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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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Memorandum

MAY 22 1998

To: Secretary

From: Solicitor

Subject: Trinity River Flow Evaluation Study

Introduction and Short Answer

This is in response to your request for advice on whether the Department has sufficient authority to implement recommendations contained in the Trinity River Flow Evaluation Study (Flow Study), absent reauthorization of the Trinity River Basin Fish and Wildlife Management Act of 1984, Pub. L. No. 98-541. For the reasons that follow, I conclude that the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, Tit. 34, 106 Stat. 4706, provides sufficient authority, subject to certain possible limitations, noted further below, to implement the recommendations contained in the current draft of the Flow Study (assuming you and the Hoopa Valley Tribe concur in those recommendations). To the extent those recommendations are modified during completion of the Flow Study or the associated Environmental Impact Statement, I may, of course, need to consider the matter further.

You also requested advice on the funding source for implementation of the Study recommendations. Section 3406(b)(2) of the CVPIA specifies that costs of implementing that paragraph are to be classified as operation and maintenance (O&M) costs. As a result, those recommendations would be funded out of Reclamation appropriations and charged as O&M costs to the Project. Implementation of the recommendations authorized by section 3406(b)(1) can be funded either by the CVPIA Restoration Fund established under section 3407, or by appropriations authorized under section 3410, of the CVPIA or by some combination of the two.

Background

In 1955, Congress authorized the Trinity River Division (Division) of the Central Valley Project of California. Act of Aug. 12, 1955, ch. 872, 69 Stat. 719. The Division consists of Trinity Dam and reservoir, power plants, and a series of tunnels, dams and associated works that divert water from the Trinity

River to the Sacramento River Basin. Congress also directed that the Division be integrated, both financially and operationally, with the remainder of the Central Valley Project, set certain minimum instream flows, and directed the Secretary to adopt appropriate measures to preserve fish and wildlife. 69 Stat. 719.

Within a decade of completion of the Division it became apparent that the steps being taken to preserve fish and wildlife in the Trinity River Basin were insufficient to maintain pre-project fish and wildlife population levels. In 1981, in response to the serious decline in fisheries in the Trinity River, then-Secretary of the Interior Andrus issued a Secretarial Decision, increasing flows in the Trinity River and directing the U.S. Fish and Wildlife Service to prepare a 12-year evaluation of flows and other measures needed to restore the Trinity River anadromous fishery.

In 1984, finding that the Secretary required "additional authority to implement a basin-wide fish and wildlife management program in order to achieve the long term goal of restoring fish and wildlife populations in the Trinity River Basin," Congress enacted the Trinity River Basin Fish and Wildlife Management Act of 1984 (1984 Act). See Pub. L. No. 98-541, § 1(6), 98 Stat. 2721. That Act directed the Secretary to formulate and implement a fish and wildlife restoration program for the Trinity River Basin, specifying work on both the mainstem of the River as well as various tributaries.¹ Id. at § 2.

¹ Section 2(a) of the 1984 Act directs: "Subject to subsection (b), the Secretary shall formulate and implement a fish and wildlife management program for the Trinity River Basin designed to restore the fish and wildlife populations in such basin to the levels approximating those which existed immediately before the start of the construction [of the Trinity River Division] and to maintain such levels. The program shall include the following activities:

- 1) The design, construction, operation, and maintenance of facilities to --
 - A) rehabilitate fish habitats in the Trinity River between Lewiston Dam and Waltonpeck;
 - B) rehabilitate fish habitats in tributaries of such 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.

- 2) The establishment of a procedure to monitor (A) the fish and wildlife stock on a continuing basis, and (B) the effectiveness of the rehabilitation work.

The 1984 Act was subsequently amended in 1996 to, among other things, extend its authorization for appropriations and to increase membership on the advisory task force. Pub. L. No. 104-143. Authorization for appropriations for the design and construction of rehabilitation projects under the 1984 Act, as amended, expires October 1, 1998. Authorization for appropriations "as necessary to monitor, evaluate, and maintain program investments . . ." becomes effective "beginning in the fiscal year immediately following the year the restoration effort is completed," and continues indefinitely under the 1984 Act, as amended. *Id.*

In 1992, Congress enacted the CVPIA, which, in Section 3406(b)(23), directs the Secretary to complete the "Trinity River Flow Evaluation Study" that had been initiated in 1981. The Flow Evaluation Study is to be completed

(A) . . . in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River fishery; and

(B) . . . If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) shall be implemented accordingly.

The Fish and Wildlife Service has circulated its January 1998 draft of the Trinity River Flow Evaluation for peer review, and a final version is expected to be published in the next few months. An environmental impact statement analyzing the impacts of implementing the Flow Study is expected to be complete in early 1999. The January draft of the Flow study contains flow recommendations for (1) temperature control, (2) spawning/rearing, (3) fluid geomorphic/salmonid temperature control, and (4) ramping. The January draft also recommends mechanical channel rehabilitation for the mainstem, including certain side channels, a sediment management program for the mainstem and various tributaries, and an adaptive management program.

3) Such other activities as the Secretary determines to be necessary to achieve the long term-goal of the program.

Section 2(b) directed that the Secretary be assisted by an advisory group, the Trinity River Basin Fish and Wildlife Task Force, which was also established under the Act. 98 Stat. 2723.

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On February 13, 1998, the Trinity River Task Force wrote to you, proposing reauthorization of the 1984 Act, as amended. The Task Force concluded that "reauthorization is needed to continue work prescribed in the nearly completed Trinity River Flow Evaluation." The Department has not yet taken a position on whether to support reauthorization of the 1984 Act. You have asked, however, whether the Task Force's conclusion that implementation of the Flow Study requires reauthorization of the 1984 Act is warranted. Thus, the issue presented is whether you have sufficient authority to implement and fund the recommendations contained in the draft Flow Study, absent reauthorization of the 1984 Act, as amended.

Analysis

Section 3406(b)(23) of the CVPIA (hereafter b(23)), mandates that, once the Secretary and the Hoopa Valley Tribe concur in the Flow Study's recommendations on permanent instream fishery flow requirements and operating criteria and procedures (OCAP), such recommendations "shall be implemented accordingly." (Emphasis added). Thus, Congress clearly has directed implementation of at least some portion of the recommendations of the Flow Study -- those governing "permanent instream fishery flow requirements and operating criteria and procedures" -- independent of any need for further reauthorization of the 1984 Act. The issue then is the extent to which the recommendations in the January draft Flow Study fit under "instream fishery flow requirements" and "operating criteria and procedures."

Nothing in the Act or its legislative history sheds light on what Congress intended by these terms. At about the same time the CVPIA was passed by Congress, an OCAP was prepared for the Central Valley Project (Long Term Central Valley Project Operations Criteria and Plan (CVP-OCAP), Oct. 1993). In the CVP-OCAP, Reclamation set forth various operating plans for the Project depending on hydrology and system capacity. Nothing in the CVP-OCAP addressed non-flow related activities. In light of Reclamation's previous practices in the Central Valley, OCAP under b(23) would plainly cover those recommendations made in the draft Flow Study which encompass the quantity, timing and duration of flows. This would include the recommendations for (1) temperature control, (2) spawning/rearing, (3) fluid geomorphic/salmonid temperature control, and (4) ramping. It would also include monitoring activities that are part of an adaptive management program to evaluate the effectiveness of the flows.

As noted above the January draft of the Flow Study contains other recommendations: for example, multiple mechanical channel rehabilitation projects. The projects entail reconstructing the stream bed or bank in forty-seven (47) different places by using heavy equipment to remove the "berm down to the historic cobble

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surface" and "reshape the bank, typically 2-3 feet below the water surface elevation." 3.86, Trinity River Flow Evaluation (draft ed. Jan. 1998).

The goal of these channel rehabilitation projects is to reconfigure the stream bed from one where the channel is defined by a severe drop into one where the stream bed slopes gradually from the bank to the channel. It is a closer question whether such a reconfiguration of the stream bed through the use of heavy mechanical equipment can fairly be read as embraced within the ideas of either instream flows or operating criteria and procedures. It is not necessary to resolve this question now, however, because authority for these projects can be found in section 3406(b)(1), which authorizes and directs the Secretary to develop and implement a program to increase and sustain "natural production of anadromous fish in Central Valley rivers and streams . . ." That section continues:

[I]n the course of developing and implementing [the anadromous fish restoration program] the Secretary shall make all reasonable efforts consistent with the requirements of this section to address other identified adverse environmental impacts of the Central Valley Project not specifically enumerated in this section.

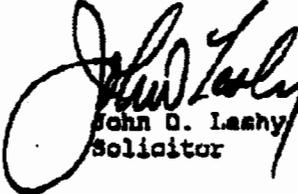
The statute defines "Central Valley Project" as including the Trinity River Division. Sec. 3403(d). Thus, while the anadromous fish restoration program of b(1) is directed toward "Central Valley rivers and streams," the concluding proviso of b(1) extends much further, encompassing the Trinity River as well. Consequently, Congress in b(1) has directed the Secretary to address adverse impacts of the project, including adverse impacts of the Trinity River, to the extent those adverse impacts are not "specifically enumerated" elsewhere in section 3406. Section 3406(b)(2) does not "specifically enumerate" the adverse impacts of the Trinity River Division that would be addressed by the mechanical channel restoration activities; therefore, section 3406(b)(1) provides the Secretary with authority to implement such recommendations.²

The current draft Flow Study also recommends a sediment control program involving excavation of fine sediment from Hamilton Ponds

² Other activities may also fall under the authority of section 3406(b)(1), to the extent they are directed at rectifying the impacts sustained from operating the Project ("the Secretary shall make all reasonable efforts . . . to address other identified adverse environmental impacts of the Central Valley Project"). If no causal link can be established between the harm being rectified and the operation of the Project, section 3406(b)(1) is inapplicable.

on Grass Valley Creek and introduction of coarse sediments in the mainstem. 6.21-22, Trinity River Flow Evaluation (draft ed. Jan. 1992). Like the mechanical restoration recommendations, sediment control management entails activities independent of management of a flow regime or OCAP. Nonetheless, to the extent activities are designed to address "adverse environmental impacts of the Project" they are authorized by section 3406(b)(1).³

The conclusion regarding the source of authority for implementation of any given recommendation also determines the source of funding for that action. Specifically, section 3406(b)(23)(B) requires that "costs associated with implementation of this paragraph shall be reimbursable as operation and maintenance expenditures pursuant to existing law." As discussed above, section 3406(b)(1) provides the Secretary with the authority to address impacts of the Project not otherwise enumerated in section 3406. Funding for habitat restoration activities is provided in section 3407, which establishes the CVP Restoration Fund and authorizes appropriations from that fund of monies "to carry out programs, projects, plans, and habitat restoration, improvement, and acquisition provisions of this title." Such authorization for appropriations clearly supports funding the recommended mechanical habitat restoration as well as sediment control activities through section 3407. (But see footnote 2.) To the extent Restoration Fund monies are not available, section 3410 provides general authorization for appropriations to carry out the provisions of the Act.


John O. Lashy
Solicitor

³ To the extent the Flow Study identifies work on tributaries or elsewhere in the Basin that lacks a causal link to impacts of the Project, reauthorization of the 1984 ACT might prove an appropriate vehicle for seeking authorization of such work. Such a conclusion seems premature, however, until the recommendations of the Flow Study are finalized and until compliance with NEPA is complete.