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Congress of the United States
House of Representatives
Washington, DC 20515-0507

September 30, 2004

Hon. John Keys, Commissioner
U.S. Bureau of Reclamation
1849 C Street, NW
Washington, DC 20240

Dear Commissioner Keys:

Thank you for your letter of September 8, 2004. I appreciate your willingness to engage in a discussion of the appropriate allocation of California's water, and to address some of Congress' concerns with the Bureau's renewal of Central Valley Project (CVP) water contracts.

These massive contracts and the Bureau's contracting process as a whole remain fundamentally flawed. Because the Bureau's reasoning remains contrary to congressional intent on many key issues, the Bureau should fix these errors and extend the comment period deadline on all contracts, as I and others have asked.

Pricing policy

According to your letter, the Bureau "anticipate[s] that all existing CVP capital costs allocated to water supply functions will be recovered" by 2030. Although this would indeed be welcome, I do not share your optimism, given the Bureau's lengthy and inaccurate track record on capital cost repayment. Though these accounts have been open for decades, the Bureau has achieved a disturbingly low rate of recovery: the data clearly show that barely 10% of repayment obligations assigned to irrigators have been met, and more than \$1 billion in federal investment has yet to be recouped.¹ On what basis should Congress and the American taxpayer take the Bureau's word that the remaining sum will be paid by the end of these new renewal contracts? Over the years, the Bureau's contracts have featured some of the most generous repayment terms imaginable, and it is difficult for me to imagine why Congress and the American taxpayer should accept the Bureau's "anticipation" of full repayment which is unwarranted by the Bureau's historic record of collecting repayment.

Your assertion that "CVP water is some of the most expensive water in the state today," likewise, raises many more questions than it answers. Simply noting that the prices in the contracts range from \$14 to \$44 does not demonstrate that the Bureau is charging reasonable rates. You have provided no data showing how much water is being provided at each rate, which would be crucial in determining if this public resource is being fairly priced. In addition, it is my understanding

¹ According to Schedule A-2Ba, "Capital Repayment as of 9/30/2002" was \$122,629,417; the allocated capital cost is \$1,135,550,913, meaning approximately 10.8% has been repaid.

<http://www.usbr.gov/mp/cvpwaterrates/ratebooks/2004/Irr/IRR%202004%20Sch%20A-02Ba%20F.Z06.pdf>

that compared to other agricultural users in California – those receiving water from the State Water Project, for example – CVP water is far from the most expensive in the state.

As you know, I have asked the Office of Management and Budget (OMB) to compare CVP water contract rates to other recent water market transactions. In his response, Deputy Director Joel Kaplan indicated to me that OMB is in the process of investigating a series of questions about the Bureau's financial management of the CVP, including what is likely to happen when the deferred payment schedule leads to a failure to meet repayment obligations by 2030. Moreover, OMB has asked the Department of the Interior to compare CVP water prices to actual prices paid in recent market transactions; I look forward to receiving this information, which should help to shed some light on the Bureau's bookkeeping.

Water Markets and Water Rights

I invite you to explain further the Bureau's position on over-allocation of water in these contracts. My concern, shared by many of my colleagues and by other stakeholders in California, is that by allowing some contractors to pay below-market rates for far more water than can be used beneficially – or indeed used at all – the Bureau is encouraging those contractors to resell the water at much higher rates, reaping windfall profits for themselves which otherwise would go to the taxpayers who paid for the development of these water resources. The CVPIA did not encourage water transfers with the goal of providing an annuity, and your discussion of flexibility did not address this point.

Moreover, your cursory dismissal of allegations that the Bureau delivers zero-cost water to certain users similarly misses the point. The Bureau has completely failed to demonstrate why all CVPIA contracting reforms should not apply to the "settlement" contractors. Yet your letter appears to be taking the position that regardless of actual water use or applicable federal environmental laws, the original 40-year deal with these "settlement" contractors should now continue in perpetuity. Moreover, Shasta Dam, a federal facility, supplies much of the "base supply" water that these contractors receive at no cost, so it is inaccurate to state that "Reclamation does not deliver water for 'free.'"

Ability to Pay

As you know, when the Bureau grants a contractor an "ability to pay" waiver, that contractor is no longer required to pay its share of capital costs. Because this can mean the beneficiaries of federal water projects can escape repaying millions of dollars, the Bureau should make every possible effort to ensure that this designation is not abused.

Although your letter states that the Bureau is required to re-examine these ability-to-pay analyses every five years, evidence on the Bureau's own website shows that several of the CVP renewal contracts rely on "Payment Capacity Analyses" that are more than five years old. Indeed, the contracts in the Tehama-Colusa service area cite a "Payment Capacity Analysis" from nearly a decade ago: February 10, 1995. By failing to update these analyses on a regular basis, the Bureau is not only making costly decisions based on outdated analyses, it is ignoring a clear congressional mandate.

To make matters worse, the Bureau has failed to provide these analyses for public review. They are not available on the Bureau's website, and the Bureau did not respond to my request that they be made available before the end of the relevant comment period.

If issues of timing were the only problem with the Bureau's "ability to pay" designations, it might be possible to give the benefit of the doubt to this questionable practice. However, these examples of delay and secrecy only exacerbate the broader problem. The very calculations used to determine a contractor's ability to pay are extremely suspect: these calculations artificially assume that every other farm expense must be accounted for before water payments can be considered, and they rely on district-wide hypothetical budgets, rather than actual payment capacities.

I would also like to correct your deeply misleading statement that congressional actions – especially the Central Valley Project Improvement Act (CVPIA) – have "limited the obligation of irrigators to repay the capital component." The section of the CVPIA cited in your letter directs the Secretary of the Interior to assess and collect payments for the Restoration Fund, *allowing for ability-to-pay determinations only if necessary*.² The meaning of the statute is clear, and must not be treated by the Bureau of Reclamation as encouragement to expand ability-to-pay determinations, especially when those determinations are out of date and kept out of the public eye.

In addition, several contracts contain a footnote stating that no payments will be collected for the Restoration Fund because "Contractors with ability to pay relief do not pay Restoration Fund charges for irrigation water."³ However, the CVPIA only *authorizes* restoration charge waivers "if necessary." It is clearly inappropriate for the Bureau to authorize a blanket waiver. What is the Bureau's basis for this determination? Please provide further information on the history of contractors' payment to the Restoration Fund, and how that payment has been impacted by ability-to-pay waivers.

A closed and partial process

The failure of the Bureau to allow for adequate public participation, review and comment in the development of the long-awaited and very important contracts defies your assertion that "Reclamation is committed to an open and full process for public input."

Most of the environmental documentation remains missing, and at this point it is clear that the public will not see this critical information until months after the comment period on the contracts has closed. This is simply unacceptable. By accelerating the public comment deadlines so they close before NOAA Fisheries has completed its consultations under the ESA, the Bureau is undermining the core purpose of the CVPIA, "to protect, restore, and enhance fish, wildlife, and associated habitats."⁴

And without re-opening the comment period, as you have been repeatedly asked to do, what does it mean to say that the Bureau is "available to respond to questions"? What will those responses entail? Will those questions be considered official public comments despite the closure of the public comment period? I know from my own experience – and from that of numerous other parties – that specific inquiries to the Bureau and the Department about the CVP often receive no response at all, so I am skeptical of your claim of an "open and full process."

² Section 3407(d)(2) of the CVPIA

³ Footnote (***) in the contract with Orland-Artois Water District, among others.

<http://www.usbr.gov/mp/cvpia/3404c/2004FOC/2004FOC-Orland-ArtoisWD-04-19-04.pdf>

⁴ Section 3402(a) of the CVPIA

Furthermore, despite your statement to the contrary, the Bureau's website and the contracts it contains are utterly insufficient for the public to fully evaluate the impact of the CVP renewal contracts:

- None of the contracts contain either a map or a description of the contractor's service area, "Exhibit A" of the CVP-wide contract form.
- All the contracts listed under "2004 Settlement Contractors Forms of Contract" contain the amazing caveat that the rates listed are not, in fact, the rates that the contractors will be charged, rendering the information useless.⁵
- Many of the proposed contracts fail to provide the rates and charges altogether.⁶
- Throughout this summer's public review period, the web page has contained no current or accurate schedule for the availability of environmental compliance document, relying instead on information that is sometimes four years out of date.

Again, I appreciate your response, and I look forward to working with you to ensure that the Bureau of Reclamation appropriately administers the laws governing the Central Valley Project. As you know, California faces many competing demands on its scarce water resources, and I am extremely concerned that the Bureau has not acted to meet those demands by ensuring that CVP water is appropriately allocated and fairly priced. It remains my firm belief that the Bureau's decision to finalize unjustifiable contract terms for up to 40 years – without the publication of required environmental analyses, and without demonstrating that basic benchmarks of fiscal responsibility have been met – is fundamentally in error.

For this reason, I reiterate my request that the Bureau hold public hearings on your pricing policies and contracting proposals, and reopen and extend the public comment periods on all the contracts and their associated NEPA documents until these important questions are answered.

Sincerely,



GEORGE MILLER
Member of Congress

CC: Hon. Gale Norton, Secretary of the Interior
Kirk Rodgers, Mid-Pacific Regional Director

⁵ "Rates and Charges shown are 2003 rates. This exhibit will be updated prior to execution." The contract with Thomas and Karen Alexander is one example
<http://www.usbr.gov/mp/cvpia/3404c/2004SettleContFOC/2004SettCont-AlexanderThomasKaren04-04-03.pdf>

⁶ See, for example, the Colusa County Water District
<http://www.usbr.gov/mp/cvpia/3404c/2004FOC/2004FOC-ColusaCountyWD-04-19-04.pdf>