

1 Trent W. Orr, State Bar No. 77656  
A. Yana Garcia, State Bar No. 282959  
2 EARTHJUSTICE  
50 California Street, Suite 500  
3 San Francisco, CA 94111  
torr@earthjustice.org  
4 ygarcia@earthjustice.org  
Tel: (415) 217-2000  
5 Fax: (415) 217-2040

6 *Attorneys for Protestant Restore the Delta*

7  
8 **BEFORE THE**  
9 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

10  
11 HEARING IN THE MATTER OF  
12 CALIFORNIA DEPARTMENT OF WATER  
13 RESOURCES AND UNITED STATES  
14 BUREAU OF RECLAMATION REQUEST  
FOR A CHANGE IN POINT OF DIVERSION  
FOR CALIFORNIA WATERFIX

**TESTIMONY OF GARY MULCAHY**

1 I, Gary Mulcahy, Government Liaison with the Winnemem Wintu Tribe, do hereby testify:

2 1. My English name is Gary Mulcahy. My Winnemem Wintu name is Ponti Tewis. I  
3 am a member of the Winnemem Wintu Tribe, and the Government Liaison for the Tribe. I have  
4 worked on and represented the Tribe on water issues, water-related issues, salmon issues, and other  
5 cultural issues affecting the Tribe continuously for the past 23 years. I am testifying in that capacity.

6 2. We, the Winnemem Wintu, are an historic Native California Tribe listed as a  
7 recognized California Native Tribe by the California Native American Heritage Commission  
8 (NAHC), a California Agency. The Winnemem Wintu are also known as: Northern Winton, Baird  
9 Indians, McCloud River Indians, McCloud Wintu, Okwanuchu (a Shasta Indian word for people of  
10 the north), Oylaca (un-ratified Cottonwood Treaty of 1851), Wailacca (various spellings meaning  
11 northern people), Northern Wintu, Baird Auxiliary, and many others. The traditional name is  
12 Winnemem Wintu, (Winnemem: meaning Middle Water (the McCloud River) and Wintu: meaning  
13 People – Middle Water People).

14 3. The Winnemem’s historical territory included the east side of the upper Sacramento  
15 River watershed, the McCloud River watershed from origin to termination, the Squaw Creek  
16 watershed from origin to termination, and approximately 20 miles of the Pit River from confluence  
17 of the McCloud River, Squaw Creek, and Pit River up to Big Bend.

18 4. As you can see by the breadth and location of our traditional homeland, which covers  
19 the upper Sacramento River watershed, and the McCloud river watershed, spanning across three  
20 rivers and other tributaries, any water diversions, large or small, can have, will have, and have had  
21 an adverse effect on our Tribe’s cultural resources, sacred sites, village sites, burial grounds, and  
22 sustenance gathering ability. On these points I will elaborate a little further on.

23 5. But before We, the Tribe, can begin to address the proposition of the so called  
24 “California WaterFix,” which this change petition is directly related to, we would like to state for the  
25 record that any and all determinations of existing water rights allocated, or changes thereto,  
26 modifications thereof, or issuance of new, we believe are *illegal* on their face and should be  
27 suspended, voided, or enjoined until such time as the inherent water rights of the Indigenous People  
28

1 of this state are recognized, allocated, protected, and preserved first and foremost, before and above,  
2 any and all other claims to water in the State of California.

3           6. Long has the State of California prospered on the backs of the Indigenous Peoples –  
4 from the time this State was conceived, up to and including this very day. You, the State of  
5 California, lobbied in Congress to make sure the treaties were never ratified because you wanted all  
6 the resources for yourself. You, the State of California, paid \$5 dollars a head for Native scalps,  
7 because you didn't want us here. You, the State of California, have destroyed millions of acres of  
8 Indigenous cultural lands which included sacred sites, village sites, burial grounds and medicinal  
9 gathering areas, by allowing them to be paved over, dug up, planted over, dammed up, flooded out,  
10 logged out, siphoned off, or polluted to an uninhabitable state.

11           7. This change petition and the proposed project it is related to, the "California  
12 Waterfix," builds on and enables the continuation of that legacy of death and destruction. It will  
13 help to energize and justify projects that should not be built. It will accelerate the march to species  
14 extinction and will allow the perpetuation of cultural genocide.

15           8. For us, the Winnemem Wintu Tribe, this "California Waterfix" begins in the 1800's  
16 when we signed a Treaty of Peace and Friendship on August 16, 1851 at Reading's Ranch in  
17 Cottonwood. This treaty promised a 25-square mile reservation which included land along the Pit,  
18 McCloud, and Sacramento Rivers. This reservation was to be established in consideration for the  
19 ceding of all other tribal lands to the Federal Government. This treaty, as well as the 17 others  
20 signed by California Tribes between 1851 and 1852, was never ratified. The California Legislature  
21 lobbied the U.S. Senate against the treaties, which in turn pressured President Millard Fillmore to  
22 refuse ratification of any of the treaties. The treaties were then "lost" for over 50 years and did not  
23 surface again until 1905, after the Indian Appropriations Act of 3 March 1871, which took away the  
24 power of the President to make treaties with Native American tribes.

25           9. The treaties were never ratified, the land was never ceded, but the State of California  
26 and the U.S. Government moved forward as if the land had been ceded and set claim to all the land  
27 and the resources contained therein.

1 **Baird Fish Hatchery**

2 10. The Winnemem Wintu are a spiritual people. We believe in a Creator who gave life  
3 and breath to all things. In our creation story we were brought forth from a sacred spring on Mt.  
4 Shasta. We were pretty helpless, couldn't speak, pretty insignificant. But the Salmon, the Nur, took  
5 pity on us and gave us their voice, and in return we promised to always speak for them. Side by  
6 side, the Winnemem Wintu and the Nur have depended on each other for thousands of years - the  
7 Winnemem speaking, caring, and trying to protect the salmon, and the salmon giving of themselves  
8 to the Winnemem to provide sustenance throughout the year. Ceremonies, songs, dances, and  
9 prayers of the relationship between the salmon and the Winnemem Wintu are intricately woven into  
10 the very fabric of Winnemem Wintu culture and spirituality.

11 11. In 1872 the U.S. Fish Commission (now U.S. Fish and Wildlife Service) began  
12 construction of a salmon egg collection facility on the McCloud River about 2 miles above the  
13 juncture of the McCloud and Pit Rivers. This salmon egg collection facility (first known as the  
14 McCloud River Facility and later as the Baird Fish Hatchery), was under the direction of Livingston  
15 Stone, a fish culturist and Deputy Commissioner for the U.S. Fish Commission. Livingston Stone  
16 had been dispatched to California to procure Pacific salmon eggs for planting into eastern U.S. rivers  
17 where the native Atlantic salmon stocks had been depleted (U.S. Fish Commission Reports: Stone  
18 1874-1897).

19 12. The Winnemem Wintu were seriously concerned for the health and welfare of the  
20 salmon and staged two war dances across from the hatchery in the hopes to drive off the invaders,  
21 but this was to no avail. The last war dance toward the hatchery occurred in 1887. An  
22 understanding between the hatchery operation and the Winnemem Wintu was eventually worked  
23 out, where the Winnemem would help in the egg gathering process and in return the Winnemem  
24 would receive all the salmon from the operation. One of the things that helped facilitate this  
25 understanding was that the Winnemem who lived in the Baird region were told that a 250-acre  
26 reservation had been established and the Winnemem who worked at the hatchery and lived in the  
27 area would be protected. The Winnemem later found out that the "reservation" was a "fish  
28 reservation" and not a reservation for them.

1           13.     The significance of the Baird Fish Hatchery in relation to this change petition comes  
2 from the success it achieved in its egg exportation. From 1872 until it finally ceased operation in  
3 1935, salmon eggs were sent all over the world to either augment existing salmon populations or to  
4 establish new salmon populations. The most significant was the salmon population and runs that  
5 were established in the rivers of New Zealand. The first consignment of 25,000 eggs was sent to  
6 New Zealand in 1874. In 1875 an additional 50,000 salmon eggs were sent from the McCloud River  
7 Station (Baird Hatchery) to New Zealand and Australia. Through the ensuing years, eggs continued  
8 to be shipped to New Zealand all the way up to 1907. (Based on U.S. Fish Commission reports [i.e.,  
9 Stone and USFC references 1871 – 1907])

10           14.     New Zealand, a country where once no salmon existed in its rivers, now has teeming  
11 salmon runs throughout the year in all its rivers thanks to the Baird Fish Hatchery and the  
12 Winnemem Wintu that worked there. Meanwhile, here at home in California, our salmon runs are  
13 inching ever closer to extinction. The winter-run Chinook and the spring-run Chinook once thrived  
14 in vast numbers, but, with the loss of hundreds of miles of historical spawning grounds in the Upper  
15 Sacramento and McCloud River watersheds, the runs are now just a faint echo of what they once  
16 were. In 1875, Livingston Stone attested in his report to the U.S. Fish Commission (USFC report  
17 1897) in regards to the winter-run spawning in the upstream reaches:

18           They were so thick in the river in July that we counted a hundred salmon jumping out  
19 of the water in the space of a minute, making 6,000 to be actually seen in the air in an  
20 hour. Nearly 9,000,000 eggs were taken, and there were more to be had for the taking.

21 (Stone 1897:212). And again regarding the winter-run (USFC report 1880):

22           By the 10th of July the river was closed to the upward migration of the salmon. I was  
23 the more willing to close the stream as early as this because vast numbers of full-  
24 grown salmon,...had escaped the nets of the Sacramento fishermen and had already  
25 fully stocked the upper waters of the McCloud with spawning fish.

26 (Stone 1880:742). Regarding the spring-run (USFC report 1880):

27           During this time [the 40 days before October 5 1878] we caught and examined, one  
28 by one, nearly 200,000 salmon. We took and impregnated at least 14,000,000 eggs.

(Stone 1880:763).

1 15. Today, the winter-run salmon are listed as endangered under both the federal and  
2 California Endangered Species Acts. The spring-run salmon are listed as endangered under the state  
3 ESA and threatened under the federal ESA.

4 16. It is sad to know what was and that it will never be again, mainly because of human  
5 alterations to the salmon's once pristine and abundant spawning grounds. But there is a small light  
6 of hope. We believe that the salmon sent to New Zealand from the McCloud River to establish the  
7 New Zealand runs, if brought back home to the McCloud River from whence they came, could be  
8 the salvation from the probable extinction of the winter-run Chinook salmon.

9 **Wintu Allotments**

10 17. In 1893 President Grover Cleveland authorized the issuance of land allotments to  
11 members of the Winnemem Wintu Tribe. These allotments, some 4480 acres in total, at 160 acres  
12 each, located on and around the Sacramento, McCloud, and Pit Rivers, allowed the Winnemem to  
13 remain somewhat in their traditional homeland. Many of the allotments were on land that was  
14 unsuitable even for grazing. Here are just a few examples:

Allotment #	Name	Description of Land	Character of Land
4	William Kenyon	W2 NW4 W2 W4	Land of no value not wanted
5	Charley Walker	NE4	High hills, scattering of oak and pine, sm. flat, would raise garden, spring of water, chiefly valuable for minerals
6	Dick Gregory Baird	SE4 of SE4	McCloud River crosses land 3 ac. In garden, balance rough land of no value.
13	Big Frank Gregory	Lots 1, 2, and 7	Mountainous scattering oak and pine, only valuable for domestic purpose 5ac. Along Salt Creek would produce crops.
14	Sedem Sallie alias Coyote Leader	Lots 4, 5, and 6	Rough rocky mountains scattering timber, no value for any purpose.
42	Jim Campbell Baird	S2 SE4	Mountainous scattering oak and pine, no water no value.
43	Sahamismit wife of #42	N2 SE4	Brushy Mts, no water, no timber, no value.

Allotment #	Name	Description of Land	Character of Land
44	Helen Campbell daughter of #42 Wife of Pat Silverthorn	S2 NE4	Brushy Mts, no water, no timber, no value.
46	Toby Charley	S2 NE4	Mountainous scattering oak and pine, little value for any purpose. no water.
47	Luli Waituluma	N2 NE4	Mountainous land, 3rd rate, Oak, pine, for domestic use, no water, valuable for grazing and poor for that.

I submit the entire spreadsheet as an exhibit for the Board's consideration. (RTD-501.)

18. Not all the Winnemem received allotments. On October 3, 1914, Horace Wilson, Supervisor within the Department of Interior, submitted to the Commissioner of Indian Affairs in Washington, D.C. a letter indicating that the Baird Indians along the McCloud River should have purchased for them a tract of land. The Winnemem were included in previous lists of Indian bands deserving of allotments, but while other bands listed in the letter eventually received land bases, the Winnemem (Baird) band did not.

19. On April 20, 1915, in a letter to Cato Sells, agent Terrell reported on his progress of purchasing lands for California's Indians. Terrell described the Indians near Redding as not fitting within the guidelines of the Allotment Act. He stated, however, that the Baird (Winnemem) Indians were in need of homes. He further stated that he investigated lands above the government fishery at Baird and proposed the purchase of these lands for the Winnemem. He described the self-sufficiency of the Winnemem based on the salmon and other sustenance crops. D.P. Doak, who owned several tracts of this land, was approached and was mentioned in later letters.

20. The Terrell letter also included a census of the Indians present, which included the name of Flora Curl, age 5. Florence Curl Jones was the Spiritual and Tribal Leader of the Winnemem Wintu Tribe. Florence passed away at the age of 95, but before she did, she passed leadership down to her great niece Caleen Sisk, who is the Spiritual and Tribal Leader of the Winnemem Wintu today.

1           21.     In August 1915, Terrell reported to Washington that D.P. Doak, the man who had  
2 obtained land on the McCloud River, refused to sell land for the Indian Allotments, waiting instead  
3 for higher prices due to speculation about the building of a new dam that would provide power to the  
4 state. Doak stated that he would not cause problems for the Indians living on his land but he would  
5 not sell. The letter also stated that the government would provide lands for the Indians once  
6 removed due to the dam's construction.

7                   **CVP Indian Lands Acquisition Act and the Construction of Shasta Dam**

8           22.     The idea of constructing a dam on the Sacramento River began to come to fruition in  
9 the 1930s. Agents were dispatched to land owners and allottees in the area that would be affected by  
10 any dam construction and the resulting inundation it would cause. Many of the Indian allottees  
11 could neither be found nor contacted, for a variety of reasons, regarding the possible sale or  
12 exchange of their land for other land that would not be inundated. This proved to be problematic  
13 and delayed the beginning of construction of the dam.

14           23.     To remedy this problem, in 1937 Public Law 198 [S1120] was introduced and titled  
15 the Central Valley Project Indian Land Acquisition Act. This Act was signed into law in 1941, as 55  
16 Stat. 612. The purpose of this act specifically states:

17                   Be it enacted by the Senate and House of Representatives of the United States of  
18 America in Congress assembled, That, in aid of the construction of the Central Valley  
19 project, authorized by the Acts of April 8, 1935 (49 Stat. 115), and August 26, 1937  
20 (50 Stat. 850), there is hereby granted to the United States, subject to the provisions  
21 of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and  
22 allotted lands within the area embraced by the Central Valley project ....

23           24.     This Act, which took all the Indian Lands within the area embraced by the Central  
24 Valley Project, also set out provisions for compensating those affected, e.g., (1) provide just  
25 compensation for the lands that would be flooded (55 Stat. 612, sec. 2); (2) acquire lands and  
26 improvements for the land taken (55 Stat. 612, sec. 3); and (3) provide a Cemetery to be held in trust  
27 for the appropriate tribe or family, as the case may be (55 Stat. 612, sec. 4).

28           25.     1938 brought the beginning of construction on a new dam at Kennett, CA, known  
first as the Kennett Dam and later to be known as Shasta Dam. When completed, the dam would  
capture flows from three rivers, the Sacramento, McCloud, and Pit, as well as the flow from other

1 tributaries such as Squaw Creek. The captured water would eventually inundate thousands of acres  
2 of land, including hundreds of miles of prime salmon spawning grounds, historical tribal village  
3 sites, sacred sites, burial sites, and cultural gathering sites. The dam would also effectively extirpate  
4 all existing salmon runs in the upper Sacramento, McCloud, and Pit Rivers.

5 26. The removal of the Winnemem from the river began with the taking of Winnemem  
6 allotments. In 1943 the Winnemem living on traditional homelands on the lower McCloud River  
7 (Baird and surrounding areas) were removed. The Winnemem Wintu that were removed from the  
8 area were not removed by relocation, because no like land was ever provided to replace the land that  
9 would be flooded; they were removed by virtue of their homes being bulldozed down. Water would  
10 inundate these village areas and sacred sites due to the filling of Shasta Lake. The Department of  
11 Interior and its Bureau of Reclamation never fulfilled the requirements of the CVP – Indian Lands  
12 Acquisition Act (55 Stat. 612). No compensation was ever provided for the over 4480 acres of  
13 allotment lands that were taken, nor were there ever any other lands acquired for the Winnemem to  
14 replace the lands that were taken. The 4480 acres of allotment lands did not include the thousands to  
15 hundreds of thousands of acres of additional Winnemem Wintu historical homeland that were also  
16 taken. Over 90% of the Winnemem Wintu’s historical village sites, sacred sites, burial sites, and  
17 cultural gathering sites along the three rivers and tributaries inundated by the filling of Shasta Lake  
18 were lost.

19 27. The only item from 55 Stat. 612 that was somewhat completed was the creation of a  
20 cemetery in Central Valley, CA (now Shasta Lake City). But the Bureau of Reclamation failed to  
21 hold the cemetery in trust for the “appropriate tribe” as the statute specifically directed – this, in spite  
22 of the fact that ALL the Indians that were originally interred in this cemetery were members of the  
23 Winnemem Wintu Tribe either by marriage or birth. The Bureau named the cemetery the Shasta  
24 Reservoir Indian Cemetery, thereby, intentionally or negligently, denying the Winnemem Wintu  
25 listing on the Bureau of Indian Affairs list of tribes with assets held in trust.

26 28. Shasta Dam has since become known as the “keystone” of the Central Valley Project  
27 to both state and federal agencies, but to the Winnemem Wintu it is only known as a weapon of mass  
28 destruction – the tool to destroy a culture and the means to exterminate a species.

1           29.     The change petition that is the subject of this hearing is just a continuation of what  
2 has come before regarding the Central Valley Project. In fact, the idea this change petition is  
3 connected to has been around since 1965 in one form or another, when both state and federal  
4 agencies put forth a plan to move water around the Delta to the state California Aqueduct and the  
5 federal Delta-Mendota Canal systems. It was considered as part of phase 2 of the California State  
6 Water Project in the form of a peripheral canal – a means to take water from the Sacramento River  
7 above the Delta and convey it around the Delta to water users south of the Delta. This idea was put  
8 before the California voters in 1982 as Proposition 9 and soundly rejected.

9           30.     Relatedly, the proposed construction of a peripheral canal had been introduced in the  
10 95<sup>th</sup> Congress (1977-1978) as H.R.9258 as an amendment to the Central Valley Project Act and  
11 included the following description:

12           Part VI: Construction of Facilities - Authorizes the Secretary to construct, operate and  
13 maintain (under specified conditions) the Peripheral Canal, the Contra Costa Canal,  
14 the Western Delta Overland Water Facilities, the South Delta Water Quality  
15 Improvement Facilities, Suisun Marsh facilities, the Mid-Valley Canal, and the Los  
Vaqueros Unit. Authorizes appropriations for the costs of the construction, operation,  
and maintenance contract of the Peripheral Canal.

16 This bill was never adopted.

17           31.     However, in 1980 the U.S. Congress passed Public Law 96-375 [94 Stat. 1505]  
18 authorizing feasibility studies for:

19           (5) Delta Overland Water Service Facilities, located in the Sacramento, San Joaquin,  
20 Solano, and Contra Costa Counties of California.

21           32.     Additionally, 94 Stat. 1505 authorized the Interior Department to engage in feasibility  
22 studies for the enlargement of Shasta Dam:

23           SEC. 2. (a) The Secretary of the Interior is hereby authorized to engage in feasibility  
24 studies relating to enlarging Shasta Dam and Reservoir, Central Valley Project,  
California, or to the construction of a larger dam on the Sacramento River, California,  
to replace the present structure.

25           (b) The Secretary of the Interior is further authorized to engage in feasibility studies  
26 for the purpose of determining the potential costs, benefits, environmental impacts,  
27 and feasibility of using the Sacramento River for conveying water from the enlarged  
Shasta Dam and Reservoir or the larger dam to points of use downstream from the  
dam.

28           (c) Before funds are expended for the feasibility studies authorized by this section, the  
State of California shall agree to participate in the studies and to participate in the

1 costs of the studies. The State's share of the costs may be partly or wholly in the form  
2 of services directly related to the conduct of the studies.

3 33. From the ground-level viewpoint, these two projects, a peripheral canal and enlarging  
4 Shasta Dam, would appear to be unrelated to one another. That view drastically changes though  
5 when you look all the way north to the Trinity River and everything in between down to the  
6 California Aqueduct and the Delta-Mendota Canal systems. Each piece of this engineered water  
7 system may have its own name, but all of the pieces are part of one system, with each piece  
8 contributing to the whole and linked to every other piece in some form or fashion.

9 34. In a real sense then, when you consider making such a significant change to a water  
10 diversion in the system, such as the "California WaterFix" proposal, a change that could actually be  
11 used for "simultaneous" water conveyance through and around the Delta via a "dual conveyance"  
12 system, you must consider how fragile the Delta ecosystem and estuary already are from years of  
13 water diversions and drought, and you must consider the state of our salmon fisheries, with some  
14 species, like the winter-run, on the very edge of extinction.

#### 15 **2004 OCAP**

16 35. In 2004 the Bureau of Reclamation and California Department of Water Resources  
17 jointly issued a new Long Term Operations Criteria and Plan (OCAP) for the joint operations of the  
18 Central Valley Project and the State Water Project. This new plan superseded all previous OCAPs  
19 and Biological Opinions (BiOp) and significantly changed the way some operations of the  
20 CVP/SWP would be conducted.

21 36. Previous BiOps, such as the 1992 and 1993 BiOps, found that the impact of CVP  
22 operations (1992 BiOp) jeopardized the continued existence of winter-run Chinook salmon, and the  
23 1993 BiOp arrived at the same conclusion regarding joint CVP/SWP operations. As a result of these  
24 biological opinions, several mitigation measures were incorporated into a jointly operated CVP/SWP  
25 OCAP, including requirements that the projects be operated in such a way that water temperatures in  
26 the Sacramento River at Bend Bridge normally not exceed 56 degrees Fahrenheit from April 15  
27 through September 30, and 60 degrees Fahrenheit through October ("temperature compliance point"  
28 requirement) and that at least 1.9 million acre-feet of cold water be held in storage at the end of each

1 water year in Shasta Reservoir to be available for release from Shasta Dam into the Sacramento  
2 River to maintain these temperatures during drought years or exceptionally hot weather (“carry over  
3 storage” requirement). According to the National Marine Fisheries Service (NMFS), these mitigation  
4 measures were required in order to avoid jeopardy to the winter-run Chinook salmon.

5 37. The 2004 OCAP disregarded these requirements by moving the “temperature  
6 compliance point” contained in earlier OCAPs 19 miles upstream from Bend Bridge to Ball’s Ferry,  
7 thus eliminating nearly 20 miles, or about 42 percent, of the available spawning habitat for the  
8 endangered winter-run Chinook. In addition, the 2004 OCAP eliminated the carryover storage  
9 requirement for Shasta Reservoir contained in earlier OCAPs and replaced that requirement with an  
10 unenforceable “target.” Moving the temperature compliance point upstream and eliminating the  
11 Shasta Reservoir 1.9 million acre-feet carryover storage requirement each has the effect of allowing  
12 dangerously high water temperatures within the winter-run Chinook salmon’s critical habitat.

13 38. Not coincidentally, moving the temperature compliance point upstream and  
14 eliminating the Shasta Reservoir 1.9 million acre-feet carryover storage requirement would also have  
15 the effect of making additional water available for export to Central Valley and southern California  
16 water users because the amount of cold water that must be retained in Lake Shasta for purposes of  
17 controlling water temperature downstream of Shasta Dam would be reduced.

18 39. This actually appears to be the case based on information contained in Department of  
19 Water Resources DayFlow Database: [www.iep.ca.gov/dayflow/output/index.html](http://www.iep.ca.gov/dayflow/output/index.html). From 2003  
20 through 2007 the average combined CVP and SWP exports were right around 1 million acre-feet  
21 more than had ever been previously exported.

## 22 **Biological Opinions**

23 40. In March of 2004, the Bureau requested formal consultation with NMFS on the  
24 impacts of the 2004 OCAP on listed salmon and steelhead Evolutionary Significant Units (ESUs),  
25 which resulted in the preparation of a new written biological opinion on those impacts.

26 41. On October 22, 2004, NMFS released its Biological Opinion on the impacts of the  
27 2004 OCAP to listed salmon and steelhead ESUs. The Biological Opinion documented the severe  
28 decline of all of the salmon and steelhead ESUs due to the joint operations of the CVP and SWP and

1 the substantial additional adverse impacts that the 2004 OCAP would have on those ESUs.

2 Nevertheless, the Biological Opinion concluded that the 2004 OCAP would not jeopardize the  
3 continued existence of any of the ESUs nor adversely modify or destroy their critical habitat.

4 42. However, a draft of the 2004 BiOp had found that the 2004 OCAP would be likely to  
5 jeopardize the continued existence of Central Valley spring-run Chinook salmon and Central Valley  
6 steelhead and that it would be likely to adversely modify or destroy the critical habitat of the winter-  
7 run Chinook salmon. No new scientific data or information had emerged after the draft Biological  
8 Opinion was prepared to justify the final BiOp's contrary "no jeopardy" finding. U.S. Senator  
9 Barbara Boxer, U.S. Representative George Miller, and 18 other members of Congress called for  
10 investigations into whether improper political pressure had been placed on NMFS to change the draft  
11 Biological Opinion's jeopardy conclusion, or whether political appointees played a role in  
12 encouraging NMFS to ignore the scientific basis for the initial jeopardy conclusions and to override  
13 those conclusions.

14 43. In March of 2006, the Winnemem Wintu Tribe, along with eight other Plaintiffs  
15 represented by Earthjustice, filed suit challenging the NMFS' Biological Opinion and the 2004  
16 OCAP it supported. In April of 2008, the U.S. District Court for the Eastern District of California  
17 issued its ruling in the case, *Pacific Coast Federation of Fisherman's Associations v. Gutierrez*  
18 (Case No 1:06-cv-00245), which invalidated portions of the 2004 BiOp and remanded it to NMFS  
19 for revision.

20 44. In June of 2008 NMFS issued a new Biological Opinion on the 2004 OCAP, and  
21 found that the water pumping operations in the Central Valley for the CVP/SWP jeopardize the  
22 continued existence of several threatened and endangered species under the jurisdiction of NMFS.

23 45. Federal biologists and hydrologists concluded that current water pumping operations  
24 for the CVP and SWP should be changed to ensure survival of winter and spring run Chinook  
25 salmon, Central Valley steelhead, the southern population of North American green sturgeon, and  
26 southern resident killer whales, which rely on Chinook salmon runs for food.

27 46. In arriving at a Reasonable and Prudent Alternative (RPA), which set forth protective  
28 measures to improve the chances of survival for designated ESUs, NMFS concluded that analysis

1 showed that, even after all discretionary actions are taken to operate Shasta and Folsom reservoirs to  
2 reduce adverse effects of water operations on listed anadromous fish, the risk of temperature-related  
3 mortality of fish and eggs persists, especially in critically dry years. This mortality can be  
4 significant at the population level. The analysis also led to the conclusion that, due to climate  
5 change, the frequency of these critically dry years will increase. [NMFS 2009 BiOp.]

6 47. NMFS concluded that it believes it is necessary for Reclamation, other fisheries  
7 agencies, and DWR, in cooperation with NMFS, to undertake a program to provide fish passage  
8 above the rim dams such as Shasta and Folsom, in order to reintroduce winter-run, spring-run, and  
9 Central Valley steelhead back into their historical habitats above the dams. NMFS believes that the  
10 high-elevation areas of suitable habitat will provide a refuge for cold water fish in the face of climate  
11 change.

12 48. In an effort to save our salmon, which we believe are a cultural and spiritual Tribal  
13 Property, the Winnemem Wintu Tribe submitted a draft Volitional Fish Passage Project to the  
14 Bureau and the Fish Passage Steering Committee for the reintroduction of salmon into the McCloud  
15 River, and the means to progress through their natural life cycle, that is, swimming to the ocean from  
16 their spawning grounds, and returning from the ocean to spawn again of their own volition. So far,  
17 the Bureau and NMFS, who sit on the Fish Passage Steering Committee, have rejected the idea and  
18 chose to continue on a path of ‘trap and truck’ to move fish in and out of the river. We believe this  
19 path is set up for failure.

## 20 **Shasta Dam Enlargement**

21 49. The Shasta Lake Water Resource Investigation (SLWRI) has been ongoing since  
22 1999 when the Bureau published its first assessment, Shasta Dam Reservoir Enlargement Appraisal  
23 Assessment of the Potential for Enlarging Shasta Dam and Reservoir (5/1999  
24 [http://www.usbr.gov/mp/slwri/docs/appraisal\\_assess/index.html](http://www.usbr.gov/mp/slwri/docs/appraisal_assess/index.html) )

25 50. The idea of enlarging Shasta Dam has been around since its completion in 1945 and  
26 has varied in possible height increases from 6.5 ft. to as much as 200 ft. In July of 2015 the Bureau  
27 of Reclamation transmitted to Congress its Final Feasibility Report and its Final Environmental  
28 Impact Statement with appendices: <http://www.usbr.gov/mp/slwri/>. Though no preferred alternative

1 was submitted to Congress, an argument for Comprehensive Plan 4A (CP4A) was put forth based on  
2 a National Economic Development (NED) evaluation. This plan would raise the height of Shasta  
3 Dam by 18.5 feet, resulting in an increase in the full pool depth of 20.5 feet and an additional  
4 634,000 acre-feet of storage capacity. What is curious about the promotion of CP4A over a  
5 competing alternative to raise the dam 18.5 feet, CP4, is the amount of water reserved to augment  
6 the cold water pool in order to better protect anadromous fish survival. CP4 would reserve 378,000  
7 acre-feet of storage for the cold-water pool, while CP4A would only reserve 191,000 acre-feet for  
8 the same purpose.

9 51. The Final Feasibility Report, in Table ES-1: Retained Management Measures to  
10 Address Planning Objectives (Final Feasibility Report – Executive Summary p. ES-15) sets out  
11 Primary Planning Objectives for the proposed Shasta Dam raise proposals:

- 12 Primary Planning Objective 1 – Increase Anadromous Fish Survival.
- 13 Primary Planning Objective 2 – Increase Water Supply and Water Supply Reliability.

14 52. The seeming oddity of favoring CP4A over CP4, when increasing anadromous fish  
15 survival is supposed to be one of the two primary objectives of a Shasta raise, goes away in light of  
16 the previous discussion regarding the 2004 OCAP, the removal of the 1.9 million acre-feet of  
17 Carryover Storage, the 19-mile reduction in the temperature control point, and the increase in the  
18 average of total CVP and SWP exports over a 5 year period of just over 1 million acre-feet after  
19 these actions were taken. The obvious conclusion to be drawn from these actions considered  
20 collectively is that the survival of anadromous fish is secondary to increasing the amount of  
21 exportable water and only used as a “carrot” to promote projects such as the enlargement,  
22 construction, and modification of dams and other water conveyance infrastructure aimed at allowing  
23 even greater water exports.

24 53. This type of reasoning is also driving the “California WaterFix” and thus the  
25 application for this change petition. How can we get more water and export it south regardless of  
26 the consequences to native fish species and the environment? As I stated above, you have to view  
27 the CVP and SWP as a whole, not just piecemeal project by project. Each piece is in some way  
28

1 linked to every other by enabling, facilitating, or augmenting. What happens in one area cannot be  
2 ignored in the other and must be taken into consideration.

### 3 **Considerations That Should Be Taken into Account**

4 54. The original construction of Shasta Dam flooded over 90% of the Winnemem Wintu  
5 village sites, sacred sites, burial sites, and cultural gathering sites along the Sacramento, McCloud,  
6 and Pit Rivers. The Bureau of Reclamation did not follow the law – 55 Stat. 612 – and no  
7 compensation or like land was ever provided for what was taken. An enlarged Shasta Dam at 18.5  
8 feet would inundate what remaining sites we have left on the rivers – sites we still use today.

9 55. An enlarged Shasta Dam would impede the flow of the McCloud River, the free-  
10 flowing reaches of which are to be protected under California Public Resources Code sec. 5093.542.  
11 In 2007 Westlands Water District purchased approximately 3000 acres along the McCloud River to  
12 facilitate the enlargement of Shasta Dam, “We did not want to see the use of this land to be changed  
13 to impede the potential of raising the dam,” a representative of Westlands told the *Record*  
14 *Searchlight* in 2007. Westlands has also promised to cover \$200 million of the estimated \$1 billion  
15 cost to raise the dam. Why would Westlands Water District, a San Joaquin Valley based district do  
16 this? Because they expect more water to be exported south of the Delta if the dam enlargement is  
17 completed.

18 56. In April of this year 2016, the Metropolitan Water District of Southern California  
19 purchased five islands at a cost of \$175 million in the Sacramento-San Joaquin Delta. Lawsuits  
20 were filed against the purchase, but in July the State Supreme Court declined to block the purchase,  
21 and the deal was finalized. Metropolitan is a strong advocate of the “California WaterFix” and a  
22 large beneficiary of water exports from northern to southern California. Metropolitan’s advocacy for  
23 the “California WaterFix” and its position as a major beneficiary of water exports leaves little to the  
24 imagination regarding what it expects in return.

25 57. In 2014 only 5% of the winter-run Chinook juveniles survived to migrate to the  
26 ocean, and in 2015 less than 3%. [SFGATE Feb 1, 2016.] These troubling numbers are largely  
27 attributed to water temperatures being too high in the river, with not enough cold water carryover in  
28 the Shasta reservoir to combat the higher temperatures.

1           58.     As I've discussed, the 2009 NMFS BiOp calls for fish passage above the rim dams to  
2 increase the chance of survival for endangered salmonids. The Winnemem Wintu Tribe has  
3 presented a draft Salmon Restoration Plan that includes a volition passage for migrating salmon  
4 around Shasta Dam. We believe that neither plan can be successful if the "California WaterFix" is  
5 completed. The stated capacity of 9000 cfs water transfer through the two tunnels would spell the  
6 death knell to migrating salmon, not only by entrapment at the tunnel intakes but by the harm to the  
7 Bay Delta Estuary from the reduction of inflowing fresh water. Because the salmon are considered a  
8 cultural and spiritual property of the Winnemem Wintu, we formally request that a National Historic  
9 Preservation Act Sec. 106 consultation be undertaken before any decision is made on the change  
10 petition.

11           59.     The Winnemem Wintu believe that the construction and success of the twin tunnels  
12 are dependent on the enlargement of Shasta Dam and, conversely, that the authorization of funding  
13 to begin construction on the enlargement of Shasta Dam is dependent upon the approval of this  
14 change petition giving the go-ahead for the tunnels to be constructed. As I stated before, you cannot  
15 look at one piece of the whole to make a decision, you must look at the whole. Therefore, we  
16 formally request that a 106 consultation be initiated immediately, and that no decision on this change  
17 petition be made until that consultation is concluded.

18           60.     The Winnemem Wintu Tribe believes that the construction and success of the  
19 proposed Sites Reservoir is also dependent on the enlargement of Shasta Dam and that the success of  
20 the "California WaterFix" is dependent on the construction of Sites Dam. The additional storage in  
21 Sites is to be used for water transfers for a variety of purposes, and the purpose of the tunnels is to  
22 transfer water. Since each of these projects can and will have a direct or indirect effect on our  
23 cultural resources and tribal cultural properties, we formally request a 106 consultation be initiated  
24 immediately, and that no decision on this change petition be made until that consultation is  
25 concluded.

26 **"California WaterFix"**

27           61.     The Winnemem Wintu believes that the "California WaterFix" petition that is the  
28 subject of this hearing is not a change petition for an existing water right. Rather, it should be

1 submitted as a petition for new water rights. Throughout 2007, I represented the Winnemem Wintu  
2 Tribe on the Delta Vision Stakeholders Coordination Group. Throughout our deliberations and  
3 considerations, we examined at least five viable options to help improve the Delta. None of these  
4 options included endorsement or sanction of a dual conveyance system.

5 [<http://deltavision.ca.gov/DeltaVisionStakeholderReports.shtml>]

6 62. By its very name, “dual conveyance” implies the ability to convey something through  
7 two separate means either simultaneously, or individually. Having the ability and the opportunity to  
8 simultaneously perform two actions when previously you only have the permission to perform one,  
9 would seem to mean that you need to get permission for a “new” action. The new action in this  
10 circumstance should require a new permit for additional diversion.

11 63. Granting this change petition would provide the ability to do simultaneous water  
12 diversion both out of and away from the Delta, allowing significantly more water to be taken away  
13 from through-Delta flows than can currently occur. Indeed, a major purpose of “California  
14 WaterFix” is to increase export reliability and, thus, overall exports. Though proponents of the  
15 “California WaterFix” would state that they would never do simultaneous diversions, the history of  
16 water management in California has taught us otherwise. There will always be an emergency here, a  
17 crisis there that will need immediate attention and thus the switch at both locations turned on to  
18 address the issue. The only way to prevent this from ever happening if this petition were to be  
19 granted would be to revoke any right to divert water out of the Delta proper and close down those  
20 Delta facilities altogether.

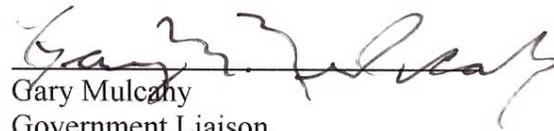
21 **In Summary:**

22 64. The Winnemem Wintu Tribe would like to reiterate for the record that we believe that  
23 any and all determinations of existing water rights allocated, or changes thereto, modifications  
24 thereof, or issuance of new water rights are *illegal* on their face and should be suspended, voided, or  
25 enjoined until such time as the inherent water rights of the Indigenous People of this state are  
26 recognized, allocated, protected, and preserved first and foremost, before and above, any and all  
27 other claims to water in the State of California.

1           65.     Drowned cultures, dead and extinct fish, broken promises, stolen lands,  
2 environmental destruction, water grabs, and years and years of litigation – is it truly worth it?

3 Dated: August 29, 2016

Respectfully submitted,

4  
5 

6 Gary Mulcahy  
7 Government Liaison  
8 Winnemem Wintu Tribe  
9 (916) 214-8493  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28