

1 STEPHAN C. VOLKER (CSB #63093)
 ALEXIS E. KRIEG (CSB #254548)
 2 STEPHANIE L. CLARKE (CSB #257961)
 JAMEY M.B. VOLKER (CSB #273544)
 3 LAW OFFICES OF STEPHAN C. VOLKER
 1633 University Avenue
 4 Berkeley, California 94703
 Tel: 510/496-0600
 5 Fax: 510/845-1255

6 Attorneys for Plaintiffs
 NORTH COAST RIVERS ALLIANCE, CALIFORNIA
 7 SPORTFISHING PROTECTION ALLIANCE, PACIFIC
 COAST FEDERATION OF FISHERMEN'S
 8 ASSOCIATIONS, SAN FRANCISCO CRAB BOAT
 OWNERS ASSOCIATION, INC., and INSTITUTE
 9 FOR FISHERIES RESOURCES

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12 FRESNO DIVISION

13 NORTH COAST RIVERS ALLIANCE,
 14 CALIFORNIA SPORTFISHING
 PROTECTION ALLIANCE, PACIFIC
 15 COAST FEDERATION OF
 FISHERMEN'S ASSOCIATIONS, SAN
 16 FRANCISCO CRAB BOAT OWNERS
 ASSOCIATION, INC., and INSTITUTE
 17 FOR FISHERIES RESOURCES,

18 Plaintiffs,

19 v.

20 UNITED STATES DEPARTMENT OF
 THE INTERIOR, and UNITED STATES
 21 BUREAU OF RECLAMATION,

22 Defendants,

23 WESTLANDS WATER DISTRICT, SAN
 LUIS WATER DISTRICT, and PANOCHÉ
 24 WATER DISTRICT,

25 Intervenor-Defendants.
 26 _____
 27
 28

) Civ. No. 16-cv-307-DAD-SKO

) **[PROPOSED] SECOND**
) **AMENDED AND**
) **SUPPLEMENTAL COMPLAINT**
) **FOR DECLARATORY AND**
) **INJUNCTIVE RELIEF**

) Judge Dale A. Drozd

1 **INTRODUCTION**

2 1. Plaintiffs NORTH COAST RIVERS ALLIANCE, CALIFORNIA
3 SPORTFISHING PROTECTION ALLIANCE, PACIFIC COAST FEDERATION OF
4 FISHERMEN’S ASSOCIATIONS, SAN FRANCISCO CRAB BOAT OWNERS
5 ASSOCIATION, INC., and INSTITUTE FOR FISHERIES RESOURCES (collectively,
6 “plaintiffs”) hereby sue defendants UNITED STATES DEPARTMENT OF THE
7 INTERIOR and UNITED STATES BUREAU OF RECLAMATION (collectively,
8 “Reclamation”) for violations of the National Environmental Policy Act (“NEPA”), 42
9 U.S.C. section 4321 et seq., and the Central Valley Project Improvement Act
10 (“CVPIA”), Public Law No. 102-575, 108 Stat. 4600, Title XXXIV (1992). Plaintiffs
11 challenge, under the Administrative Procedure Act (“APA”), 5 U.S.C. sections 701-706,
12 three sets of decisions by Reclamation that allow environmentally harmful diversions by
13 Reclamation’s Central Valley Project of massive quantities of freshwater from the Delta
14 formed by the Sacramento and San Joaquin rivers for consumptive use without the
15 comprehensive environmental reviews required by NEPA and the CVPIA.

16 2. First, plaintiffs seek this Court’s judgment overturning Reclamation’s
17 approval in 2016 of six water service contracts based on Reclamation’s deficient
18 Revised Environmental Assessment (“2016 Revised EA”) and Finding of No
19 Significant Impact (“FONSI,” collectively “2016 EA and FONSI”). Reclamation calls
20 this project the *Central Valley Project Interim Renewal Contract for Westlands Water*
21 *District, Santa Clara Valley Water District, and Pajaro Valley Water Management*
22 *Agency 2016-2018* (“2016 interim contracts”). The 2016 interim contracts reauthorize
23 two years of water delivery from Reclamation’s Central Valley Project (“CVP”) to
24 Pajaro Valley Water Management Agency, Santa Clara Valley Water District, and
25 Westlands Water District (collectively, the “interim contractors”). The 2016 EA and
26 FONSI violate NEPA because (1) they fail to fully consider and disclose the
27 environmental consequences of the reduced-contract-quantity and no-action alternatives
28 as required by this statute; (2) they fail to consider a reasonable range of alternatives;

1 (3) their statement of purpose and need is inadequate; (4) they ignore the Project’s
2 environmental impacts outside the contractors’ delivery and service areas; (5) they fail
3 to disclose the environmental impacts of the Project on source watersheds; (6) they fail
4 to fully analyze and disclose the Project’s impact on listed species including the giant
5 garter snake and the California least tern; (7) they fail to consider the extent to which
6 climate change will affect the environmental impacts of the Project; and (8) they do not
7 disclose the cumulative impacts of an extended series of interim contract renewals. As a
8 consequence of these erroneous assumptions, omissions and mischaracterizations, the
9 2016 EA and FONSI erroneously conclude that water deliveries under the interim
10 contracts will have *no effect on the environment*.

11 3. Second, plaintiffs seek this Court’s judgment overturning Reclamation’s
12 reauthorization in 2020 of these same six interim water service contracts based on
13 Reclamation’s deficient 2020 Environmental Assessment (“2020 EA”) and FONSI
14 (“2020 FONSI,” and collectively with the 2020 EA, the “2020 EA and FONSI”) for
15 another two years. The 2020 EA and FONSI violate NEPA in the same eight respects as
16 the 2016 EA and FONSI, as summarized above. For more than two decades,
17 Reclamation has been using these interim contracts and their similar predecessors to
18 avoid preparation of the long-overdue Environmental Impact Statement (“EIS”) that
19 would otherwise be required by NEPA and the CVPIA for approving long-term
20 contracts under the CVPIA. Congress required Reclamation to conduct a thorough
21 environmental review of the impacts of entering into long-term contracts and then to
22 enter into those contracts with appropriate mitigations based on that comprehensive
23 review. Nearly thirty years later, Reclamation still has not completed this task, relying
24 instead on repeated renewals of the interim contracts without adequate environmental
25 review. Reclamation may not evade meaningful environmental review under NEPA by
26 entering into an assembly-line cycle of interim contracts based on essentially
27 meaningless EAs that ignore those contracts’ significant individual and cumulative
28 environmental impacts.

1 4. Third, plaintiffs seek this Court’s judgment overturning Reclamation’s
2 decision on or about February 28, 2020 to enter into permanent repayment (or
3 “conversion”) contracts with intervenor-defendant Westlands Water District
4 (“Westlands”), East Bay Municipal Utility District, City of Folsom, Placer County
5 Water Agency, City of Roseville, Sacramento County Water Agency, Sacramento
6 Municipal Utility District, and San Juan Water District, and decisions on or about May
7 29, 2020 and later, to enter into additional conversion contracts with
8 intervenor-defendant Westlands and others, effective on or about June 1, 2020 and later,
9 without: (1) conducting the environmental review required by NEPA and the CVPIA,
10 (2) requiring the contractors to first obtain and provide court judgments validating the
11 repayment contracts as required under 43 U.S.C. §§ 423e and 511, and (3) complying
12 with other requirements of Reclamation Law. Plaintiffs are informed and believe that
13 Reclamation is approving and entering into scores of other repayment contracts
14 similarly without compliance with NEPA, the CVPIA, and other requirements of
15 Reclamation Law, and accordingly seek declaratory and injunctive relief against those
16 ongoing unlawful approvals as well.

17 5. With respect to the first of these three grounds for Plaintiffs’ challenge to
18 the repayment contracts—Reclamation’s failure to conduct the environmental analysis
19 required by NEPA and the CVPIA—Reclamation entered, and is entering, into these
20 repayment contracts to supersede the 2020 EA and FONSI (and other similar interim
21 contract EAs and FONSI), and to replace the 2020 interim water service contracts
22 between these parties and other similar interim water contracts, without conducting
23 required environmental reviews. Reclamation failed to conduct *any* environmental
24 analysis in connection with its approval of the repayment contracts, despite the
25 requirements of NEPA and the CVPIA that it do so, on the fallacious grounds that it
26 lacked discretion to conduct the environmental reviews required by NEPA and the
27 CVPIA. This Court should reject Reclamation’s erroneous claims of impotence to
28 conduct an adequate environmental review and remedy Reclamation’s error by setting

1 aside its unlawful approval of the repayment contracts and ordering Reclamation to
2 comply with NEPA and the CVPIA.

3 6. With respect to the second of Plaintiffs’ three grounds for challenging the
4 repayment contracts—Reclamation’s failure to require the contractors to obtain
5 validation judgments— Reclamation has failed to require the contractors to secure
6 validation judgments confirming their authority to enter into those contracts despite its
7 plain statutory duty to do so. Section 423e of Title 43 of the United States Code
8 provides in pertinent part that “[n]o water shall be delivered [by a federal reclamation
9 project] until a contract or contracts in form approved by the Secretary of the Interior
10 shall have been made with an irrigation district or irrigation districts organized under
11 State law providing for payment by the district or districts of the cost of constructing,
12 operating and maintaining the works during the time they are in control of the United
13 States . . . , and the execution of said contract or contracts shall have been confirmed by
14 a court of competent jurisdiction.” Section 511 similarly provides in pertinent part that
15 “[i]n carrying out the purposes of the Act of June 17, 1902 (32 Stat. 388), and Acts
16 amendatory thereof and supplementary thereto, and known as the reclamation law,
17 no contract with an irrigation district under this section [511] and sections 512 and 513
18 of this title [title 43 of the United States Code] shall be binding on the United States
19 until the proceedings on the part of the district for the authorization of the execution of
20 the contract shall have been confirmed by decree of a court of competent jurisdiction, or
21 pending appellate action if ground for appeal be laid.” Reclamation failed to comply
22 with both of these statutes when it entered into the repayment contracts.

23 7. With respect to the third of Plaintiffs’ three grounds for challenging the
24 repayment contracts, Reclamation failed to comply with several other requirements of
25 Reclamation Law. First, Reclamation failed to make the repayment contracts as
26 ultimately modified available for public review prior to their approval in violation of 43
27 C.F.R. § 426.22(b) and(d), which respectively direct in pertinent part that Reclamation
28 must “[p]rovide copies of revised proposed contracts to all parties who requested copies

1 of the proposed contract in response to the initial notice,” and insure that “[a]nyone can
2 get copies of a proposed contract from the appropriate regional director. . . .”

3 8. Second, Reclamation’s repayment contract with Westlands exceeds by
4 more than 200,000 acres the maximum acreage authorized to receive Central Valley
5 Project water by Congress in the San Luis Act of 1960, Public law No. 86-466, 74 Stat.
6 156 (1960).

7 9. Third, Reclamation’s repayment contract with Westlands fails, and its
8 repayment contracts with other contractors fail, to assure Westlands’ and the other
9 contractors’ compliance with applicable water quality standards as required by the
10 CVPIA. The CVPIA provides in 43 U.S.C. § 3405(c) that “[a]ll Central Valley Project
11 water service or repayment contracts for agricultural, municipal or industrial purposes
12 that are entered into, renewed, or amended under any provision of Federal Reclamation
13 law after the date of enactment of this title, shall provide that the contracting district or
14 agency shall be responsible for compliance with all applicable State and Federal water
15 quality standards applicable to surface and subsurface agricultural drainage discharges
16 generated within its boundaries.” The CVPIA directs further in 43 U.S.C. § 3404(c)(2)
17 that “[u]pon renewal of any long-term repayment or water service contract providing for
18 the delivery of water from the Central Valley Project, the Secretary shall incorporate all
19 requirements imposed by existing law, including provisions of the title, within such
20 renewed contracts.”

21 10. Contrary to these mandates, Reclamation’s repayment contract with
22 Westlands does not, and its repayment contracts with other contractors do not, expressly
23 incorporate any specific State or Federal water quality standards. Instead, its repayment
24 contracts leave implementation of such standards to the discretion of Reclamation’s
25 contracting officer, and to Westlands and the other contractors. But applicable water
26 quality standards and permit requirements are not discretionary under the law. And,
27 they are being violated by Reclamation’s excessive diversions of water from the Delta
28 for delivery to its contractors, and by the contaminated agricultural drainage that has

1 resulted in the past, and will foreseeably result in the future, from those diversions and
2 deliveries.

3 11. In sum, Reclamation's environmental review of the interim contracts has
4 been a meaningless charade, devoid of any effective disclosure and analysis of the
5 interim contracts' cumulative adverse effects, and of alternatives and mitigations that
6 would avoid or reduce those effects. Even worse, Reclamation evaded and is evading
7 environmental review altogether in approving the successor repayment contracts.
8 Reclamation violated and is violating Congress's clear mandate that any such contracts
9 first be validated by a court judgment, comply with other procedural and substantive
10 standards of Reclamation Law, and assure thorough public review and implementation
11 of federal water quality standards. Plaintiffs seek speedy adjudication of this matter to
12 address and reverse the accelerating decline of water quality and fish and wildlife
13 caused by the water diversions authorized by the interim contracts and the repayment
14 contracts.

15 **JURISDICTION AND VENUE**

16 12. The Court has jurisdiction over this action under 28 U.S.C. sections 1331
17 (federal question), 1337 (regulation of commerce), 1346 (United States as defendant),
18 1361 (mandamus against an officer of the United States), 2201 (declaratory judgment),
19 and 2202 (injunctive relief), and under the APA, 5 U.S.C. sections 701-706, because (1)
20 the action arises under the APA, NEPA and the CVPIA; (2) Reclamation is an agency of
21 the United States government and the individual defendants are sued in their official
22 capacities as officers of the United States; (3) the action seeks a declaratory judgment
23 that Reclamation's 2016 EA and FONSI and 2020 EA and FONSI are inadequate; and
24 (4) the action also seeks declaratory and injunctive relief declaring unlawful and
25 vacating Reclamation's approval of the repayment contracts because they violate the
26 requirements of NEPA and the CVPIA.

27 13. Venue is proper in this judicial district pursuant to 28 U.S.C. sections
28 1391(b)(2) and 1391(e)(2) because a substantial part of the events giving rise to

1 plaintiffs' claims occurred, and a substantial part of the property that is the subject of
2 the action is situated, in this judicial district.

3 14. The parties have an actual, justiciable controversy. Plaintiffs are entitled to
4 a declaration of their rights and of Reclamation's obligations, and to injunctive relief to
5 enforce Reclamation's statutory duties and prevent further irreparable environmental
6 harm.

7 15. This Complaint is timely filed within the applicable six-year statute of
8 limitations set forth in 28 U.S.C. section 2401(a). Reclamation approved the 2016
9 interim contracts on or about February 29, 2016, and Reclamation signed the updated
10 FONSI based on the deficient Revised EA on May 31, 2017. Reclamation issued the
11 2020 EA and signed the 2020 FONSI on or about February 24, 2020, and approved the
12 2020 interim contracts effective March 1, 2020. Reclamation commenced approving
13 the repayment contracts on or about February 28, 2020, with an effective date on or
14 about June 1, 2020, and, on information and belief, has subsequently approved scores of
15 additional repayment contracts.

16 16. Plaintiffs have standing to assert their claims because they suffer tangible
17 harm from Reclamation's violations of law as alleged herein. Plaintiffs' interests in
18 restoring water quality and quantity and dependent fish and wildlife species in the Bay-
19 Delta and its tributary rivers and watershed will continue to be harmed by the massive
20 diversions of public water permitted by the interim contracts and repayment contracts.
21 The contracts' diversion and consumptive use of vast quantities of freshwater not only
22 harm fish and wildlife directly through reduced freshwater flows in the Delta and
23 entrainment at the pumping plants. The contracts also harm plaintiffs indirectly through
24 the discharge of polluted return flows from the contractors' use of the diverted water for
25 irrigation of contaminated soils in the southern and western San Joaquin Valley. A
26 ruling from this Court requiring Reclamation to conduct a thorough environmental
27 review of these impacts as required by NEPA and the CVPIA would redress plaintiffs'
28 harms in several ways. First, Reclamation would be required to disclose and analyze the

1 harms that the contracts cause to the Delta and its watershed and their fish and wildlife.
2 Second, Reclamation would be ordered to evaluate less harmful alternatives and
3 consider mitigation measures to avoid or reduce the harms that the contracts cause.
4 Third, Reclamation would be ordered to comply with the environmental restrictions on
5 its diversions of water from the Delta that are set forth in the CVPIA, thereby conferring
6 environmental benefits, including protection of water quality and dependent fish and
7 wildlife, on plaintiffs.

8 17. Plaintiffs have suffered and are suffering procedural injuries due to
9 Reclamation's failure to fulfill its NEPA and CVPIA duties. As explained in *Hall v.*
10 *Norton*, "plaintiff[s] seeking to enforce a procedural requirement the disregard of which
11 could impair a separate concrete interest of theirs, can establish standing without
12 meeting all the normal standards for redressability and immediacy. Instead, they need
13 only establish the reasonable probability of the challenged action's threat to [their]
14 concrete interest." 266 F.3d 969, 975 (9th Cir. 2001) (quotation marks and citations
15 omitted); see also *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir.
16 2011) ("Once a plaintiff has established an injury in fact under NEPA, the causation and
17 redressability requirements are relaxed"). Plaintiffs' interests in the preservation and
18 restoration of water quality and quantity and dependent fish and wildlife species in the
19 Bay-Delta and its watershed are just such "concrete interests." *Hall v. Norton*, 266 F.3d
20 at 975.

21 18. Plaintiffs have associational standing because (1) their members would
22 have standing to sue in their own right to seek redress for the injuries outlined above;
23 (2) the interests at stake are germane to plaintiffs' purposes, as detailed below; and (3)
24 neither the claims asserted nor the relief requested requires the participation of
25 plaintiffs' members in this lawsuit. *Western Watersheds Proj. v. Kraayenbrink*, 632
26 F.2d 472, 482-485 (9th Cir. 2010).

27 19. Plaintiffs have exhausted available administrative remedies. Moreover, the
28 exhaustion requirement is inapplicable, because Reclamation had independent

1 knowledge of the legal defects described below, and because those defects are
2 procedural in nature. *‘Ilio‘ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092-1093
3 (9th Cir. 2006).

4 **PARTIES**

5 20. Plaintiff NORTH COAST RIVERS ALLIANCE (“NCRA”) is a non-profit
6 unincorporated association with members throughout Northern California. NCRA was
7 formed for the purpose of protecting California’s rivers and their watersheds from the
8 adverse effects of excessive water diversions, ill-planned urban development, harmful
9 resource extraction, pollution, and other forms of degradation. Its members use and
10 enjoy California’s rivers and watersheds for recreational, aesthetic, scientific study, and
11 related non-consumptive uses. The interests of NCRA and its members have been, are
12 being, and unless the relief requested herein is granted, will be adversely affected and
13 injured by Reclamation’s approval of the interim contracts and repayment contracts (and
14 its threatened future approvals of other repayment contracts) without proper NEPA
15 review and CVPIA compliance, and by the contracts’ consequent unexamined and
16 inadequately mitigated impacts on the environment.

17 21. Plaintiff PACIFIC COAST FEDERATION OF FISHERMEN’S
18 ASSOCIATIONS (“PCFFA”) is a non-profit, tax-exempt corporation which represents
19 a coalition of 14 fishermen’s organizations in California, Oregon, and Washington with
20 a combined membership of more than 750 fishing men and women. Each of its
21 members depends on the ocean’s fishes for his or her livelihood. PCFFA has a vital and
22 direct interest in Reclamation’s environmental review and management of the CVP
23 because its operation directly affects water quality and quantity in the Central Valley
24 and Bay-Delta and the health and population of anadromous fishes including salmon
25 and steelhead on which PCFFA’s members rely for their sustainable harvest of the
26 ocean’s fishes. The interests of PCFFA and its members have been, are being, and
27 unless the relief requested herein is granted, will be adversely affected and injured by
28 Reclamation’s approval of the interim contracts and repayment contracts (and its

1 threatened future approvals of other repayment contracts) without proper NEPA review
2 and CVPIA compliance, and by the contracts' consequent unexamined and inadequately
3 mitigated impacts on the environment.

4 22. Plaintiff SAN FRANCISCO CRAB BOAT OWNERS ASSOCIATION,
5 INC. ("Crab Boat Owners Association") is a California corporation whose members rely
6 on a sustainable harvest of crustaceans and fishes from San Francisco Bay and the
7 Pacific Ocean for their livelihoods. The Crab Boat Owners Association has been
8 protecting the rich seafood fisheries of San Francisco Bay and the Pacific Ocean since
9 1913. The Crab Boat Owners Association's members operate small, family-owned
10 fishing boats that catch Dungeness crab, wild California king salmon, herring, and many
11 other fish species that live in the cold waters of San Francisco Bay and the Pacific
12 Ocean. Its members are also actively involved in community education, and fishing
13 resource advocacy to ensure that the rich heritage of commercial fishing for Bay Area
14 residents will survive for future generations. The interests of the Crab Boat Owners
15 Association and its members have been, are being, and unless the relief requested herein
16 is granted, will be adversely affected and injured by Reclamation's approval of the
17 interim contracts and repayment contracts (and its threatened future approvals of other
18 repayment contracts) without proper NEPA review and CVPIA compliance, and by the
19 contracts' consequent unexamined and inadequately mitigated impacts on the
20 environment.

21 23. Plaintiff INSTITUTE FOR FISHERIES RESOURCES ("IFR") is a non-
22 profit public benefit corporation headquartered in San Francisco, California. Since
23 1993, IFR has engaged in fishery research and conservation activities for working
24 fishing men and women. IFR works on conservation projects and policy issues at the
25 regional, national and international levels, with a particular focus on salmon protection
26 and water diversions. The interests of IFR and its members have been, are being, and
27 unless the relief requested herein is granted, will be adversely affected and injured by
28 Reclamation's approval of the interim contracts and repayment contracts (and its

1 threatened future approvals of other repayment contracts) without proper NEPA review
2 and CVPIA compliance, and by the contracts' consequent unexamined and inadequately
3 mitigated impacts on the environment.

4 24. Plaintiff CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
5 (“CSPA”) is a non-profit corporation organized under the laws of the State of
6 California. CSPA has thousands of members who reside and recreate throughout
7 California. CSPA’s members are citizens who, in addition to being duly licensed sport
8 fishing anglers, are interested in the preservation and enhancement of California’s
9 public trust fishery resources and vigorous enforcement of California’s environmental
10 laws. CSPA members have been involved for decades in public education and advocacy
11 efforts to protect and restore the public trust resources of California’s rivers. CSPA
12 members use California’s rivers and the Bay-Delta for recreation, scientific study and
13 aesthetic enjoyment. The interests of CSPA and its members have been, are being, and
14 unless the relief requested herein is granted, will be adversely affected and injured by
15 Reclamation’s approval of the interim contracts and repayment contracts (and its
16 threatened future approvals of other repayment contracts) without proper NEPA review
17 and CVPIA compliance, and by the contracts’ consequent unexamined and inadequately
18 mitigated impacts on the environment.

19 25. Plaintiffs’ injuries are fairly tracable to Reclamation’s actions. These
20 injuries are actual, concrete, and imminent and cannot be adequately remedied by
21 money damages. Plaintiffs have no plain, speedy, or adequate remedy at law.
22 Accordingly, plaintiffs seek injunctive, mandamus and declaratory relief from this Court
23 to rectify Reclamation’s unlawful acts and thereby redress plaintiffs’ injuries.

24 26. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is the
25 agency of the United States charged with managing the CVP. The United States
26 Department of the Interior approved the interim contracts and repayment contracts
27 challenged in this action without compliance with NEPA and the CVPIA.

28 27. Defendant UNITED STATES BUREAU OF RECLAMATION

1 (individually, and also collectively with the United States Department of the Interior,
2 “Reclamation”) is the federal agency within the United States Department of the Interior
3 charged with managing the CVP. Reclamation approved the interim contracts and
4 repayment contracts challenged in this action without compliance with NEPA and the
5 CVPIA.

6 **BACKGROUND**

7 **I. Environmental Setting**

8 28. As a result of widespread habitat degradation caused by the construction
9 and operation of dams on nearly all major California rivers flowing into the Delta,
10 including many dams built and managed by Reclamation such as Shasta Dam on the
11 Sacramento River, Folsom Dam on the American River, and Friant Dam on the San
12 Joaquin River, anadromous and other imperiled fishes dependent on the Delta and its
13 tributaries have suffered severe population declines. The Sacramento River winter and
14 spring run Chinook salmon, Central Valley steelhead, North American green sturgeon
15 and Delta smelt, for example, have been driven perilously close to extinction. Winter
16 run Chinook salmon were initially listed as a federally threatened species in 1990 (55
17 Fed.Reg. 46515), and then due to continuing losses in population, declared endangered
18 in 2005 (70 Fed.Reg. 37160). Their critical habitat in the Sacramento River and its
19 tributaries was designated in 1993. 58 Fed.Reg. 33212. Spring run Chinook salmon
20 were listed as threatened, and their critical habitat designated, in 2005. 70 Fed. Reg.
21 37160, 52488. Central Valley steelhead were listed as threatened in 2000 (65 Fed.Reg.
22 52084) and their critical habitat was designated in 2005 (70 Fed.Reg. 52488). The
23 Southern Distinct Population Segment (“DPS”) of North American green sturgeon was
24 listed at threatened in 2006 (71 Fed.Reg. 17757) and their critical habitat was
25 designated in 2008 (73 Fed.Reg. 52084). Delta smelt were listed as endangered in 1993
26 (58 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg.
27 65256). Many species of fish indigenous to the Delta have already gone extinct; just 12
28 indigenous species remain. Habitat for the Sacramento River winter and spring run

1 Chinook salmon, Central Valley steelhead, Southern DPS of the green sturgeon, and the
2 Delta smelt has been increasingly degraded over the last several decades by excessive
3 Delta water exports by the CVP and the State Water Project (“SWP”). Those exports
4 decrease freshwater flows, and increase salinity and the concentration of herbicides,
5 pesticides and toxic agricultural runoff, in Central Valley water bodies including the
6 Delta.

7 29. On June 4, 2009, pursuant to its consultation duties under section 7 of the
8 Endangered Species Act (“ESA”), 16 U.S.C. section 1536, the National Marine
9 Fisheries Service (“NMFS”) informed Reclamation that:

10 Based on the best available scientific and commercial information, NMFS’
11 final [Biological] Opinion concludes that the CVP/SWP operations are
12 *likely to jeopardize* the continued existence of Federally listed:

- 13 • Endangered Sacramento River winter-run Chinook salmon (*Oncorhynchus*
14 *tshawytscha*),
- 15 • Threatened Central Valley spring-run Chinook salmon (*O. tshawytscha*),
- 16 • Threatened Central Valley steelhead (*O. mykiss*),
- 17 • Threatened Southern Distinct Population Segment (DPS) of North

18 American

19 green sturgeon (*Acipenser medirostris*), and

- 20 • Southern Resident killer whales (*Orcinus orca*) [who feed on the salmon].

21 NMFS also concludes that the proposed action is *likely to destroy or*
22 *adversely modify* the designated critical habitats of

- 23 • Central Valley spring-run Chinook salmon,
- 24 • Central Valley spring-run Chinook salmon, and
- 25 • Central Valley steelhead, and
- 26 • proposed critical habitat for the Southern DPS of North American green
27 sturgeon.

28 NMFS’ letter to defendant Donald R. Glaser transmitting final Biological Opinion on

1 CVP/SWP operations dated June 4, 2009, at pages 1-2 (emphasis added).

2 30. On December 15, 2008, pursuant to its consultation duties under section 7
3 of the ESA, the United States Fish and Wildlife Service (“FWS”) informed Reclamation
4 that “the coordinated operations of the CVP and SWP, as proposed, are *likely to*
5 *jeopardize the continued existence of the delta smelt.*” FWS Biological Opinion on
6 Proposed Coordinated Operations of the CVP and SWP, dated December 15, 2008, at
7 page 276 (emphasis added). FWS further concluded that coordinated operation of the
8 CVP and SWP is “likely to adversely modify delta smelt critical habitat.” *Id.* at 278.

9 31. The Sacramento River winter and spring run Chinook salmon, Central
10 Valley steelhead, Southern DPS of the green sturgeon and Delta smelt are all indicator
11 species for the health of the San Francisco Bay-Delta ecosystem and for the other
12 special status-- fish species that inhabit this fragile estuary such as the Sacramento
13 splittail, longfin smelt and white sturgeon. These species are harmed by Reclamation’s
14 continuing failure to conduct a meaningful analysis of the environmental impacts of the
15 CVP’s interim water contracts, and to conduct any environmental analysis at all of the
16 repayment contracts approved on or about February 28, 2020, and of other, similar
17 repayment contracts that Reclamation is threatening to approve. All of these species
18 depend on clean, cold and plentiful freshwater flows through the Delta from its
19 tributaries. Reclamation’s diversions of staggering quantities of water from the Delta
20 for consumptive use by Westlands and other water contractors by means of these
21 interim contracts and repayment contracts is depriving these fishes of the clean, cold
22 and abundant freshwater flows they require to survive and recover their ecological
23 health.

24 32. The environmental harm caused by Reclamation’s water diversions from
25 the Delta is not limited to the direct loss of clean, cold water from the Delta.
26 Reclamation’s water diversions also harm the environment through their contaminated
27 agricultural return flows back to the Delta. When the CVP water delivered by
28 Reclamation is used for irrigation, it passes through the topsoil and enters the

1 groundwater, which then flows down gradient toward the Delta. Much of this soil,
2 particularly in the southern and western San Joaquin Valley, is heavily contaminated
3 with selenium and other pollutants, many of which occur naturally in these soils. As
4 this irrigation water passes below the surface, it leaches pollutants from the soil and
5 carries those pollutants into ground and surface waters in the San Joaquin Valley. The
6 contaminated subsurface and surface drainage water discharges pollutants including
7 selenium, arsenic, boron, mercury, uranium, chromium, molybdenum and sodium
8 sulfates into Central Valley rivers and ultimately the Delta. This pollution degrades the
9 Delta's water quality and exacerbates the existing threats to its endangered and
10 threatened fish species, including the Delta smelt, salmon, steelhead, and sturgeon. The
11 contractors' polluted discharge is also drawn into drinking water supplies through the
12 CVP and SWP, thereby degrading drinking water for 20 million Californians.

13 33. Reclamation's water deliveries also harm several imperiled terrestrial
14 species, including the California least tern and the giant garter snake. FWS concluded
15 in its Biological Opinion for the 2016 interim contracts that "the proposed project may
16 affect, and is likely to adversely affect the California least tern and giant garter snake."
17 Appendix C to Revised EA at 1. FWS concluded that both the California least tern and
18 the giant garter snake are likely to be harmed by exposure to polluted drainwater from
19 agricultural users. *Id.* at 19, 21. While FWS stated that the least tern population in the
20 area "is expected to be low," FWS also stated that it "anticipate[s] biological effects
21 similar to those observed at Kesterson Reservoir in the 1980s could occur to least terns
22 if exposed to drainage water originating from [Westlands Water District]." *Id.* at 19.
23 Kesterson received drainage water containing high levels of selenium, and as a result
24 "[a]bout 40 percent of nests of ducks and other waterbirds contained one or more dead
25 or deformed embryos and four species of waterbirds . . . *experienced complete*
26 *reproductive failure.*" *Id.* (emphasis added).

27 II. CVPIA

28 34. The CVPIA was enacted by Congress on October 30, 1992, for the express

1 purpose of ameliorating the adverse environmental impacts that result from CVP
2 operations. CVPIA, *supra*, §§ 3402(a)-(b), 3406(b). In order “[t]o address impacts of
3 the Central Valley Project on fish, wildlife and associated habitat,” the CVPIA requires
4 “appropriate environmental review” under NEPA – which in this case means
5 preparation of an environmental impact Statement (“EIS”) – before any long-term water
6 service or repayment contracts can be renewed by Reclamation. CVPIA §§ 3402(a),
7 3404(c)(1).

8 35. The CVPIA directed that Reclamation was to protect the fish and wildlife
9 in the Delta and its tributary rivers to assure a doubling *by 2002* of the Central Valley’s
10 average anadromous fisheries populations during the baseline period of 1967-1991.
11 CVPIA § 3406(b)(1). This fish doubling goal was never met.

12 36. Despite the fact that Congress enacted the CVPIA nearly 30 years ago,
13 Reclamation never completed its required NEPA review of the long-term contracts.
14 Instead, it has repeatedly issued short-term, interim contract renewals devoid of
15 adequate environmental review in a series of nearly identical, essentially meaningless
16 EAs that ignore these interim contracts’ significant cumulative environmental impacts,
17 prompting plaintiffs’ filing of this action.

18 III. Short-Term Contract EAs

19 37. The short-term, interim contracts were authorized by the CVPIA to bridge
20 the gap between expiration of the initial long-term contracts and completion of
21 comprehensive environmental review for, and finalization of, the subsequent,
22 discretionary, long-term contracts. The informed approval – or disapproval – of these
23 subsequent short-term, interim contracts is expressly within the discretion of
24 Reclamation. CVPIA § 3404(c)(1). Specifically, the CVPIA distinguishes between the
25 initial renewals, which “shall” be granted upon request, and the subsequent, interim
26 contracts, which “may” be approved:

27 (c) Renewal of Existing Long-Term Contracts. – Notwithstanding the provisions
28 of the Act of July 2, 1956 (70 Stat. 483), the Secretary *shall*, upon request, renew

1 any existing long-term repayment or water service contract for the delivery of
2 water from the Central Valley Project for a period of 25 years and *may* renew
3 such contracts for successive periods of up to 25 years each.

4 (1) No such renewals shall be authorized until appropriate environmental
5 review, including the preparation of the environmental impact statement
6 required in section 3409 of this title, has been completed. Contracts which
7 expire prior to the completion of the environmental impact statement
8 required by section 3409 *may be renewed for an interim period* not to
9 exceed three years in length, and for successive interim periods of not more
10 than two years in length, until the environmental impact statement required
11 by section 3409 has been finally completed, at which time such interim
12 renewal contracts shall be eligible for long-term renewal as provided
13 above. . . .

14 CVPIA § 3404(c)(1) (emphasis added). Thus, under the CVPIA’s plain language,
15 Reclamation lacks discretion to disapprove the initial long-term contract renewals, but
16 retains full discretion to disapprove or alter the interim contracts, which “*may be*
17 *renewed for an interim period.*” *Id.* (emphasis added). The Ninth Circuit adopted this
18 interpretation of the CVPIA when it issued an amended memorandum of decision in
19 *Pacific Coast Federation of Fishermen’s Associations v. United States Department of*
20 *Interior* (“*PCFFA*”), 655 Fed. Appx. 595, 598 (9th Cir. 2016).

21 38. As it had done previously for earlier interim contracts, on or about
22 February 29, 2016, Reclamation issued another, similar FONSI and EA for the 2016
23 renewal contracts with the water contractors. Based on that FONSI and EA,
24 Reclamation approved the six interim contracts initially challenged in this action,
25 involving water deliveries to the Pajaro Valley Water Management Agency, Santa Clara
26 Valley Water District, and Westlands Water District.

27 39. On March 4, 2016, plaintiffs filed a Complaint for Declaratory and
28 Injunctive Relief, challenging Reclamation’s issuance of the 2016 FONSI and EA.

1 40. On July 25, 2016, the Ninth Circuit Court of Appeals issued an amended
2 memorandum of decision in *PCFFA*. The Ninth Circuit determined that Reclamation’s
3 prior EA did not comply with NEPA because (1) the EA used an improper no action
4 alternative, (2) the agency abused its discretion in failing “to give full and meaningful
5 consideration to the alternative of a reduction in maximum interim contract water
6 quantities,” and (3) “the agency did not adequately explain why it eliminated this
7 alternative from detailed study.” *PCFFA*, 655 Fed. Appx. at 598, 599 (quote).

8 41. On August 2, 2016, defendants filed a Motion for Voluntary Remand to
9 prepare a new EA in light of the Ninth Circuit’s decision in *PCFFA*. ECF No. 28. In
10 response, on December 16, 2016, Judge O’Neill issued an Order granting defendants’
11 Request for Voluntary Remand Without Vacatur, stayed all proceedings, and retained
12 jurisdiction over this matter. ECF No. 52.

13 42. In March 2017, Reclamation released a Revised Draft EA.

14 43. Plaintiffs submitted timely comments regarding the sufficiency of the
15 Revised Draft EA by letter to Reclamation dated April 6, 2017.

16 44. On or about May 31, 2017, Reclamation released its Final Revised 2016
17 EA and FONSI (“2016 EA and FONSI”) for the Project.

18 45. In its 2016 EA and FONSI, Reclamation failed to address the
19 environmental consequences of the pivotal choices before it, namely: whether or not to
20 provide the contractors with water, and if so, in what quantities. Although the 2016 EA
21 states that an alternative of halting water deliveries could have “beneficial effects to
22 biological resources, including listed species and/or their associated habitat,” it fails to
23 provide *any* detail about the magnitude or consequence of these “beneficial effects.”
24 2016 EA 29, 44. In comparing the impacts of contract renewal verses the no-action
25 alternative, the 2016 EA illogically assumes that under either scenario, Reclamation
26 would in most circumstances continue to deliver the *same* amount of water to CVP
27 contractors in the south-of-Delta region, and would operate the CVP at the *same* rate of
28 pumping. While the 2016 EA concedes that in some years, the operations would differ,

1 it fails to examine the circumstances or environmental consequences of those differing
2 operations – and thus it fails to present a true comparison of the action and no-action
3 alternatives. 2016 EA 11.

4 46. The 2016 EA lacks any substantive analysis of the interim contracts’
5 impacts on the giant garter snake and the California least tern, despite the fact that FWS
6 concluded that approval of the interim contracts is *likely* to adversely affect these
7 species. *Compare* 2016 EA 31 (no mention of either species under the EA’s “Migratory
8 Birds” and “Federally-listed Species” headings addressing environmental consequences
9 of Project approval) *with* the FWS’ February 29, 2016 Biological Opinion (i.e., 2016
10 EA Appendix C) at 1 (“the proposed project may affect, and is likely to adversely affect
11 the California least tern and giant garter snake”).

12 47. The 2016 EA fails to study in detail a reduced contract quantity alternative,
13 and fails to use a water needs assessment “for which the data remain accurate” to
14 determine whether such an alternative is appropriate. *PCFFA*, 655 Fed. Appx. at 600-
15 601. In the 2016 EA, Reclamation provided a water needs assessment that showed that
16 for the most recent water year with available data, Westlands Water District had a 6%
17 water surplus despite receiving just an 80% allocation. Ignoring this *actual surplus*,
18 Reclamation’s Revised EA dismissed a reduced contract quantity alternative from
19 detailed consideration because the speculative water needs *projections for over 30 years*
20 *hence* – in 2050 and 2051 – showed unmet demand. 2016 EA 13-1-6. But the reduced
21 contract quantity alternative should have been given full consideration, in light of the
22 fact that Westlands was enjoying a water surplus even when its supply was curtailed by
23 20 percent.

24 48. The Revised EA erroneously limits its Study Area of the impacts of the
25 interim contracts to their delivery or service areas. In doing so, Reclamation ignored the
26 interim contracts’ principal environmental impacts. Those impacts take place in the
27 water bodies that are upstream of the CVP’s diversions of water from the Delta. They
28 include manipulation of the reservoir levels and releases, and timing and quantity of

1 those releases and resulting downstream river flows, of the CVP's tributary watersheds:
2 the American, Trinity, Sacramento and San Joaquin rivers. They also necessarily
3 include the environmental effects of those reservoir level and release manipulations on
4 their downstream rivers, and on the Delta into which they flow, and on the imperiled
5 fish and wildlife of these inextricably intertwined lake, river and delta ecosystems.

6 49. On or about November 14, 2019, Reclamation circulated a draft EA for the
7 latest round of interim contracts. Plaintiffs submitted timely comments on the
8 sufficiency of this draft EA on or about December 14, 2019.

9 50. On or about February 24, 2020, Reclamation issued the Final 2020 EA and
10 FONSI for the latest round of interim contracts. The 2020 EA and FONSI are
11 substantially similar to the previous, 2016 versions, and thus repeat their deficiencies as
12 detailed above.

13 **IV. Long-Term Contract Environmental Review**

14 51. The CVPIA required Reclamation to expeditiously conduct comprehensive
15 environmental review of the long-term contract renewals. The CVPIA recognizes that
16 the "direct and indirect [environmental] impacts and benefits" of its water diversion and
17 delivery contracts extend throughout "the Sacramento, San Joaquin, and Trinity River
18 basins and the San Francisco Bay/Sacramento-San Joaquin River Delta Estuary." It
19 states:

20 Not later than three years after the date of enactment of this title [in 1992],
21 the Secretary shall prepare and complete a programmatic environmental
22 impact statement pursuant to the National Environmental Policy Act
23 analyzing the direct and indirect impacts and benefits of implementing this
24 title, including all fish, wildlife, and habitat restoration actions and the
25 potential renewal of all existing Central Valley Project water contracts.
26 Such statement shall consider impacts and benefits within the Sacramento,
27 San Joaquin, and Trinity River basins, and the San Francisco
28 Bay/Sacramento-San Joaquin River Delta Estuary.

1
2 CVPIA § 3409. The CVPIA expressly requires Reclamation to undertake “appropriate
3 environmental review” before entering into any long-term contract renewals. CVPIA §
4 3404(c)(1).

5 52. Reclamation completed a Programmatic Environmental Impact Statement
6 (“PEIS”) in October 1999, four years after the required statutory deadline. In it,
7 Reclamation generally reviewed the broad, overarching impacts of implementing
8 various aspects of the CVPIA on a regional level. However, because its programmatic
9 review did not address the project-level, site- and contract-specific environmental
10 impacts of the long-term contracts, the “appropriate environmental review” required
11 under the CVPIA and NEPA for these project-level long-term contracts required
12 preparation of an EIS. In recognition of this legal requirement, Reclamation began the
13 process of preparing project-level EISs for specific long-term contract renewals.
14 Accordingly, in September 2005, Reclamation prepared and released a Draft EIS for its
15 anticipated long-term contract renewals for the West San Joaquin Division and San Luis
16 Unit contractors.

17 53. However, that NEPA review was never completed. Since 2005,
18 Reclamation’s environmental review of the long-term contracts has stalled, despite
19 Congress’ requirement that Reclamation conduct “appropriate environmental review”
20 for the long-term contracts in an expeditious manner. CVPIA § 3404(c)(1). Instead,
21 Reclamation has evaded this mandated review by relying for decades on interim
22 contracts such as the 2016 and 2020 interim contracts challenged in this action.

23 **V. The WIIN Act**

24 54. The Water Infrastructure Improvements for the Nation Act (“WIIN Act”),
25 Pub. L. 114-322, 130 Stat 1628, was enacted December 16, 2016, and expires on
26 December 16, 2021.

27 55. The WIIN Act allows water contractors with existing water service
28 contracts to request conversion of those contracts to repayment contracts. WIIN Act §

1 4011. It states that “[u]pon request of the contractor, the Secretary of the Interior shall
2 convert any water service contract in effect on the date of enactment . . . under mutually
3 agreeable terms and conditions.”

4 56. In order to convert water service contracts into repayment contracts, water
5 contractors must pay Reclamation the “remaining construction costs identified in water
6 project specific irrigation rate repayment schedules, as adjusted to reflect payment not
7 reflected in such schedules . . . such amount to be discounted by 1/2 the Treasury rate”
8 under an accelerated time-table. WIIN Act § 4011(a)(2)(A).

9 57. The WIIN Act provides:

10 Upon a contractor’s compliance with and discharge of the obligation of
11 repayment of the construction costs pursuant to a contract entered into
12 pursuant to subsection (a)(2)(A), subsections (a) and (b) of section 213 of
13 the Reclamation Reform Act of 1982 (96 Stat. 1269) shall apply to affected
14 lands.

15
16 WIIN Act § 4011(c)(1). Subsections (a) and (b) of section 213 of the Reclamation
17 Reform Act of 1982 relieve the contractor of the “ownership and full cost pricing
18 limitations” of Federal reclamation law. 43 U.S.C. § 390mm(a) and (b) (Public law 97-
19 293, October 12, 1982 (96 Stat 1269). In other words, upon repayment, the WIIN Act
20 removes the acreage and full cost pricing limitations that would otherwise apply to land
21 within the water contractors’ service areas. *Id.*

22 58. Absent the WIIN Act, water contractors could not make “lump sum or
23 accelerated repayment of construction costs” in order to remove the acreage or full cost
24 pricing limitations. 43 U.S.C. § 390mm.

25 59. Removal of the acreage and full cost pricing limitations that would
26 otherwise apply allows individual landowners within the service area to apply CVP
27 water to more land at lower cost. This change enables these users to increase the
28 acreage of lands that are served by (and thus dependent upon) CVP deliveries, and

1 thereby increases the impact of the delivery of CVP water by expanding the acreage of
2 irrigated lands that generate and discharge contaminated irrigation return flows, among
3 other impacts, and induces additional demand for CVP water.

4 60. The WIIN Act provides that the obligations of the CVPIA continue to
5 apply to Reclamation's actions, with the sole exception for "savings provisions for the
6 Stanislaus River predator management program." WIIN Act § 4012 (a)(2). Further, the
7 WIIN Act grants Reclamation broad discretion to negotiate "mutually agreeable terms
8 and conditions" in converting existing contracts to repayment contracts. WIIN Act §
9 4011(a)(1).

10 61. However, because the provisions of the CVPIA continue to apply to
11 Reclamation, Reclamation must still conduct "appropriate environmental review" under
12 NEPA before it may enter into long-term water delivery contracts. And, because the
13 Programmatic EIS that Reclamation prepared in 1999 does not address the project-level,
14 site-specific impacts of any of the repayment contracts (just as it previously failed to
15 address the project-level, site-specific impacts of the interim contracts), Reclamation is
16 still required by NEPA to prepare an EIS detailing the environmental impacts of each
17 draft repayment contract. Hence, Reclamation must prepare an EIS for the repayment
18 contracts that Reclamation approved on or about February 28, 2020, and for the
19 additional repayment contracts that Reclamation has subsequently approved and is
20 threatening to approve in the future.

21 **FIRST CLAIM FOR RELIEF**

22 **(Violation of the National Environmental Policy Act – Inadequate EAs)**

23 **(Against All Defendants)**

24 62. The paragraphs set forth above and below are realleged and incorporated
25 herein by reference.

26 63. NEPA requires the preparation of an EIS if a proposed major federal action
27 has the potential to significantly affect the quality of the human environment. 42 U.S.C.
28 § 4332. Even if a project's risks of environmental harm are uncertain, if they are

1 potentially significant, an EIS is required. *City of Davis v. Coleman*, 521 F.2d 661, 676
2 (9th Cir. 1975).

3 64. However, a proper finding by an agency that a proposed action will
4 produce no significant impact on the environment relieves the agency of its duty to
5 prepare an EIS. 40 C.F.R. §1501.4(e). But an agency cannot simply issue a conclusory
6 statement claiming without factual analysis the absence of significant impacts. Instead,
7 the agency must support each finding of “no significant impact” with a “concise public
8 document,” known as an environmental assessment, or EA. 40 C.F.R. § 1501.4(a)-(b),
9 1508.9. The EA must “[b]riefly provide sufficient evidence and analysis for
10 determining whether to prepare an environmental impact statement or a finding of no
11 significant impact.” 40 C.F.R. § 1508.9(a)(1) (emphasis added). Although an EA need
12 not be as thorough as an EIS, the agency must still conduct a “comprehensive
13 assessment of the expected effects of a proposed action” to determine if that action
14 poses potentially significant environmental impacts. *Foundation on Economic Trends*
15 *v. Weinberger*, 610 F.Supp. 829, 837 (D.C.D.C. 1985) (quoting *Lower Alloways Creek*
16 *Tp. v. Public Service Elec.*, 687 F.2d 732, 740 (3rd Cir. 1982)). Reclamation failed to
17 do so here for both the 2016 EA and FONSI and the 2020 EA and FONSI.

18 65. Reclamation’s 2016 EA and FONSI and 2020 EA and FONSI fail to
19 comply with *PCFFA*’s holding that Reclamation must fully disclose the environmental
20 impacts of the no-action alternative. The 2016 EA’s vague and conclusory analysis of
21 the ways that declining to provide water to Westlands would benefit the environment is
22 no substitute for the meaningful analysis required by NEPA and *PCFFA*. For example,
23 the 2016 EA merely states, in the broadest possible terms, that “beneficial effects to
24 biological resources, including listed species and/or their associated habitat, could occur
25 if water that would have been made available to Westlands is instead re-allocated to
26 wildlife refuges or re-apportioned to pass through the Delta un-diverted by
27 Reclamation; however, these effects would also be dependent on how much of
28 Westlands’ otherwise available water supply is available for re-apportionment.” This

1 sentence is repeated in the 2020 EA. 2020 EA p. 26. It does not provide the reader with
2 any substantive, let alone specific, disclosure and analysis of the interim contracts’
3 environmental impacts compared to the impacts of not providing the subject water
4 deliveries, or of providing them at a reduced quantity. It provides no meaningful
5 information to the public or Reclamation about the specific environmental effects of
6 Reclamation’s choice of whether or not to supply Westlands with water.

7 66. The 2016 Revised EA and 2020 EA also fail to consider a reasonable range
8 of alternatives as required by *PCFFA*. The Revised EA considers only two alternatives,
9 the Proposed Action and the No Action Alternative, thus presenting only the simple
10 binary choice between approving or disapproving the proposed action. Limiting the
11 public to this single, either/or option violates NEPA. *Save Our Cumberland Mountains*
12 *v. Kempthorne*, 453 F.3d 334, 345 (6th Cir. 2006) (NEPA “prevents federal agencies
13 from effectively reducing the discussion of environmentally sound alternatives to a
14 binary choice between granting or denying an application”). Alternatives proposing
15 reduced contract quantities were improperly eliminated from consideration with the
16 flawed justification that Westlands can make beneficial use of its entire contract
17 quantity, but this justification is refuted by the fact that the most recent data available
18 indicated the Westlands had *too much water* in a year in which it only received an 80%
19 allocation. Nor could Reclamation sidestep its duty to consider alternatives that reduced
20 the quantity of water diverted on the grounds that it lacked discretion to do so. Because,
21 as noted, Reclamation had broad discretion to reject the interim contracts entirely, it
22 necessarily had broad discretion to approve a reduced-quantity contract. And, because
23 such alternatives would reduce environmental harm, Reclamation had a duty under
24 NEPA to consider them.

25 67. The 2016 Revised EA’s and 2020 EA’s narrow statements of purpose and
26 need – to extend existing interim contracts that would otherwise expire – are likewise
27 inadequate, because each is based on Reclamation’s erroneous premise that it had no
28 discretion to consider a broader purpose and range of options that included denial of the

1 requested extension, or an extension at a reduced contract quantity. An EA’s purpose
2 and need statement is fatally flawed if, as here, it is based on the agency’s erroneous
3 premise that “it had no discretion to consider” a broader purpose and range of options.
4 *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d
5 1172, 1219 (9th Cir. 2008).

6 68. The 2016 Revised EA and 2020 EA also ignore the environmental impacts
7 of the interim contracts’ water deliveries on the source watersheds – the Delta and its
8 tributaries including the American, Trinity, Sacramento and San Joaquin rivers – and
9 their imperiled fish and wildlife. Both EAs artificially and illogically exclude these
10 directly impacted natural resources from their unduly narrow study area. Conversely,
11 both EAs artificially and illogically restrict that study area to the service (i.e., delivery)
12 areas of the interim contractors. Yet the service areas are the lands that would mostly
13 benefit from, rather than be harmed by, the deliveries. Consequently, the areas that
14 would be most harmed by the contracts – the Delta and its tributary rivers whose flows
15 would be reduced by the diversions allowed under the contracts – are completely
16 excluded from analysis of the harm those diversions would cause. In short, the EAs’
17 methodology is deliberately skewed to exaggerate the benefits, and ignore the harms, of
18 the water diversions allowed by the contracts.

19 69. As a result of this skewed analysis, both the 2016 Revised EA and the 2020
20 EA ignore NMFS’ finding that Reclamation’s continued operation of the CVP as
21 enabled by the interim contracts jeopardizes the continued existence of numerous
22 aquatic species including salmon, steelhead and green sturgeon. But this “contrived
23 ignorance” is contrary to NEPA. NEPA prohibits agencies from arbitrarily
24 circumscribing the geographic scope of their environmental analysis in order to avoid
25 analysis of a project’s adverse environmental effects. *Save Our Sonoran, Inc. v.*
26 *Flowers*, 408 F.3d 1113, 1121-23 (9th Cir. 2004).

27 70. The 2016 Revised EA and 2020 EA provide no substantive analysis of the
28 interim contracts’ effects on any species, let alone listed ones. Each EA’s empty

1 assertion that approval of the interim contracts will not have *any* impacts on listed
2 species is refuted by FWS’ and NMFS’s directly contrary findings. And, these claims
3 reflect Reclamation’s concerted effort to ignore the contracts’ impacts on the imperiled
4 species that inhabit the Delta and its tributary rivers.

5 71. The 2016 Revised EA and 2020 EA fail to consider the extent to which
6 climate change will exacerbate the environmental impacts of the interim contracts, due
7 to increased water temperatures, reduced dissolved oxygen, increased aridity,
8 diminished precipitation, reduced snowfall, diminished storage of precipitation as snow,
9 increased saltwater intrusion and salinity, and increasingly erratic weather patterns.

10 72. The 2016 Revised EA and 2020 EA ignore the fact that each subsequent
11 interim contract renewal has had an incremental environmental effect, resulting in
12 cumulative effects. These cumulative effects are growing, because selenium and other
13 pollutants carried into the Delta by irrigation return flows bioaccumulate in the
14 ecosystem – meaning that concentrations of these pollutants increase over time when a
15 constant quantity of these pollutants is discharged. The adverse impacts of these
16 cumulative effects are also worsening because at the same time the contamination is
17 worsening, the populations of affected species are declining. Put simply, as pollution
18 worsens, species weaken. Together, these cumulative effects are accelerating and
19 snowballing as they share a positive feedback loop. Because the EAs lack “quantified”
20 and “detailed” information about these impacts, they violate NEPA. *Neighbors of*
21 *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-1380 (9th Cir. 1998).

22 73. In sum, Reclamation’s failure to prepare legally adequate EAs and FONSI
23 for the 2016 and 2020 interim contracts is arbitrary and capricious, a failure to proceed
24 in the manner required by law, and not supported by substantial evidence, and thus in
25 violation of NEPA. Accordingly, those interim contracts and their EAs and FONSI
26 should be declared unlawful and set aside under the APA.

1 **SECOND CLAIM FOR RELIEF**

2 **(Violation of National Environmental Policy Act –**
3 **Failure to Prepare an EIS for Repayment Contracts)**

4 (Against All Defendants)

5 74. The paragraphs set forth above and below are realleged and incorporated
6 herein by reference.

7 75. Reclamation violated NEPA by failing to prepare an EIS for the repayment
8 contracts it approved in 2020, and it continues to violate NEPA by failing to prepare an
9 EIS for the repayment contracts it is continuing to approve. Reclamation began
10 negotiations with Westlands and other CVP water contractors, including East Bay
11 Municipal Utility District, City of Folsom, Placer County Water Agency, City of
12 Roseville, Sacramento County Water Agency, Sacramento Municipal Utility District,
13 and San Juan Water District, to convert their existing water contracts from water service
14 contracts to repayment contracts under the WIIN Act on May 29 and May 30, 2019.
15 Defendants participated in additional negotiation sessions in August 2019.

16 76. Reclamation and Westlands “finalized on Westlands’ primary and largest
17 WIIN Act contract conversion” and then Reclamation invited public comment on that
18 draft repayment contract through January 8, 2020.

19 77. Plaintiffs submitted timely comments to Reclamation on December 24,
20 2019, addressing Reclamation’s proposed repayment contract with Westlands.

21 78. In late 2019 and early 2020, Reclamation also negotiated the terms of five
22 additional repayment contracts with Westlands. Plaintiffs submitted timely comments
23 on those contracts on February 17, 2020. Reclamation approved these contracts on or
24 about May 29, 2020.

25 79. Reclamation negotiated other repayment contracts in early 2020. Plaintiffs
26 submitted timely comments addressing Reclamation’s proposed repayment contracts
27 with the American River Division contractors, including East Bay Municipal Utility
28 District, City of Folsom, Placer County Water Agency, City of Roseville, Sacramento

1 County Water Agency, Sacramento Municipal Utility District, and San Juan Water
2 District, on February 19, 2020. Reclamation approved these contracts on or about
3 February 28, 2020. Plaintiffs submitted additional timely comments addressing
4 Reclamation’s additional proposed repayment contracts with other water contractors on
5 April 22 and April 24, 2020.

6 80. Reclamation’s approval of each of these repayment contracts is a “major
7 Federal action[] significantly affecting the quality of the human environment” for which
8 an environmental impact statement (“EIS”) must be prepared. 42 U.S.C. §
9 4332(2)(C)(i)-(v). These repayment contracts are “major” Federal actions because they
10 allow the diversion of over one million acre-feet of freshwater annually from the largest
11 estuary on the west coast of the Americas, degrading vital freshwater habitat for some of
12 the most imperiled species in the world, such as the winter-run and spring-run Chinook
13 salmon and Delta smelt.

14 81. The environmental effects of these repayment contracts are clearly
15 significant under the governing NEPA regulations, under which significance is
16 measured both by the impacts’ “context” and by their “intensity.” 40 C.F.R. § 1508.27.

17 82. The contracts’ context demonstrates significance, because the Delta is the
18 largest estuary on the west coast of the United States, and supports an extraordinarily
19 diverse fishery of unparalleled importance both commercially and recreationally. And,
20 the Delta also provides freshwater supplies for over 20 million Californians, as well as
21 irrigation water for millions of acres of highly productive Central Valley farmland.

22 83. The “intensity” of the repayment contracts likewise demonstrates their
23 significance. Intensity is determined with reference to ten sub-factors, the presence of
24 *any* one of which is sufficient to require an EIS. 40 C.F.R. § 1508.27(b); *Ocean*
25 *Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2004). The
26 intensity of the contracts’ effects is indisputably significant because (1) the contracts’
27 diversion of over 1 million acre-feet annually from the Delta, and the contractors’ use of
28 the water for irrigation in a manner that releases contaminated return flows into the

1 Delta’s ground and surface tributary waters, directly affect the health and safety of the
2 public that relies on the Delta and its tributary rivers for their livelihoods, drinking
3 water, and recreation; (2) the loss of freshwater flows and reduction in water quality
4 harm the fish and wildlife of the unique and beleaguered Delta ecosystem; (3) the
5 contracts’ environmental impacts are highly controversial and the extent of their
6 harmful environmental impacts is uncertain; (4) Reclamation’s approval of these
7 contracts of potentially permanent duration “establish[es] a precedent for future actions
8 with significant effects;” (5) the contracts will have potentially significant cumulative
9 impacts on the Delta’s ecological health and the survival of its imperiled fish and
10 wildlife; and (6) the contracts will have significant impacts on many endangered
11 species, each of which has significant scientific value. 40 C.F.R. § 1508.27(b).

12 84. Reclamation nonetheless contends that its approval of these repayment
13 contracts is exempt from NEPA, on two grounds. Both fail. First, Reclamation claims
14 that under the WIIN Act, it lacks discretion to disapprove the repayment contracts and
15 thus its approval of them falls within the “non-discretionary” or “ministerial” exception
16 to NEPA. That assertion is refuted by the plain language of this statute. Section
17 4011(a)(1) of the WIIN Act states that “[u]pon request of the contractor, [Reclamation]
18 shall convert any water service contract in effect on the date of enactment . . .and
19 between the United States and a water users’ association to allow for prepayment of the
20 repayment contract . . . *under mutually agreeable terms and conditions.*” Public Law
21 114-322, 130 Stat. 1628, section 4011(a)(1) (emphasis added). This language makes
22 clear that the terms and conditions of these contracts are to be negotiated by the parties.
23 Since these terms and conditions are negotiable, it follows that Reclamation necessarily
24 exercises discretion in their formulation and approval. Therefore these contracts are
25 discretionary rather than ministerial. Accordingly, NEPA applies to Reclamation’s
26 exercise of that discretion, to ensure that Reclamation is fully informed regarding the
27 environmental impacts of the terms and conditions of the contracts as they are
28 formulated and negotiated.

1 85. Reclamation also claims that the WIIN Act impliedly repeals NEPA to the
2 extent it might otherwise apply to the contracts. This claim too is readily dispatched.
3 Repeals by implication are disfavored, particularly when a remedial statute such as
4 NEPA is in play. “When confronted with two Acts of Congress allegedly touching on
5 the same topic, [we are] not at liberty to pick and choose among congressional
6 enactments and must instead strive to give effect to both.” *Stand Up for California v.*
7 *U.S. Department of the Interior* (“*Stand Up*”), ___ F.3d ___, 2020 WL 2745320 *7 (9th
8 Cir. May 27, 2020), quoting *Epic Sys. Corps. v. Lewis*, 138 S.Ct. 1612, 1624 (2018)
9 (citations and quotation marks omitted) (enforcing NEPA against Department of Interior
10 notwithstanding applicability of Indian Gaming Regulatory Act).

11 86. “[A] statute [is not] repealed by a subsequent act unless Congress’s
12 intention is ‘clear and manifest.’” *San Luis & Delta-Mendota Water Auth. v. Haugrud*,
13 848 F.3d 1216, 1230 (9th Cir. 2017) (citations omitted). “This is especially true in the
14 case of NEPA, which “directs that, ‘to the fullest extent possible . . . public laws of the
15 United States shall be interpreted and administered in accordance with [it].” *Stand Up*
16 at *7, quoting *Jamul Action Comm. v. Chaudhuri* (“*Jamul*”), 837 F.3d 958, 961 (9th
17 Cir. 2016) (in turn quoting *Westlands Water Dist. v. Nat. Res. Def. Council*
18 (“*Westlands*”), 43 F.3d 457, 460 (9th Cir. 1994). In *Westlands*, the court ruled that
19 “[t]he lack of discretion exception to NEPA compliance does not apply” where a section
20 of the CVPIA directed that the Secretary of the Interior take certain action if the Hoopa
21 Valley Tribe and the Secretary reached agreement, explaining that “[t]he automatic,
22 non-discretionary language was only operative after both the Hoopa Valley Tribe and
23 the Secretary concurred,” and that the Secretary had full discretion to scope, analyze,
24 and make any recommendations before any concurrence. *Id.* at 1180. Likewise here,
25 Reclamation has full discretion to negotiate “mutually agreeable terms and conditions”
26 for any repayment contract. Public Law 114-322, 130 Stat. 1628, section 4011(a)(1)
27 (emphasis added).

28 87. These rulings are consistent with the Ninth Circuit’s settled rule that “[w]e

1 have recognized only ‘two circumstances where an agency need not complete an EIS
2 even in the presence of major federal action and “despite an absence of express statutory
3 exemption”’: (1) “‘where doing so “would create an irreconcilable and fundamental
4 conflict” with the substantive statute at issue,’ and (2) where, ‘in limited instances, a
5 substantive statute “displaces” NEPA’s procedural requirements.’” *Stand Up* at *7,
6 quoting *Jamul*, 837 F.3d at 963 (quoting *San Luis & Delta Mendota Water Auth. v.*
7 *Jewell*, 747 F.3d. 581, 648 (9th Cir. 2014)). Neither circumstance is present here. The
8 WIIN Act contains no language implying, let alone expressly stating as required to
9 effect a repeal, that compliance with NEPA “would create an irreconcilable and
10 fundamental conflict” with the WIIN Act as necessary to foreclose NEPA’s application
11 to contracts authorized by that Act. *Id.* Nor does the WIIN Act “‘displace[]’ NEPA’s
12 procedural requirements,” the only other means by which a repeal could occur. *Id.*

13 88. Accordingly, NEPA is fully applicable to Reclamation’s approval of the
14 repayment contracts. Therefore Reclamation should have prepared an EIS addressing
15 the potentially significant impacts associated with each of them. Because it failed to do
16 so, Reclamation’s approval of the repayment contracts is arbitrary and capricious, a
17 failure to proceed in the manner required by law, and not supported by substantial
18 evidence, and thus in violation of NEPA. Therefore it should be declared unlawful and
19 set aside under the APA.

20 89. Reclamation’s threatened entry into other repayment contracts without
21 compliance with NEPA is likewise arbitrary and capricious, a failure to proceed in the
22 manner required by law, and not supported by substantial evidence. Accordingly,
23 Reclamation’s threatened approval of additional repayment contracts should be declared
24 unlawful and enjoined.

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26 //
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1 **THIRD CLAIM FOR RELIEF**

2 **(Violation of Central Valley Project Improvement Act –**
3 **Failure to Prepare an EIS for Repayment Contracts)**

4 (Against All Defendants)

5 90. The paragraphs set forth above and below are realleged and incorporated
6 herein by reference.

7 91. The CVPIA requires Reclamation to conduct a comprehensive
8 environmental review before it may enter into new long-term contracts with existing
9 water contractors as a means of correcting the growing imbalance between excessive
10 water diversions and declining fish and wildlife populations. “To address impacts of
11 the Central Valley Project on fish, wildlife and associated habitat,” the CVPIA requires
12 Reclamation to complete “appropriate environmental review, including the preparation
13 of the environmental impact statement required in section 3409 of [the CVPIA],” before
14 Reclamation may “renew any existing long-term repayment or water service contract for
15 the delivery of water from the Central Valley Project for a period of 25 years. . . .”
16 CVPIA §§ 3402(a), 3404(c)(1), 3409. As noted, the Programmatic EIS that
17 Reclamation prepared in 1999 pursuant to section 3409 does not address the project-
18 level, site- and other contract-specific impacts of any of the repayment contracts.
19 Consequently, Reclamation is still required by NEPA to prepare an EIS detailing the
20 environmental impacts of each draft repayment contract. Hence, Reclamation must
21 prepare an EIS for the repayment contracts that Reclamation approved on or about
22 February 28, 2020, and for the additional repayment contracts that Reclamation has
23 subsequently approved and is threatening to approve in the future.

24 92. The CVPIA defines the scope of contracts subject to this imperative
25 broadly, to include “*any* long-term water service or repayment contract for the delivery
26 of water from the Central Valley Project for a period of 25 years.” CVPIA § 3404(c)
27 (emphasis added). The repayment contracts Reclamation is now approving authorize
28 the delivery of CVP water for at least 25 years. Indeed, they potentially authorize the

1 delivery of CVP water in perpetuity. That means that their impacts will extend at least
2 as long, and probably much longer, than will the impacts of the 25-year renewal
3 contracts for which Congress mandated “appropriate environmental review” under
4 NEPA. CVPIA §§ 3402(a), 3404(c)(1), 3409. Hence, the need for environmental
5 review of their impacts is at least as great as, and probably even greater than, it is for the
6 25-year contracts for which Congress mandated preparation of appropriate
7 environmental review under NEPA in the CVPIA.

8 93. The WIIN Act does not abrogate this CVPIA mandate that “appropriate
9 environmental review” take place before any long-term water service or repayment
10 contract may be renewed by Reclamation. To the contrary, the WIIN Act specifically
11 directs that it “shall not be interpreted or implemented in a manner that . . . (2) affects or
12 modifies *any* obligation under the [CVPIA] except for the savings provisions of the
13 Stanislaus River predator management program.” WIIN Act § 4012(a)(2) (emphasis
14 added). Hence, the CVPIA mandate that appropriate environmental review (which as
15 explained, necessarily requires an EIS) is required for long term contracts, applies fully
16 to the repayment contracts that Reclamation is now approving.

17 94. Accordingly, Reclamation’s failure to prepare *any* environmental
18 review—let alone the required EIS—before entering into the repayment contracts violates
19 the CVPIA. Therefore, Reclamation’s entry into these repayment contracts is arbitrary
20 and capricious, a failure to proceed in the manner required by law, and not supported by
21 substantial evidence. For these reasons, Reclamation’s entry into these repayment
22 contracts should be declared unlawful and set aside under the APA.

23 **FOURTH CLAIM FOR RELIEF**

24 **(Violation of 43 U.S.C. §§ 423e and 511 Requiring** 25 **Validation Judgments for CVP Water Contracts)**

26 (Against All Defendants)

27 95. The paragraphs set forth above and below are realleged and incorporated
28 herein by reference.

1 96. For nearly a century, Reclamation has acknowledged and adhered to the
2 fundamental and unwavering Congressional mandate that “[i]n carrying out the
3 purposes of the Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof and
4 supplementary thereto, and known as the reclamation law, no contract with an
5 irrigation district under this section [511] and sections 512 and 513 of this title [title 43
6 of the United States Code] shall be binding on the United States until the proceedings
7 on the part of the district for the authorization of the execution of the contract shall have
8 been confirmed by decree of a court of competent jurisdiction, or pending appellate
9 action if ground for appeal be laid.” Act of May 15, 1922, section 1, codified at 43
10 U.S.C. § 511.

11 97. Section 46 of the Omnibus Adjustment Act of 1926 sets forth a similar
12 Congressional directive that “[n]o water shall be delivered [by a federal reclamation
13 project] until a contract or contracts in form approved by the Secretary of the Interior
14 shall have been made with an irrigation district or irrigation districts organized under
15 State law providing for payment by the district or districts of the cost of constructing,
16 operating and maintaining the works during the time they are in control of the United
17 States . . . , and the execution of said contract or contracts shall have been confirmed by
18 a court of competent jurisdiction.” Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649, as
19 amended, codified at 43 U.S.C. § 423e.

20 98. The purpose of Congress’s century-old and consistent command that
21 irrigation districts demonstrate their lawful authority to enter into each and every
22 contract for the delivery of public water from federally-owned and operated reclamation
23 facilities is to assure that water from those facilities is only delivered to districts with
24 judicially confirmed authority and ability to receive and pay for such waters so that the
25 public’s expense in constructing and operating these facilities is protected against fraud
26 and fully reimbursed. As explained by the Office of the Solicitor of the Department of
27 the Interior:

28 “[t]he Act of May 15, 1922 requires the judicial confirmation of contracts with

1 irrigation districts as a measure of protection for the United States. This
2 confirmation assures the validity of the contract by making sure the irrigation
3 district has complied with all state law requirements. . . . Congress has required
4 the proceeding to take place before the United States will be bound by the terms
5 of the contract.”

6 Memorandum of the Office of the Solicitor dated July 9, 1984, citing Solicitor’s
7 Opinion, 71 Interior Decisions 496, 517-18 (1964) and 43 U.S.C. § 511.

8 99. In tacit recognition of this settled law and practice, on or about October 25,
9 2019 Westlands filed a Complaint for Validation Judgment in Fresno County Superior
10 Court seeking a court judgment validating Westlands’ proposed repayment contract
11 with Reclamation. See, *Westlands Water District v. All Persons Interested in the Matter*
12 *of the Contract Between the United States and Westlands Water District Providing for*
13 *[Central Valley] Project Water Service, San Luis Unit and Delta Division and Facilities*
14 *Repayment*, Fresno County Superior Court Case No. 19CECG03887. On or about
15 December 30, 2019 Westlands filed a Motion for Validation of Contract in which it
16 requested the Superior Court to enter a judgment validating Westlands’ repayment
17 contract with Reclamation. After hearing, the Superior Court, per the Honorable Alan
18 Simpson, denied Westlands’ motion by Minute Order filed March 16, 2020. A true and
19 complete copy of Judge Simpson’s Minute Order is attached as Exhibit 1 hereto.

20 100. In his Minute Order denying validation, Judge Simpson ruled that
21 Westlands’ repayment contract could not be validated under either California Water
22 Code §35855 (*see* Exhibit 1 hereto at ¶ 3.a), or California Government Code § 53511
23 (*id.* at ¶ 3.b). Judge Simpson further ruled that the repayment contract “does not meet
24 [validation] requirements for provisions unrelated to debt because it is a proposed
25 contract, not an executed contract.” *Id.* at ¶ 3.c. Judge Simpson next ruled that the
26 repayment contract could not be validated because the contract’s “absence of the actual
27 final amount and payment schedule render the proposed contract lacking in material
28 terms and incomplete,” and the “validation statutes do not encompass judicial approval

1 of incomplete contracts.” *Id.* at ¶ 4. Finally, Judge Simpson ruled that validation was
2 not possible because “the requested finding of compliance with the Brown Act
3 [California Government Code §§ 54950 et seq.] cannot be made.” *Id.* at ¶ 5.

4 101. Westlands did not timely seek reconsideration, or appellate review, of
5 Judge Simpson’s Minute Order. Accordingly, that ruling is now final. This Minute
6 Order precludes Westlands from contending that its repayment contract is validated.

7 102. Because Westlands has failed to secure judicial validation of its repayment
8 contract, and indeed, has instead received a final Order from the Fresno County
9 Superior Court refusing to validate that repayment contract, Reclamation is forbidden
10 by the Act of May 15, 1922 from entering into, and delivering water pursuant to, that
11 repayment contract. *Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp.
12 263, 265 n.1 (E.D. Cal. 1980) (noting that section 46 of the Omnibus Adjustment Act of
13 1926 requires that “no water shall be delivered pursuant to any contract entered into
14 with an irrigation district until such contracts have been confirmed by a State court of
15 competent jurisdiction.’ *See* 43 U.S.C. § 511.”).

16 103. Notwithstanding Westlands’ failure to secure judicial validation of its
17 repayment contract, and Judge Simpson’s Minute Order setting forth at least five
18 separate grounds for denying Westlands’ Motion for Validation of Contract, by letter
19 dated May 26, 2020, Westlands’ General Manager Thomas Birmingham represented to
20 Ernest Conant, Regional Director of the Bureau of Reclamation, that judicial
21 confirmation of Westlands’ authority to enter into the Repayment Contract with
22 Reclamation had merely been delayed, due to the Covid-19 pandemic and other
23 undisclosed factors, and was on track for completion soon.

24 104. Mr. Birmingham stated that “[t]he District filed an action to obtain [a
25 judicial] decree on October 25, 2019, but for multiple reasons, the Court was not able to
26 validate the District’s proceedings prior to the Court closing for judicial business in
27 response to the COVID-19 pandemic and the proclamations of emergency by Governor
28 Gavin Newsom.” Letter from Thomas W. Birmingham to Ernest A. Conant dated May

1 26, 2020, a true and correct copy of which is attached as Exhibit 2 hereto, at 1.

2 105. Mr. Birmingham did not disclose that several parties had filed Answers
3 opposing Westlands' validation action, and that after hearing their grounds for opposing
4 validation, Judge Simpson had ruled that the District's Repayment Contract could not
5 be validated for at least five separate reasons. *Id.* Nor did Mr. Birmingham provide Mr.
6 Conant with Judge Simpson's detailed ruling denying Westlands' motion for validation.
7 *Id.*

8 106. Instead of disclosing these material facts revealing that the Fresno County
9 Superior Court had concluded that Westlands' Repayment Contract could not be
10 validated, Mr. Birmingham strived to persuade Mr. Conant of just the opposite. He
11 represented, in direct contradiction of Judge Simpson's specific findings and final Order
12 rejecting validation, that "[t]he proceedings on the part of the District to authorize
13 execution of the Repayment Contract complied with the law, and no one has initiated
14 legal action to challenge the lawfulness of those proceedings." *Id.* at 1.

15 107. Mr. Birmingham went on to represent that "[u]nder California's 'reverse
16 validation' statute, any action seeking to challenge the District's proceedings to
17 authorize execution of the Repayment Contract would be barred by the 60-day statute of
18 limitations in California Code of Civil Procedure sections 860 and 863." *Id.* at 2. But
19 Mr. Birmingham failed to disclose that there was no need for any party opposed to
20 validation to file such a "reverse validation" action, since Westlands had itself filed a
21 validation action to which opposition could, and was in fact, presented by way of the
22 four Answers that were in fact filed in opposition to Westlands' validation action and
23 the four opposition memoranda that were filed in response to Westlands' subsequent
24 validation motion.

25 108. Based on these misrepresentations, Mr. Birmingham "request[ed] that
26 [Reclamation] confirm the District's understanding that its inability to obtain a
27 validation judgment does not render the Repayment Contract void." *Id.* Mr.
28 Birmingham closed by reassuring Mr. Conant that "the District is confident it will

1 obtain a final decree confirming the proceedings on its part for the authorization of the
2 execution of the Repayment Contract.” *Id.* at 2-3.

3 109. Mr. Birmingham’s ploy worked perfectly. Just two days later, apparently
4 without conducting any independent factual or legal research or even checking the
5 Fresno County Superior Court’s docket to ascertain the true state of Westlands’
6 validation proceedings, Mr. Conant gave Reclamation’s complete blessing to
7 Westlands’ request that Reclamation deem the repayment contract valid. Mr. Conant’s
8 single-page letter uncritically accepted and indeed, repeated like an echo chamber, Mr.
9 Birmingham’s representation that “for various reasons, the court was not able to validate
10 the District’s proceedings prior to the court closing for business in response to the
11 COVID-19 pandemic and emergency proclamations by California Governor Newsom.”
12 A true and complete copy of Mr. Conant’s May 28, 2020 letter to Mr. Birmingham is
13 attached as Exhibit 3 hereto.

14 110. Based solely on Mr. Birmingham’s incomplete and misleading
15 representation of the facts surrounding Westlands’ inability to secure judicial validation
16 of the repayment contract, and in disregard of the actual facts and ruling by Judge
17 Simpson denying validation, Mr. Conant concluded his letter by stating “ Reclamation
18 confirms its understanding that the Repayment Contract will govern the rights and
19 obligations of the United States and the District after the Repayment Contract’s
20 effective date, June 1, 2020, notwithstanding the District’s inability to obtain a final
21 decree confirming its proceedings to authorize the execution of this Repayment
22 Contract. See, 43 U.S.C. § 511.” *Id.*

23 111. Reclamation’s execution of its repayment contract with Westlands on or
24 about February 28, 2020, and purported waiver, by letter dated May 28, 2020, of
25 Reclamation’s statutory duty to confirm that Westlands had in fact secured a judicial
26 validation of that contract, are both final agency actions subject to this Court’s
27 jurisdiction and review under the APA, 5 U.S.C. § 706.

28 112. Reclamation’s execution on or about February 28, 2020 of its repayment

1 contract with Westlands notwithstanding Westlands' failure to first secure a judicial
2 decree confirming and validating Westlands' authority to enter into that contract, and
3 Reclamation's purported disavowal, by letter dated May 29, 2020, of its statutory duty
4 to require Westlands to secure that judicial decree before recognizing that contract as
5 valid and enforceable against Reclamation, violate 43 U.S.C. §§ 423e and 511.

6 113. Accordingly, Reclamation's entry into its repayment contract with
7 Westlands notwithstanding Westlands' failure to first secure a judicial decree validating
8 its authority to enter into that contract, and Reclamation's purported disavowal of its
9 duty to require Westlands to secure that judicial decree, are arbitrary and capricious,
10 failures to proceed in the manner required by law, and not supported by substantial
11 evidence. For these reasons, Reclamation's entry into its repayment contract with
12 Westlands and purported disavowal of its duty to require Westlands to secure that
13 judicial decree, should be declared unlawful and set aside under the APA.

14 114. Plaintiffs are informed and believe, and on that basis allege, that
15 Reclamation has approved, or is threatening to approve, additional repayment contracts
16 with other water districts without requiring the districts to first secure a judicial decree
17 confirming their authority to enter into such contracts. Such approvals are, or would be,
18 contrary to law in the same respects as Reclamation's approval of the repayment
19 contract with Westlands alleged above, and for that reason are, or would be, arbitrary
20 and capricious, failures to proceed in the manner required by law, and not supported by
21 substantial evidence, and accordingly should be declared unlawful and set aside under
22 the APA.

23 **FIFTH CLAIM FOR RELIEF**

24 **(Violation of Reclamation Law Requirements for CVP Water Contracts)**

25 **(Against All Defendants)**

26 115. The paragraphs set forth above and below are realleged and incorporated
27 herein by reference.

28 116. Reclamation's repayment contracts with Westlands violate several

1 additional substantive and procedural requirements applicable to Reclamation’s entry
2 into water service and repayment contracts that arise under the Reclamation Law. First,
3 Reclamation failed to release the repayment contracts as ultimately modified for public
4 review prior to their approval in violation of 43 C.F.R. § 426.22(b) and(d), which
5 respectively direct in pertinent part that Reclamation must “[p]rovide copies of revised
6 proposed contracts to all parties who requested copies of the proposed contract in
7 response to the initial notice,” and insure that “[a]nyone can get copies of a proposed
8 contract from the appropriate regional director. . . .”

9 117. Second, Reclamation’s repayment contracts with Westlands exceed by
10 more than 200,000 acres the maximum acreage authorized to receive Central Valley
11 Project water by Congress in the San Luis Act of 1960, Public Law No. 86-466, 74 Stat.
12 156 (1960). When Congress passed the San Luis Act in 1960, it imposed limits on the
13 acreage available to receive water from the San Luis Project. It directed in section 1(a)
14 of the Act that Reclamation was authorized to “construct, operate, and maintain the San
15 Luis unit as an integral part of the Central Valley Project” in accordance with the 1956
16 San Luis Unit Feasibility Study for the purpose of irrigating a service area that is limited
17 to just 496,000 acres, based on a long-term crop utilization pattern for 440,000 acres, in
18 the entire San Luis Unit in three counties—Merced, Fresno and Kings—as delineated in
19 the map prepared as part of that study. *See*, U.S. Department of the Interior, Feasibility
20 Report (approved by President Roosevelt, December 2, 1935), reprinted in House
21 Committee on Interior & Insular Affairs, Central Valley Project, Documents-Part One:
22 Authorizing Documents, H.R. Doc. No. 416, 84th Cong., 2d Sess. 563 (1956) at p. 36
23 (map).

24 118. Exhibit A—the Map of the Contractor’s Service Area—to Reclamation’s first
25 repayment contract with Westlands, however, reveals that a much larger area would be
26 served by Central Valley Project water delivered pursuant to the repayment contracts
27 than is permitted under the San Luis Act. It shows, after subtracting the acreage for the
28 San Luis, Panoche and Pacheco water districts, and deducting an additional roughly

1 100,000 acres that has already been retired with taxpayer dollars and largely put to
2 industrial uses, that roughly 300,000 acres of land with Westlands Water District are
3 eligible to receive water from the San Luis Unit. Yet contrary to this acreage limitation,
4 Reclamation's repayment contracts with Westlands would irrigate more than 600,000
5 acres of land within Westlands Water District as shown in Exhibit A to the first
6 repayment contract. Under the contract, that acreage would be allocated between 2.2
7 and 1.7 acre-feet of water per year. The repayment contract's inclusion of this
8 additional acreage therefore represents the delivery of roughly 400,000 acre-feet of
9 additional public water not authorized by Congress in the San Luis Act. The subsequent
10 repayment contracts likewise allow excess deliveries. This unauthorized reallocation of
11 these scarce waters unlawfully takes water from other Central Valley Project
12 contractors, communities, and the environment. It also leads to increased impacts on
13 the areas from which the water would be exported, including the watersheds of the
14 Trinity, Sacramento and American rivers, and the San Joaquin-Sacramento Delta and
15 Estuary, as well as increased contamination of ground and surface waters from the
16 polluted irrigation return flows draining the lands irrigated with this water.

17 119. Third, Reclamation's repayment contracts with Westlands violate
18 Reclamation's duty under the Coordinated Operations Act of 1986, Public Law 99-546,
19 100 Stat. 3050, § 305 (amending 43 U.S.C. § 422d) to demonstrate that lands receiving
20 Central Valley Project water are capable of "successful irrigability of those lands and
21 [that] their susceptibility to sustained production of agricultural crops by means of
22 irrigation has been demonstrated in practice." This Act also requires Reclamation to
23 show that it has conducted "an investigation of soil characteristics which might result in
24 toxic or hazardous irrigation return flows." Contrary to this duty, Reclamation has
25 conducted no studies and provided no evidence or documentation in support of the
26 permanent allocation of water to irrigate these lands as described in Exhibit A of the
27 first repayment contract. In fact, the San Luis Drainage Feature Re-evaluation EIS
28 found that roughly 300,000 acres of the lands proposed for irrigation under these

1 contracts within Westlands’ service area are drainage-impaired and will generate “toxic
2 or hazardous irrigation return flows” to ground or surface water.

3 120. Fourth, Reclamation’s repayment contracts with Westlands fail to assure
4 Westlands’ compliance with applicable water quality standards as required by the
5 CVPIA. The CVPIA provides in 43 U.S.C. § 3405(c) that “[a]ll Central Valley Project
6 water service or repayment contracts for agricultural, municipal or industrial purposes
7 that are entered into, renewed, or amended under any provision of Federal Reclamation
8 law after the date of enactment of this title, shall provide that the contracting district or
9 agency shall be responsible for compliance with all applicable State and Federal water
10 quality standards applicable to surface and subsurface agricultural drainage discharges
11 generated within its boundaries.” The CVPIA directs further in 43 U.S.C. § 3404(c)(2)
12 that “[u]pon renewal of any long-term repayment or water service contract providing for
13 the delivery of water from the Central Valley Project, the Secretary shall incorporate all
14 requirements imposed by existing law, including provisions of the title, within such
15 renewed contracts.”

16 121. Contrary to these Congressional mandates requiring adherence to state and
17 federal water quality standards, Reclamation’s repayment contracts with Westlands do
18 not expressly incorporate any specific water quality standards, and impermissibly leave
19 compliance with such standards to the discretion of Reclamation’s contracting officer
20 and Westlands. But applicable water quality standards and permit requirements are not
21 discretionary under the law, and are being violated by Reclamation’s excessive
22 diversions of water from the Delta for delivery to its contractors, and by the
23 contaminated agricultural drainage that has resulted in the past, and will foreseeably
24 result in the future, from those diversions and deliveries. For example, although the
25 repayment contract will generate irrigation return flows that contaminate ground and
26 surface waters with selenium and other pollutants, including discharges from point
27 sources requiring permits under the Clean Water Act’s National Pollutant Discharge
28 Elimination System under 33 U.S.C. §1342, the contract makes no provision for

1 compliance with that statutory duty. And, although the repayment contracts will cause
2 continuing and worsening declines in Delta water quality due to excessive diversions of
3 water from the Delta for irrigation, they make no provision for complying with the
4 federal water quality standards adopted by the United States Environmental Protection
5 Agency some 25 years ago pursuant to federal court orders and codified at 40 C.F.R. §
6 131.37.

7 122. In sum, Reclamation's approval of its repayment contracts with Westlands
8 conflict with numerous procedural and substantive requirements of the CVPIA and
9 other components of Reclamation Law, and fails to protect water quality as required by
10 those laws. Accordingly, Plaintiffs seek speedy adjudication of this matter to address
11 and reverse the accelerating decline of water quality and fish and wildlife caused by the
12 water diversions and irrigation return flows authorized by Reclamation's approval of the
13 repayment contracts with Westlands, and the other similar repayment contracts it has
14 recently approved and is approving.

16 PRAYER FOR RELIEF

17 As relief for the above violations of law, plaintiffs respectfully request the
18 following:

- 19 1. A declaration that defendants acted contrary to law by issuing FONSI for
20 the 2016 and 2020 interim contract renewals based on EAs that are legally
21 and factually inadequate.
- 22 2. An injunction ordering defendants to withdraw their FONSI for the 2016
23 and 2020 interim contract renewals and to prepare an adequate EA for each
24 of those interim contract renewals before considering them for approval as
25 required by NEPA.
- 26 3. A declaration that defendants acted contrary to law by approving and
27 entering into repayment contracts with Westlands and others without first
28 preparing appropriate environmental review including an EIS as required

1 by NEPA and the CVPIA.

2 4. An injunction ordering defendants to withdraw their approval of and entry
3 into their repayment contracts with Westlands and others without first
4 preparing appropriate environmental review including an EIS as required
5 by NEPA and the CVPIA.

6 5. A declaration that defendants acted contrary to law by approving and
7 entering into their repayment contracts with Westlands and others
8 notwithstanding the failure of those contractors to first secure a judicial
9 decree confirming their authority to enter into the repayment contracts.

10 6. An injunction ordering defendants to withdraw their approval of and entry
11 into their repayment contracts with Westlands and others notwithstanding
12 the failure of those contractors to first secure a judicial decree confirming
13 their authority to enter into the repayment contracts.

14 7. A declaration that defendants may not approve and enter into any
15 repayment contracts without compliance with all substantive and
16 procedural requirements of Reclamation Law, including protection and
17 restoration of water quality where mandated by applicable state and federal
18 environmental laws.

19 8. An injunction ordering defendants to withdraw, or to refrain from granting,
20 their approval of any repayment contracts unless those contracts comply
21 with all substantive and procedural requirements of Reclamation Law,
22 including protection and restoration of water quality where mandated by
23 applicable state and federal environmental laws.

24 9. An award of costs and reasonable attorney's fees and expenses that
25 plaintiffs incurred in the litigation of this action under the Equal Access to
26 Justice Act, 28 U.S.C. section 2412, and any other applicable fee recovery
27 law or doctrine.

28 //

1 10. Any other relief that this Court deems just and proper.

2
3 Dated: July 8, 2020

Respectfully submitted,

4 s/ *Stephan C. Volker*

STEPHAN C. VOLKER

Attorney for Plaintiffs

5 NORTH COAST RIVERS ALLIANCE,
6 CALIFORNIA SPORTFISHING PROTECTION
7 ALLIANCE, PACIFIC COAST FEDERATION OF
8 FISHERMEN'S ASSOCIATIONS, SAN
9 FRANCISCO CRAB BOAT OWNERS
10 ASSOCIATION, INC., AND INSTITUTE FOR
11 FISHERIES RESOURCES

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Unlimited Department, Central Division		Entered by:
TITLE OF CASE: Westlands Water District vs All Persons Interested		
MINUTE ORDER		Case Number: 19CECG03887

Date: March 16, 2020

Re: Decision

Department: 502

Judge/Temporary Judge: Alan Simpson

Court Clerk: N. Capalare

Reporter/Tape: N/A

Contested

Appearing Parties:

Plaintiff:

appearing on behalf of Plaintiff

Defendant:

appearing on behalf of Defendant

Off Calendar

Set for at Dept for

The Court having taken the February 27, 2020 motion for Validation of "Converted Contract" under submission, now takes the matter out from under submission and adopts the 2/27/20 tentative ruling as the final order. (see attached tentative ruling)

(19)

Tentative Ruling

Re: **Westlands Water District v. All Persons Interested**
Superior Court Case No. 19CECG03887

Hearing Date: February 27, 2020 (Department 502)

Motion: by Westlands Water District for Validation of "Converted Contract"

Tentative Ruling:

To deny.

Explanation:

1. Untimely Answers

"We view the time limit established by section 862 like a statute of limitations. Put differently, if any interested party appears in a validation action after the time period permitted by the applicable summons, the government would have a valid defense, preventing that interested party from further challenging the government's proposed action."

San Diego v. San Diegans for Open Government (2016) 3 Cal. App. 5th 568, 579.

"The validating statutes should be construed so as to uphold their purpose, i.e., 'the acting agency's need to settle promptly all questions about the validity of its action.'" *McLeod v. Vista USD* (2008) 158 Cal. App. 4th 1156, 1166 (rev. denied). In construction of Code of Civil Procedure section 862, "[o]ur primary goal is to implement the legislative purpose." *Lateef v. City of Madera* (2020) 2020 WL 746176, *4, Case No. F076227. Interpreting the statute to bar late filing honors the plain language of the statute as well as its purpose.

The answers of all but Central Delta Water Agency and South Delta Water Agency were filed after the December 16, 2019 deadline set forth in the Summons, and are therefore untimely.

2. Validation Actions Generally

"Validation proceedings are a procedural vehicle for obtaining an expedited but definitive ruling regarding the validity or invalidity of certain actions taken by public agencies. (Code Civ. Proc., § 860 et seq.) They are expedited because they require validation proceedings to be filed within 60 days of the public agency's action (Code Civ. Proc., §§ 860 & 863); they are

given preference over all other civil actions (*id.*, § 867) . . . They are definitive because they are in rem proceedings that, once proper constructive notice is given (*id.*, §§ 861, 862), result in a judgment that is binding ... against the world, and cannot be collaterally attacked, even on constitutional grounds. By providing a protocol for obtaining a prompt settlement of all questions about the validity of its action . . . validation proceedings provide much-needed certainty to the agency itself as well as to all third parties who would be hesitant to contract with or provide financing to the agency absent that certainty."

Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency (2016) 1 Cal. App. 4th 1684, 1096 (internal quotes and case citations omitted).

"Of course, not all actions of a public agency are subject to validation. The statutes defining validation proceedings do not specify the types of public agency action to which they apply; instead, they establish a uniform system that other statutory schemes must activate by reference." (*id.* at 1097, internal quotes and citations omitted.)

3. Availability of Validation Proceeding for the Converted Contract

a. Not Under Water Code Section 35855

The specific statute for validation proceeding on this type of contract is stated by Westlands to be Water Code section 35855. The comments to the 1961 amendment of Water Code section 35855 noted the prior version expressly allowed a validation action for a "proposed contract." The amendment took out "proposed." It is a tenet of statutory construction that where the Legislature has chosen to delete a provision, the Court cannot interpret the statute to put it back in. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." *Gikas v. Zolin* (1993) 6 Cal. 4th 841, 861. The Legislature did not intend that Courts make such advisory opinions on proposed contracts after 1961. This contract does not qualify for validation under that statute. But it is not the only one cited.

b. General Validation Statutes for Debt Obligations

"Government Code section 53511 makes validation proceedings available 'to determine the validity of [a local agency's] bonds, warrants, *contracts*, obligations or evidences of indebtedness.' (Government Code section 53511(a)), italics added.) Although 'contracts' could be read to reach *all* contracts, the courts have defined it by reference to the clause in which it has been used, and thus to reach only those contracts 'that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness.' (*Kaatz*, *supra*, 143 Cal. App. 4th at pp.

40, 42 . . . *Friedland, supra*, 62 Cal. App. 4th at p. 843 . . . 'contracts' in this statute do not refer generally to all public agency contracts, but rather to contracts involving financing and financial obligations."

Purchase contracts are not subject to validation under this statute. See *Santa Clarita Organization for Planning & Environment v. Castaic Lake Water Agency, supra*, 1 Cal. App. 5th at 1099. There, the plaintiff sought invalidation of a contract to purchase stock by a water agency from a retail water purveyor. The Court found such action was not properly subject to validation. See also *San Diego County Water Authority v. Metropolitan Water Dist. Of Southern California* (2017) 12 Cal. App. 5th 1124, finding an agency's action challenging rates was not a proper validation action. In *Phillips v. Seely* (1974) 43 Cal. App. 3d 104, the Court found that a contract obligation the County to pay \$12,500 a month for legal services to indigent defendants was not the type of contract subject to validation proceedings. In *Smith v. Mt. Diablo USD* (1976) 56 Cal. App. 3d 412, the Court found that a purchase contract by a school district did not fall under Code of Civil Procedure section 864.

Code of Civil Procedure section 864 does permit validation of proposed contracts: "For purposes of this chapter, bonds, warrants, contracts, obligations, and evidences of indebtedness shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution." *City of Ontario v. Superior Court* (1970) 2 Cal. 3d 335, 343-344, confirmed general validation was available for contracts of indebtedness.

Unless the Converted Contract can be considered a contract for indebtedness, it does not yet qualify for a validation action.

c. The Converted Contract Has Some Provisions Subject to Validation

Para. 1.(i)(1) defines "Existing Capital Obligation" as the "remaining amount of construction costs or other capitalized costs allocable to the Contractor . . ." "Repayment Obligation" is defined in para. 1.(x) as that "for water delivered as irrigation water shall mean the Existing Capital Obligation discounted by ½ of the treasury rate, which shall be the amount due and payable to the United States . . ." under the WIIN Act.

"Water Infrastructure Improvements for the Nation (WIIN) Act: Bureau of Reclamation and California Water Provisions," updated December 14, 2018,¹ discusses numerous provisions of the WIIN Act, but of particular interest for this case is Section 4011: "Accelerated Repayment and Surface Water Storage Account," starting on page 22. These publications are cited by California appellate courts. See, e.g., *In re A.A.* (2016) 243 Cal. App. 4th 765, 773; *Legal Services for Prisoners with Children v. Bowen*

¹ See <https://crsreports.congress.gov/product/pdf/R/R44986>

(2009) 170 Cal. App. 4th 447, 456-457, *People v. Salcido* (2019) 42 Cal. App. 5th 529, 539, fnt. 3.

This shows that the contract at issue in this case is, in part, one for faster repayment of debts incurred to the Bureau of Reclamation for infrastructure used to store and move water around California. Thus the contract at issue meets the requirements, at least in part, for a validation action under Government Code section 53511 and Code of Civil Procedure section 864.

The Converted Contract does not meet such requirements for provisions unrelated to debt because it is a proposed contract, not an executed contract.

4. The Converted Contract Lacks Material Terms.

In the Appendix of Evidence submitted by Westlands ("AOE") Vol. II, page 108, paragraph 8, the draft resolution states: "The President of the District is hereby authorized to execute and deliver the Converted Contract in substantially the form attached hereto, with such additional changes and/or modifications as are approved by the President of the District, its General Manager, and its General Counsel." The resolution itself has that language as well. AOE, Vol. II, page 144. Exhibits A, B, C, and D to the Converted Contract are missing from all materials submitted to the Court. Exhibit D is the repayment page.

The proposed judgment seeks a ruling that "the Converted Contract is in all respects valid under applicable California Law and binding upon Westlands." Given that the contract terms, including repayment terms, are not certain, and that the contract may be changed or modified, validation is not appropriate. It is not possible to make the determinations sought where no final contract is presented for validation.

Westlands' Declarant Gutierrez states he does not anticipate any major changes, but the validation statutes do not encompass judicial approval of incomplete contracts. Given the estimate for the repayment amount is over \$362,000,000 (Ex. 12 to Westlands' Exhibits), the absence of the actual final amount and payment schedule render the proposed contract lacking in material terms and incomplete.

5. Brown Act Issues

"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO
Civil Department, Central Division
1130 "O" Street
Fresno, California 93724-0002
(559) 457-2000

FOR COURT USE ONLY

TITLE OF CASE:

Westlands Water District, a California Water District vs. All Persons
Interested in the Matter of the Contract Between the United States and
Westlands Water District Providing for Project Water Service, San Luis
Unit and Delta Diversion and Facilities Repayment

CASE NUMBER:
19CECG03887

I certify that I am not a party to this cause and that a true copy of the:

Minutes/Order

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 03/16/2020

Clerk, by



Deputy

N. Capalare

David C. Palmer
Stradling Yocca Carlson & Rauth, P.C.
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660

S. Dean Ruiz
3439 Brookside Road
Suite 208
Stockton, CA 95219

Stephan C. Volker
Law Offices of Stephan C. Volker
1633 University Avenue
Berkeley, CA 94703

Roger B. Moore
Law Office of Roger B. Moore
337 17th Street
Suite 211
Oakland, CA 94612

Adam Keats
Center For Food Safety
303 Sacramento Street
2nd floor
San Francisco, CA 94111

Clerk's Certificate of Mailing Additional Address Page Attached

EXHIBIT 2



Westlands Water District

3130 N. Fresno Street, P.O. Box 6056, Fresno, California 93703-6056, (559) 224-1523, FAX (559) 241-6277

May 26, 2020

VIA ELECTRONIC MAIL ONLY

Ernest Conant, Regional Director
Interior Region 10, California-Great Basin
Bureau of Reclamation
2800 Cottage Way, MP-100
Sacramento CA 95825
E-Mail: EConant@USBR.Gov

Re: Contract Between the United States and Westlands Water District San Luis Unit and Delta Division and Facilities Repayment, Contract No. 14-06-200-495A-IR1-P

Dear Mr. Conant:

On October 15, 2019, at a regular meeting, the Board of Directors ("Board") of Westlands Water District ("District") adopted Resolution No. 119-19, through which the Board authorized the District's President to execute the Contract Between the United States and Westlands Water District San Luis Unit and Delta Division and Facilities Repayment, Contract No. 14-06-200-495A-IR1-P ("Repayment Contract"). As you are aware, Article 46 of the Repayment Contract provides that the Repayment Contract shall not be binding on the United States until the District secures a final decree confirming the proceedings on the part of the District for the authorization of the execution of the Repayment Contract.

The District filed an action to obtain this decree on October 25, 2019, but for multiple reasons, the Court was not able to validate the District's proceedings prior to the Court closing for judicial business in response to the COVID-19 pandemic and the proclamations of emergency by Governor Gavin Newsom. The Court has announced it will remain closed until May 29, 2020; therefore, the District will not be able to obtain a validation judgment prior to the Repayment Contract's effective date, June 1, 2020.

The proceedings on the part of the District to authorize execution of the Repayment Contract complied with the law, and no one has initiated legal action to challenge the lawfulness of those proceedings. The meeting of the District's Board – the proceedings – at which the Board authorized execution of the Repayment Contract were properly noticed, open to the public, and afforded the public an opportunity to comment, in full compliance with the Brown Act, California Government Code sections 54950 *et seq.* No member of the public complained about the District's compliance with the Brown Act, either prior to or at the October 15, 2019, meeting at which the Board adopted Resolution No. 119-19. Nor has anyone requested that the District take

Ernest Conant, Regional Director
Interior Region 10: California-Great Basin
Bureau of Reclamation
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action to correct an asserted violation of the Brown Act, and therefore, a Brown Act challenge would be generally barred at this time. (California Government Code § 54960.1).

Through Resolution No. 119-19, the District Board found that execution of the Repayment Contract was statutorily and categorically exempt from compliance with the California Environmental Quality Act ("CEQA"), and no member of the public commented on these findings prior to adoption of Resolution No. 119-19. On October 17, 2019, the District filed notices of exemption with the State Clearinghouse. No person or entity filed a CEQA action against the District within the statute of limitations, which expired on November 21, 2020. (Public Resources Code § 21167).

Under California's "reverse validation" statute, any action seeking to challenge the District's proceedings to authorize execution of the Repayment Contract would be barred by the 60-day statute of limitations in California Code of Civil Procedure sections 860 and 863. (*California Commerce Casino, Inc. v. Schwarzenegger*, 146 Cal.App.4th 1406, 1420 (2007)). Moreover, there is a history of nearly 60 years between the United States and the District, which reflects the District's ability and commitment to satisfy its contractual obligations to the United States. For these reasons it appears that the United States' interest served by the requirement for a validation judgment have largely been satisfied.

The purpose of this letter is to request that you confirm the District's understanding that its inability to obtain a validation judgment does not render the Repayment Contract void. Indeed, the United States Court of Appeals for the Eighth Circuit addressed this issue in *Concerned Irrigators v. Belle Fourche Irrigation Dist.*, 235 F.3d 1139 (8th Cir., 2001):

Federal law gives the United States authority to enter into repayment contracts with irrigation districts, but specifies that these contracts are not "binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid." 43 U.S.C. § 511 (1994). Even if the United States is not bound by the ... contract because it was not judicially confirmed, the contract is not necessarily invalid. Cf. *Restatement (Second) of Contracts* § 7 & cmt. a (1979) (where a party has the power to avoid the legal relations created by a contract, that contract is voidable but not void). There is no evidence that the United States has ever attempted to escape any obligation created by the contract. The lack of judicial confirmation does not invalidate the ... contract.

(*Id.* at 1144.)

The District intends to diligently prosecute its validation action upon the reopening of the California courts, and the District is confident it will obtain a final decree confirming the proceedings on its part for the authorization of the execution of the Repayment Contract. However, like the circumstances considered by the Court of Appeals in *Concerned Irrigators*, it is the District's understanding the Repayment Contract will control the rights and obligations of the United States

Ernest Conant, Regional Director
Interior Region 10: California-Great Basin
Bureau of Reclamation
Page 3

and the District after its effective date, June 1, 2020, notwithstanding the District inability to obtain a final decree confirming its proceedings to authorize the execution of this Repayment Contract.

In addition, because many other Central Valley Project contractors that converted their agricultural water service contracts to repayment contracts are likely facing the same challenges in obtaining a final decree confirming their proceedings to authorize the execution of their repayment contracts, Reclamation may want to confirm that their repayment contracts will control the rights and obligations of the United States and the contractors notwithstanding their failure to obtain a validation judgment.

If you have questions concerning this request, please contact me at your convenience.

Very truly yours,



Thomas W. Birmingham
General Manager

cc: Amy Aufdemberge, Assistant Regional Solicitor

EXHIBIT 3



United States Department of the Interior

BUREAU OF RECLAMATION
2800 Cottage Way
Sacramento, CA 95825-1898



IN REPLY REFER TO:
CGB-100
2.2.4.22

MAY 28 2020

VIA ELECTRONIC MAIL

Thomas W. Birmingham
General Manager
Westlands Water District
3130 N. Fresno Street
P.O. Box 6056
Fresno, CA 93703-6056

Subject: Contract Between the United States and Westlands Water District San Luis Unit and Delta Division and Facilities Repayment, Contract NO. 14-06-200-495A-IR.1-P (Repayment Contract)

Dear Mr. Birmingham:

This letter responds to your letter of May 26, 2020. In that letter, you indicated that Westlands Water District ("District") filed a judicial action on October 25, 2019 to obtain a decree of validation of the subject contract referenced above. However, for various reasons, the court was not able to validate the District's proceedings prior to the court closing for business in response to the COVID-19 pandemic and emergency proclamations by California Governor Newsom. Additionally, because the court has announced it will remain closed until May 29, 2020, the District will not be able to obtain a validation judgment prior to the Repayment Contract's effective date of June 1, 2020.

By this letter, the Bureau of Reclamation ("Reclamation") confirms its understanding that the District's inability to obtain a validation judgment does not render the Repayment Contract void. More specifically, Reclamation confirms its understanding that the Repayment Contract will govern the rights and obligations of the United States and the District after the Repayment Contract's effective date, June 1, 2020, notwithstanding the District's inability to obtain a final decree confirming its proceedings to authorize the execution of this Repayment Contract. See, 43 USC § 511.

Please let me know if you have any questions. Thank you.

Sincerely,
Ernest A. Conant
Ernest A. Conant
Regional Director

Digitally signed by
Ernest A. Conant
Date: 2020.05.28
12:39:28 -0700