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March 4, 2013

VIA EMAIL

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Rhonda Reed
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Re: Comments of the San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition to the November 2012 "Draft Environmental Assessment for Non-Essential Experimental Population Designation and 4(d) Take Provisions for Reintroduction of Central Valley Spring-Run Chinook Salmon to the San Joaquin River below Friant Dam"

Dear Ms. Fehm-Sullivan and Ms. Reed:

The following comments to the Draft Environmental Assessment referenced above (DEA) are offered on behalf of the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition (referred to for convenience collectively as "Exchange Contractors"). By separate letter, the Exchange Contractors will comment on the proposed 4(d) take provisions and Section 10(j) designation of non-essential experimental population set forth in the proposed rule issued at 78 Fed. Reg. 3381 (January 16, 2013). For your convenience, a copy of that letter is appended hereto.

General Comments

1. Lack of Funding.

In comments to the Draft Programmatic Environmental Impact Statement/Environmental Impact Report (PEIS/R), the Exchange Contractors raised the concern that the Settling Parties, including the National Marine Fisheries Service (NMFS), have erroneously assumed that all necessary funding will be made available to fully implement the Settlement referred to in DEA Section 1.1.2. While perhaps historically there was some basis, however remote, that all of the funding necessary to fully implement the settlement would be forthcoming, based upon more recent information that understanding is no longer valid. This newly discovered information includes assurances from members of Congress that further federal funding will not be forthcoming as well as the substantial increase in costs of necessary expenditures identified by Reclamation in its Framework for Implementation. At the time the Settlement was presented to the United States Congress in support of the necessary implementing legislation, estimates of the cost of the San Joaquin River Restoration Program (SJRRP) ranged from \$250-800 million. In the Framework for Implementation, Reclamation has identified actions that are necessary in addition to those set forth in the Settlement to assure successful reintroduction of the San Joaquin spring-run Chinook salmon. Further, Reclamation has appropriately identified in the Record of Decision (ROD) at Section 6.2 that contingencies must be developed in the event that full funding is not available. The ROD provides that Reclamation will prepare each year an Annual Work Plan of projected SJRRP activities that "will be subject to revision to respond to changing conditions, including environmental, budgetary or otherwise." Moreover, "[c]onsistent with and in the process of fulfilling the requirements set forth in the Settlement and Act, and in consideration of available resources," the ROD also establishes a list of SJRRP activities that will be expedited over other activities.

NMFS is aware of the current level of funding available for the SJRRP, the fact that additional funding is not going to be available, that the SJRRP is currently underfunded based on original estimates, and that additional actions and costs that have been identified by Reclamation in the Framework for Implementation. In a situation such as this, where changed circumstances affect the factors relevant to the development and evaluation of alternatives, the agency "must account for such change in the alternatives it considers." (*Natural Resources Defense Council v. United States Forest Service*, 421 F.3d 797, 813 (9th Cir. 2005) [finding that error in interpreting report affected the economic and wildlife factors that the Forest Service used in developing and evaluating the alternatives considered]; *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, at 730-731 ["While we cannot predict what impact the elimination of the [long-term] contract will have on the Forest Service's ultimate land use decisions, clearly it affects the range of alternatives to be considered"].) Here, the DEA violates NEPA by failing to analyze the SJRRP assuming no additional funding or the necessity for additional funds identified in the Framework for Implementation.

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2. Less than Full Implementation.

The DEA does not analyze the impacts on the successful reintroduction in the event that less than all measures identified in the Settlement are implemented. Yet, in multiple sections of the DEA, NMFS states that “the flow and habitat improvements to be implemented by the SJRRP represent the best opportunity to have spring-run Chinook reintroduced to the San Joaquin River.” (Page 5-1¹). Further, the DEA does not contain any analysis of the newly identified actions beyond those set forth in the Settlement that Reclamation has identified (in close cooperation with NMFS and other Settling Parties) in the Framework for Implementation that are necessary for the successful reintroduction of spring-run Chinook salmon to the San Joaquin River.

3. No Analysis of Individual Projects and Cumulative Effects Thereof.

Reclamation is currently pursuing two projects in furtherance of the Settlement. These are the Arroyo Canal Fish Screen and Sack Dam Fish Passage Project and the Mendota Pool Bypass and Reach 2B Improvements Project. (See Mendota Pool Bypass and Reach 2B Improvements Project, Project Description Technical Memorandum and the Draft Environmental Assessment/Initial Study and Finding of No Significant Impact/Mitigated Negative Declaration for the Arroyo Canal Fish Screen and Sack Dam Fish Passage Project.) Each of these projects are considered necessary for the successful reintroduction of spring-run Chinook salmon. Each of these projects will have a cumulative effect upon the spring-run and the human environment. There is no analysis of the effect of these projects on the reintroduction of spring-run Chinook salmon, nor is there any analysis of the effect of subsequent projects required to be implemented by the Settlement. Similarly, there is no analysis of the failure to implement either of the above projects or subsequent projects on a successful reintroduction of spring-run Chinook salmon. (*Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) [finding EIS inadequate for failing to address reasonably foreseeable cumulative impacts]; *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1033 (S.D. Cal. 2003) [failure to analyze cumulative impact of project on water quality and quantity rendered Environmental Assessment “inherently inadequate.”].) For instance, at page 1-5 the DEA acknowledges “reintroduction will begin with actions appropriate to existing habitat and to refining methods that would be used. Succeeding actions are expected to have more likely success as the habitat improvement and accompanying actions in the Settlement are implemented.” Yet, no analysis is set forth in the event that the succeeding actions are implemented in whole or in part or not implemented at all.

¹ Words of similar effect are also found on the following pages: 1-5, 2-11, 4-16 (Until the habitat improvement projects are completed, in river survival is expected to be low, except in wet years.)

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4. Subsidence.

NMFS is aware that recently discovered significant subsidence has and is still occurring in the Restoration Area and adjacent thereto. The Exchange Contractors have previously commented on the subsidence problem. Please see those comments set forth in the Supplemental Comments to the Final PEIS/R Based on New Information from the San Joaquin River Exchange Contractors Water Authority and the San Joaquin River Resource Management Coalition submitted August 15, 2012. See also, the Exchange Contractors Protest to the United States Bureau of Reclamation Petitions for Change to License 1986 and Permits 11885, 11886 and 11887 (Applications 23, 234, 1465 and 5638), pages 41-42, submitted to the State Water Resources Control Board on June 18, 2012, and the Supplemental Information to Protest of USBR Petitions for Permits 11885, 11886, and 11887 and License 1986 (Applications 23, 243, 1465, and 5638) re San Joaquin Restoration Program, pages 6-7, submitted to the State Water Resources Control Board on August 31, 2012. Those comments are incorporated herein as though fully set forth.

The subsidence is the result of recently initiated deep well pumping from under the Corcoran Clay for overlying lands. Differential subsidence on the scale of up to 0.6 feet per year has been documented within the study area of the SJRRP near Western Madera. Since 2008, subsidence in the study area has been as much as 1.2 feet. The current level of subsidence is as much as 4 feet and freeboard at Sack Dam has been reduced to but a few inches. The SJRRP will need to determine how to address existing and increasing future subsidence. The extreme rate of subsidence may have a significant impact on the SJRRP schedule to complete the planning, design and construction of the Phase I projects. To date the subsidence has resulted in a halt to the further engineering and construction of the Arroyo Canal Fish Screen and Sack Dam Fish Passage Project. Additional Phase I facilities and river reaches that will be impacted include:

- Flow capacity of Reaches 3 and 4A
- Flood flow capacity in the Chowchilla bypass
- Flood flow capacity in the Eastside Bypass
- Modifications at the Reach 4B headgate
- Modifications to the Sand Slough Control Structure
- Modifications in the San Joaquin Reach 4B1

Specific Comments

Section 1.3.1.1. Proposed Designation Will Further the Conservation of the Species.

This Section acknowledges that to achieve the restoration goal, the Settlement requires a combination of channel and structural modifications and habitat improvements, water releases and the reintroduction of Chinook salmon. It further states "with these actions, the prognosis for

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spring-run Chinook populations to return is good.” (citation omitted). Presumably, without one or more of these actions, the prognosis for spring-run Chinook populations to return is less than good. No analysis is provided of the effect on spring-run of less than full implementation of the foregoing measures.

Section 1.4.1. San Joaquin River Restoration Program Environmental Impact Statement/Report.

This section states that the PEIS/R evaluated the “potential direct, indirect, and cumulative impacts on the environment at a program level that could result from implementing the Settlement consistent with the Restoration Act [citations omitted].” However, the PEIS/R did not provide an environmental analysis of the various structural and habitat improvements that needed to be made. Rather, it assumed those were common elements and provided no actual analysis of the impacts of implementing those measures.

The PEIS/R analyzed reintroduction of spring run Chinook with regard to hybridization, competition and disease. This analysis was conducted at the program level. As stated in the Exchange Contractors previously submitted comments to the PEIS/R, the analysis of impacts to salmon from the SJRRP, the impacts to adjacent landowners, agricultural interests, and water supply, was at a programmatic level. Yet, the DEA does not contain the level of analysis required to assess the impact of reintroduction of salmon into the upper San Joaquin River with respect to the aforementioned interests.

Section 1.6. Action area.

Included in the action area is not only the San Joaquin River but the flood control bypasses. The 4(d) rule must cover flood control activities in the Kings River, San Joaquin River and flood control bypasses.

Section 2.0. Proposed action and alternatives.

The section states that the reintroduction process will be implemented such that in any given year the SJRRP will consider the condition of salmon populations and the likely success of reintroduction of spring run. How will this latter analysis be done? What factors will be considered? How will varying levels of success regarding levels of river improvements be taken into account in this analysis?

Section 2.3.1. 10(j) area alternatives.

The preferred alternative is area alternative 2. Area alternative 2 describes the NEP area as the restoration area of the San Joaquin River from Friant Dam to the Merced River and the Kings River to the San Joaquin River. Area alternative 2 excludes the Eastside tributaries on the lower San Joaquin. It is unclear why the tributaries are excluded from the NEP area given that

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there are no established populations of spring-run and only at best questionable reports of spring-run straying to these rivers. The spring-run are at best strays from the Sacramento basin.

Within this section is a subparagraph "a", regarding take exemption on the tributary rivers. The discussion notes the legal requirement to not impose more than a *de minimis* water supply impact, etc. on unwilling third parties. The third-party designation includes the Exchange Contractors. There may not be more than a similar *de minimis* impact on the Exchange Contractors.

Section 2.3.2. 10(j) duration alternatives.

It is essential that the 10(j) experimental population designation remain in effect well beyond 2025. It is now evident that the settlement will not be fulfilled by 2025, nor will the measures included in the Framework for Implementation. It is likely several decades before these measures will be completed. Until such time as all of these improvements or actions are taken, and it can be demonstrated that the salmon population is not only self-sustaining but thriving, the 10(j) designation should remain.

Section 3.2.1. Life history.

The description of the life history of the spring-run Chinook is that when it swims upstream from the Delta it goes to the Sacramento River. There is no indication that spring-run migrate to the San Joaquin River. This is additional evidence that the entire San Joaquin basin should be designated as an NEP area.

Section 3.2.4.3. Diversity.

On page 3 – 3, lines 32-36 the DEA discusses potential sources of phenotypic spring running Chinook that have been observed on the San Joaquin River tributaries. No citation is provided for the potential sources of these salmon. Please provide a citation to back up the hypotheses set forth.

Section 3.3.2.3. Tuolumne River.

On page 3 – 18, line 6-7, no citation is provided for the assumption that spring-run Chinook in some numbers "undoubtedly" ascended the main stem a considerable distance. Similarly, no citation is provided for the statement at lines 15-17 that there have been reports of adult Chinook in the Tuolumne in the spring months of April and May.

At line 21-25 the DEA states that a "hard look" needs to be taken at information regarding the potential presence of spring-run Chinook. Yet, the statements set forth in the DEA are without any support to authoritative accounts of historical spring run. A "hard look" requires a hard look at the evidence as well as the analysis. The evidence cited is at best sparse and

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speculative. Substantiation should be provided.

Section 3.4.2. San Joaquin River from Friant Dam to Merced River.

At page 3 – 21, commencing line 1, the habitat in Reach 1 is described. The description cites concerns with existing in-channel and floodplain pits that reduce native habitat, increase river water temperatures and provide increased habitat for non-native species (which presumably leads to predation). In response to comments to the PEIS/R, Reclamation downplayed the significance of the gravel pits and the predation problem. (*See e.g.* Final Program Environmental Impact Statement/Report for the San Joaquin River Restoration Program, July 2012 (“Final PEIS/R”), pp. 3.8-260 (EC1-110), 3.8-262-63 (EC1-115), 3.8-283-84 (EC1-151f), 3.8-292-93 (EC1-164), 3.8-296-97 (EC1-174), 3.8-305-06 (EC1-191), 3.8-315-316 (EC1-205, 206a), 3.8-324-25 (EC1-222), 3.8-325-26 (EC1-223a).)

At line 16-17 in the section which describes Reaches 2-5, it is stated that there are projects proposed for the SJRRP to improve habitat conditions and support flows that would permit juvenile rearing and adult/juvenile migration. Is there any analysis to support or quantify the extent to which improved habitat conditions or flows would permit such beneficial fish conditions? Please provide citations.

Section 3.4.3. San Joaquin River Tributaries.

At lines 19-21 it is stated that anadromous fish populations on the San Joaquin tributaries are affected by flow and water temperatures. A recent study conducted in conjunction with the hydropower relicensing on the Tuolumne River concludes that 76% to 98% of juvenile salmon are lost to predation. (Predation Study Report, Don Pedro Project FERC No. 2299 (W&AR-07), January 2013.) How does this loss to predation compare with any impacts associated with flow and temperature? It would appear if up to 98% are lost to predation, only a small percentage are affected by flow and temperature.

Section 3.5. Fish Species Within the San Joaquin River Basin.

Table 3 – 10 catalogs the fish found in the San Joaquin River basin and in particular in Reaches 1-5. It is noted that largemouth bass appear in Reaches 1,2,3, and 5. If Reach 4 is rewetted, bass will habituate there as well. How will the presence of bass adversely impact the restoration effort given the likely high predation rate such as that recently documented on the Tuolumne River?

Section 3.5.2. Predation and Disease.

This section discusses predation as being a significant factor affecting juvenile salmon. Yet, in the PEIS/R a contrary position was taken. (*See e.g.*, Final PEIS/R, pp. 3.8-283-84 (EC1-

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151f), 3.8-296-97 (EC1-174), 3.8-315-316 (EC1-205, 206a), 3.8-324-25 (EC1-222), 3.8-325-26 (EC1-223a).) Please explain why a different position is taken in the DEA as compared to the PEIS/R.

Section 3.6.3. Hatchery facilities.

The Interim Facility and the full-scale Conservation Hatchery Facility must be isolated from the San Joaquin River to prevent the escape of unmarked spring-run Chinook salmon until such time as full take protection is provided.

Section 3.6.4. Land Use.

At page 3 – 34 public agencies are identified that occur within the restoration area. The listing fails to include the local public water agencies including the Central California Irrigation District, the Firebaugh Canal Water District, Henry Miller Reclamation District, and local cities.

Table 3 – 12 and the text that follows on page 3 – 35 appear inconsistent regarding the acreages and percentages of land-use within Reach 1.

Section 3.6.5. Water quality.

At lines 2-5 it is stated that water quality improvement would occur regardless of reintroduction of spring-run. This appears to be an inaccurate statement as the hydrographs that are called for in the Settlement are designed specifically for spring-run benefit. There would be no basis for the hydrographs without the presence of spring-run. There is no analysis of what hydrographs would be necessary for fall run Chinook.

Section 3.6.5.1. Water Temperature.

In the PEIS/R the occurrence of high water temperatures was downplayed as a significant limiting factor. The DEA notes high temperatures that are likely to occur in the San Joaquin River in the restoration area. How will these high temperatures adversely impact restoration efforts?

Section 3.6.7. Climate change.

There is speculation regarding the potential water temperature impact to the watershed above Friant Dam due to climate change. Please provide citations to support the notion that water temperatures in the upper San Joaquin River will somehow be spared from significant increases associated with climate change.

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Section 4.1. Introduction. (Environmental consequences).

With respect to the release of salmon to the San Joaquin River, it is stated the changes in river flow and related restoration projects are evaluated in the PEIS/R. The PEIS/R does not provide an evaluation of the numerous projects identified in the settlement.

Section 4.2.1.3. Southern DPS of Green Sturgeon.

How will passage of green sturgeon be accomplished given the impediments that currently exist?

Section 4.3.2. Fish.

At lines 22-29 is speculated that with increased flows and the return of spring-run Chinook salmon the number of predators in the restoration area will not increase. Please provide authority this conclusion. For example, one result of the Tuolumne Study (Predation Study Report, Don Pedro Project FERC No. 2299 (W&AR-07), January 2013.) was a finding that there was no trend relative to flow for habitat use overlap between Chinook salmon and predators. (Table 5.4-3 on page 5-21.)

At lines 30-36 it is stated that barriers to prevent fall-run and spring-run hybridization will be developed and maintained. Where is this discussed in the PEIS/R or other authorities?

On page 4 – 9 regarding predation on the upper San Joaquin River, it is assumed that predation will be similar to the levels on the tributaries. The recent study on the Tuolumne indicates predation rates are very high and independent of flow. If predation is this high in the Restoration area what will be the impact on spring run? What is the basis for that conclusion?

Section 4.3.5. Land-use.

Regarding the impact on agricultural resources and forestry, it is stated that if permission is granted to access private land for collection activities, that potential impacts will be reduced to a non-significant level. Whether permission to access private lands is granted or not has nothing to do with the impacts that will occur. Simply having permission to access the land does not ensure that there will not be adverse environmental impacts.

Section 4.6. Area Alternative 2 (preferred alternative).

It is stated that on the tributaries, water activities will be exempted from the take provisions. Agricultural, municipal and similar uses should also be exempted.

Within the NEP area, in addition to agricultural uses, will water diversion and

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management uses be included in the take exemptions?

The PEIS/R discusses impacts on water related uses, but appears to focus only on the provision within the Restoration Act regarding the *de minimis* impacts. However, the Restoration Act also prohibits the imposition of costs not otherwise voluntarily incurred. Any costs associated with restoration activities that are not voluntarily incurred must be absorbed by the SJRRP.

Section 5. Cumulative impacts.

There are multiple cumulative impacts in addition to the introduction of spring-run. Reintroduction impacts include all of the potential river improvements and habitat changes identified in the Settlement and in the Framework for Implementation. These cumulative impacts should be analyzed. They are not analyzed in the PEIS/R.

Conclusion

Based on the above comments, the Exchange Contractors believe that a full EIS should be prepared to analyze the new discovered information that has emerged since the finalization of the PEIS/R or was not analyzed in the PEIS/R. This information includes Congressional assurances of no additional federal funding above the level already funded, new cost estimates by Reclamation that show core and levee costs at approximately \$1.1 billion and total Framework costs at over \$2 billion, significant subsidence that is and will continue to occur, and the new predation study results from the Tuolumne River. In addition, the Exchange Contractors have identified areas where additional analysis is required to fully assess the impacts of the reintroduction of spring-run to the San Joaquin River.

The Exchange Contractors appreciate the opportunity to comment on the DEA. We look forward to continuing to work with NMFS to develop the SJRRP in a manner that fosters its success in a manner consistent with the Restoration Act and agreements among the Settling an Third Parties.

Sincerely yours,



Thomas M. Berliner

TMB:ccn

cc: San Joaquin River Exchange Contractors Water Authority
San Joaquin River Resource Management Coalition
San Joaquin Tributaries Authority

Duane Morris

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San Luis and Delta-Mendota Water Authority
Alicia Forsythe - USBR

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ATTACHMENT

**Comments of the San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition on Proposed Rule for Introduction of a Nonessential Experimental Population of Spring-Run Chinook Salmon in the San Joaquin River Pursuant to Section 10(j) of the ESA and Related Incidental Take Protection Pursuant to Section 4(d) of the ESA,
NOAA-NMFS-2012-0221**

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MEXICO CITY
ALLIANCE WITH
MIRANDA & ESTAVILLO

Re: Comments of the San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition on Proposed Rule for Introduction of a Nonessential Experimental Population of Spring-Run Chinook Salmon in the San Joaquin River Pursuant to Section 10(j) of the ESA and Related Incidental Take Protection Pursuant to Section 4(d) of the ESA, NOAA-NMFS-2012-0221

Dear Ms. Fehm-Sullivan:

The San Joaquin River Exchange Contractors Water Authority and San Joaquin River Resource Management Coalition (referred to hereafter collectively for convenience as "Exchange Contractors") appreciate the opportunity to submit comments on the proposed rule for introduction of an experimental population of spring-run Chinook salmon to the upper San Joaquin River as part of the San Joaquin River Restoration Program (SJRRP) and the accompanying incidental take protection.

The Exchange Contractors are very appreciative of the outreach that has been conducted by NMFS regarding the proposed rule and other issues associated with the reintroduction of spring run Chinook salmon to the upper San Joaquin River. In particular, Ms. Rhonda Reed has met with the Exchange Contractors on numerous occasions. In the course of those meetings, Ms. Reed has requested comments on both the substance of the proposed rule and the format of the rule. Accordingly, the Exchange Contractors will comment on both form and substance.

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Drafting concerns

D.1. The summary should state that take exemptions include take in the upper San Joaquin River as well as the tributaries and the Delta. Further, while all lawful activities are exempted from take, in keeping with prior practice, examples of some particular activities exempted from take should be set forth.

D.2. Under the section "Statutory and Regulatory Framework for Experimental Population Design" it is stated that in order to comply with section 10011(c), NMFS considered any additional measures appropriate to address management concerns under local conditions, a process for data collection and periodic review of the status of the experimental population. It is unclear as to what provisions in section 10011(c) require these considerations. Section 10011(c) concerns protections for third parties. NMFS should explain how the foregoing considerations are relevant to protections for third parties.

D.3. Under the same section as referenced in D.2. The draft states that California Fish and Game Code section 1600, *et seq.* will help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat. The draft states that Section 1600 *et seq.* requires that the Department of Fish and Wildlife be notified before anyone substantially diverts the natural flow of a river or stream. NMFS should explain the legal basis for contending that Section 1600 *et seq.* requires notification before someone substantially diverts the natural flow of a river or stream. In a recent court decision the Superior Court of California found that the Department of Fish and Wildlife did not have authority to restrict diversions under Section 1600 *et seq.* (*Siskiyou County Farm Bureau v. California Department of Fish and Game*, Case No. SC CV 11-00418, Siskiyou County Superior Court.) Rather, the court found that Section 1600 *et seq.* regulated physical alterations to the river bed and banks, but not simply water diversion.

D.4. The section entitled "Additional Management Restrictions, Protective Measures, and Other Special Management Considerations" should start with a summary that identifies how the 4(d) rule will be applied and which activities it covers.

D.5. Under the section entitled "Process for Periodic Review" the draft states that "while this monitoring is being conducted for purposes of making the reintroduction effort successful, we will use the information to also to determine if the experimental population designation is causing any harm to CV spring-run Chinook salmon that are part of the threatened ESU and their habitat, and then, based on this and other available information, determine if any changes to the experimental population designation may be warranted." Is this a reference to Sacramento-based spring-run? If so, the draft should be clarified to make this explicit.

D. 6. The amendment to the special rules for marine and anadromous species should be summarized at the beginning of the draft rule so that the reader knows what activities are

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covered, and the geographic areas that are covered. The reader should not have to wait until the very last two pages of the rule to find out specifically what is or is not covered.

Substantive concerns

S.1. Under the section "Background Information Relevant to Experimental Population Designation" it should be stated that the proposed experimental population will occur in the San Joaquin River upstream of the confluence with the Merced River, etc. as well as the tributaries to the San Joaquin River from the Merced River on downstream. The tributaries are outside of the current range of the CV spring-run Chinook salmon ESU.

S.2. Under the same section as S.1., the draft states that NMFS' recovery plan for CV salmon characterizes the San Joaquin River basin below Friant Dam as having a high potential to support a spawning population of reintroduced salmon "with implementation of the San Joaquin River Restoration Program (SJRRP)." The SJRRP includes channel and structural modifications to the San Joaquin River. The draft rule does not state whether failure to develop all or only part of the channel and structural modifications "will create habitat conditions... sufficient to support the establishment of CV spring-run Chinook salmon populations."

Pursuant to the Record of Decision (ROD) issued by the Bureau of Reclamation, if there are insufficient funds to develop the entire plan as set forth in the "Framework for Implementation", Reclamation will rely on a contingency plan as explained in section 6.2 of the ROD. This plan will prioritize certain actions. Consistent with the types of actions to be prioritized, the Exchange Contractors recommend that the projects that should be prioritized to assure successful passage of salmonids are the improvements to Sack Dam and installation of a fish screen in the Arroyo Canal, and a bypass around Mendota Dam and the installation of a fish screen for flows into the Mendota Pool. Presumably, NMFS is also aware of the subsidence problem near Sack Dam that is affecting flow in the San Joaquin River and nearby flood control system. The effects of subsidence must also be addressed when considering the likelihood of success of the 10(j) population.

S.3. Under the same section as S.1., the draft states that programs for strategic screening and participation in habitat conservation programs will be implemented in conjunction with SJRRP activities. What types of diversions will be screened? Will diversions below 300 CFS be screened? If flows below 300 CFS are not required to be screened, they must still be covered by the 4(d) rule such that incidental take is permitted. Will all diversions above 300 CFS be screened? Are there specific locations that NMFS has identified to be screened on a priority basis?

S.4. Under the section "Identification of the Experimental Population", it states that the SJRRP includes actions to prevent or reduce straying to false pathways. What actions are assumed to be taken that will reduce straying to false pathways? In 2011, due to flood operations, fall-run salmon successfully migrated upstream of the Hills Ferry Barrier and over 70 salmon

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perished in the Eastside Bypass. The Department of Fish and Wildlife did not have any measures in place to prevent straying once salmon migrated past the Hills Ferry Barrier.

S.5. The section entitled "Additional Management Restrictions, Protective Measures, and Other Special Management Considerations" states that take prohibitions would apply to the experimental population that has an intact adipose fin "as well as those that are adipose fin-clipped." It is our understanding that an agreement was reached with Reclamation and the U.S. Fish and Wildlife Service that adipose fin-clipped salmon in the experimental population area would not be subject to take prohibitions under the 4(d) rule currently in place for Sacramento spring-run Chinook salmon. This provision should stay in place until such time as adipose fin-clipped fish from the Feather River Fish Hatchery or any other facility will no longer be introduced into the San Joaquin River system.

S.6. Under the section entitled "Public Comment" NMFS requests feedback on six specific questions. The Exchange Contractors have attempted to address each of those areas in the above comments. However, we will also provide brief responses to each of the questions below.

(1) *The geographic boundary of the designated experimental population.* The geographical boundary should include the San Joaquin River upstream of the confluence with the Merced River, the Kings River and tributaries to the San Joaquin River from the Merced River downstream.

(2) *The extent to which the experimental population would be affected by current or future federal, state, or private actions within or adjacent to the experimental population area.* The experimental population will be affected by agricultural and water diversion activities, among others. These normal and lawful activities must be exempted from take prohibitions. Water diversion activities include, among others, the operation, maintenance, repair and replacement of water diversion structures including dams, intakes, pumps, canals, pipes, etc. some of these activities will occur in the San Joaquin River.

(3) *Any necessary management restrictions, protective measures, or other management measures that we may not have considered.* Exemption from take will cover all lawful activities. The rule should provide examples of protected activities, including diverting or receiving water, water spreading (such as to address the subsidence problems east of Sack Dam), and flood control activities.

(4) *The extent to which we have provided protections for third parties as required by the SJRRSA.* NMFS should address specifically how it will treat unscreened diversions on the San Joaquin River above the confluence with the Merced River as well as in false pathways, including irrigation canals and flood control channels. Examples of otherwise lawful activities that will be included under Section 223.301(B) should include activities related to diverting or receiving water including operation, maintenance, repair, and replacement of water diversion

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structures including dams, intakes, pumps, canals, pipes, etc. as well as flood control operations and spreading to address subsidence problems since the latter is related to water supply.

As NMFS is aware, there are a number of water diversion facilities located along the San Joaquin River in the restoration area. The member agencies of the Exchange Contractors operate a number of facilities, including the above-mentioned dams, intakes, pumps, canals, pipes, etc. The member agencies include the Columbia Canal Company, Central California Irrigation District, Firebaugh Canal Water District, and San Luis Canal Company. In the recently adopted 4(d) rule for the Deschutes watershed (78 Fed. Reg. 2893), take of Middle Columbia River steelhead was permitted "incidental to any activities related to or associated with the operation and maintenance of the Opal Springs Hydroelectric Project..." The facilities of the member agencies are not so precisely identified. However, it is necessary that all facilities operated by these member agencies for water diversion and water management purposes be exempted from take.

NMFS has appropriately made clear it is attempting to develop a rule that will not have more than a *de minimis* water supply impact on third parties. NMFS must also ensure that no costs will be imposed on third parties that are not voluntarily incurred. (San Joaquin River Restoration Settlement Act, Sec. 10009(a)(3).)

(5) *Whether we should propose the experimental population as nonessential.* Yes. According to the draft rule, the nonessential population designation will be reviewed every five years. If the spring-run are re-categorized as an essential population, the provisions of the San Joaquin River Restoration Settlement Act will still be applicable regarding the protections to third parties. If the San Joaquin spring-run Chinook salmon experimental population is re-categorized as an essential population, how will NMFS ensure there will be no impacts on the water, agricultural and flood control activities that should be exempted under this rule?

(6) *Whether the proposed designation furthers the conservation of the species and we have used the best available science in making this determination.* The designation will further the conservation of the species and will provide necessary agency flexibility in adaptively managing the fishery. However, the failure to consider the lack of funds, increased costs as identified in the Framework for Implementation, program delays, and the new subsidence condition (see Exchange Contractors' comments to Draft Environmental Assessment that accompanies this draft rule) do not constitute consideration of the best available science.

In light of cost increases and funding deficiencies, NMFS should develop a reintroduction strategy that seeks to achieve reintroduction in light of the new financial reality. NMFS could design the strategy as a layered contingency plan with assumptions about different levels of funding. Starting at the \$500-600 million range, given that that's what's available, and building from there would make sense. The Restoration Settlement Act does not compromise NMFS' independent decision-making authority. It must still apply its independent

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judgment under the Endangered Species Act (“ESA”) as to how best to accomplish reintroduction. (See San Joaquin River Restoration Settlement Act § 10011; Stipulated Settlement ¶¶ 14 and 14(a).) NMFS is not required to follow the letter of the settlement, but may develop a strategy it views as consistent with its ESA obligations. The act makes it clear that the ESA is not amended and, therefore, NMFS has its own decision-making authority under sections 10(a) and 10(j).

In conclusion, the Exchange Contractors appreciate the efforts by NMFS to reach out to the affected third parties and to attempt to fashion rule that will have *de minimis* water supply impacts to third parties. Given the uncertainties associated with implementation of the SJRRP and the application of the 4(d) rule, including Delta take of SJR spring-run, an adaptive management approach appears warranted. The Exchange Contractors support the suggestion of the State Water Contractors that a process be developed to assess the amount of take in the Delta on SJR spring-run.

Thank you for this opportunity to comment.

Sincerely yours,



Thomas M. Berliner

TMB:dls

cc: San Joaquin River Exchange Contractors Water Authority
San Joaquin River Resource Management Coalition
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