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Via email: elead@usbr.gov

Emma Leal
Bureau of Reclamation, South Central California Area Office
1243 N Street
Fresno, CA 93721

Subject: WIIN Act Draft Prepayment Contract Between the United States and Westlands Water District, Irrigation and M&I Contract No. 14-06-200-495A-XXX

Dear Ms. Leal:

Restore the Delta submits comments in this letter regarding the above-referenced draft Prepayment Contract (draft contract) recently negotiated between the United States and Westlands Water District (WWD) on January 6, 2020. Our letter further incorporates by reference three other letters. The first of these will be submitted to you by the Planning and Conservation League, dated January 8, 2020, under the signatures of seventeen California environmental water organizations, and to which we are also signatory. The other letter will be submitted to you by Sierra Club California on January 7, 2020, of which we will also be a signatory. And a fourth letter we will also submit on January 7, 2020, regards the manner in which the Bureau of Reclamation handled the process for the Westlands contract negotiation.

We regard this draft contract as an imprudent power play by WWD. The draft contract to gather unto WWD for as long as possible a water delivery arrangement with the Bureau that positions WWD to make water deals in a future of climate change when other less powerful water users would face rising water prices and greater water scarcity. This strategem is unacceptable and pre-emptive of both national and state climate change policy options as they concern water resources in California.

This draft contract is silent on a specific land retirement program, a proper and effective water needs assessment methodology, and ironclad requirements that contract water is restricted only to long-term irrigable land base in WWD's service area. Its silences endorse WWD's continued vexatious treatment of the Delta and nearly every other

water user in California's Central Valley and coastal water service areas. However, by continuing to allow water users in its service area to irrigate drainage-problem lands with rising water tables, and to do so in the absence of any land retirement program that underlies and structures WWD's water needs assessment for a realistic Contract Total (lines 171-172), WWD would be using and applying water unreasonably, which would be contrary to the California Constitution (Article X, section 2) and the California Water Code (section 100). We strongly recommend that the Bureau and WWD renegotiate this draft contract, and determine whether other converting contracts need similar attention.

1. We strenuously object to the lack of a defined, time-limited term in the draft contract (lines 258-260), provided WWD makes all of its required payments. There is no compelling reason provided anywhere in the draft contract, including the explanatory recitals, that justifies the Bureau of Reclamation (the Bureau) providing permanent contractual service to WWD. Because economic, policy, climatic, and environmental conditions can and do and will change, it is always more prudent to limit contractual relationships between negotiating parties to a specific, time-limited term. The term of this contract is unwise on the part of both parties. If a long-term contract is sought by both parties, it should be time-limited and less than a single generation at most. Given the array of uncertainties and problems that loom for WWD in the decades immediately before us, a shorter time-frame would give both parties greater flexibility to respond to changing conditions.
2. The Water Infrastructure Improvement Now Act (WIIN Act, Public Law 114-322, 33 USC 2201) at Section 4011 provides for Bureau contractors to, at their option, convert their water service or repayment contracts to prepayment contracts. However, no authorization is provided in this section for eliminating contract terms thereby effectively making a contract permanent or perpetual.
3. The contract appears to us to carry over many non-boilerplate sections from earlier Bureau-Westlands contracts, including provisions addressing land retirement, groundwater recharge, and drainage matters, with little if any attention to changed conditions.
4. Lines 297-319 address a land retirement program. This section clearly indicates that land retirement is at this time a hypothetical chimera—a truly indefinite article—rather than an actual program. The draft contract is deficient for failing to include a draft Exhibit that describes the WWD land retirement program, or citing to some other publicly available document that contains WWD's land retirement program. This exhibit should establish a mapped and descriptive baseline for the contract as to which lands have already been retired under previous contracts, and where, and which lands will be retired within the WWD service area within the time-limited term of a properly re-drafted contract.
5. Lines 300-312 provide for the use by the Bureau of a water needs assessment methodology in relation to the (at present, hypothetical) WWD land retirement

program “to determine whether the Contract Total will be reduced.” The Contract Total, we are informed at lines 171-172, is the “maximum amount of water to which the Contractor is entitled” under the draft contract, or 1.15 million acre-feet of water delivery in any one year. So, lines 300-312 are important for determining whether this maximum water delivery amount might be reduced should further land retirement occur. The methodology is included in Exhibit C to the draft contract, which also suggests that the methodology is nearly 20 years old. The lack of a specific, time-limited contract term means that this methodology would apply in perpetuity without means of adjustment by either or both parties. This is unwise and imprudent, since its use would occur during times of change in agricultural production due to shifting commodity markets as well as in the event of climatic changes impacts reducing water available and making growing conditions more inhospitable under this draft contract (in Article 4). As mentioned above in paragraph 3, no land retirement program description is included in the draft contract, nor any baseline established to indicate what WWD has already accomplished through land retirement within its service area. The draft contract is also deficient for having no definition of either “land retirement” or “land retirement program.”

6. The water needs assessment methodology (Exhibit C) indicates that in the event water is lost to WWD from increasing evapotranspiration and decreasing effective precipitation, more water would therefore be “needed” from the Central Valley Project (CVP) under this methodology. However, this method outcome reflects a self-serving pressure or self-fulfilling prophecy for more water imports to WWD from the CVP Delta Division and San Luis Unit facilities. This is contrary to sustainable water management for this part of the San Joaquin Valley. These supplies are less likely to be available as the climate warms.¹ Steps should be taken by both parties, prior to executing this draft contract, to update the water needs assessment methodology. The methodology should respond more realistically to economic factors—such as inclusion of an elasticity component in the methodology that will give proper signals to cost-minimizing farmers wishing to use water efficiently and save money in the future—as well as to climate and policy factors such as the need to find other sources of water and protection of endangered species in the Delta source of water that supplies the Delta Division and the San Luis Unit facilities.

¹ Supporting studies for the Fourth California Climate Assessment found, for example, that there is between an 89 and 93 percent probability that annual Delta exports will be reduced; that at 2 degrees Celsius of warming by 2050 and a 10 percent decrease in precipitation, average annual Delta exports are estimated to decrease by about 30 percent; a 20 percent decrease in precipitation would decrease Delta exports between 40 and 50 percent from historic levels. Another study indicated that changes in precipitation and sea level rise would result in a half-million acre-feet reduction in Delta exports by 2050. See citations available in Restore the Delta, 2019, Climate Equity and Seismic Resilience for the San Francisco Bay-Delta Estuary, pp. 23-24. Accessible at <https://www.restorethedelta.org/climate-equity-and-seismic-resilience-for-the%E2%80%A8-san-francisco-bay-delta-estuary/>.

7. Of course, the need for land retirement in WWD's service area is driven by continued application of irrigation water to soils that are high in salts and selenium.² Westlands cannot simply pump irrigation water that has accumulated underground because it lacks a place where such water, containing high concentrations of salts and selenium, can be used and applied.³ WWD's agricultural water management plan (AWMP) describes its land retirement programs as originating with the Central Valley Project Improvement Act of 1992, a San Luis Drainage Feature Re-Evaluation Project environmental review process, and selection of an alternative that would retire 194,000 acres of land from irrigated farming. As of 2012, the AWMP states that implementation of this land retirement program—which has been around since 2007 —“would require appropriation of funds by Congress and the apportionment of such funds by the Office of Management and Budget.” Thirteen years have passed with neither the Bureau nor WWD acting on this alternative. In the meantime, a few hundred acres within WWD's service area have converted to solar farms owned and operated by PG&E. The draft contract should recommit both parties in Article 3 to working together to seek funds that will enable land retirement to resume in WWD's service area. Together with a revised and improved water needs assessment, WWD and the Bureau can arrive at a more realistic “Contract Total” for the draft contract. We also suggest that the San Luis Drainage Feature Re-Evaluation selected alternative be included as an exhibit to the contract and referred to as the program that will be the object of Article 3.

8. There needs to be a meaningful environmental review of the draft contract, including the climate change and environmental justice effects of such a proposed permanent contract for WWD. We understand that the Trump administration proposes to eliminate requirements for analysis of climate change for infrastructure projects under the National Environmental Policy Act (NEPA).⁴ Fortunately, the draft contract is not reasonably definable as an “infrastructure project” and should not be exempted from such analysis under NEPA. This environmental review should also address the potential for impacts to the Stockton water diversion. A significant point of contention concerning the flow and salinity impacts of California WaterFix before this latter project was cancelled by the Newsom Administration, the draft contract

² WWD's 2012 Agricultural Water Management Plan acknowledged (pp. 14-15) that, “Complicating Westlands' salinity problems is its soil structure in some areas where dense lay layers of varying depth and thickness restrict natural drainage. This causes an accumulation of unused irrigation water above the clay layers, resulting in a near-surface saline water table. The District agricultural lands that are severely affected by a saline water table are in need of artificial drainage facilities or in some cases conversion to non-irrigated use.”

³ *Ibid.*, pp. 16-17. “Pumping of the semi-confined aquifer has not been an attractive recommendation due to lack of options for the use of the water. Westlands limited water supply could be enhanced if this water were of good quality, and would probably have been readily adopted.”

⁴ Lisa Friedman, “Trump Rule Would Exclude Climate Change in Infrastructure Planning,” *New York Times*, 3 January 2020. Accessible at <https://www.nytimes.com/2020/01/03/climate/trump-nepa-climate-change.html>.

seeks to “bake in” increased permanent exports by the Central Valley Project that would directly benefit WWD as the CVP’s largest south of Delta water importer. Restore the Delta is also concerned that flow and salinity impacts—and potential HABs impacts—will drive up water treatment costs for the City of Stockton and its water ratepayers, in neighborhoods affected by adverse changes in drinking and surface water quality. These potential impacts of the draft contract ignore public health and economic impacts to environmental justice communities.

9. Restore the Delta incorporates into this letter by reference our five-minute video on Harmful Algal Blooms in the San Francisco Bay-Delta Estuary, accessible at <https://www.youtube.com/watch?v=NCoKBIEJph0>. It briefly describes the causal factors leading to harmful algal blooms. In addition, the draft contract needs to be evaluated for its impacts on far more intensive HABs activity. Recently, we learned that DWR scientists gathered data on 2019 HABs in the Delta and found a total of eleven (11) different species of cyanobacteria that bloom, many of which have cyanotoxins.
10. The most well-known cyanotoxin is microcystin from the *Microcystis* species. Even more disturbing than the biodiversity of cyanobacteria in the Delta is that some species’ cyanotoxins can become airborne, meaning that HABs are not just toxic when ingested by humans or dogs, but may be inhaled by human beings next to or not far from water bodies where HABs are present. This raises a serious public health concern for Delta residents in warm seasons. Of course the HABs typically subside and dissipate once higher flows, colder water, and more wintry weather prevail, as occurred at the end of October and early November 2019 when San Joaquin River flows increased, yet they will rebloom when warm weather returns, worsening and spreading each year, until water quality and quantity conditions are improved.
11. Increased presence of stressors like selenium and mercury from alterations to hydrology (flow volume, timing, and magnitude) and water quality could increase food web pathways to humans relying on subsistence fishing. Without meaningful environmental review of the draft contract, these potential effects on humans are ignored by the Bureau and WWD. The absence of climate change, public health, or environmental justice analysis of this potential contamination effect on human subsistence fishing in the Delta renders this public review process fundamentally, legally inadequate.

There are two typographical errors involving paragraph labels at lines 291 and 297 [two “(a)”s], and at lines 328 and 330 [two “(c)”s].

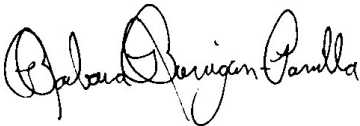
By proposing this draft contract, the Bureau coddles WWD as a junior water right holder—one whose right is based simply in a contract for water service delivery and not a more primary form of water right at that. The Bureau’s enabling of a vexatious water district needs to stop, and renegotiation of a repayment contract can provide that opportunity. This draft contract is silent on a specific land retirement program, a proper

and effective water needs assessment methodology, and ironclad requirements that contract water is restricted only to a long-term irrigable land base in WWD's service area that is cognizant of climate change impacts. By continuing to allow water users in its service area to irrigate drainage-problem lands with rising water tables, and doing so in the absence of any land retirement program that underlies and structures WWD's water needs assessment for a realistic Contract Total, WWD would be diverting, using, and applying water unreasonably, contrary to the California Constitution (Article X, section 2) and the California Water Code (section 100).

We strongly recommend that the Bureau and WWD renegotiate this draft contract, and determine whether other converting contracts need similar attention.

Thank you for the opportunity to comment on this important matter. If you have questions, please feel free to email us, as indicated below.

Sincerely,



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cc: Senator Dianne Feinstein
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