



SOUTH SAN JOAQUIN
IRRIGATION DISTRICT



August 27, 2009

Michael L. Connor
Commissioner, USBR
1849 C Street NW
Washington DC 20240-0001

Re: NOAA OCAP Biological Opinion

The Oakdale Irrigation and South San Joaquin Irrigation District have determined that the proposed Revised Plan of Operation for New Melones Reservoir and the Stanislaus River contained in the OCAP Biological Opinion is fundamentally flawed. The Districts hereby request that the USBR rescind the proposed plan of operation described in its Biological Assessment and initiate re-consultation with NOAA concerning the operation of New Melones Reservoir under the Biological Opinion.

While this letter is written nearly two months after the issuance of the OCAP Biological Opinion, the delay should not be taken as an acceptance of the Biological Opinion. Immediately upon receipt of the OCAP Biological Opinion, the Districts began an in-depth review of the information, data and assumptions that underlie the proposed plan of operation for the proposed Reasonable and Prudent Alternatives and the Biological Opinion as they relate to the Stanislaus River and operations of New Melones Reservoir. However, despite the size and complexity of the OCAP Biological Opinion, much of the necessary information, and particularly the information and data relating to the hydrologic and temperature modeling, was not included as part of the OCAP Biological Opinion. Therefore, on June 12, 2009, the Districts requested the hydrologic and temperature modeling used by NMFS to support the Reasonable and Prudent Alternative for the Stanislaus River and New Melones Reservoir.

The Districts received the modeling runs, including the inputs, assumptions and analysis, from NMFS on July 20, 2009. The runs were immediately analyzed and reviewed by the Districts and their consultants. The review revealed that the Reasonable and Prudent Alternative for the Stanislaus River and New Melones Reservoir, including the Reasonable and Prudent Alternative for Vernalis are based upon faulty facts, assumptions and legal premises.

When New Melones was being built, the USBR applied for water right permits from the State Water Resources Control Board. The Districts initially opposed the USBR's application, but their protest was withdrawn once the USBR and the Districts reached an agreement addressing how the USBR would operate New Melones Reservoir while recognizing and

preserving the Districts' prior water rights. The USBR's water right application was eventually approved by the SWRCB, but the permit issued to the USBR was expressly made subject to the October 24, 1972 Agreement and Stipulation executed by and between the USBR and the Districts. (See D-1422, Order, ¶ 24(a), p. 36). The October 24, 1972 Agreement was superseded by the Agreement and Stipulation executed by and between the USBR and the Districts on August 30, 1988. ("the 1988 Agreement"). The 1988 Agreement provides the Districts are entitled to the first 600,000 acre feet of inflow between October 1 and September 30 of the following year. (1988 Agreement, ¶¶ 1, 2). The 1988 Agreement also provides if inflow for the year is below 600,000 AF, then the Districts are entitled to inflow + $(600,000 - \text{inflow} \div 3)$. (1988 Agreement, ¶ 1). Given hydrology in the Stanislaus River Basin, there are many critical¹ and dry years when inflow is at or near 600,000 AF. The USBR's compliance with the terms and conditions of the 1988 Agreement is a condition of the USBR's water right permits for New Melones. However, the water supply concept included in the Biological Assessment and the modeling supporting the Biological Opinion's RPAs will violate the terms and conditions of the 1988 Agreement.

The USBR, as part of the section 7 consultation with NMFS, unilaterally and without any consultation or discussion with the Districts, proposed a plan of operation for New Melones. The Districts immediately voiced their concern to the USBR that the proposed plan of operation was incomplete and illegal. The major problem identified by the Districts concerned the identification (classification) of a "conference year" water supply condition within which water was reallocated from the Districts to other USBR purposes.

Although modified during the process of consultation, USBR continued to illustrate to NOAA a plan of curtailment of the Districts' entitlements based on some form of water supply indicator, either a forecasted water supply index or an end-of-year carryover storage, both which are not consistent with the 1988 Agreement. The USBR proposed plan of operation, if in the recent past would have been operative, could well have lead to a "conference year" condition implying that the Districts would not have received the full amount of water to which they are entitled under the 1988 Agreement. For example, in 2007 (Critical), 2008 (Critical) and 2009 (Dry), the Districts receive their full, or near full 600,000 AF allocation under the 1988 Agreement. However, in these same years, if the Biological Assessment plan of operation had been in place, the Districts may have received only approximately 400,000 AF in each of those years. The Districts informed the USBR that the affect of the proposed plan of operation was a violation of the 1988 Agreement, but the USBR has not indicated that it agrees or that it will rectify the violation.

While the language of the OCAP Biological Opinion suggests that the implementation of the "conference year" condition is similar to the operation of New Melones under the Interim Plan of Operation, this is not an accurate characterization. Between 1987 and 1992, the Districts worked with the USBR and other Stanislaus River stakeholders to develop a plan of operations for New Melones that maximized the benefit for all involved, yet was consistent with the applicable water right conditions affecting the parties. Thus, for example, the Districts sold water to Stockton East Water District, to USFWS/CDF&G for fishery needs, and re-operated Lake Tulloch to enhance water temperature conditions downstream for Fall Run Chinook Salmon spawning. These actions assisted in the satisfaction of the needs of the CVP contractors and the

¹ Based on SJR Basin 60-20-20 index.

instream beneficial uses, but were done within the framework of the 1988 Agreement. The Interim Plan of Operations did not re-allocate water away from the Districts, nor change the formula by which the Districts water was determined each year, or in any other way alter, amend or change the terms and conditions of the 1988 Agreement. To the contrary, using the water allocated to it pursuant to the 1988 Agreement, the Districts were able to assist the USBR in meetings other needs. The unilateral imposition of the proposed plan of operation, which expressly alters the 1988 Agreement, is in no way akin to the process which led to the Interim Plan of Operation.

As was pointed out to the USBR, it has no legal right either in contract or in water rights to enforce any aspect of the proposed plan of operation against the Districts, let alone the "conference year" condition. The 1988 Agreement clearly provides that the Districts get up to the first 600,000 AF of inflow, no matter what "index" is, or what storage is in New Melones. This is in recognition of the fact that the Districts have the pre-1914 right to the first 1816.6 cfs of flow in the Stanislaus River, plus appropriative rights for storage and redirection above, at and below New Melones. Neither the 1988 Agreement nor the USBR's permit for New Melones authorizes it to unilaterally reduce or impair the Districts' superior rights. Indeed, any plan that purports to do so jeopardizes the USBR's water rights for New Melones, which are expressly conditioned upon compliance with the 1988 Agreement.

The problematic outcome and implications of the proposed plan of operation were accentuated by NMFS' incomplete and faulty analysis and absurd RPA's. It appears that the modeling done by NMFS concludes that the Districts would receive an average 559,000 AFA under a future base condition and 548,000 AFA under the Biological Opinion RPA condition. This method of presentation masks the substantial curtailments made to the Districts' entitlements during several, and sometimes sequential years. For instance, in its modeling NOAA has assumed that (with the USBR's concept of curtailing the Districts' entitlements) for each of the years 1990, 1991, and 1992 the Districts would be curtailed over 100,000 acre-feet per year. These curtailments are in addition to an already reduced supply of approximately 100,000 per year due to dryness and the 1988 Agreement. The Districts have essentially utilized every drop of their entitlements in every year since 1995. Moreover, the Districts' demands for surface water continue to increase. By "modeling" less water delivered to the Districts NOAA is exacerbating already reduced deliveries and is providing a false sense of plan viability, to the tune of hundreds of thousands of acre-feet.. A problem also exists within the studies in that modeling assumptions sometimes do not deliver every drop of the Districts' entitlements to the Districts every year. The Districts have the right to use their full entitlements each and every year, and to the extent that their entitlements are "left in the reservoir" due to modeling assumptions the operational plan must not assume that the water is available and used for other USBR purposes.

The new "plan" will result in a reduction of the Districts' superior water rights of anywhere from 100,000 to 200,000 AFA per year. How does this occur when NMFS recognizes that it does not have the legal authority to change water rights (Appendix 5, page 17), when the Districts' water rights were not part of the Section 7 consultation, and when compliance by the USBR will result in a violation of the 1988 Agreement and therefore its own water right for New Melones?

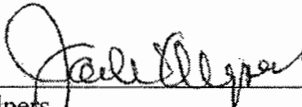
The problem with OCAP Biological Opinion goes beyond Stanislaus River operations. Since water supply is overstated at New Melones, flow in the Stanislaus River is therefore also overstated, as is flow at Vernalis. Of course, if flow at Vernalis is overstated, then so are exports which will be partially dependent upon Vernalis flow. In short, given that much of the operations of the CVP are dependent upon conditions at Vernalis, when those conditions are misstated, then so too are all operations of the CVP, as well as all actions that are dependent upon the CVP.

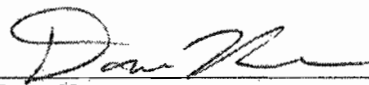
There are many more problems with the NMFS OCAP Biological Opinion. The Districts are in the process of preparing a detailed summary of the issues. The Districts are preparing to file suit against NMFS regarding the OCAP BO.

The Districts are unclear as to whether or not to sue the USBR. The Districts are in this position because it is not clear how the USBR is going to proceed. The Districts request that the USBR take the following actions:

- Rescind the USBR's Biological Assessment plan of operation for New Melones which was incorporated into the OCAP BO
- Seek re-consultation with NMFS for New Melones operations using the Interim Plan of Operation for New Melones (1998)
- Affirm, in writing, that the USBR will abide by the 1988 Stipulation Agreement with the Districts.

We look forward to your expeditious response to our request. All of us have a great many plans and actions to take before next years water operations.

By: 
Jack Alpers
Oakdale Irrigation District Board President

By: 
Dave Kamper
South San Joaquin Irrigation District
Board President

Cc:
Donald Glaser, Regional Director USBR
Congressman Jim Costa
Congressman Gary Condit
Congressman George Radanovich
Congressman Dennis Cardoza
Congressman Jerry McNerney
Senator Diane Feinstein
Senator Barbara Boxer
Governor Arnold Schwarzenegger
State Water Resource Control Board
San Joaquin River Group



IN REPLY REFER TO:

MP-140
ENV-7.00

United States Department of the Interior

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



OCT 13 2009

Mr. Jack Alpers
Board President
Oakdale Irrigation District
1205 East F Street
Oakdale, CA 95361

Dear Mr. Alpers:

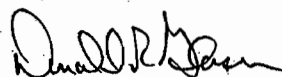
On behalf of Bureau of Reclamation Commissioner Michael Connor, I am responding to your letter of August 27, 2009, requesting Reclamation rescind the proposed future operating plan for New Melones Reservoir and the Stanislaus River as described in the August 2008 Biological Assessment (BA) regarding operations of the Central Valley Project and State Water Project, reinstate consultation with the National Oceanic and Atmospheric Administration (NOAA) Fisheries, and continue to abide by the 1988 Stipulation Agreement. We address each element of your request below.

The representation of future New Melones operations in the BA is not consistent with the Reasonable and Prudent Alternative (RPA) set forth in the NOAA Fisheries Biological Opinion (BO) and therefore will not be implemented. The modeling evaluation and subsequent RPA prepared by NOAA Fisheries appears to be generally based on the New Melones Interim Plan of Operation (IPO), with several exceptions, and not based on the proposed operations described in the BA. Given that this proposed future operating plan is not being implemented, Reclamation does not believe that there is a need to rescind the draft plan.

Regarding reinstatement of consultation, Reclamation continues to evaluate all the various aspects of the NOAA Fisheries BO and RPA. For now, Reclamation will continue to use the IPO for guidance and the NOAA Fisheries BO for operations. We do not believe the appropriate triggers to reinstate consultation exist at this time. Finally, please be assured that Reclamation will continue to abide by the terms of the 1988 Stipulation Agreement.

If you require additional information about New Melones Reservoir operations, please contact Mr. Paul Fujitani, Chief, Water Operations Division, Central Valley Operations Office, at 916-979-2197 (TDD 916-979-2183).

Sincerely,



Donald R. Glaser
Regional Director

Identical Letter Sent To:

Mr. Dave Kamper
Board President
South San Joaquin Irrigation District
11011 E. Highway 120
Manteca, CA 95336

cc: Honorable Arnold Schwarzenegger
Governor of California
Sacramento, CA 95814

Honorable Barbara Boxer
United States Senate
Washington, D.C. 20510

Honorable Dennis Cardoza
House of Representatives
Washington, D.C. 20515

Honorable Jerry McNerney
House of Representatives
Washington, D.C. 20515

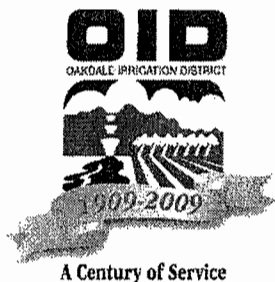
✓ Mr. Allen Short
Coordinator
San Joaquin River Group
P.O. Box 4060
Modesto, CA 95352

Honorable Dianne Feinstein
United States Senate
Washington, D.C. 20510

Honorable George Radanovich
House of Representatives
Washington, D.C. 20515

Honorable Jim Costa
House of Representatives
Washington, D.C. 20515

Mr. Charles R. Hoppin
Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812



November 19, 2009

Mr. Donald R. Glaser
Regional Director, Mid-Pacific Region
Bureau of Reclamation
2800 Cottage Way
Sacramento, CA 95825-1898

Re: OCAP-BO

Dear Mr. Glaser:

Thank you for your response of October 13, 2009 to our letter to you of August 27, 2009, regarding the OCAP-BO. On behalf of OID and SSJID, we are pleased to see the USBR will abide by the terms of the 1988 Agreement and Stipulation. As we expressed to Commissioner Michael Conner on our trip to Washington D.C., the Districts have had a very good working relationship with the USBR on the Stanislaus River. We look forward to continuing our relationship to address and resolve issues as they arise.

We are perplexed, however, by your statement you will "abide" by the 1988 Agreement and yet you will "use the IPO for guidance and the NOAA fisheries BO OCAP-BO operations." Shouldn't that statement be, "IPO for operations and BO for guidance"? Otherwise, we need you to explain this further as it does not answer our questions on how the USBR will operate New Melones. The OCAP-BO is not an operations plan. The Bureau as part of the project description for the BA set forth an operation plan. The OCAP-BO RPAs are predicated on the USBR operating New Melones as set forth in the BA--an operation plan you now say the USBR will not follow. The OCAP-BO RPA is not an "operation plan". It only says that if you have that BA operation plan then you need to do these additional actions. What is the Operation Plan for New Melones in 2010? Beyond 2012?

We are also greatly concerned if the USBR intends to use the modeling runs done for the OCAP-BO RPA as the guidelines or operation plan for the Bureau's operations at New Melones. The model assumes an average year reduction of 29,000 af to the Districts. The 1988 Agreement says 600,000, it doesn't say 571,000 af. The model should show the Districts taking 600,000. Secondly, the model takes additional water from the Districts in critical years. The Districts are

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limited to 400,000 af in critical years based on the BA operation plan. The 1988 Agreement has no such provision. In some years this would amount to a 200,000 af reduction to the Districts.

Given current carryover storage in New Melones and the unprecedented dry antecedent conditions within the system, the Bureau may be standing on the precipice of 1987-92 or 1928-34 droughts right now. So, how does the Bureau plan to get through such a drought and abide by the 1988 Stipulation Agreement and operate pursuant to the OCAP-BO?

The following are several other comments and inquires regarding your response letter and how the USBR will operate in 2010.

We conclude from the modeling done for the OCAP-BO RPA's that certain required operational criteria were conditioned in order to produce a viable reservoir operation through all drought periods. In certain runs NMFS turns off meeting the SWRCB D-1641 flow requirements at Vernalis, Dissolved Oxygen requirements at Ripon, and as stated above takes water from OID and SSJID. So, how will the USBR meet D-1641 and its permit conditions for New Melones and the OCAP-BO RPAs? How will the F&G Agreement integrate into the RPAs? What will be the allocation to CVP contractors? Will it be BA allocations, 1997 IPO, or something else? In the past the Stanislaus River Stakeholders have understood the protocols for the water allocations under the IPO. What are the protocols (triggers) for next year's allocations and operation?

We now know that the NMFS did not run its OCAP-BO RPA's through the Stanislaus River Temperature Model, even though CDF&G, USFWS and USBR recommended NMFS to do so. Some questions arise from our temperature analysis that we gave Commissioner Michael Conner when we were in Washington, D.C. We have attached additional copies in case you have not received them.

The temperature modeling shows that the temperature objective at Knights Ferry in the month of May cannot be met 90% of the time and in the month of April it cannot be met 80% of the time, no matter how much water is released. How will the Bureau know if it can, or cannot meet the temperature objective? Under what conditions will the Bureau off-ramp from attempting to meet the temperature objective? We also understand that the temperature objective for Orange Blossom Bridge in October can only be met 50% of the time. Under what conditions will the Bureau stop releasing water to try to meet a temperature objective that cannot be met in October 2010?

We understood the flow releases made this summer to meet the temperature objective in summer at Orange Blossom Bridge were done based on a "Daily Maximum". Page 620 of the OCAP-BO says "seven-day average daily maximum temperature". Is the USBR operating pursuant to a "Daily Maximum" or "seven-day average daily maximum temperature" for meeting temperature objectives?

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Based on temperature modeling we have done, flows above 2,000± at Tulloch Dam actually increase the temperature of the water below Goodwin in April, May and October. Is the Bureau going to sacrifice meeting flow objectives (Appendix 2E) in the RPA for the sake of meeting temperature objectives? Or vise-versa, not meet the flow objectives because it would degrade temperatures. What has priority? Does the USBR no longer consider itself subject to the flow limitation in the lower Stanislaus that it has observed in the IPO and before that?

Please provide us with the Orange Blossom Bridge temperature data (daily maximums) for June 1st through October 31st. Did the USBR meet the OCAP-BO RPA's temperature objectives for Orange Blossom Bridge June 1st through October 1st? For October 1st through October 31st?

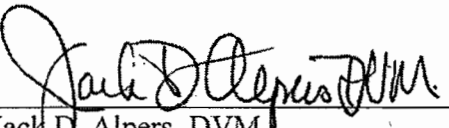
Are current operations at New Melones tied to a New Melones Index (NMI)? Will the New Melones operations for 2010 be done under a New Melones Index? If yes, can you please provide us with your assumptions for the index and a copy of the index? If the 2010 operation is based upon the NMI, what will be the allocation protocols for Appendix 2E and the Vernalis 60-day flows? If the allocations are based on the SJR Basin 60-20-20 index, what will be the allocation protocols for 2010? After the interim period?

Table 2e is predicated upon a 50% forecast of the New Melones Index. Are all allocations, CVP, Dissolved Oxygen, D-1641, etc. also now done under a 50% forecast on March 1st?

Thank you for your prompt response to our inquiries. We are assuming you had this information available to you when the Bureau "provisionally" accepted the OCAP-BO. We look forward to your earliest response as the 2010 water year is almost upon us. We thank you for allowing Mr. Paul Fujitani of your staff, to respond to our inquiries.

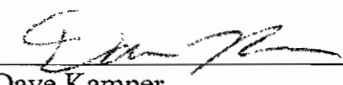
Sincerely,

OAKDALE IRRIGATION DISTRICT



Jack D. Alpers, DVM
Board President

SOUTH SAN JOAQUIN IRRIGATION
DISTRICT



Dave Kamper
Board President



United States Department of the Interior

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



IN REPLY REFER TO:

MP-140
ENV-4.00

DEC 18 2009

Mr. Tim O'Laughlin
O'Laughlin & Paris LLP
2580 Sierra Sunrise Terrace, Suite 210
Chico, CA 95928

Dear Mr. O'Laughlin:

On behalf of Bureau of Reclamation Commissioner Michael L. Connor, I am responding to your letter of November 11, 2009, regarding the National Marine Fisheries Service's Biological Opinion for salmon and steelhead.

Thank you for keeping Reclamation apprised of your work and for providing the additional temperature information. We will take your data into consideration when formulating our operating plan for New Melones Reservoir. Additionally, we are preparing a response to your letter of November 19, 2009, regarding New Melones Reservoir operations and modeling.

Should you have any questions, please contact Mr. Ron Milligan, Operations Manager, Central Valley Operations Office, at 916-979-2199 (TDD 916-979-2183).

Sincerely,

for Donald R. Glaser
Regional Director

cc: Honorable Jim Costa
House of Representatives
Washington, D.C. 20515

Honorable Jerry McNerney
House of Representatives
Washington, D.C. 20515

Honorable George Radanovich
House of Representatives
Washington, D.C. 20515

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✓ Mr. Allen Short, Coordinator
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