HOOPA VALLEY TRIBAL COUNCIL
Hoopa Valley Tribe
Post Office Box 1348 Hoopa, California 95546
PH (530) 625-4211 • FX (530) 625-4594
www.hoopa-nsn.gov

Chairman Byron Nelson, Jr.

September 10, 2020

Via E-mail (WORVIS@usbr.gov)

Mr. Wilson Orvis
Deputy Regional (Acting) Director
Business Services, MP-11 0
Bureau of Reclamation Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Re: Request for Written Comments onInterim Guidelines for the Central Valley Project Improvement Act (CVPIA) and Draft Business Practice Guidelines (BPG) for CVPIA Receipts, ProgramAccounting, Cost Allocation and Cost Recovery

Dear Mr. Orvis:

On behalf of the Hoopa Valley Tribe (Tribe), we submit the following comments on the Department's Request for Written Comments to Interim Guidelines (IG) for the Central Valley Project Improvement Act (CVPIA) and the Draft Business Practice Guidelines (BPG) for CVPIA Receipts, ProgramAccounting, Cost Allocation and Cost Recovery.[1].

I. Background

As a backdrop to these comments we first address the Law of the Trinity River, including, the Tribe's property rights in the Trinity River's water and fishery, the legal, financial and operational relationship of the Trinity River to the Central Valley Project (CVP), and the CVPIA provisions that are unique to the Tribe and the Trinity River fishery.

A. Interest of the Hoopa Valley Tribe

The Tribe is a federally recognized Indian tribe located on the Hoopa Valley Reservation, which was established for the Tribe by the United States in 1864. *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S.1016 (1996). The lower twelve miles of the Trinity River, and a stretch of the Klamath River near the Trinity confluence, flow through the

[1] By August 25 and 31, 2020 emails, Heather Casillas, Division Chief- Program Management BDO-300, CVPIA Program Manager advised tribal attorneys Joseph Membrino and Thomas Schlosser that the Bureau would accept comments received by September 11 from the Tribe,

Tribe's Reservation. Since time immemorial, the fishery resources of the Trinity and Klamath Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The principal purpose of the Tribe's Reservation was to set aside sufficient resources of these rivers for the Indians to be self-sufficient and achieve a moderate standard of living based on fish. Memorandum from John D. Leshy (M-36979), Solicitor of the Department of the Interior to the Secretary of the Interior (Oct. 4, 1993), *cited with approval, Parravano*, 70 F.3d at 542. The United States, as trustee for the Tribe, has a fiduciary responsibility to protect and preserve the Tribe's trust resources. *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206, 1213 (9th Cir. 2000); Memorandum to Regional Director, Bureau of Reclamation from Regional Solicitor, Pacific Southwest Region (July 25, 1995) ("Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights").

B. Trinity River Division Authorization and Damage to Trinity River Fishery

Congress authorized the Trinity River Division (TRD) of the Central Valley Project (CVP) in 1955. Pub. L. No. 84-386, 69 Stat. 719 ("1955 Act"). Congress recognized that "an asset to the Trinity River Basin, as well as to the whole north coastal area, are the fishery resources of the Trinity River." S. Rep. No. 1154, 84 Cong., 1st Sess. (1955 Senate Report) at 5; H.R. Rep. No. 602, 84th Cong., 1st Sess. (1955 House Report) at 4. Congress accordingly limited the integration of the TRD into the CVP and required the Secretary of the Interior to exercise a priority for use of all TRD water necessary to protect Trinity River fish and other in-basin needs. 1955 Act, section 2 provisos.[2] Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979. S*ee also* Memorandum from Solicitor to Secretary (M-37030) re Trinity River Division Authorization's 50,000 Acre-Foot Proviso and the 1959 Contract between the Bureau of Reclamation and Humboldt County, December 23, 2014.

Nonetheless, development and operation of the TRD without faithful adherence to the foregoing legal and fiduciary obligations took a devastating toll on the Hoopa Valley Tribe, the Trinity and Klamath Rivers, and the fish species that rely on those rivers. Between 1963 and 1981, Chinook salmon runs in the Trinity River declined by 80%. Eighty to ninety percent of total salmonid habitat in the Trinity Basin was lost.

C. Administrative and Legislative Restoration Actions

In 1981, relying on an environmental study, the statutory mandate to ensure the preservation and propagation Trinity River fish and wildlifein section 2 of the 1955 Act, and the federal trust responsibility regarding tribal fishery resources, the Secretary ordered an increase of annual flows released from the TRD to the Trinity River downstream of Lewiston Dam to 340,000 acre-feet annually and further directed initiation of a Trinity River Flow Evaluation

[2]The first proviso of Section 2 of the 1955 Act provides that ". . . the Secretary is authorized and directed to adopt appropriate measures to insure the preservation and propagation of fish and wildlife . . . ." The second proviso of Section 2 of the 1955 Act provides that ". . . not less than 50,000 acre-feet shall be released annually from the Trinity Reservoir and made available to Humboldt County and downstream water users." These two provisos "represent separate and independent limitations on the TRD's integration with, and thus diversion of water to, the CVP." Memorandum M-37030, December 23, 2014.

Study ("TRFES") to develop a flow regime and other restoration measures to improve habitat conditions in the Trinity River. The Secretary concluded "there are responsibilities arising from congressional enactments, which are augmented by the federal trust responsibility to the Hupa and Yurok tribes, that compel restoration of the river's salmon and steelhead resources to pre-project levels." 1981 Secretarial Order.[3]

In 1984, Congress legislatively confirmed the Secretary's restoration directive in the Trinity River Basin Fish and Wildlife Management Act ("1984 Act"), Pub. L. No. 98-541, 98 Stat. 2721. Section 2 of the 1984 Act directed the Secretary to

> restore the fish and wildlife populations in . . . [the Trinity River] basin to the levels approximating those which existed immediately before the start of [TRD] construction . . . and to maintain such levels."

Section 2(a)(1) of the 1984 Act specified that the restoration program include the "design, construction, operation and maintenance of facilities to—

> (A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and Weitchpec;
>
> (B) rehabilitate fish habitats in tributaries of the river below Lewiston Dam and in the south fork of such river; and
>
> (C) modernize and otherwise increase the effectiveness of the Trinity River Fish Hatchery."

Congress reauthorized and amended the 1984 Act in the Trinity River Basin Fish and Wildlife Management Act of 1996 ("1996 Act"), Pub. L. No. 104-143, 110 Stat. 1339 (1996). The 1996 Act expanded the scope of the 1984 Act's mandate to include rehabilitation of fish habitat "in the Klamath River downstream of the confluence with the Trinity River." 1996 Act, § 3(b). Moreover, in the 1996 Act, Congress required careful integration and management of fishery restoration downstream of Lewiston with operation of the hatchery "so that it can best serve its purpose of mitigation of the fish habitat loss above Lewiston Dam while not impairing efforts to restore and maintain naturally reproducing anadromous fish stocks within the basin."

The Central Valley Project Improvement Act ("CVPIA")[4] amended the purposes of the CVP to include the mitigation, protection, and restoration of fish and wildlife. Section 3406(a). It made restoration of environmental damage caused by construction and operation of the CVP a reimbursable cost payable by water and power contractors. The CVPIA also expressly confirmed the Bureau of Reclamation's trust responsibility to the Hoopa Valley Tribe and its fishery by requiring in section 3406(b)(23) that the Secretary take specific actions "in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the [1984 Act]." Congress directed the Secretary to

---

[3] On May 8, 1991, the Secretary extended the fishery restoration flow study and increased TRD flow releases for the study.

[4] Pub. L. No. 102-575, Title XXXIV, 106. Stat. 4600, 4706-31 (1992).

complete the TRFES and, if the Secretary and the Tribe concurred in the TRFES' recommendations once completed, to implement them accordingly. *Id.*, § 3406(b)(23)(B).

D. The Tribe and the Secretary Concur in a Restoration Program to Implement 3406(b)(23)

In 1999, seven years after enactment of the CVPIA, the U.S. Fish and Wildlife Service, the Hoopa Valley Tribe and other agencies completed the TRFES. The TRFES prescribed TRD flow releases downstream of the TRD's Lewiston Dam and management actions to: (1) reestablish geomorphic and riparian processes; (2) control temperatures and maintain habitat for all life history stages of salmonids and other species; (3) physically rehabilitate the river channel and rehabilitate the watershed; (4) manage fine and coarse sediment; and (5) implement an adaptive management and monitoring system. Following completion of the TRFES and an EIS under NEPA, the Secretary, with the Tribe's concurrence as required by section 3406(b)(23) of the CVPIA, executed the Trinity River Mainstem Fishery Restoration Record of Decision ("ROD") in a December 2000 ceremony at Hoopa. The 2000 Trinity ROD adopted the TRFES' recommended prescriptions for fishery restoration pursuant to Congress' direction in the 1984 Act, as amended in 1996, and the CVPIA. The Tribe has been and remains an active leader in implementation of all aspects of the ROD, including habitat rehabilitation projects pursuant to the ROD.

E. CVP Contractors' Litigation against Trinity Restoration and Maladministration of Restoration

Water and power users promptly challenged the 2000 Trinity ROD, but the courts upheld it. In affirming the ROD in 2004, the Ninth Circuit Court of Appeals recognized that: "Restoration of the Trinity River fishery, and the ESA-listed species that inhabit it . . . are unlawfully long overdue." *Westlands Water District*, 376 F.3d 853, 878 (9th Cir. 2004). Nevertheless, the federal statutory directive to return fish species in the Trinity River to pre-TRD levels has fallen woefully short due to: (1) underfunding; (2) mismanagement; (3) refusal to implement provisions of the CVPIA in addition to section 3406(b)(23)—e.g. section 3404--that are essential to the trust interest of the Tribe and restoration goals established in the 1984 and 1996 Acts; and (4) continuing failure to recognize the priority established by the 1955 Act for use of TRD water necessary to protect fish and other in-basin needs and for economic development. As an example, Trinityhatchery mismanagement has contributed to the instability and degradation of the fishery because of improper oversight; abusive and discriminatory personnel practices; and failure to fulfill the 1984 Act's mandate for fish population restoration and hatchery modernization and improved effectiveness, as well as the 1996 Act's mandate to integrate hatchery production with downstream natural spawning restoration.All of the foregoing have impaired the vested property right of the Tribe and its members to a moderate livelihood based on fish.

II. Comments on the 1993 Interim Guidelines (IG) and the 2020 Business Practices Guidelines (BPG)

A. The proposed reduction in contractor cost reimbursement is unlawful.

The Tribe has a direct interest in CVPIA section 3406(b)(23), which provides for Trinity River fishery restoration. That section of the CVPIA makes the costs of restoration fully reimbursable by CVP water and power contractors. The last sentence of section 3406(b)(23) states: "Costs associated with implementation of this paragraph *shall be reimbursable as operation and maintenance expenditures pursuant to existing law*" (emphasis added).[5]

In 2007, the Department of the Interior and the Tribe in consultation with California Senator Dianne Feinstein identified the costs (October 2007 price levels) of implementing section 3406(b)(23): $16.4 million annually during construction and an average of $11.0 million annually thereafter. *See*https://bit.ly/2rIaDiT. Reclamation has never furnished those funding levels.

The Tribe recently learned that Reclamation has known for years that it faces a shortfall in reimbursable contractor payments of nearly $200 million. Reclamation convened a workshop to address the matter in 2019. Because Reclamation did not notify the Tribe, the Tribe did not participate in the workshop. Since that workshop, Reclamation has decided--unilaterally and in violation of the section 3406(b)(23)'s statutory mandate for full reimbursement--to reduce the contractors' already underfunded payment obligation from 100% to 85.6%, according to the draft 1993-2017 ECO Report.[6]

B. Reclamation Fails to Account for Contractor Reimbursement Obligations that are Independent of Payments to the Restoration Fund

In view of the Tribe's property rights in the Trinity River fishery, a fundamental problem with the IG and BPG is that neither accounts for financial obligations established by the CVPIA for environmental restoration other than those identified in CVPIA section 3407. Not only the IG and BPG, but also all CVP contracts need to account for reimbursable O&M costs on one hand, and reimbursable Mitigation and Restoration (M&R) charges that are paid into the CVPIA Restoration Fund under CVPIA Section 3407, on the other.

The BPG acknowledge that separate authorities provide for the collection of each type of charges. For example O&M is defined as follows: "**O&M Costs.** In general, O&M costs are costs incurred with activities that ensure the reliability and operational readiness of dams, power plants, water distribution systems, recreational facilities, and related structures." That definition needs to be updated to account for the reimbursable costs for environmental restoration established in CVPIA section 3406(a) as a CVP project purpose. Accordingly, the O&M definition should include citation

---

[5]As noted above,the activities under (b)(23) involve fish restoration, monitoring and construction by the Trinity River Restoration Program and modernization of and propagation by the Trinity River Hatchery.

[6]The only means by which the Secretary is authorized to mitigate contractors' reimbursement obligation is identified in the last sentence of CVPIA section 3406(b). It states that if the Secretary and the State of California conclude that implementing the programs in section 3406(b) results in fish production exceeding that prior to CVP construction, then "the costs of implementing those measures which are determined to provide the enhanced production shall become credits to offset reimbursable costs." That enhanced fish production condition has not been met.

to the specific reimbursable obligations in the CVPIA, such as section 3406(b)(23) or, more generally, with a phrase such as, "or as otherwise specified by law[7]

Similarly revising the definition of O&M in the September 29, 2003, Business Practices Guidelines would bring them into compliance with the CVPIA as well.

> O&M. Costs associated with O&M activities are treated as an annual expense ("expensed") for the year in which they are incurred. Activities are classified as O&M *where the activity is other than construction and is for day-to-day operation, maintenance, and/or management of Reclamation facilities and lands*. Examples include minor repair and cleaning, routine replacements, inspections, and day-to-day manual or electronic operation of project facilities. In addition to O&M activities, costs associated with certain other activities may also be expensed. Examples include (1) investigation activities prior to project authorization and (2) construction activities where the Federal Government does not hold title to the completed facility. (Emphasis added).

The following in BPG page 17 distinguishes between O&M and M&R in explaining charges that are paid into the Restoration Fund:

> **Process for Identifying and Allocation of Costs and Recovery of Outstanding Obligation**
> 1. Out of total CVPIA expenditures, identify what percentage of costs are reimbursable by water and power and non-reimbursable (see Appendix B).
> 2. Based on reimbursable percentages, determine what cost share is allocated to water and power (see Appendix B).
> 3. Apply total receipts from water to the water's cost share obligations and apply total receipts from power to power's cost share obligation. *The application of receipts is applied against operation and maintenance (O&M) costs first, then the remainder against construction costs consistent with the premise that O&M is paid in advance.* Construction expenditures attributable to water contractors with ability to pay relief are assigned to power and added to power's allocation of construction expenditures. (Emphasis added.)

The IG's August 6, 2020 "redline" version includes an Abstract setting out the Objective and Authority for the IG. It refers to collections from revenue sources in the CVPIA that are to be covered into the Restoration Fund. However, Reclamation's broader collection obligation beyond collections for the Restoration Fund includes collection of the costs of implementing section 3406(b)(23) as O&M charges. But the IG makes no mention of section 3406(b)(23) and makes only four references to O&M charges, none of which pertain to 3406(b)(23). As discussed below, the O&M costs associated with section 3406(b)(23) need to be identified, memorialized in O&M rates, and in included in CVP contracts (both pending repayment contracts and contracts for transfer of project facility O&M) pursuant to CVPIA section 3404(c)(2).

The annual CVPIA Expenditures, Credits and Offsets Table (ECO Report) needs to allocate CVPIA environmental restoration costs between: (1) O&M as provided for in 3406(b)(23)--"Costs

---

[7] The CVPIA has other such provisions, *e.g.* section 3406(b)(1) that are beyond the scope of these comments.

associated with implementation of this paragraph shall be reimbursable as operation and maintenance expenditures pursuant to existing law"; and (2) Restoration Fund collections pursuant to section 3407. While section 3407 limits collections into the Restoration Fund, section 3406(b)(23) requires Reclamation to collect in full the significant and ongoing section 3406(b)(23) costs from water and power contractors. Their payment is a condition on TRD diversions to the Central Valley. That collection authority is separate from and in addition to the Mitigation and Restoration Payments by those contractors into the CVPIA Restoration Fund under Section 3407.

The BPG need to account for those collections in its annual report to Congress required by CVPIA section 3407(f). For example the *Annual Financial Report Central Valley Project Improvement Act* Public Law 102-575, Title XXXIV Revenues and Expenditures for the Periods: October 1, 2013 - September 30, 2014 (Actual) October 1, 2015 - September 30, 2016 (Projected)[8], makes no mention of collections pursuant to section 3406(b)(23) even though 100% of section 3406(b)(23)'s cost are reimbursable as O&M expenditures. In what form does the Bureau account for those collections both historically and prospectively?

C. CVPIA O&M Collections are Neither Capped or otherwise limited by Allocations of Reimbursements between Water and Power Contractors.

The BPG should also make clear that O&M collections and expenditures pursuant to section 3406(b)(23) are not subject to the limitations in section 3407 of the CVPIA and are not affected by the November 6, 2019 CAFC decision in *Northern California Power Agency v. United States*. This follows from the separate collection authorities in section 3406(b)(23) and section 3407.The BPG also appears to be the appropriate place to clarify the terms of the ECO Report. Section 3406(b)(23) makes the cost to implement that paragraph of the CVPIA a reimbursable obligation payable as an O&M charge. Further the CVPIA provides in section 3407(b) that to the extent that any CVP Restoration Fund receipts are used for implementing (b)(23), such funds "shall act as an offset against any water and power contractor cost share obligations that are otherwise provided for in this title." That provision of section 3407(b) establishes a distinction between: (1) section 3407's Mitigation and Restoration collections that the court of appeals has recently ruled are subject to limits and allocation between water and power contractors; and (2) section 3406(b)(23)'s unlimited cost obligations that are fully payable as O&M costs.

D. The 1955 Act conditions TRD Diversions on Fulfillment of Statutory Protections and Economic Development based on TRD Water.

The cost obligation under section 3406(b)(23) continues and has priority over other O&M expenditures for any use of TRD water for as long as the TRD facilities are in place and divert water to the Central Valley. The IG and BPG, as well as CVP contracts, should make that clear. *See, e.g.,* Memorandum from Solicitor to Assistant Secretary, Land and Water Resources, Dec. 7, 1979.

E. Accounting for O&M Cost Collection under CVPIA Section 3406(b)(23).

---

[8] https://link.zixcentral.com/u/e745ded7/Zhrp0Sru6hG7YKLl8I9C_g?u=https%3A%2F%2Fwww.usbr.gov%2Fmp%2Fcvpia%2Fdocs_reports%2FFinancial_Reports%2F2014-cvpia-annual-financial-report.pdf

How will Reclamation memorialize the contractors' obligation to reimburse section 3406(b)(23)'s costs and enforce that obligation? At a minimum, the BPG should separately identify the amounts billed and collected from water and power contractors as O&M for the CVPIA section 3406(b)(23) activities annually and cumulatively since the CVPIA's enactment. Any other funds, such as Restoration Funds and Water and Related Resources appropriations, expended on section 3406(b)(23) activities should be accounted for as well. CVPIA section 3407(f) reports to Congress are required "to describe all receipts to and uses made of monies within the Restoration Fund and the Restoration Account during the prior fiscal year and shall include the Secretary's projection with respect to receipts to and uses to be made of the finds (sic) during the next upcoming fiscal year." To fully and transparently inform Congress, CVPIA section 3407(f)'s reporting obligation should encompass not only Restoration Fund activity but also account for other funding sources used to implement section 3406(b)(23). If it is not made clear that section 3406(b)(23) collections are in addition to payments deposited in the Restoration Fund, there is a risk that those collections will not be recognized as an obligation of the contractors. This is discussed further in the next section of these comments.

F. Westlands Water District has Repudiated its CVPIA Reimbursement Obligations.

The Westlands Water District (Westlands) has been a persistent adversary of the Tribe's interest in the TRD and its property rights in the Trinity River fishery. In its February 14, 2020, comments (Letter to Wilson Orvis from Stephen Farmer), Westlands recognized that the Bureau of Reclamation construed the CVPIA to establish financial obligations on the contractors for which Restoration Fund collections may be inadequate. Westlands points out that Appendix C, CVPIA Cost Recovery Procedure states that the Bureau claims the authority and discretion to "determine what the amount of projected obligations is significant enough to require recovery through water rates."

Pursuant to CVPIA section 3406(b)(23), the costs to meet fiduciary obligations to the Hoopa Valley Tribe for the fishery resources that the United States holds in trust and meeting the fishery restoration goals and hatchery modernization mandated by the 1984 and 1996 Acts, manifestly are a "significant, outstanding obligation by water" and "significant enough to require recovery through water rates." A review of the annual ECO Reports and budget requests demonstrates that Restoration Fund disbursements for implementing section 3406(b)(23) amount to between ten and twenty percent of the total costs. The remaining balance has been assessed annually against the contractors. Other than the February 14, 2020,Westlands letter, have any of the contractors objected to paying their section (b)(23) costs? Has Reclamation billed and collected those costs? The Tribe requests Reclamation to furnish it with the record of those objections, if any, as well as records of billings, collections, and any accounts receivable.

Later in its comments, Westlands asserts that it can "find nothing in rate setting policies or our contract that allows for cost overruns, that cannot be covered by the Restoration Fund, to be collected through CVP irrigation or municipal and industrial water rates. It is the District's position that we have paid our Mitigation and Restoration Assessment and have satisfied our obligation under the law."

Thus rather than assuring certainty and finality regarding contractor obligations to pay for CVPIA environmental restoration programs, the Westlands comment letter and the Westlands water

contract[9] signed by Reclamation in 2020 create conditions for: (1) prolonged litigation; (2) a financial crisis for the Tribe and others dependent on full implementation of the CVPIA's environmental restoration provisions in section 3406; and (3) violation of the United States' fiduciary obligation to the Tribe.

G. CVPIA Requires Rate Setting to Provide for Full Reimbursement of Section 3406(b)(23) Costs.

Reclamation recognizes the relationship between its water ratesetting policy and CVP Restoration Fund collections.[10]

> **Relationship to Water Ratesetting (Water Rates).** CVP irrigation and municipal and industrial (M&I) water contractors pay for water deliveries on an acre/foot basis according to water rates specified in their respective contracts. The process for developing annual water rates is referred to as water ratesetting. In addition to annual water rates, CVPIA further requires CVP water contractors to pay specific charges to mitigate the impact of the CVP on the environment. Revenues from these charges are deposited in the Restoration Fund in the U.S. Treasury and are subsequently appropriated by Congress to fund mitigation activities. Restoration Fund charges are assessed in accordance with various provisions of CVPIA and are not calculated as part of the CVP ratesetting process.

However, this statement overlooks the fact that the O&M reimbursement obligation in 3406(b)(23) is to pay "to mitigate the impact of the CVP on the environment" separate and apart from Restoration Fund payments. As far as we know the Bureau's annual "ratesetting" does not include 3406(b)(23) costs, even though the quoted paragraph indicates that such ratesetting would be the process by which the 3406(b)(23) collections are made. Instead, it appears to segregate the standard O&M ratesetting from the CVPIA's additional requirement to pay charges for CVP's environmental impacts.

H. Draft 1993-2017 ECO Report is a Radical Departure from CVPIA Mandates.

With respect to CVPIA section 3406(b)(23), the 1993-2017 ECO Report has been revised to reduce the contractors' liability to 85.6% and assigns 14% to Federal Taxpayers (the revision does not account for the remaining 0.4%). Previous ECO Reports state that 3406(b)(23) activities are 100% reimbursable by water and power contractors.[11]

---

[9] Article 37 of Westlands' Contract No. 14-06-200-495A-IR1-P (February 28, 2020) provides:

> By entering into this Contract, the Contractor does not waive its rights to contest the validity or application in connection with the performance of the terms of this Contract of any Federal law or regulation; *Provided, That*, the Contractor agrees to comply with the terms and conditions of this Contract unless and until relief from application of such Federal law or regulation to the implementing provision of the Contract is granted by a court of competent jurisdiction.

[10] *See* Reclamation'ssummary explanation of Restoration Fund charges at this link: https://link.zixcentral.com/u/310eb869/vlJywqbv6hGECFTmgNRvyg?u=https%3A%2F%2Fwww.usbr.gov%2Fmp%2Fcvpwaterrates%2Frest-fund.html.

[11] See this link to the 2011 ECO Report: https://link.zixcentral.com/u/7ca95d38/CnpywqbV6hGECFTmgNRvyg?u=https%3A%2F%2Fwww.usbr.gov%2Fmp%2Fcvpwaterrates%2Fdocs%2Feco-report-repayment-11.pdf.

Further the 1993-2017 ECO Report has two line items for Trinity:

Trinity River Restoration –(b)(23)
Trinity River Restoration – Fac Constr –(b)(23).

This is a change from earlier ECO Reports, for example the one for 2011:

Trinity River Restoration (b)(23).

The 2011 ECO Report reported in part:

Activity	*Restoration Fund*	*WRR [Water & Related Resources]*	*Bay-Delta*	*Total Expenditures*	*Cost Share-Water and Power contractors*	*Cost Share-Federal Taxpayers*
Trinity River Restoration (b)(23)	4,863,910	47,611,793	883,539	53,359,242	100%	-0-

In contrast, the 2017 ECO Report the two line items state the following:

Activity	*Restoration Fund*	*WRR*	*Bay-Delta*	*Total Expenditures*	*Cost share Water and Power contractors*	*Cost Share Federal Taxpayers*
Trinity River Restoration (b)(23)	-0-	34,634,219	883,705	35,517,924	85.6%	14%
Trinity River Restoration – Fac Constr – (b)(23)	4,864,074	29,492,388	-0-	34,356,462	85.6%	14%
				69,874,386		

These changes raise the following questions:

1) When and on what basis was the contractors' 100% reimbursable obligation reduced?
2) When and on what basis were Bay-Delta funds provided?
3) What is the reason for breaking Trinity Restoration into two line items?

4) The annual TRRP budget has been approximately $1.5 million from the Restoration Fund and $10 million from WRR appropriations? But between 2011 and 2017 the ECO Report accounts for only $34,356,462 for the six-year period from 2012 to 2017, or an annual average of $5,726,077; that is, roughly half the annual appropriation? Where is the rest of the money accounted for?

However, CVP rate setting policies and water and power contracts are informed and controlled by legislation. As to section 3406(b)(23) the statutory ratesetting policy directive is explicit: "Costs associated with implementation of this paragraph shall be reimbursable as operation and maintenance expenditures pursuant to existing law." For more than a decade the Hoopa Valley Tribe has repeatedly engaged with Reclamation to request that it implement 3406(b)(23) by setting the O&M rates required to meet the annual and permanent costs of implementing section 3406(b)(23). The Tribe has similarly attempted to have Reclamation incorporate those rates into all contracts subject to section 3404 of the CVPIA, as required by section 3404(c)(2).[12]Reclamation has not done so.

I. The Need for a Record of Receipts and Accounts Receivable.

The BPG needs to state the extent to which credits or "amounts to pay" shown on the ECO Report have been actually collected in the first instance from the contractors. Where net obligations have not been collected, the BPG should set forth Reclamation's plan for collecting the amounts and include in that plan a condition that contractors' timely payments are a prerequisite to water deliveries. Further, Part D of the IG suggest, incorrectly, that O&M is collected only when Irrigation Full Cost Rates are applicable, which in turn are only applicable as Second- or Third-Rate Tier water rates during very wet years:

> Irrigation Full Cost Rates are calculated pursuant to the applicable provisions of the RRA. The Irrigation Full Cost Rates include components to recover applicable operation and maintenance (O&M) costs, accumulated deficits, construction costs, and interest on unpaid construction capital costs. Irrigation Full Cost Rates are computed to recover O&M costs within the year incurred; accumulated deficits within the authorized repayment period; and capital construction costs amortized at the applicable RRA interest rate over the remaining repayment period. ...Consistent with the above, a Water Contractor shall not be subject to the Second and Third Rate Tier water rates if the cumulative total of all Project Water Diverted for use by the Water Contractor ... in a given contract year equals 80 percent or less of the Water Contractor's maximum combined contractual Project Water entitlement.

The CVPIA does not authorize costs associated with implementation of section 3406(b)(23) to be limited pursuant to the foregoing text.

---

[12] "Upon renewal of any long-term repayment or water service contract providing for the delivery of water from the Central Valley Project, the Secretary *shall incorporate all requirements imposed by existing law, including provisions of this title, within such renewed contracts*. The Secretary shall also administer all existing, new, and renewed contracts in conformance with the requirements and goals of this title" (emphasis added).

Summary and Conclusion

The CVPIA requires Reclamation to obtain reimbursement for Trinity River fishery restoration, preservation and propagation activities as O&M costs pursuant to CVPIA Section 3406(b)(23). The BPG and the draft Guidelines currently do not comply with that mandate, which is separate from the Restoration Fund collections mandate in CVPIA section 3407. The obligation under 3406(b)(23) is permanent and is neither capped nor otherwise limited as are the collections pursuant to section 3407. The 3406(b)(23) payment obligation must be memorialized in all CVP contracts and CVP O&M rates. The Bureau's failure to state whether and how section 3406(b)(23) collections are being made and accounted for creates a financial risk to the integrity of the CVPIA's program for the Trinity River fishery and compromisesthe fiduciary responsibility of the United States for the Tribe's fishery resources. The Tribe has long requested clarification of these issues. In view of the decisions presently pending regarding CVPIA finances and CVP contracts, the Tribe believes that further delay in addressing and resolving these matters, including pursuant to the National Environmental Policy Act, would be unlawful.

Sincerely yours,

HOOPA VALLEY TRIBAL COUNCIL

Byron Nelson, Jr., Chairman

T:\WPDOCS\0020\05543\HVT Scoping Comments on NOP