Petition for Change in Point of Diversion* (Aug. 25, 2015) at 9-10.

obligations under the exchange and could result in the Exchange Contractors exercising reserved rights to the San Joaquin River water on which the Friant Division contractors rely and to which they are entitled. The RDEIR/SDEIS concedes that “[w]here there are reduced deliveries to agricultural contractors, it is reasonable to expect that agricultural production in affected areas would also decline, with potential resultant changes in employment, labor income, community character, and local government fiscal conditions.” *Id.* at 4.2-60-61. Since the Petition and its supporting documents acknowledge injury to the Friant Division contractors, who are legal users of water, the Petition must be denied.

### **TERMS AND CONDITIONS UNDER WHICH THIS PROTEST MAY BE DISREGARDED OR DISMISSED**

The Form of Protest inquires under what conditions this Protest may be disregarded or dismissed. The parties to this Protest respond as follows:

The State of California through the California Department of Water Resources (“DWR”) and the United States through the Department of the Interior, Bureau of Reclamation (“United States”) have petitioned the State Water Resources Control Board for changes to specified water permits that would allow them to divert and redivert water at new points of diversion for the State Water Project (“SWP”) and Central Valley Project (“CVP”) in furtherance of the project entitled the California WaterFix Project (“Project”).

Normally the United States sets forth its proposed operations for the CVP in the Operations Criteria and Plan (“OCAP”). That process provides potentially affected contractors, which are the legal users of CVP water, written notice and an opportunity to review, comment and be heard on the proposed operational parameters and how a potential change in project operations might affect them. The materials submitted to the Board with the Petition do not include any operations plan explaining how the SWP and CVP will be operated once the proposed new facilities and points of diversion and rediversion are constructed and operational, nor have the Petitioners made any attempt to model the potential impacts of those operations. This poses much difficulty for the legal users of CVP water, which would be affected adversely by the proposed facilities and changes to the existing water right permits.

The Friant members have developed terms and conditions that must be incorporated into any revised permits approved by the Board in response to the Petition, to prevent injury to them as legal users of CVP water.

The proposed construction of new facilities also would require a reexamination of joint project operations under the Coordinated Operations Agreement (“COA”). A determination of how benefits of the Project are to be shared between the SWP and CVP under the COA will dictate the extent of injury that the Project will inflict on the Friant Division contractors, and other CVP contractors. The Petition was filed even though the review of, and likely subsequent negotiations for the amendments to the COA have only just begun, and no agreement has been reached. To avoid injury to legal users of CVP water resulting from the Project and associated changes in water permits to accommodate the proposed new facilities, each of the specified water permits must include terms and conditions encompassing the following principles.

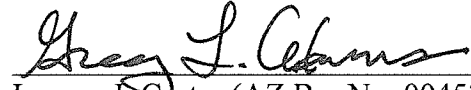
1. Any permit issued in response to the Petition shall be subject to vested rights, including without limitation rights vested under the Friant Division long-term contracts and the Exchange Contract.
2. All rights and privileges under any permit issued in response to the Petition are subject to the continuing authority of the State Water Resources Control Board in accordance with law and in the interest of the public welfare.
3. No permit issued in response to the Petition shall alter the quantity or timing of diversion, place of use, return flows, or consumptive uses of water in the State Water Project and Central Valley Project as established by existing water right determinations.
4. Existing obligations shall continue to be met and beneficial uses of water shall not be impacted negatively by operations under any permit issued in response to the Petition. Without limiting the generality of the preceding sentence, there shall be no changes to any contractual obligations as a result of the granting of all or any part of the Petition.
5. Any operations plan developed as a result of granting all or any part of the Petition shall not injure any legal user of water.
6. Consistent with its obligations to the Friant Division long-term contractors under the terms of the Friant Division repayment contracts and water service contracts, the United States shall not deliver waters of the San Joaquin River to the Exchange Contractors (as identified under the Exchange Contract), unless and until required by the terms of the Exchange Contract.
7. Consistent with its obligations to the Friant Division long-term contractors under the terms of the Friant Division repayment contracts and water service contracts, the United States shall not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors, from water that is available or that may become available to the United States from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta, those quantities of substitute water required to satisfy the obligations of the United States under the Exchange Contract.
8. The United States acknowledges that the federal courts have resolved numerous issues arising from establishment and operation of the CVP and SWP, and that those decisions are final and binding. Among those decisions are: *Westlands Water Dist. v. United States*, 805 F. Supp. 1503 (E.D. Cal. 1992) (*Westlands 0*), *aff'd*, 10 F.3d 667 (9<sup>th</sup> Cir. 1993) (*Westlands I*); *Westlands Water Dist. v. United States*, 850 F. Supp. 1388 (E.D. Cal. 1994) (*Westlands II*); *Westlands Water Dist. v. Patterson*, 864 F. Supp. 1536 (E.D. Cal. 1994) (*Westlands III*); *Westlands Water Dist. v. Patterson*, 900 F. Supp. 1304 (E.D. Cal. 1995) (*Westlands IV*), *rev'd*, 100 F.3d 94 (9<sup>th</sup> Cir. 1996) (*Westlands V*); *Westlands Water Dist. v. United States*, 153 F. Supp. 2d 1133 (E.D. Cal. 2001) (*Westlands VI*), *aff'd*, 337 F.3d 1092 (9<sup>th</sup> Cir. 2003) (*Westlands VII*).



9. Any permit revised in response to the Petition shall be subject to Water Rights Decisions D-935 and D-990.
10. The United States acknowledges and agrees that the operation of the Friant Division have never been fully integrated with the operation of the remaining units of the CVP. Through this Petition, the United States has not sought the permission of the State Water Resources Control Board to integrate the Friant Division operation with the operation of the other units of the CVP, and the United States shall not seek to do so in the future unless each of the Friant Division contractors agrees to support operational integration of the Friant Division into the CVP.
11. The United States and DWR must ensure that the COA, as amended:
  - a. Honors the United States' legal obligation to treat the Exchange Contractor substitute supply as a "vested priority obligation" that the United States must satisfy, consistent with the terms of the Exchange and Purchase Contracts, without including it in the CVP available supply;
  - b. Specifies that only the "CVP available supply" is subject to sharing under the COA;
  - c. Does not apply the percentages developed for Sacramento Valley in-basin uses outside of the context for which they were developed;
  - d. Provides a new means of sharing responsibility for requirements such as Delta outflow (and other water quality flows) and Delta pumping constraints, and the sharing of those burdens must be equitable to both the CVP and SWP. Current percentages are not proportional between the CVP and SWP and negatively impact the CVP; the COA must be amended to correct that inequity;
  - e. Provides for sharing of responsibility for Sacramento Valley in-basin uses that is fair to the CVP and SWP. The COA, as amended, cannot assign the CVP direct or indirect responsibility for meeting SWP's senior water right obligations or the indirect effects caused by DWR's allocation decisions, such as occurred in 2014 where DWR's decision to increase the allocation to Feather River Settlement Contractors (SWP Contractors) to 100% imposed increased Delta Water Quality and outflow obligations on the CVP.
12. Consistent with the multi-party water user agreement reached in 2006, San Joaquin River Restoration Flows entering the Delta must be recognized as CVP water. For purposes of CVP exports and COA accounting, the United States must ensure that San Joaquin River Restoration Flows are not subject to use by contractors outside the Friant Division or by the United States as offsets for COA obligations.

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