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**Via Electronic & First Class Mail**

February 7, 2006

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Re: Hoopa Valley Tribe's Comments Concerning South Delta Improvements Program  
Draft Environmental Impact Statement/Environmental Impact Report (October  
2005) ("SDIP DEIS")

Dear Mr. Marshall and Ms. McHale:

On behalf of the Hoopa Valley Indian Tribe ("Tribe"), we submit the following comments concerning the South Delta Improvements Program Draft Environmental Impact Statement/Environmental Impact Report (October 2005) ("SDIP DEIS").

The Tribe believes that, overall, the proposed action in the SDIP DEIS should be beneficial for smelt and Chinook salmon. To the extent that the DEIS so provides, the Tribe supports efforts to reduce entrainment and does not object to pumping, provided that the volume and timing of the water diversions is calculated to avoid harm to fisheries, particularly Klamath and Trinity River fisheries. The Tribe also supports actions, such as those proposed in the DEIS that might, in turn, improve compliance with applicable Biological Opinions, including the two opinions on the Long-term Central Valley Project and State Water Project Operations Criteria and Plan ("CVP OCAP BiOp"), thereby reducing the demand for Trinity River exports. However, the Tribe is concerned with the inadequacy of the SDIP DEIS's discussion of adverse effects on the Trinity River fisheries from carryover storage capacity and the adverse effects of the proposed action on the Tribe's federally reserved fishing rights. In particular, the SDIP DEIS must conform to the Trinity River Mainstem Fishery Restoration EIS (Oct. 2000) and the Trinity River Record of Decision ("ROD"); it should clearly state that the proposed action here is not intended to change the Trinity ROD in any way.

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For these and other reasons, the SDIP DEIS is inadequate and must be revised and recirculated. These comments reflect the Tribe's ongoing concern with management of the CVP, which includes the Trinity River Division, and its effect on the federally-reserved fishing rights of the Tribe.

#### **A. Nature of the Tribe's Interest**

Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The Hoopa Indians follow exacting cultural practices to protect individual runs of fish and to celebrate the bounty of the river that gives life to their people. The salmon fishery also holds significant value in the Hoopa culture and economies, and the Tribe holds property rights in the Trinity River Basin fishery. See Mem. from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 3, 15, 18-21 (Oct. 4, 1993), *cited with approval*, *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 flows through the Hoopa Valley Reservation.

The CVP has a direct and dramatic effect on fisheries reserved for the Tribe. The Trinity River Division ("TRD"), which is part of the CVP, diverts water from the Klamath-Trinity River Basin by means of a system of dams and trans-mountain diversion works. Act of August 12, 1955 ("1955 Act"), 69 Stat. 719, Pub. L. 84-386 (authorizing construction and operation of the TRD). Water diverted by the TRD eventually flows into the Sacramento River and Delta, and becomes part of the supply available to satisfy CVP water service delivery contracts. Trinity River operations affect the volume of water available for export.

Congress authorized the TRD after being advised that approximately 50% of the Trinity's flow would be diverted and that the balance of the Trinity's flow would remain in the Trinity-Klamath River system and basin. In section 2 of the 1955 Act, Congress expressly made diversion to the Central Valley subject to requirements for fish and wildlife preservation and propagation in the Klamath-Trinity River Basin. However, upon completion of the TRD in 1964, up to 90% of the Trinity's flow was diverted. TRFEFR at 8, 63-64. Fishery studies throughout the late 1970s and early 1980s determined that the operation of the TRD was the single greatest contributor to the Trinity fishery declines. The devastating effects on the anadromous fishery resulted in listing of Klamath-Trinity coho salmon under both state and federal Endangered Species Acts.

Congress has enacted a number of laws intended to restore the Trinity River fishery, including: the 1955 Act, the Trinity River Basin Fish and Wildlife Management Act, Pub. L. 98-541, 98 Stat. 2721 (1984), the Trinity River Basin Fish and Wildlife Management Reauthorization Act, Pub. L. 104-143, 110 Stat. 1338 (1996), and Section 3406(b)(23) of the CVPIA, Pub. L. 102-575, 106 Stat. 4600. In particular, CVPIA § 3406(b)(23) directed the

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Secretary to determine and, upon concurrence of the Tribe, implement permanent instream fishery flow requirements and operating criteria and procedures for the Trinity River Division to restore and maintain the Trinity River fishery. This provision was one of many Congress added to the CVP authorizing legislation in 1992 in conjunction with that Act's clarification that the CVP be operated for the purposes of protecting fishery resources, mitigating fish and wildlife impacts, as well as providing water deliveries to irrigators and municipalities and industrial users. *See, e.g.*, CVPIA § 3406(a).

In accordance with the specific directive of CVPIA § 3406(b)(23), the TRFEFR was completed in June 1999. The Tribe concurred in the Flow Study results on December 18, 2000. Related environmental reviews were completed and, on December 19, 2000, the Secretary and the Tribe signed the ROD implementing a suite of habitat improvement actions including instream fishery flow releases from the TRD commensurate with those recommended in the TRFEFR ("Flow Study").

The Tribe is committed to ensuring that Reclamation's actions comply with applicable law, including the CVPIA, the Endangered Species Act ("ESA"), 16 U.S.C. § 1631 *et seq.*, and the government's trust responsibility to the Tribe. The Tribe is also fully committed to the timely implementation of the scientifically based fishery flow requirements set forth in the Trinity River Flow Study and mandated by the ROD. *See Westlands v. United States*, 275 F. Supp.2d 1157 (E.D. Cal. 2002), *rev'd on other grounds*, 376 F.3d 853 (9th Cir. July 13, 2004), *reh'g denied* (9th Cir. Nov. 8, 2004) (upholding the Trinity River EIS and concluding that "nothing remains prohibiting the full implementation of the ROD, including its complete flow plan for the Trinity River").

## **B. Specific Comments**

### **1. Operations Related Effects on Trinity River Fisheries**

The SDIP DEIS fails to fully analyze the effects of the proposed operations on Trinity River fisheries in three primary ways. First, the DEIS only includes a limited analysis of effects on coho salmon and does not analyze effects on fall and spring Chinook, winter and summer steelhead, lamprey, and sturgeon. Second, the DEIS fails to discuss the fact that the proposed Trinity Reservoir carryover storage may have negative effects on the survival of Trinity River fisheries and does not comply with the storage mandates of the Trinity River EIS. Third, the DEIS does not take into account the requirements of the ROD. We discuss each concern in turn.

#### **a. Inadequate Discussion of Effects on Chinook and Steelhead**

The DEIS fails to recognize the importance of steelhead and Chinook in tribal harvest. The DEIS admits that "[c]hanges in water supply operations, however, may affect Trinity Reservoir storage and Trinity River flow." DEIS at 6.1-87. Nevertheless, these concerns are rejected out-of-hand. It is unclear how the DEIS reaches this conclusion and on what the analysis is based.

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The absence of biological support for the conclusion that any adverse effects on steelhead and Chinook are insignificant is made clear when the DEIS opines: “[e]ffects on Chinook salmon, steelhead, and other species are not discussed for the Trinity River. The effects on coho salmon are representative of the potential effects on Chinook salmon and steelhead.” *Id.* This statement flies in the face of the purpose of the DEIS. How can the effects on coho be the same for Chinook if the effects on Chinook were not even discussed? Such circular logic fails to provide a “hard look” at the affects of the proposed action of the Trinity River fisheries. Moreover, the bare statement comparing coho to other anadromous fish species in the Trinity River grossly oversimplifies fish biology and ignores the life history of all species in the Trinity River. For instance, adult coho salmon generally migrate and spawn when temperature concerns are minor (late fall/winter). In contrast, spring Chinook, fall Chinook, and summer steelhead spawn, migrate, and hold during periods when temperatures are more likely to be a concern (summer/early fall). This one just one example of the crucial biological differences between the species that rely on a healthy Trinity River that must be accounted for when Reclamation provides for the timing of exports from the Trinity River.

The DEIS must be revised and recirculated to provide a full analysis of effects of the proposed action on Chinook salmon, steelhead, and other species upon which the Tribe relies. The associated requirement to modify the timing and volume of Trinity River exports to meet the migration and survival needs of these fish must also be analyzed and discussed in a revised and recirculated DEIS.

**b. Inadequate Discussion of Temperature Effects**

Second, the DEIS fails to discuss the fact that the proposed Trinity Reservoir carryover storage will likely have a negative impact on the survival of Trinity River fisheries. The DEIS seems to suggest that increased exports from the Trinity River to the Sacramento River will actually reduce Trinity River temperatures. DEIS at 6.1-88 (“As indicated previously, changes in Trinity River flow are minimal and would not affect water temperature”). This is not entirely true and ignores the effects of ambient air temperatures on storage waters. The DEIS does not fully analyze the effect of increased exports on the water temperature of the remaining storage waters. Cold water reserves are necessary to ensure adequate temperatures in the Trinity River for survival of Trinity River fish.

Trinity Reservoir, or Trinity Lake, is a 2.48 million acre-foot reservoir located on the Trinity River near Lewiston, California. Water released from Trinity Dam is approximately 45°F, and can be diverted through the Clear Creek and Spring Creek tunnels to the Sacramento River for use by the CVP. Importantly, the water stored in the reservoir can and must also be released into the Trinity River to meet fishery needs in the Trinity River and the Lower Klamath River. Since the massive adult salmon kill of 2002 where at least 68,000 adult Chinook salmon died due to degraded water conditions caused by Klamath Project operations, additional water has been released from Trinity Dam in an effort to prevent another fish kill. Releases were made in 2003 and 2004, but were deemed unnecessary in 2005. Releases of water from the reservoirs behind the Trinity and Lewiston Dams have been shown to significantly decrease water

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temperatures by 5-6°F in the Trinity River and increase dissolved oxygen in the Lower Klamath River, approximately 112 miles downstream of Lewiston Dam.

Compounding temperature problems, Trinity Reservoir capacity is approximately twice the size of the average annual inflow from the upstream watershed. Accordingly, the refill potential of the reservoir is extremely low compared to other reservoirs such as Shasta Lake, which has an inflow roughly equal to its size. Once Trinity Reservoir is drawn down during an extended dry period, the Reservoir will not adequately refill due to the limited inflow. The reduced inflow capacity will cause the Reservoir water levels to drop even further. The decreased water levels render the remaining storage water susceptible to the effects of ambient air temperatures. This, in turn, limits cold water supplies, reducing an important source of cold water necessary for release to the Trinity and Lower Klamath Rivers to maintain river temperatures at levels consistent with fish survival.

The DEIS seems to acknowledge this problem when it states that increased water temperature in the Trinity River during the fall months “could have an adverse effect on coho salmon and other salmonids.” DEIS at 6.1-88. As discussed above, the reason for the adverse effect is clear. Inexplicably, however, the DEIS does not analyze the issue further or provide a solution to the risk of increased temperatures and fish mortality caused by reduced volumes of water storage due to increased exports under the SDIP DEIS. The failure to address increased temperatures of storage water is especially troubling because, if the heated water is released for fishery flows, the Trinity River may not meet the temperature objectives for the Trinity River adopted by the Hoopa Valley Tribe, North Coast Regional Water Quality Control Board, and U.S. Environmental Protection Agency. The water releases may also violate the temperatures standards adopted in the Trinity River ROD/EIS that requires water released into the Trinity River “be no more than 5°F warmer than the receiving water temperatures.” Trinity River EIS at 3-125. The increased temperatures may also jeopardize salmonid health and survival.

The SDIP DEIS must be revised to include a full analysis of the effects of increased Trinity River temperatures caused by reduced carryover capacity on the Tribe’s fishing rights and salmon survival, and to ensure consistency with state, federal and tribal water quality standards and objectives.

**c. Failure to Account for the Trinity ROD and Inadequate Discussion of Carryover Capacity**

The ROD calls for increased fishery flows into the Trinity River from the Trinity and Lewiston Dams, corresponding to roughly a 1/1 reduction in water exports to the Sacramento River. ROD at 20-23. Reclamation, under the guise of the SDIP, appears to reject the ROD’s mandate for decreased exports to the CVP commensurate with the increase in fishery flows. The SDIP DEIS makes clear that Reclamation intends to continue historic deliveries of CVP water, as is also stated in the numerous CVP Long-term Contracts providing for status quo water deliveries. DEIS at 1-10 (purpose of the proposed action is to “increase water deliveries and delivery reliability to SWP and CVP water contractors south of the Delta”).

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The failure of the DEIS to account for the Trinity ROD is made clear in the DEIS's discussion of the "potential impacts from the SDIP operations on the Trinity River" in Appendix Q. A mere four pages of text, Appendix Q makes clear a perceived unimportance of fish and wildlife, and correspondingly, the federally reserved fishing rights of the Tribe, in the Trinity River. Appendix Q provides: "Trinity River Division operations are primarily governed by (1) the need for exports to the Sacramento Basin to increase CVP water supply and/or hydropower production, (2) satisfying the fish and wildlife flow and temperature requirements along the Trinity River, and (3) maintaining flood control in accordance with safety of dams criteria." DEIS at Q-2. The order of priorities listed is telling. Despite the Trinity ROD and CVPIA § 3406(b)(23), the Tribe's rights are never mentioned.

The ROD is only mentioned in passing. The DEIS states that the ROD requires Trinity River flows of "368-815 thousand acre-feet" annually. *Id.* This is a gross oversimplification of the flow requirements of the ROD. The DEIS fails to account for the fact that, within this volume allocation, there must be sufficient flows measured in cubic feet per second (cfs) for a specified number of days for operation and management of the TRD to be in compliance with the ROD for the stated water year type. ROD at 12. In fact, it would appear that the DEIS confuses acre-feet with cubic feet per second. The SDIP DEIS includes tables that identify both exports from the Trinity River to the Sacramento River, as well as Trinity River instream flows, in terms of cubic feet per second. *See, e.g.*, Tbl. 5.1-1. This is misleading and inconsistent with other environmental documents related to the CVP wherein the quantity of water (*e.g.*, such as for exports) is measured in acre-feet. Cubic feet per second is a measurement of the rate of water movement, and is usually used to measure specific flows. For instance, one cubic foot per second of water flowing for 24 hours produces approximately 2 acre-feet. Acre-feet is an appropriate measure for quantity of water. The DEIS should be revised and recirculated to properly identify effects and proposed mitigation measures using commonly accepted and understood terms.

The DEIS's failure to discuss the ROD and the corresponding need to manage and operate the TRD to protect the Tribe's federally reserved fishery is inexcusable. The effects of the failure of the DEIS to account for the ROD is highlighted by the provided "summary of impacts for the SDIP program" in Table 4-1. The table provides that the impact of the SDIP program on salmonids within the Trinity River will be "less than significant." Tbl. 4-1. This statement is extremely misleading, and is based on flawed assumptions that conflict with the requirements of the ROD and the Trinity River EIS.

The DEIS's discussion of the TRD provides that, based on the simulation used to predict carryover capacity, a minimum pool of 250,000 acre-feet every few years, with 500,000 acre-feet every several years, would be the minimum pool for the reservoir. DEIS at 5.1-9. However, the Trinity River EIS preferred alternative mandates a higher reservoir capacity. The Trinity River EIS requires Trinity Reservoir minimum storage to range from 400,000 to 600,000 acre-feet annually. Trinity River EIS at 3-83. In other words, the proposed carryover capacity falls far short of the Trinity River EIS requirements. Based on the SDIP simulations, there would be 21 years out of 100 where the minimum pool for the reservoir would be less than the level mandated

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by the Trinity River EIS. *See* Fig. 5.1-1, 5.1-2. The inadequate storage proposed, and the DEIS's complete failure to consider the Trinity River ROD requirements, could have a severe adverse effect on salmonids in the Klamath-Trinity Basin. Water temperatures instream would regularly exceed state, federal and tribal water temperature standards and objectives. The SDIP DEIS must be revised to be consistent with the mandates of the Trinity River EIS and ROD.

Finally, the Tribe notes that the baseline used by the DEIS, the year 2001, is not accurate because, as the DEIS admits, Trinity River ROD flows were not fully implemented that dry year. DEIS at 5.1-9 – 10. The DEIS should use as a baseline the year 2005 where the ROD flows were being implemented as anticipated in the ROD. Otherwise, the DEIS presents a skewed view of the environmental baseline, seriously compromising the remaining analysis. Indeed, because ROD flows were not fully implemented in 2001, additional water was available for export. Such water may not be available for export now if the baseline actually reflected current conditions. The 2001 baseline does not adequately represent the existing environmental baseline and must be revised.

## **2. Indian Trust Assets**

The DEIS's description and manner of addressing "Indian Trust Assets" is incomplete and incorrect. The DEIS provides that:

In the north-of-Delta area, the Hoopa Valley Tribe has fishing rights on the Trinity River. The Hoopa Valley Indian Reservation was established along the Trinity River in the late 1800s. Historically, Trinity River fisheries provided the primary dietary staple and also supported commercial and subsistence fishing for Indians in the area. The fisheries also played a significant role in the tribes' religious beliefs (U.S. Department of the Interior 2000). The Environmental Consequences subsection below concludes there are no adverse effects on the trust assets of the Hoopa Valley Tribe . . .

DEIS at 7.10-2. The Tribe appreciates the DEIS's appropriate recognition of the Tribe's federally reserved fishing rights. However, as a practical matter, this recitation of the Tribe's rights is incomplete and fails to account for the importance of the Trinity River and its fishery to the Tribe. For instance, the DEIS fails to account for the fact that the Hoopa Valley and Yurok Tribes also have federally reserved fishing rights in the Klamath River. This fact should be acknowledged. Other aspects of the Tribe's use of the Trinity River and its natural bounty are overlooked. The Tribe suggests that the DEIS be updated to include a more complete discussion of the nature of the Tribe's rights and interests as provided in Section A *supra* herein or the Trinity River EIS at section 3.6.

Second, there very well may be "adverse effects" on the Tribe's federally reserved fishing rights. The consideration of "Indian Trust Assets" in the DEIS completely fails to acknowledge the nature of water rights associated with tribal fishing rights. For example, the Tribe's federally-reserved fishing right guarantees to the Tribe the right to a fishery that will support a moderate standard of living. As has been repeatedly acknowledged by the federal

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courts, tribes are entitled to sufficient water in rivers flowing through their lands to support a fishery that will meet those needs despite the prospect of increasing state wide water demand. Accordingly, as the needs of the Tribe and the fishery change, so must the water delivery contracts and export provisions affecting the ability to sustain that fishery. The DEIS's analysis of this issue is nonexistent and legally inadequate.

The failure to account for the Tribe's needs is highlighted by the DEIS's failure to discuss, let alone acknowledge, that the CVPIA requires operation and management of the CVP to protect the Tribe's federally reserved fishing rights. Chapter 8 of the DEIS purports to discuss "the major requirements for permitting and environmental review and consultation for implementation of the SDIP." DEIS at 8-1. Yet, the DEIS ignores CVPIA § 3406(b)(23) that mandates the Secretary's fiduciary duty to the Tribe and includes the obligation that the Secretary meet the instream fishery flow requirements of the Trinity River as specified in TRFEFR. *See* DEIS 8-14. The DEIS must reference and follow the legal requirements expressed in CVPIA § 3406(b)(23).

### **3. Concerns with Multiple NEPA Documents**

The Tribe is concerned by the continued decision of Reclamation to release multiple NEPA documents staggered over a period of years that, like this DEIS, appear to pass responsibility for reviewing certain other aspects of related water diversions off to other pending NEPA documents. For instance, the Tribe previously provided comments concerning the two Draft Central Valley Project, West San Joaquin Division, San Luis Unit Long term Water Service Contract Renewal Environmental Impact Statements (November 2004 and September 2005). The Tribe also provided comments concerning Central Valley Project Long term Renewals of Water Service Contracts for Delta Mendota Canal (Delta Division), San Luis Unit, etc. (October 2004) and the Delta Mendota Canal Unit Draft Environmental Assessment Long term Contract Renewal (November 2004) ("DMC DEA") in separate letters in 2004. These comments are incorporated by reference herein.

The SDIP DEIS is premature because it presumes decisions south of the Delta and drainage issues in the San Luis Unit of the CVP that are currently subject to ongoing separate environmental analyses. For instance, environmental review of the San Luis Drainage Feature Re-Evaluation has not been completed. Reclamation is also currently negotiating Long-term Contracts for San Luis Unit and Western San Joaquin Division CVP contractors. NEPA documents concerning the Long-Term Contracts have been circulated for public comment, but have not been finalized. Both the Drainage Re-Evaluation and the San Luis Unit Long-term Contracts have a bearing on the SDIP DEIS. There cannot be the requisite "hard look" at the action and its cumulative effects under NEPA if relevant Long-term Contracts' terms are exempted from analysis in this and other DEISs. Reclamation's approach – limiting the scope of review of this NEPA document and passing off decisions between multiple NEPA documents – is arbitrary and capricious, and serves to confuse the public while avoiding consideration of the cumulative impacts of all the CVP Long-term Contracts and related water diversions on the environment. *See* 40 C.F.R § 1508.8 (discussing cumulative impacts).

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NEPA's disclosure purposes are undermined if the public is forced to navigate through a maze of contracts and environmental review documents to comprehend the true nature and far-flung effects of CVP water service contract renewal and increased water diversions for contractors provided through increased diversions in this DEIS. The SDIP DEIS should be integrated with elements of the larger CALFED program, CVP Long-term Contract renewals, and other CVP and SWP operations to provide a clear picture of the nature and scope of the effects on the environment of the proposed interrelated actions.

**C. Conclusion**

The Tribe urges Reclamation to revise and recirculate the SDIP DEIS to address the legal deficiencies noted above and to account for the legal obligation to protect the Tribe's federally reserved fishing rights. Thank you for the opportunity to comment on the DEIS. We trust that our comments will be appropriately considered and addressed in any final NEPA documentation for this proposed action.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & MCGAW



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