

1 John Buse (SBN 163156)
2 CENTER FOR BIOLOGICAL DIVERSITY
3 1212 Broadway, Suite 800, Oakland, CA 94612
4 Tel: 510-844-7100
5 Fax: 510-844-7150
6 Email: jbuse@biologicaldiversity.org

7 Attorney for Plaintiff Center for Biological Diversity

8 E. Robert Wright (SBN 51861)
9 LAW OFFICE OF E. ROBERT WRIGHT
10 909 12th Street, Suite 202
11 Sacramento, California 95814
12 Tel: (916) 557-1104
13 Fax: (916) 557-9669
14 Email: bwrightatty@gmail.com

15 Attorney for Plaintiffs Restore the Delta and
16 Planning and Conservation League

17 Adam Keats (SBN 191157)
18 LAW OFFICE OF ADAM KEATS, PC
19 303 Sacramento Street, 2nd Floor
20 San Francisco, CA 94111
21 Tel: (415) 430-9403
22 Email: adam@keatslaw.org

23 Attorney for Plaintiffs Restore the Delta and
24 Planning and Conservation League

25 **IN THE UNITED STATES DISTRICT COURT**
26 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

27 CENTER FOR BIOLOGICAL DIVERSITY;
28 RESTORE THE DELTA; and PLANNING
AND CONSERVATION LEAGUE,

Plaintiffs,

v.

UNITED STATES BUREAU OF
RECLAMATION; DAVID BERNHARDT, in
his official capacity as Secretary of the Interior;
and UNITED STATES DEPARTMENT OF
THE INTERIOR,

Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY, RESTORE THE DELTA,
3 and PLANNING AND CONSERVATION LEAGUE, (collectively, “Plaintiffs”) hereby sue
4 Defendants UNITED STATES BUREAU OF RECLAMATION, DAVID BERNHARDT, in his
5 official capacity as Secretary of the Interior, and UNITED STATES DEPARTMENT OF THE
6 INTERIOR (collectively, “Reclamation”) for violations of the National Environmental Policy
7 Act (“NEPA”), 42 U.S.C. section 4321 et seq.

8 2. Plaintiffs seek from this Court an order and judgment setting aside and rescinding
9 Reclamation’s conversion of 14 of its Central Valley Project (“CVP”) renewal contracts into
10 permanent repayment contracts with water contractors, and ordering Reclamation to comply with
11 NEPA. Plaintiffs also seek an order and judgment restraining Reclamation from converting, or
12 converting by amending, any additional contracts including 26 contracts that Reclamation is in
13 the process of converting into permanent repayment contracts, and ordering Reclamation to
14 comply with NEPA. Pursuant to the 14 contracts that Reclamation has already converted,
15 Reclamation would be obligated to deliver about 1,799,148 acre-feet¹ of water through the CVP
16 to those contractors each year. Pursuant to the 26 contracts that Reclamation is in the process of
17 converting, Reclamation would be obligated to deliver about 480,679 acre-feet of water to those
18 contractors each year. The total obligation including contracts already converted, and contracts
19 Reclamation is the process of converting would be about 2,279,879 acre-feet of water per year.

20 3. Deliveries of CVP water are accomplished by diversions from rivers and the Delta
21 and therefore have many significant adverse environmental impacts on the watershed, including
22 the rivers and the San Francisco-San Joaquin Bay-Delta estuary. Adverse impacts include
23 reducing freshwater flows and worsening already degraded Delta water quality; further
24 endangering and destroying endangered and threatened fish species and critical habitat; reducing
25 freshwater flows causing and worsening harmful algal blooms in the Delta; adverse impacts on
26 public health and safety in the Delta region; and adverse impacts on agriculture in the Delta.

27
28

¹ An acre-foot is the quantity of water that would cover one acre to a depth of one foot, or about 325,851.4 gallons.

1 Moreover, Reclamation is in the process of converting virtually all of its CVP contracts, about 35
2 more of them, into permanent contracts like the 40 contracts already converted or in the process
3 of being converted. Pursuant to NEPA, “cumulative impact” “is the impact on the environment
4 which results from the incremental impact of the action when added to other past, present, and
5 reasonably foreseeable future actions” 40 C.F.R. § 1508.7. The conversion of all of these
6 contracts would have many significant adverse cumulative impacts on the environment as well as
7 direct significant adverse environmental impacts. Reclamation has discretion in determining and
8 negotiating the terms and conditions of the contract conversions, and therefore must comply with
9 NEPA, including preparation of an Environmental Impact Statement (“EIS”) and/or an
10 Environmental Assessment (“EA”) before converting the contracts.

11 4. However, Reclamation has refused to prepare an EIS, EA, or comply with NEPA
12 in any way whatsoever, contending that it has no discretion in determining and negotiating the
13 terms and conditions of the contract conversions. Reclamation’s conclusion is an erroneous
14 interpretation of law and of the plain language of the statute Reclamation relies upon.

15 5. Reclamation, therefore, has failed to proceed in the manner required by NEPA
16 and has unlawfully withheld or unreasonably delayed required agency action pursuant to the
17 Administrative Procedure Act (“APA”), 5 U.S.C. sections 706. Reclamation’s approvals of the
18 contract conversions are arbitrary and capricious, and without observance of the procedure
19 required by law. *Id.* Reclamation has also failed to proceed in the manner required by the
20 Endangered Species Act (“ESA”), 16 U.S.C. section 1531 et seq. Plaintiffs may amend, or if
21 required seek leave to amend or supplement, this complaint to allege ESA claims against
22 Reclamation and additional federal parties following completion of 60 day notice under the ESA.

23 **JURISDICTION AND VENUE**

24 6. The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal
25 question), 1346 (United States as defendant), 1361 (mandamus against an officer of the United
26 States), 2201 (declaratory judgment), and 2202 (injunctive relief), and under the APA, 5 U.S.C.
27 sections 701-706 (review of final agency action).

1 7. Venue is proper in this judicial district pursuant to 28 U.S.C. sections 1391(b)(2)
2 and 1391(e)(2) because a substantial part of the events giving rise to Plaintiffs' claims occurred,
3 and a substantial part of property that is the subject of the action is situated, in this judicial
4 district. Intradistrict assignment of this matter to the Sacramento or Fresno Divisions of the Court
5 would be appropriate as a substantial part of the events giving rise to Plaintiffs' claims occurred
6 in those divisions.

7 8. There exists now between the parties hereto an actual, justiciable controversy in
8 which Plaintiffs are entitled to have a declaration of their rights and of Reclamation's
9 obligations, and further injunctive relief because of the facts and circumstances hereinafter set
10 forth.

11 9. This Complaint is timely filed within the applicable six-year statute of limitations
12 set forth in 28 U.S.C. section 2401(a).

13 10. Plaintiffs have standing to assert their claims because they suffer tangible harm
14 from Reclamation's violations of law as alleged herein. Plaintiffs' interests in improving water
15 quality in the Central Valley and preserving fish and wildlife in the Central Valley and Trinity
16 River watersheds and the San Francisco Bay-Delta Estuary, have been and will continue to be
17 harmed by the activities permitted by the contracts. The diversion, pumping, delivery, and use of
18 vast quantities of water from the Bay-Delta pursuant to the contracts directly harms fish through
19 entrainment at the pumping plants and reduce freshwater flows in the Delta, and also alters the
20 hydrologic flow patterns in the Delta, adversely affects the Delta's salinity barrier, causes water
21 contamination in the San Joaquin River and other northern and Central Valley water bodies,
22 produces toxic drainage that contaminates wetlands, and pollutes water and groundwater basins
23 underlying much of the Central Valley, among other adverse impacts. A judgment from this
24 Court requiring Reclamation to conduct a thorough environmental review of the impacts of the
25 contracts would redress Plaintiffs' harms, at least in part, because Reclamation would be
26 required to consider less harmful alternative terms and conditions in the contracts and also to a
27 devise mitigation measures to address harms caused by the contracts.

1 11. Plaintiffs have suffered and are suffering procedural and informational injuries
2 due to Reclamation's failure to fulfill its NEPA duties. Plaintiffs seeking to enforce a procedural
3 requirement that has been disregarded and could impair a separate concrete interest of theirs, can
4 establish standing without meeting all the normal standards for redressability and immediacy.
5 They need only establish the reasonable probability of the challenged action's threat to their
6 concrete interests.

7 12. Plaintiffs' interests in the preservation of fish and wildlife in the Bay-Delta,
8 Central Valley, Trinity River watershed, and San Francisco Bay, as well as their interests in
9 improving water quality in those areas, are concrete interests.

10 13. All applicable administrative remedies have been adequately exhausted by
11 Plaintiffs. Within the period for public comment established by Reclamation, Plaintiffs submitted
12 comment letters dated January 7, February 15, and April 22, 2020, to Reclamation, asserting that
13 Reclamation must comply with NEPA before converting the contracts. Plaintiff Restore the
14 Delta also submitted separate comment letters dated January 6 and 7, 2020, and Plaintiffs
15 Planning and Conservation League and Restore the Delta submitted a comment letter dated
16 January 6, 2020. Reclamation failed to provide any NEPA notices, prepared no NEPA
17 documents, and provided no NEPA public comment period.

18 **PARTIES**

19 14. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the "Center") is a non-
20 profit, public interest organization with over 74,000 active members. The Center has offices in
21 Oakland, Los Angeles, and Joshua Tree, California, as well as in Arizona, Florida, New Mexico,
22 Oregon, Colorado, and Washington, D.C. The Center and its members are dedicated to
23 protecting diverse native species and habitats through science, policy, education, and
24 environmental law. The Center's members reside and own property throughout California as
25 well as those areas to be affected and served by the contracts, and use the waters and lands
26 affected by the contracts for wildlife observation, recreation, scientific research, environmental
27 education, and aesthetic enjoyment. One of the Center's primary missions is to protect and
28 restore habitat and populations of imperiled species throughout Western North America. The

1 group's members and staff include individuals who visit the streams, rivers, riparian areas and
2 Bay-Delta and have biological, health, educational, scientific research, spiritual, and aesthetic
3 interest in the ecosystems and the species and habitats affected by Central Valley Project
4 including the deliveries of waters to Reclamation's contractors. The Center's members and staff
5 regularly use and intend to continue to use these areas for observation, research, aesthetic
6 enjoyment, and other recreational, scientific, and educational activities. The Center's members
7 and staff have researched, studied, observed, and sought protection for many imperiled species,
8 including federally listed threatened and endangered species that depend on the rivers, streams,
9 riparian habitat, and Bay-Delta in California. The Center's members and staff have and continue
10 to derive scientific, recreational, educational, conservation, and aesthetic benefits from the
11 continued existence of imperiled species in the wild and the preservation of the ecosystems upon
12 which they depend. Central Valley Project diversions are a detriment to achieving the group's
13 goal of protection and restoration, and its members and staff are injured by Reclamation entering
14 into the permanent contracts in the absence of compliance with NEPA. These injuries would be
15 redressed by the relief sought.

16 15. Plaintiff RESTORE THE DELTA ("RTD") is a non-profit public benefit
17 organization based in Stockton, California. RTD is a coalition of Delta residents, business
18 leaders, civic organizations, community groups, faith-based communities, union locals, farmers,
19 fishermen, and environmentalists seeking to strengthen the health of the Bay-Delta estuary and to
20 protect the environmental interests in the Sacramento-San Joaquin Delta, including but not
21 limited to public health, fishing, farming, and recreation. With over 60,000 members statewide,
22 RTD advocates on behalf of local Delta stakeholders to ensure that they have a direct impact on
23 water management decisions affecting the water quality and well-being of their communities,
24 and water sustainability policies for all Californians. RTD works through public education and
25 outreach so that all Californians recognize the Sacramento-San Joaquin Delta as part of
26 California's natural heritage, deserving of restoration, seeking a Delta whose waters are fishable,
27 swimmable, drinkable, and farmable, supporting the health of the San Francisco Bay-Delta
28 Estuary. Members of RTD reside in and along the Bay-Delta and its watershed and use the

1 waters of the Central Valley and Bay-Delta for drinking, farming, and for aesthetic, recreational,
2 and educational enjoyment. As just one example of environmental harms inflicted on RTD
3 members by diversions for the Central Valley Project, diversions reduce freshwater flows
4 through the Delta causing and worsening harmful algal blooms (HABs) which threaten the
5 public health of those drinking, fishing in, or swimming in, Delta waters, or inhaling the air near
6 Delta waters. These injuries would be redressed by the relief sought.

7 16. Plaintiff PLANNING AND CONSERVATION LEAGUE (“PCL”) is a nonprofit
8 advocacy organization empowered to protect and restore California’s natural environment and to
9 promote and defend the public health and safety of the people of California, through legislative,
10 administrative, and judicial action. Founded in 1965, PCL was the first organization devoted to
11 bettering Californians’ quality of life through environmental legislation. One of the
12 organization’s earliest accomplishments was the enactment in 1970 of the California
13 Environmental Quality Act (“CEQA”), which PCL helped draft and has continually supported
14 over the years. PCL has been a party in successful legal actions to compel compliance with
15 NEPA and CEQA. PCL members reside and own property throughout California as well as those
16 areas to be served by CVP contracts, and use the waters and lands affected by the CVP contracts.
17 PCL’s interests have been injured as a result of Reclamation’s permanent locking-in of CVP
18 contracts, and these injuries would be redressed by the relief sought.

19 17. Defendant UNITED STATES BUREAU OF RECLAMATION is the federal
20 agency within the United States Department of the Interior charged with managing the CVP and
21 is responsible for complying with NEPA in connection with its CVP management actions.
22 Reclamation approved and entered into the contracts challenged in this litigation without
23 adequate or any environmental review.

24 18. Defendant DAVID BERNHARDT is sued in his official capacity as Secretary of
25 the Department of the Interior (“Secretary”). He is responsible for the operation of the CVP,
26 subject to the mandates of the Central Valley Project Improvement Act and WIIN Act, and
27 oversees the Department of the Interior and the Bureau of Reclamation.

1 19. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is a cabinet-
2 level federal agency, and the parent agency of the United States Bureau of Reclamation.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 **I. THE NATIONAL ENVIRONMENTAL POLICY ACT**

5 20. NEPA is “our basic national charter for protection of the environment.” 40 C.F.R.
6 § 1500.1(a). Congress directed “that, to the fullest extent possible ... the policies, regulations,
7 and public laws of the United States shall be interpreted and administered in accordance with the
8 policies set forth in [NEPA]” 42 U.S.C. § 4332(1).

9 21. NEPA’s goals are to (1) “prevent or eliminate damage to the environment and
10 biosphere,” (2) “stimulate the health and welfare of” all people, and (3) “encourage productive
11 and enjoyable harmony” between humankind and the environment. 42 U.S.C. § 4321. NEPA
12 recognizes that “each person should enjoy a healthful environment” and ensures that the federal
13 government uses all practicable means to “fulfill the responsibilities of each generation as trustee
14 of the environment for succeeding generations” and “assure for all Americans safe, healthful,
15 productive, and esthetically and culturally pleasing surroundings.” *Id.* § 4331(b)-(c).

16 22. To fulfill these purposes, NEPA requires that: (1) agencies take a “hard look” at
17 the environmental impacts of their actions before the actions occur, thereby ensuring “that the
18 agency, in reaching its decision, will have available, and will carefully consider, detailed
19 information concerning significant environmental impacts,” and (2) “the relevant information
20 will be made available to the larger audience that may also play a role in both the
21 decisionmaking process and the implementation of that decision.” *Robertson v. Methow Valley*
22 *Citizens Council*, 490 U.S. 332, 349 (1989). NEPA processes must be integrated with other
23 processes “at the earliest possible time to ensure that planning and decisions reflect
24 environmental values” 40 C.F.R. § 1501.2.

25 23. NEPA requires federal agencies to prepare an EIS for “major Federal actions
26 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

27 24. “Major Federal actions” subject to NEPA include both new and continuing
28 activities. 40 C.F.R. Regulations § 1508.18(a).

1 25. To determine whether the nature and extent of a proposed action’s environmental
2 effects requires preparing an EIS, federal agencies may first prepare an EA. 40 C.F.R. §
3 1501.4(b)-(c). If, on the basis of the EA, the agency finds that the proposed action will produce
4 “no significant impact” on the environment, then an EIS need not be prepared. *Id.* § 1501.4(e).

5 26. An agency’s NEPA analysis must assess the direct, indirect, and cumulative
6 impacts of the action. 40 C.F.R. §§ 1508.8. Cumulative impacts are those that “result from the
7 incremental impact of the action when added to other past, present, and reasonably foreseeable
8 future actions.” 40 C.F.R. §§ 1508.7. An agency must prepare an EIS if it is reasonable to
9 anticipate a cumulatively significant impact on the environment. *Grand Canyon Trust v. Fed.*
10 *Aviation Admin.*, 290 F.3d 339, 346 (D.C. Cir. 2002).

11 27. As part of its NEPA review, an agency is also required to prepare a detailed
12 statement regarding the alternatives to a proposed action. *See* 42 U.S.C. § 4332(2)(C)(iii), (E).
13 This alternatives analysis is the “heart” of NEPA review. 40 C.F.R. § 1502.14; *see also id.* §
14 1508.9(b). An agency must “[r]igorously explore and objectively evaluate all reasonable
15 alternatives,” including a “no-action” alternative. 40 C.F.R. § 1502.14.

16 28. An agency may prepare a programmatic EIS covering a program. 40 C.F.R. §
17 1502.20. Subsequent EISs and EAs covering specific actions within the broader program may
18 “tier” off the programmatic EIS, relying on it to cover the program-level analysis while focusing
19 on the “issues specific to the subsequent action.” *Id.*

20 **II. THE ADMINISTRATIVE PROCEDURE ACT**

21 29. The APA provides a right to judicial review for any “person suffering legal wrong
22 because of agency action.” 5 U.S.C. § 702. Final agency actions “for which there is no other
23 adequate remedy in a court” are reviewable under the APA. *Id.* § 704.

24 30. Under the APA, a reviewing court shall compel agency action unlawfully
25 withheld or unreasonably delayed and hold unlawful. *Id.* § 706(1). In addition, a reviewing court
26 shall set aside agency action found to be arbitrary, capricious, an abuse of discretion, or
27 otherwise not in accordance with law, or without observance of the procedure required by law.
28 *Id.* §§ 706(2)(A), 706(2)(D).

1 **III. THE CENTRAL VALLEY PROJECT IMPROVEMENT ACT**

2 31. Congress enacted the Central Valley Project Improvement Act (“CVP
3 Improvement Act”), Title 34, Public Law 102-575, in 1992 to:

- 4 (a) protect, restore, and enhance fish, wildlife, and associated habitats in the Central
Valley and Trinity River basins of California;
- 5 (b) address impacts of the Central Valley Project on fish, wildlife and associated habitats;
- 6 (c) improve the operational flexibility of the Central Valley Project;
- 7 (d) increase water-related benefits provided by the Central Valley Project to the State of
8 California through expanded use of voluntary water transfers and improved water
conservation;
- 9 (e) contribute to the State of California's interim and long-term efforts to protect the San
Francisco Bay/Sacramento-San Joaquin Delta Estuary; and
- 10 (f) achieve a reasonable balance among competing demands for use of Central Valley
11 Project water, including the requirements of fish and wildlife, agricultural, municipal and
industrial and power contractors.

12 CVP Improvement Act § 3402.

13 32. The CVP Improvement Act directed the Secretary to operate the CVP “to meet all
14 obligations under State and Federal law, including but not limited to the [ESA], and all decisions
15 of the California State Water Resources Control Board establishing conditions on applicable
16 licenses and permits for the project.” CVP Improvement Act § 3406(a).

17 33. The CVP Improvement Act further directed the Secretary to develop and
18 implement a program to ensure that natural production of anadromous fish in Central Valley
19 rivers and streams is doubled by 2002 compared to 1967-1991 levels. CVP Improvement Act §
20 3406(b)(1).

21 34. To address impacts of the CVP on fish, wildlife, and associated habitat, the CVP
22 Improvement Act among other things requires Reclamation to conduct environmental review
23 before any long-term water service contract can be renewed. CVP Improvement Act §
24 3404(c)(1). Such environmental review must include, but is not limited to, the Secretary’s
25 preparation of a programmatic EIS analyzing the effects of implementing the CVP Improvement
26 Act, “including all fish, wildlife, and habitat restoration actions and the potential renewal of all
27 existing Central Valley Project water contracts.” CVP Improvement Act § 3409.

28

1 **IV. THE WATER INFRASTRUCTURE IMPROVEMENTS OF THE NATION ACT**

2 35. In 2016, Congress enacted the Water Infrastructure Improvements of the Nation
3 Act (“WIIN Act”), Public Law 114-322.

4 36. The WIIN Act provides that Reclamation shall convert existing CVP water
5 service contracts to permanent repayment contracts upon the request of the contractor, under
6 mutually agreeable terms and conditions. WIIN Act, § 4011(a). The WIIN Act expressly
7 provides that it shall not be interpreted or implemented in a manner that (1) preempts or modifies
8 any obligation of the United States under state law; (2) affects or modifies any obligation under
9 the CVP Improvement Act, subject to a limited exception for the Stanislaus River predator
10 management program; (3) overrides, modifies, or amends applicability of the ESA; (4) “would
11 cause additional adverse effects on listed fish species beyond the range of effects anticipated to
12 occur to the listed fish species for the duration of the applicable biological opinion, using the best
13 scientific and commercial data available”; or (5) overrides, modifies, or amends any obligation
14 of the Pacific Fisheries Management Council. WIIN Act, § 4012(a).

15 **FACTUAL ALLEGATIONS**

16 37. The CVP is the largest surface water storage and delivery system in California. It
17 includes 20 reservoirs with a water storage capacity of nearly 12 million acre-feet, power plants
18 and pump generating plants with a combined generation capacity of about 4.5 million megawatt
19 hours annually, two pumping plants that extract water from the Delta and export it to the Central
20 Valley, and about 500 miles of canals and aqueducts. The CVP provides nearly 6 million acre-
21 feet of water annually, primarily to agricultural contractors in the Central Valley who account for
22 about 5 million acre-feet.

23 38. The CVP has numerous adverse environmental effects on the ecosystems of the
24 San Francisco-San Joaquin Bay-Delta estuary, Central Valley, and Trinity River watershed. CVP
25 operations divert or pump water from the Delta, reducing freshwater flows through the Delta.
26 CVP dams and diversions impede fish passage and reduce instream flows. The CVP harms
27 endangered and threatened fish and adversely modifies or destroys their habitats, including areas
28 designated as critical habitat under the Endangered Species Act. Reduced freshwater flows

worsen already degraded Delta water quality and contribute to harmful algal blooms in the Delta. Impaired water quality and reduced water quantity adversely affect public health and safety in the Delta region and farming in the Delta.

39. In written comments to Reclamation on the Draft EIS for re-initiation of ESA consultation on the coordinated long-term operation of the CVP and State Water Project (“SWP”), the State Water Resources Control Board explained that “fish and wildlife species are already in poor condition, some of which are on the verge of functional extinction or extirpation” and that the body of scientific evidence shows “that increased freshwater flows through the Delta and aquatic habitat restoration are needed to protect Bay-Delta ecosystem processes and native and migratory fish.” September 25, 2019 SWRCB letter at p. 3.

40. On February 28, 2020, Reclamation approved the conversion of 14 CVP contracts into permanent water service contracts. The 14 converted contracts are shown on Table A:

Table A Contract Conversions Approved on February 28, 2020

Contractor	Contract No.	Acre-Feet Per Year
Westlands Water District	14-06-200-495A-IRI-P	1,150,000
Westlands Water District Distribution District No. 1 (Broadview Assignment)	14-06-200-8092-XXX	27,000
Westlands Water District Distribution District No. 1 (Centinella Assignment)	7-07-20-WO55-XXX	2,500
Westlands Water District Distribution District No. 2 (Mercy Springs Partial Assignment)	14-06-200-3365A-XXX-C	4,198
Santa Clara Valley Water District (and Westlands Water Dist. No. 1 Mercy Springs 2-Way Partial Assignment)	14-06-200-3365A-XXX-B	6,260
Westlands Water District Distribution District No. 1 (Widren Assignment)	14-06-200-8018-XXX	2,990
East Bay Municipal Utility District	14-06-200-5183A-LTR1-P	433,000
City of Folsom	6-07-20-W1372B-P	7,000

1	City of Roseville	4-06-200-3474A-IRI-P	32,000
2	Placer County Water Agency	14-06-200-5082A-IRI-P	35,000
3	Sacramento County Water Agency	14-06-200-5198B-IR1-P	30,000
4	Sacramento County Water Agency	6-07-20-W1372-P	15,000
5	Sacramento Municipal Utility District	14-06-200-5198A-IR1-P	30,000
6	San Juan Water District	6-07-20-W1373-LTR1-P	24,200

7
8 41. Reclamation is in the process of converting an additional 26 CVP contracts. These
9 contracts are shown on Table B.

10 **Table B Contracts in Process of Conversion**

11	Contractor	Contract No.	Acre-Foot Per Year
12	4-M Water District	14-06-200-5272A-P	5,700
13	Colusa County Water District	1-07-20-W0220-P	5,964
14	Colusa County Water District	14-06-200-304-A-P	62,200
15	Corning Water District	14-06-200-6575-P	23,000
16	Dunnigan Water District	14-06-200-399-A-P	19,000
17	Glenn Valley Water District	0-07-20-W0219-P	1,730
18	Glide Water District	7-07-20-W0040-P	10,500
19	Kanawha Water District	14-06-200-466-A-P	45,000
20	Proberta Water District	14-06-200-7311-P	3,500
21	Davis Water District	14-06-200-6001A-P	4,000
22	Cortina Water District	0-07-20-W0206-P	1,700
23	La Grande Water District	7-07-20-W0022-P	5,000
24	La Grande Water District	0-07-20-W0190-P	2,200
25	Hothouse Water District	1-07-20-W0224-P	2,450
26	City of West Sacramento	0-07-20-W0187-P	23,600
27	Orland-Artois Water District	14-06-200-8382A-P	53,000

1	City of Shasta Lake	4-07-20-W1134-P	4,400
2	Shasta County Water Agency	14-06-200-3367A-P	1,022
3	Mountain Gate Community Services District	14-06-200-6998-P	1,350
4	City of Redding	14-06-200-5272A-P	6,140
5	Bella Vista Water District	14-06-200-851A-P	24,578
6	Shasta Community Services Dist.	14-06-200-862A-P	1,000
7	Stony Creek Water District	2-07-20-W0261-P	3,345
8	Stockton East Water District	4-07-20-W0329-P	75,000
9	Central San Joaquin Water Conservation District	4-07-20-W0330-P	80,000

11
 12 42. In 1999, Reclamation issued the programmatic EIS required under the CVP
 13 Improvement Act. The programmatic EIS did not evaluate the environmental consequences of
 14 converting Reclamation’s existing CVP contracts to permanent water service contracts, but
 15 provided that future NEPA review would occur at the level of specific actions, including new
 16 contracts and contract renewals consistent with NEPA’s tiering provisions.

17 43. In 2000, following consultation with Reclamation pursuant to section 7 of the
 18 ESA (16 U.S.C. § 1536), the United States Fish and Wildlife Service released a biological
 19 opinion for the implementation of the CVP Improvement Act and the continued operation and
 20 maintenance of the CVP. The biological opinion states that:

21 Once the long-term contract renewal negotiations are completed, the renewals
 22 will be subject to a separate, tiered analysis that is consistent with the NEPA
 23 tiering in the PEIS. No contracts will be renewed until the appropriate
 24 environmental review has been completed. Reclamation will consult either
 25 formally or informally with the Service before executing a contract. The site
 26 specific, tiered analysis will address direct and indirect effects of contract
 27 renewal.

28 44. In December 2019, Reclamation issued a Final EIS for the Reinitiation of
 Consultation on the Long-Term Operation of the Central Valley Project and State Water Project
 (“Reinitiation EIS”). The Reinitiation EIS did not evaluate the environmental consequences of
 converting existing CVP contracts to permanent water service contracts and did not consider

1 alternatives that might reduce deliveries of CVP water under the converted contracts or
2 otherwise address the contract conversion. Instead, the Reinitiation EIS merely noted, without
3 analysis, that “[c]onversion of such contracts will not affect operations under the action
4 alternatives.” The Reinitiation EIS reflected Reclamation’s current policy to “maximize water
5 deliveries and optimize marketable power generation” while minimizing environmental and
6 regulatory limitations on water deliveries, such as those imposed by NEPA and the ESA.

7 45. Reclamation did not prepare an EIS, EA, or otherwise comply with NEPA in any
8 way whatsoever prior to making its contracts permanent, and its failure to comply with NEPA is
9 ongoing in the case of the contracts that are in the process of conversion.

10 46. Reclamation, on expiration of prior long-term contracts, has issued short-term
11 interim contracts and prepared environmental assessments (“EAs”) to purport to comply with
12 NEPA.

13 47. In the 27 years since the enactment of the CVP Improvement Act, fish species in
14 the Bay-Delta have declined toward extinction including endangered winter-run Chinook
15 salmon, threatened spring-run Chinook salmon, threatened Central Valley steelhead, threatened
16 green sturgeon, threatened Delta smelt, and state-protected longfin smelt. These declines have
17 been caused and worsened by CVP diversions which result in rising water temperatures,
18 increased salinity, sedimentation and other harmful reductions in water quantities, freshwater
19 flows, and water quality. Instead of meeting the salmon-doubling goal of the CVP Improvement
20 Act, the species have continued to decline. Reclamation’s conversion of CVP contracts to
21 permanent water service contracts will perpetuate these declines and is likely to cause further
22 destruction and adverse modification of fish habitat, including designated critical habitat. In
23 addition, the conversion of CVP contracts to permanent water service contracts is likely to
24 impede recovery of endangered and threatened species.

25 48. The NEPA regulations list various factors to be evaluated in determining the
26 intensity (meaning severity) of an impact to determine whether an action “significantly” affects
27 the quality of the human environment requiring preparation of an EIS. 40 C.F.R. § 1508.27(b).
28 The water deliveries to Reclamation’s contractors diminish freshwater flows through the Delta,

1 which decreases water supplies and water quality and worsens the amount and frequency of
2 harmful algal blooms (HABs) in the Delta. In addition to the dangers posed by ingesting HABs,
3 HABs can become airborne and inhaled by Delta residents and users. The conversion of CVP
4 contracts to permanent water service contracts will perpetuate and exacerbate the effects of
5 decreased freshwater flows, including HABs, significantly affecting public health and safety. 40
6 C.F.R. § 1508.27(b)(2).

7 49. The Delta has unique characteristics, being the largest inland estuary in the
8 Western Hemisphere, and which already fails to meet established water quality standards and is
9 an ecologically critical area. Reclamation's conversion of CVP contracts to permanent water
10 service contracts will contribute to and exacerbate the decline of the Delta. 40 C.F.R. §
11 1508.27(b)(3).

12 50. The conversion and locking-in of the water contracts is highly controversial. 40
13 C.F.R. § 1508.27(b)(4.)

14 51. Locking in the contracts for all time in the absence of an EIS or even an EA will
15 have effects on the human environment that are highly uncertain and involve unique and
16 unknown risks, highlighted by the absence of any NEPA environmental analysis whatsoever. 40
17 C.F.R. § 1508.27(b)(5).

18 52. Reclamation's conversion of each contract establishes a precedent for future
19 actions with significant effects and represents a decision in principle about future considerations.
20 40 C.F.R. § 1508.27(b)(6). About 75 contractors have started or completed negotiating
21 conversion of their CVP contracts with Reclamation. Consequently, each contract conversion
22 establishes a precedent for future actions with significant effects.

23 53. Each contract conversion is related to the conversion of about 75 other CVP
24 contracts, as well as to other past, ongoing, and reasonably foreseeable future actions affecting
25 the San Francisco-San Joaquin Bay-Delta estuary, Central Valley, and Trinity River watershed.
26 The incremental impact of each such contract conversion may be cumulatively significant in
27 light of these related actions. 40 C.F.R. § 1508.27(b)(7).

28

1 54. The conversion of the contracts will adversely affect endangered and threatened
2 species and their habitats that have been determined to be critical under the ESA. 40 C.F.R. §
3 1508.27(b)(9).

4 55. The conversion of the contracts threatens a violation of Federal and State laws
5 and requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b)(10). For
6 example, the CVP Improvement Act requires:

7 Upon renewal of any long-term repayment or water service contract providing for
8 the delivery of water from the Central Valley Project, the Secretary shall
9 incorporate all requirements imposed by existing law, including provisions of this
10 title, within such renewed contracts. The Secretary shall also administer all
existing, new, and renewed contracts in conformance with the requirements and
goals of this title.

11 CVP Improvement Act § 3404(c)(2). The converted contracts do not incorporate all requirements
12 imposed by existing law, in violation of the CVP Improvement Act, and the conversion of the
13 contracts threatens violations of NEPA, the ESA, the CVP Improvement Act, and Reclamation
14 law, among other things.

15 56. Reclamation's failure to prepare an EIS or EA on the conversion of the contracts
16 constitutes failure to proceed in the manner required by NEPA because entering into each
17 contract was a major federal action significantly affecting the quality of the human environment.
18 42 U.S.C. § 4332(2)(C). Reclamation's failure to prepare EIS or EA on the conversion of the
19 contracts also constitutes agency action unlawfully withheld or reasonably delayed.

20 57. Reclamation unlawfully failed to prepare an EIS or first prepare an EA and then
21 an EIS, which must "[r]igorously explore and objectively evaluate all reasonable alternatives" to
22 the action. 40 C.F.R. § 1502.14 (a.) As a result, Reclamation failed to consider alternative terms
23 and conditions that might reduce deliveries of CVP water in order to increase freshwater flows
24 and begin to restore the Delta and watersheds in the Central Valley and Trinity River system.
25 Reclamation further failed to consider alternative terms and conditions requiring periodic
26 contract evaluation for renewal, modification, or termination. These and other alternative terms
27 and conditions are particularly important here because some of the subject lands, such as those
28 serviced by Westlands Water District, continue to become unfarmable over time and be taken out

1 of production because of buildup of selenium, a toxic element that is leached from soil by
2 irrigation.

3 58. The Westlands contract obligates Reclamation to deliver to Westlands 1.15
4 million acre-feet of water each year (subject to its availability), making it the largest single CVP
5 contract. Many of the lands in Westlands Water District have impaired drainage, that contributes
6 to the buildup of selenium and other contaminants. The Ninth Circuit Court of Appeals reversed
7 a district court decision denying environmental plaintiffs' summary judgment because the
8 challenged environmental document issued by Reclamation under NEPA for eight interim CVP
9 contracts including Westlands Water District's interim contract, "did not give full and
10 meaningful consideration to the alternative of a reduction in maximum water quantities." *Pacific*
11 *Coast Federation of Fishermen's Assn's v. U.S. Dept. of the Interior*, 655 Fed.Appx. 595 (9th
12 Cir., No. 14-15514, July 25, 2016) (not selected for publication). "Reclamation's decision not to
13 give full and meaningful consideration to the alternative of a reduction in maximum interim
14 contract water quantities was an abuse of discretion and the agency did not adequately explain
15 why it eliminated this alternative from detailed study." *Id.* at 599. Reclamation's "reasoning in
16 large part reflects a policy decision to promote the economic security of agricultural users, rather
17 than an explanation of why reducing maximum contract quantities was so infeasible as to
18 preclude study of its environmental impacts." *Id.* at 600. The decision pertained to interim two-
19 year contract renewals. This case involves permanent contracts. NEPA alternatives analysis
20 would allow meaningful consideration of the trade-offs between water deliveries and
21 environmental harm as well as opportunities to reduce deliveries over time due to such
22 developments as agricultural lands becoming drainage impaired and innovations and
23 improvements in technology such as conservation, water recycling, and drip irrigation leading to
24 the reduction in claimed needs for water deliveries. An example of one obvious alternative is to
25 limit the term of the contracts so as to reduce quantities over time to reflect worsening conditions
26 caused by climate change as well as reduction in needs for exports due to continued innovation.
27 Other examples of alternatives include retiring drainage impaired lands and basing contractual
28

1 water quantities on real water available and the impacts of providing real water, instead of basing
2 quantities on “paper water.”

3 59. Reclamation also failed to conduct NEPA-required “scoping” and failed to
4 publish a NEPA-required notice of intent in the Federal Register. 40 C.F.R. § 1501.7.

5 60. Reclamation contends it has no discretion with respect to contract conversion
6 because of the WIIN Act. For example, the Westlands Water District Contract No. 14-06-200-
7 495A-IRI-P recites:

8 WHEREAS, 4011(a)(1) provides that ‘upon request of the contractor, the
9 Secretary of the Interior *shall* convert any water service contract in effect on the
10 date of enactment of this subtitle and between the United States and a water users’
Association [Contractor] to allow for prepayment of the repayment contract
pursuant to paragraph (2) *under mutually agreeable terms and conditions.*’

11 Contract No. 14-06-200-495A-IRI-P, at p. 4 (emphasis added). But while the WIIN Act may
12 require Reclamation to convert the contract, Reclamation retains discretion over the terms and
13 conditions of the converted contract. The Westlands contract further recites:

14 This amended Contract has been negotiated and reviewed by the parties hereto,
15 each of whom is sophisticated in the matters to which this amended Contract
16 pertains. The double-spaced Articles of this amended Contract have been drafted,
negotiated, and reviewed by the parties, and no one party shall be considered to
have drafted the stated Articles.”

17 *Id.*, ¶ 46, p. 71 (emphasis added). Each contract contains similar provisions to those set forth in
18 this paragraph. The title Reclamation uses on its website listing the contracts is “Negotiated
19 Draft Conversion Contracts.”

20 61. Contrary to Reclamation’s contention that it has no discretion and therefore no
21 duty to comply with NEPA before converting the contracts, Reclamation has discretion under the
22 plain language of the WIIN Act section it relies upon, because the “terms and conditions” of any
23 contract must be “mutually agreeable” to the Secretary of the Interior. The terms and conditions
24 of the contracts were *negotiated* by Reclamation with the contractors.

25 62. Contrary to Reclamation’s contention that it has no duty to comply with NEPA
26 before converting the contracts, NEPA compliance is also required by the CVP Improvement
27 Act. The WIIN Act’s savings language expressly preserves Reclamation’s obligations under the
28 CVP Improvement Act. WIIN Act, § 4012(a)(2). As alleged above in ¶ 34, the CVP

1 Improvement Act requires Reclamation to conduct environmental review before any long-term
2 water service contract can be renewed. CVP Improvement Act, §§ 3402(a), 3404(c)(1).

3 63. NEPA compliance by Reclamation before converting the contracts is also
4 necessary to create accurate information and analysis to ensure that the WIIN Act’s savings
5 language prohibiting interpretation or implementation in a manner that “preempts or modifies
6 any obligation of the United States to act in conformance with applicable State law, including
7 applicable State water law”; “overrides, modifies, or amends the applicability of the Endangered
8 Species Act of 1973 ... to the operation of the Central Valley Project or the State Water Project”;
9 or that “would cause additional adverse effects on listed fish species beyond the range of effects
10 anticipated to occur to the listed fish species for the duration of the applicable biological opinion,
11 using the best scientific and commercial data available ...” are not violated. WIIN Act, §§
12 4012(a)(1), 4012(a)(3), 4012(a)(4).

13 **CLAIMS FOR RELIEF**

14 **First Claim for Relief**

15 **(Violations of NEPA and the APA)**

16 64. The paragraphs set forth above are realleged and incorporated herein by this
17 reference.

18 65. Reclamation’s approvals of conversion of the CVP contracts to permanent water
19 service contracts constitute a major federal action or actions that will significantly affect the
20 quality of the human environment. Reclamation had a duty under NEPA to prepare an EIS or an
21 EA before approving conversion of the contracts.

22 66. Reclamation failed to prepare an EIS or an EA before approving the conversion
23 contracts in violation of NEPA.

24 67. Reclamation failed to develop or consider alternatives to the proposed contract
25 conversion actions in violation of NEPA.

26 68. Reclamation’s failure to comply with NEPA prior to its approvals of the contract
27 conversions constitutes arbitrary and capricious agency action, is an abuse of discretion, and is
28 contrary to law and procedures required by law. 5 U.S.C. § 706(2)(A), (D).

1 69. Reclamation's failure to comply with NEPA prior to its approvals of the contract
2 conversions constitutes agency action unlawfully withheld or unreasonably delayed under the
3 APA. 5 U.S.C. § 706(1).

4 **Second Claim for Relief**

5 **(Violations of NEPA and the APA)**

6 70. The paragraphs set forth above are realleged and incorporated herein by this
7 reference.

8 71. Reclamation's approvals of the conversion of the CVP contracts to permanent
9 water service contracts without any compliance with NEPA constitute agency action that is
10 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and
11 without observance of the procedure required by law. 5 U.S.C. § 706(2).

12 **PRAYER FOR RELIEF**

13 Wherefore, Plaintiffs request that this Court:

14 A. Find and declare that Reclamation's failure to prepare an EIS or an EA to assess,
15 disclose, and consider alternatives to the environmental effects of the contract conversions
16 violates NEPA.

17 B. Find and declare that Reclamation's approvals of the conversion contracts are
18 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and
19 without observance of the procedure required by law.

20 C. Order Defendants to comply with NEPA by preparing an EIS or an EA for the
21 contract conversions.

22 D. Vacate, set aside, and rescind Reclamation's contract conversions.

23 E. Enjoin Defendants from taking any action pursuant to the contract conversions,
24 until Defendants have fully complied with NEPA.

25 F. Enjoin Defendants from converting any other contracts until Defendants have
26 fully complied with NEPA.

27 G. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees.

28 H. Grant any other relief as the Court deems just and proper.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted,

Dated: May 20, 2020

/s/ John Buse
John Buse
CENTER FOR BIOLOGICAL DIVERSITY
Attorney for Plaintiff Center for Biological Diversity

Dated: May 20, 2020

/s/ E. Robert Wright (as authorized May 20, 2020)
E. Robert Wright
LAW OFFICE OF E. ROBERT WRIGHT

Adam Keats
LAW OFFICE OF ADAM KEATS, PC

Attorneys for Plaintiffs Restore the Delta and
Planning and Conservation League