



650 Capitol Mall, 5th Floor
Sacramento, CA 95814
916.445.5511 FAX 916.445.7297
<http://calwater.ca.gov>

Agenda Item: 13-4

Meeting Dates: April 13 and 14, 2005

JOINT MEETING WITH BAY-DELTA PUBLIC ADVISORY COMMITTEE

DIRECTOR'S REPORT

This report includes updates about A) the Department of Finance's recently concluded annual audit of California Bay-Delta Authority bond fund expenditures, B) administration-sponsored legislation, C) Winnemem Wintu Tribe issues with the Shasta Lake Water Resources Investigation, and D) CALFED litigation.

A. Department of Finance Review of Bond Funds

In response to the Governor's and Legislature's directives, the Department of Finance (DOF), Office of State Audits and Evaluations, completed its annual review of bond funds to determine the status of the 2000 Parks Bond (Proposition 12), 2000 Water Bond (Proposition 13), 2002 Resources Bond (Proposition 40), and 2002 Water Bond (Proposition 50) funds, and to audit the expenditures of those funds from July 1, 2003 through June 30, 2004.

The scope of the review was limited to fiscal compliance.

The Report found that in general, the Authority's expenditures of Proposition 50 bond funds and bond-acquired assets were adequately accounted, safeguarded, and reported in compliance with the prescribed bond acts and State and fiscal requirements.

B. Legislation Update

Some have referred to this year as the "Year of Water Legislation".

The Department of Water Resources (DWR) is tracking no less than 60 high-priority bills, some of which are still in spot bill form, and some of which will be tracked by the Authority.

From a legislative perspective, priorities include the need to address issues raised by a November 2003 court ruling (*Paterno v. State of California*) that increased State liability for flood protection, as well as a need to improve State and local flood protection. A co-equal on some members' priority lists is the CALFED financing effort or a larger effort to fund statewide water infrastructure, of which CALFED would be a critical component.

For the first time the Administration will be sponsoring legislation on behalf of the Authority. The two bills before the Legislative are:

- **AB 1244** (Wolk) – a Federal conformity measure that, in part, eliminates a provision that the Authority would sunset absent Federal reauthorization. That Federal reauthorization was provided by Congress via HR 2828 last year.
- **SB 866** (Kehoe) – a water use measurement and reporting proposal, authorized by the Authority on April 8, 2004, that seeks to improve and streamline reporting of water use by urban and agricultural water users.

Other bills of note, include:

- **SB 113** (Machado), which seeks to codify a definition of “beneficiary pays,” a key principle in CALFED program operations, in State law.
- **SB 200** (Machado), which seeks to create a Delta Conservancy.
- **SB 250** (Machado), to create the San Joaquin River Fund in the State Treasury, which may be used to facilitate implementation of the settlement of the pending lawsuit over Central Valley Project ecosystem restoration efforts.
- **SB 820** (Kuehl), which the author has been working diligently on, to “strengthen water conservation policy; reduce uncertainty about the use and abundance of water resources; and strengthen and integrate water planning and management efforts.”
- **AB 1245** (Wolk), which seeks to establish the Environmental Water Account in the State Treasury.
- **AB 797** (Wolk), which would affect Delta Protection Commission governance. (spot bill).

C. Tribal Issues With Shasta Dam Surface Storage Investigation

Members of the Winnemem Wintu Tribe have made presentations at recent Authority meetings and are also using other public forums and the media to voice concerns over increasing the height of Shasta Dam. Increasing the height of Shasta Dam is one of five potential surface storage projects within the CALFED Program. The Winnemem Wintu are concerned that increasing Shasta by even the minimum 6.5 feet being considered would flood the remaining portion of their ancestral home and sacred sites that was not flooded when the Dam originally was completed in 1945.

The purpose of this report (Attachment 1) is to respond to requests from Authority and Bay-Delta Public Advisory Committee (BDPAC) members for a better understanding of the concerns raised by the Winnemem Wintu and how these concerns are being – and can be addressed – by the Authority and the implementing CALFED agencies.

D. Litigation

1. Federal case

Laub v. Babbitt, et al., U.S. District Court, Fresno

Plaintiffs: The California Farm Bureau Federation (Farm Bureau) and several individual farmers.

Defendants: All Federal and State agencies participating in the CALFED Program. The State agencies named in the Farm Bureau's latest complaint are sued via their executive officers: Governor Schwarzenegger; Michael Chrisman, The Resources Agency (Resources); Terry Tamminen, Environmental Protection Agency (CalEPA); Celeste Cantu, State Water Resources Control Board (SWRCB); Lester Snow, Department of Water Resources (DWR); Ryan Broddrick, Department of Fish and Game (DFG); Peter Rabbon, The Reclamation Board (Rec. Brd.); Margit Aramburu, Delta Protection Commission; Darryl Young, Department of Conservation (DOC); Will Travis, Bay Conservation and Development Commission (BCDC); Sandra Shewry, Department of Health Services (DHS); and A.G. Kawamura, Department of Food and Agriculture (CDFA).

Summary of Case: The Farm Bureau filed this case in September 2000. It alleges that the CALFED Programmatic Environmental Impact Statement/Environmental Impact Report (EIS/EIR) violates National Environmental Policy Act (NEPA) and the Administrative Procedures Act. The Farm Bureau seeks an injunction against all State and Federal actions to implement the Record of Decision (ROD) until an adequate EIS/EIR is prepared. The State defendants are apparently being sued under the theory that the Program is a joint, Federal-State partnership that requires NEPA compliance under Federal law; and, therefore, the Federal Government must comply with NEPA for all State projects, as well as Federal projects.

Current Status: The case is pending in the Federal district court. The district court dismissed an earlier version of the complaint as premature in August 2001. The Court of Appeals reversed that decision in September 2003. The Federal agencies have filed their administrative record. A status conference was held on November 1, 2004. Plaintiffs have designated expert, Robert McKusick, who was deposed on January 31, 2005. After Mr. McKusick's

deposition, the Federal agencies filed a motion opposing the use of the Farm Bureau's expert witness and the State agencies joined in the motion. The motion will be heard on March 21, 2005. The opening brief as to Plaintiffs' NEPA claims is due to be filed on or before April 4, 2005; opposition briefs on or before June 24, 2005; and the reply briefs on or before July 25, 2005. The hearing is scheduled for September 6, 2005. Discovery on the State's jurisdictional issues is postponed pending dispositive motions.

2. State court cases

Laub v. Davis, et al., Court of Appeal, Third Appellate District (Sacramento)

Appellants/Plaintiffs: The California Farm Bureau Federation and several individual farmers.

Respondents/Defendants: The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary.

Summary of Case: The Farm Bureau filed this case in State court after the Federal district court dismissed a California Environmental Quality Act (CEQA) claim that had been part of their original NEPA lawsuit (described above). Defendants won all issues in the trial court and the Farm Bureau appealed. The Farm Bureau alleges that the CALFED Programmatic EIS/EIR violates CEQA and seeks an injunction of all Program activities until the alleged CEQA violations are cured. This case has been coordinated in Sacramento Superior Court with *Regional Council of Rural Counties* (below).

Current Status: The State defendants won on all issues at trial. The case is now on appeal, and the parties' briefing was completed on May 11, 2004. In June, The Nature Conservancy was permitted to file an amicus curiae brief supporting the EIS/EIR. The Farm Bureau's response was filed on July 16, 2004.

Regional Council of Rural Counties v. State, et al., Court of Appeal, Third Appellate District (Sacramento)

Petitioners: Regional Council of Rural Counties, Central Delta Water Agency, South Delta Water Agency, and individual farmers.

Defendants: State of California; The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary; (plus real parties in interest: Department of Water Resources, DWR Director; Department of Fish and Game, DFG Director; Patrick Wright [as Director of the CALFED Bay-Delta - Program], and numerous Federal agencies and officers).

Summary of Case: The complaint alleges that the CALFED EIS/EIR violates CEQA and that the Project would harm the Delta. They also contended that the ROD is illegal under several water law theories. This case was coordinated in Sacramento Superior Court with *Laub v. Davis* (above), and the two cases have been consolidated on appeal.

Current Status: The State defendants won on all issues at trial. The case is now on appeal and briefing was completed on May 11, 2004.

California Farm Bureau Federation v. Mike Chrisman, et al. Sacramento Superior Court

Petitioners: California Farm Bureau Federation.

Defendants: The following State agencies were sued in addition to those directors and secretaries in their official capacities: Resources (Michael Chrisman); CalEPA (Terry Tamminen); CDFA (A.G. Kawamura); DWR (Lester Snow), DFG (Loris "Ryan" Broddrick); DHS (Sandra Shewry); California Bay-Delta Authority (Patrick Wright).

Summary of Case: On April 16, 2004, the Farm Bureau filed this CEQA action challenging the adoption of a Final EIS/EIR covering operation of the Environmental Water Account (EWA) through 2007, the end of the first stage of implementation of the CALFED Program. The Farm Bureau alleges the EIS/EIR does not adequately address "agricultural resources" when analyzing impacts, alternatives, mitigation, and other issues regarding operations of the EWA. A large number of State agencies were named in addition to the State agencies actually involved in the EWA, DWR and DFG.

Current Status: The administrative record was fully lodged as of October 7, 2004; and an answer was filed on behalf of DWR and Lester Snow on November 5, 2004. Both parties filed their statement of issues. The State agencies (other than DWR) filed answers on February 2, 2005. Petitioner shall file any motion to augment the administrative record by March 31, 2005.

In light of the recent intervention of the Metropolitan Water District of Southern California and State Water Contractors and a request of Petitioner, California Farm Bureau Federation, to continue the current hearing and briefing schedules, the parties stipulated that the current hearing date of July 1, 2005 be continued to October 7, 2005. The Farm Bureau's opening brief will be due on or before June 3, 2005; the State Respondents and Intervenors' briefs will be due on or before August 5, 2005; and the Farm Bureau's reply brief will be due on or before September 2, 2005.

3. Other Cases

Natural Resources Defense Council v. Norton (OCAP Biological Opinion)

On February 15, 2005, a group of environmental organizations, including the Natural Resources Defense Council, California Trout, Baykeeper and its Deltakeeper Chapter, Friends of the River and The Bay Institute filed suit against Gale Norton, Secretary of the Interior, and Steven Williams, Director of the U.S. Fish and Wildlife Service (USFWS) in Federal district court in San Francisco. The suit challenges the Biological Opinion issued by USFWS on the effects of the operation of the Central Valley Project (CVP) and State Water Project (SWP) on Delta smelt, a small native fish that lives in the Sacramento-San Joaquin River Delta. The smelt is listed as threatened under the Federal Endangered Species Act. Recent data indicate that the abundance of Delta smelt is at very low levels.

The U.S. Bureau of Reclamation had prepared an Operations Criteria and Plan (OCAP) describing present and future CVP and SWP operations and had consulted with USFWS as required by the Endangered Species Act. On July 30, 2004, USFWS issued its Biological Opinion, which concluded that the proposed operations would not jeopardize the survival of the Delta smelt, nor cause adverse modification of the smelt's critical habitat. The lawsuit challenges the Biological Opinion on several grounds, including failure to reach a conclusion as to whether operations under the OCAP would adversely affect Delta smelt critical habitat in a manner that would impact recovery of the species; reliance on uncertain mitigation measures as a basis for its "no jeopardy" opinion; failure to consider the full effects of operations under impending long-term water supply contracts; and failure to consider the best available science.

The environmental groups ask the court to declare that the Biological Opinion is arbitrary and capricious, an abuse of discretion, and not in accordance with law. They ask the court to order the Secretary to withdraw the Biological Opinion and to refrain from taking any action in reliance on the Opinion.

Central Delta Water Agency v. State Water Resources Control Board (Delta Wetlands Project)

On March 15, 2005, the California Supreme Court declined a petition to review the Nov. 19, 2004 Third District Court of Appeal decision in *Central Delta Water Agency v. State Water Resources Control Board* (Case No.C041749). The lower court had set aside Delta Wetlands' water rights permits, holding that an application for a permit to impound water in a reservoir must state, and the water board must determine, that an actual intended beneficial use, in estimated amounts, will be made of the impounded water.

Report on Tribal Issues with Shasta Dam Surface Storage Investigation

Members of the Winnemem Wintu have made presentations at recent Authority meetings and are also using other public forums and the media to voice concerns over increasing the height of Shasta Dam. Increasing the height of Shasta Dam is one of five potential surface storage projects within the CALFED Program. The Winnemem Wintu are concerned that increasing Shasta by even the minimum 6.5 feet being considered would flood the remaining portion of their ancestral home that was not flooded when the dam originally was completed in 1945.

The purpose of this report (Attachment 1) is to respond to requests from Authority and Bay-Delta Public Advisory Committee (BDPAC) members for a better understanding of the concerns raised by the Winnemem Wintu and how these concerns are being – and can be addressed – by the Authority and the implementing CALFED agencies.

Background

The Shasta Lake Water Resources Investigation (SLWRI) is a feasibility study led by the Department of the Interior (DOI), U.S. Bureau of Reclamation (USBR), Mid-Pacific Region, in coordination with the California Department of Water Resources (DWR). The current schedule calls for USBR to initiate an environmental scoping process in 2005, leading to a draft feasibility report consisting of a draft decision document and a draft Environmental Impact Study (EIS) in the winter of 2007. The final feasibility report would be completed in the fall of 2008. Public meetings and other public communications are planned throughout this process, with a major emphasis placed on continued communication with other agencies, identified stakeholder groups, tribal interests, and involved groups and individuals.

CALFED agencies are evaluating potential surface storage projects that minimize the effects on the environment. The emphasis for planning is currently centered on five storage projects:

- Shasta Lake Water Resources Investigation
- Upper San Joaquin River Basin Surface Storage Investigation
- North-of-the-Delta Off-Stream Storage Investigation
- Los Vaqueros Reservoir Expansion
- In-Delta Storage

The reason Shasta was selected as one of the five storage projects to investigate is unique. Shasta Dam was originally designed to be 200 feet higher than the dam we see today; but, due to the poor economy at the time Shasta was constructed (coming out of the Depression), the Federal Government decided to make the reservoir smaller than designed. Initial concept plans for SLWRI did include evaluating and comparing benefits of a 200-foot dam raise; however, such a raise is too expensive because it impacts Interstate-5, railroad tracks, bridges, etc. The transportation relocation costs would likely exceed the costs of raising the dam.

Right now, USBR's SLWRI Project Manager is focusing on height increases of between 6.5 and 18.5 feet, which could provide increased storage of between 290,000 and 636,000 acre-feet, respectively. The water is to be used for water supply reliability and environmental purposes, including more cold water for salmon, which improves their habitat for spawning and migration. This will contribute to meeting Central Valley Project Improvement Act goals and objectives.

Both the State and Federal Governments are aware of the concerns of the Winnemem Wintu, who could potentially be affected by raising Shasta Dam. The Winnemem Wintu also have requested to be consulted on SLWRI in the context of a government-to-government relationship with the United States. However, because they are not a federally recognized tribe, they will not be able to participate in a "government-to-government" relationship with the United States on this matter.

The State is aware of this situation, but the State cannot act as the United States' agent in conducting such "government-to-government" relations with federally recognized tribes. For SLWRI, DOI's Bureau of Reclamation has the responsibility to conduct government-to-government relations with those federally recognized tribes potentially affected by SLWRI; but again, the Winnemem Wintu do not possess Federal recognition.

However, the Winnemem Wintu are considered a stakeholder and the types of issues they raise will be considered during environmental review and permitting processes. When Shasta Dam was constructed between 1938 and 1945, the National Environmental Protection Act (NEPA) did not exist. Today, there are processes that any stakeholder can follow that require the agencies to evaluate and address impacts resulting from a new project. USBR is working – and will continue to work with – all stakeholders to make sure that they know and understand these processes.

This project has the potential to affect the McCloud River, which state law designates as a wild and scenic river. According to Section 5093.542 of the state Public Resources Code,

'Except for participation by the Department of Water Resources in studies involving the technical and economic feasibility of enlargement of Shasta Dam, no department or agency of the state shall assist or cooperate with, whether by loan, grant, license, or otherwise, any agency of the federal, state, or local government in the planning or construction of any dam, reservoir, diversion, or impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.'

This means that the State cannot prepare a California Environmental Quality Act (CEQA) document because it can not file for a Notice of Preparation in the State Office of Planning and Research. The state can only assist in technical and economic studies. Reclamation can develop an Environmental Impact Statement (EIS) under NEPA, but the state cannot be a cooperating agency. The state Department of Fish and Game

would be required to respond to the EIS because of its regulatory mandates, but can not participate in studies through contracts with USBR or DWR.

History of the Winnemem Wintu Tribe

The Winnemem Wintu Tribe ("middle river people" or "middle water people") – today numbering about 125 people – is a Native American tribe of Wintu origin located around the Shasta Dam in Redding. The Winnemem are one of nine bands of Wintu tribes that all once inhabited the area of the McCloud River. They are not a federally recognized tribe, although tribal members say that they once were and that recognition was taken away by a bureaucratic mistake.

According to Winnemem Wintu Headman Mark Franco, the Federal Government recognized the tribe in 1851, when Winnemem Wintu representatives signed the Cottonwood Treaty, an agreement that granted the tribe a 35-square-mile reservation on its traditional lands. But the treaty was never ratified by Congress. Tribal members ultimately received some land allotments in the McCloud River area, Franco said, but the holdings were condemned under later legislation that ultimately allowed for the construction of Shasta Lake. Until 1985, the Winnemem Wintu continued to be a federally recognized tribe; and they received Federal benefits such as health, housing and education.

Then, in the mid- to late-1980s, the Winnemem Wintu say they were accidentally erased from the Bureau of Indian Affairs (BIA) list of recognized tribes. They have not been able to regain this recognition. Legislation sponsored by Senator Ben Nighthorse Campbell in 2004 gave the Winnemem Wintu the opportunity to regain recognition, the attempt failed. The Winnemem Wintu are not currently pursuing Federal recognition through BIA's application process because they believe it is the Federal Government's responsibility to correct what the Winnemem Wintu believe is the 1985 omission.

Today, the Winnemem Wintu believe that their lack of Federal recognition has impeded their efforts to be included as viable partners on the proposed raising of Shasta Dam. They continue to hold religious and cultural connections to their ancestral lands north of Shasta Dam on the McCloud River and its tributaries to Bear Mountain in the south. When the dam was built, the Winnemem Wintu were forced to move. The lake covered Winnemem Wintu homesteads, ancestral villages, cemeteries and numerous sacred sites.

Designated sites, including village sites, were archaeologically documented by the U.S. Forest Service. The Winnemem Wintu use specific sites to this day for religious purposes. One such site is Puberty Rock where ceremonies are held for girls when they come of age. A second is Children's Rock where the young lay their hands on the rock to gain blessings to become good people and make best use of their talents. The proposed raising of Shasta Dam would put these rocks under water.

What the Winnemem Wintu want

- Affirm historical Federal recognition. The Winnemem Wintu are viewed as an “interested party” by USBR for the purposes of NHPA (National Historical Preservation Act), but the 36CFR800 regulations allow for organizations to become consulting parties because of “their concern with the undertaking’s effects on historic properties” (36CFR800.2(d)(3)). Consulting parties have been determined for the SLWRI. They believe federal recognition is pivotal to gaining trust land and becoming a viable partner to matters affecting a tribe’s loss and access to traditional sacred sites.
- Transfer Shasta Reservoir Indian Cemetery trust land and legal title to the land to the BIA as implied in 1958 correspondence between USBR and BIA.
- Return of (at least 4,480 acres) of historical tribal land – or other “like land” – as just compensation for land lost to build Shasta Dam. The Winnemem Wintu believe this was promised under the 1937 Central Valley Project Indian Land Acquisition Act.
- Cease to consider raising Shasta Dam because it will submerge more sacred sites and gathering grounds.
- Initiate alternative strategies to better manage the Shasta Dam’s existing water reserve, and improve upstream monitoring.
- Explore other water storage and conservation programs and act upon the findings.
- Winnemem Wintu request to be included in the planning and designing of proposed projects. This is not for the purpose of a dam raise but to include a fish ladder into the existing Shasta project to return salmon to McCloud River.

What has been done by U.S. Bureau of Reclamation

- July 14, 2004 – a meeting occurred between Winnemem Wintu; Shasta Lake Water Resources Investigation Project Manager, USBR; and the Environmental Justice-California Bay Delta Authority at Kerekmet Village to discuss SLWRI.
- July 15, 2004 – The Winnemem Wintu met with USBR’s Northern California Area Manager at Shasta Dam to discuss the potential effects of SLWRI on the Winnemem Wintu.
- USBR has entered the contact information of the Winnemem Wintu onto its SLWRI mailing list so that the Winnemem Wintu have received timely notification of any public outreach activities on SLWRI.
- December 2003 – USBR sent a letter to the Winnemem Wintu addressing how the Winnemem Wintu can participate in SLWRI, including their participation as an “interested party” under NHPA.
- August 11, 2004 – The Winnemem Wintu attended a public workshop on SLWRI, in Redding, California.
- February 18, 2003 – USBR’s SLWRI Project Manager met with the Winnemem Wintu at USBR’s Regional Office in Sacramento.

What role for Authority members and staff?

- Foster timely and mutual communication between Winnemem and agencies.
- Raise issues of the Winnemem Wintu with CALFED implementing agencies and provide additional forums for discussion.
- Provide requested technical information to the Winnemem Wintu on the proposed SLWRI project.
- When the Section 106 process (National Heritage Preservation Act) for SLWRI is initiated, the Authority will follow up with USBR to determine if it intends to consult with the State Historic Preservation Office (SHPO) regarding the identification of consulting parties on the Section 106 process. USBR says it will consider all written requests to participate as consulting parties.