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## Comments on the Draft Supplemental Environmental Impact Statement Shasta Lake Water Resources Investigation

### *Introduction*

We offer these comments on the Draft Supplemental Environmental Impact Statement (DSEIS) for the Shasta Lake Water Resources Investigation (SLWRI). The action alternatives of this Investigation are contrary to state and federal law. The DSEIS makes assumptions and reaches conclusions contrary to law and evidence, fails to establish freedom from state permitting, fails to adopt proper significance criteria, fails to consider new information, fails to correct and update relevant parts of the SLWRI FEIS and Feasibility Report, and improperly seeks to conceal information and conclusions of the preceding FEIS and Report.

Nevertheless, there is sufficient information in the SLWRI FEIS, Final Feasibility Report, the DSEIS, and comments to the DSEIS to conclude that the action alternatives of the SLWRI and synonymous Shasta Dam and Reservoir Expansion Project (SDREP) and Shasta Dam Raise Project (SDRP) are not feasible, in part because (1) California law prevents cost-sharing partners from cooperating and assisting Reclamation with this project, (2) certain required permits will not be available to Reclamation and others, and (3) that the action alternatives are unlawful under federal law. Information developed in the SLWRI requires that a non-reservoir expansion alternative be adopted in the project Record of Decision (ROD) as the preferred and recommended alternative for the SLWRI/SDREP — and the SLWRI ended. Information developed in the SLWRI (or information that should have been developed) does not support adoption of the dam-raise (action) alternatives.

We will discuss some of the DSEIS's meaningful misrepresentations and omissions of fact in the order they appear in Reclamation's short DSEIS. The DSEIS sections are introduced in bold 14-point type. Because topic issues appear more than once in the DSEIS, there may be some repetition of issues discussed. To provide some easier use of these draft comments, the rough topics to be discussed in these comments are introduced in bold italics 12-point type.

## **DSEIS Chapter 1.1 Project Background**

The DSEIS describes the purpose of the SLWRI EIS to, in part, "evaluat[e] the potential environmental effects of alternative plans to enlarge Shasta Dam and Lake to (1) increase anadromous fish survival in the upper Sacramento River ..." (DSEIS p. 1-1) However, the SLWRI environmental impact statement does not disclose relevant determinations (including updated evidence) that the project does not meet this stated purpose. Neither does it consistently undertake proper analysis of the action alternatives nor always reach proper conclusions, as noted in our comments here and other comments on the SLWRI, which we incorporate here but have not repeated comprehensively in these comments.

*Fish & Wildlife Coordination Act Report Discussion and Update Needed* — As an example, and relevant to the above description of the SLWRI EIS purpose, the DSEIS, fails to disclose the conclusions of the Fish & Wildlife Coordination Report prepared by the U.S. Fish & Wildlife Service, Department of the Interior, from November 2015 (2015 FWCAR), which was completed *later* than the SLWRI FEIS and Feasibility Reports.<sup>1</sup> The 2015 FWCAR covered Reclamation's late-developing preferred alternative, 4a. The 2015 FWCAR noted the following:

Based on the Service's evaluation of the information available, as contained in this report, as well as evaluations contained in the EIS and associated documents provided by Reclamation, the Service has

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<sup>1</sup> The failure to present the November 2015 FWCAR is inconsistent with the conclusions of law of the DSEIS, where the following is stated:

Pursuant to NEPA, an agency must prepare a supplemental environmental impact statement if the agency makes substantial changes in the proposed action relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns that have a bearing on the proposed action or its impacts. (DSEIS p. 1-2, emphasis added)

determined that the proposed project does not provide substantial benefits to fish and wildlife resources within the Shasta Lake pool or the adjacent upland habitats. The Service has also determined that the proposed project does not provide any substantial benefit to anadromous fish downstream of the RBPP and only provides minimal benefit to anadromous fish (winter- and spring-run Chinook salmon) upstream of the RBPP. It is the Service's opinion that based on the existing information; the proposed action, by further restricting high water flows, will result in additional losses of salmonid rearing and riparian habitat, and adversely affect the recruitment and natural succession of riparian forest along the Sacramento River and bypasses. Upon consideration of the information provided to date, the level of potential impacts to fish and wildlife resources, and the lack of specificity on potential mitigation and compensation measures the Service is unable to support the adoption of any of the proposed action alternatives.<sup>2</sup> (2015 FWCAR p. xiii)

This is relevant new information from an expert agency within the Department of the Interior that should have been disclosed and discussed in the DSEIS, as well as other relevant data and conclusions in the FWCAR. Again, it shows that the action alternatives of the SLWRI fail to meet one of the fundamental purposes of the project.

*DSEIS WIIN Responsibilities* — This serious mischaracterization of project performance and feasibility is relevant not only to Reclamation's National Environmental Policy Act (NEPA) responsibilities. The Secretary of the Interior purports to have made a "determination for commencement of construction" under the authority of the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN).<sup>3</sup>

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<sup>2</sup> Reclamation should have a copy of this report. Our copy was obtained under a Freedom of Information Act request and is FOR Exhibit 01. It can also be found at the following URL:

[https://www.friendsoftheriver.org/wp-content/uploads/2019/07/USFWS\\_SLWRI-FWCAR\\_2015-ocr-compressed.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2019/07/USFWS_SLWRI-FWCAR_2015-ocr-compressed.pdf).

<https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Adm-rprt-on-2018-CA-reservoir-enlargement-approps-request-ocr.pdf>. FOR Exhibit 02. Reclamation has not responded to Freedom of Information Act requests for any determination document and analysis. The document here announcing the determination was, nevertheless, a "Report to the House and Senate Committees on Appropriations" from the Administration and is incorporated by reference.

That determination requires statutory determinations and an agreement, neither of which have been demonstrated in SWWRI or other Reclamation documents.

WIIN § 4007(b) (3) COMMENCEMENT. - The construction of a federally owned storage project that is the subject of an agreement under this subsection shall not commence until the Secretary of the Interior- (A) determines that the proposed federally owned storage project is feasible in accordance with the reclamation laws; (B) secures an agreement providing upfront funding as is necessary to pay the non-Federal share of the capital costs; and (C) determines that, in return for the Federal cost-share investment in the federally owned storage project, at least a proportionate share of the project benefits are Federal benefits, including water supplies dedicated to specific purposes such as environmental enhancement and wildlife refuges.

As discussed in these comments, the SLWRI action alternatives: (A) lack legal /environmental feasibility under state and federal laws, including Reclamation law, both for Reclamation and its likely cost-sharing partners; (B) Reclamation has not nor is likely to secure an agreement with likely cost-sharing partners, a failure which also has a bearing on economic/financial feasibility of the project; and (C) The SLWRI purports to establish federal benefits largely on the basis of its claim for salmonid benefits. The Fish & Wildlife Coordination Act Report refutes this claim and does not support any significant allocation of project costs to “federal” benefits pursuant to WIIN §4007(b)(3)(C). Thus the SLWRI WIIN §4007(b)(3) (A) and (C) determinations are not justified, nor has the Secretary secured any agreements with cost-sharing partners under §4007(b)(3)(B). These are all necessary for a “determination for commencement of construction.” The DSEIS, however, is silent on these key issues.

*Little project benefits in new CVP deliveries* — The DSEIS also summarizes another project purpose:

The SLWRI FEIS evaluated the potential environmental effects of alternative plans to enlarge Shasta Dam and Lake to, in part, ... (2) increase water supplies and water supply reliability for agricultural, municipal, industrial, and environmental purposes ...

It would be good to remind DSEIS readers that the average annual new deliveries expected from the SLWRI preferred but not recommended alternative were modeled to

be 51,300 acre-feet.<sup>4</sup> This is 0.7% of CVP annual deliveries of about 7 million acre-feet.<sup>5</sup> This project does not have much of a return on investment for the CVP.

*No resolution of unresolved feasibility issues or feasibility report updates* — The DSEIS notes that “[t]he SLWRI Feasibility Report presented the results of planning, engineering, environmental, social, economic, and financial studies and potential benefits and effects of alternatives plans for the SLWRI project.” (DSEIS p. 1-2) The DSEIS does not provide the status of any supplemental assessments on the status of any SLWRI post-Feasibility Report analysis. Some may have examined engineering /economic feasibility. For example, from documents obtained under the Freedom of Information Act (FOIA), in early 2019, Reclamation was examining the seismic safety of the existing and expanded dam. The documents were redacted, and we have not received the conclusions of the study and assessments in FOIA documents that we are aware of.<sup>6</sup> Matters of public safety are of interest to the public (the 2017 Oroville Spillway incident has heightened awareness of this matter) and apparently may have at least cost and schedule implications to the project<sup>7</sup> in addition to any environmental impacts associated with the remediation work.

Reclamation also failed to discuss significant new information regarding the numerous dam safety studies that have been conducted in the five years since the FEIS was released. With these comments, we are attaching other engineering reports that Reclamation has issued or contributed to since 2015, all of which were obtained through FOIA and which Reclamation should have considered or discussed in this draft supplemental EIS:

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<sup>4</sup> SLWRI Feasibility Report, p. 5-4 table 5-2.

<sup>5</sup> SLWRI Feasibility Report, p. 1-9, 1-20.

<sup>6</sup> Some additional review has been undertaken since 2015. A MS Powerpoint slide of a February 11, 2019, Reclamation Leadership Seismic discussion, depicted that a seismic evaluation would be complete at the end of December 2019. According to the presentation, a 2018 estimate anticipated that seismic loads [perhaps as measured on the dam or key foundations] were 300% to 400% higher than the 2014 estimate. The final seismic load estimate was to be in September 2019. (FOR Exhibit 03)  
[https://www.friendsoftheriver.org/wp-content/uploads/2020/09/13\\_Redacted.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2020/09/13_Redacted.pdf).

<sup>7</sup> A March 2019 Reclamation Denver Service Center presentation included a draft timeline for a seismic remediation or joint dam-raise/seismic remediation project start estimate of 2028. (FOR Exhibit 04)  
[https://www.friendsoftheriver.org/wp-content/uploads/2020/09/07-MR\\_Redacted.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2020/09/07-MR_Redacted.pdf).

FOR Exhibit 05 [M2], “Alternatives for Preventing Cavitation Damage on the Shasta Dam Spillway,” Hydraulic Lab. Report HL-2019-06 (produced December 2019)

FOR Exhibit 06 [D2], “Shasta Dam and Reservoir Enlargement Project (SDREP) – Dam Raise Final Design Status Report” (produced August 2019)

FOR Exhibit 07 [001], “Shasta Dam Raise Consequence Study,” Technical Memo. No. SV-86-68130-2018-1 (produced July 2018)

FOR Exhibit 08 [004], “Shasta Dam Hydrologic Hazard Analysis for Final Design – Volume I,” Technical Memo. 86-68210-2019-01 (produced October 2018)

FOR Exhibit 09 [006], “Shasta Dam Raise Failure Inundation Study,” Technical Memo. ENV-2019-011 (produced December 2018)

Exhibit 10 [008] “Population at Risk (PAR) Estimation for Shasta Dam Raise Final Design Risk Analysis” (produced December 2018)

There will no doubt be others that Reclamation should disclose and discuss.

Reclamation’s Virtual Open House for the DSEIS noted that the 18.5-foot dam raise alternative was the preferred alternative for the SLWRI.<sup>8</sup> However, neither the DSEIS nor the Virtual Open House reveals that chapter nine of the SLWRI Feasibility Report describes unresolved considerations of the SLWRI and that the “Secretary [of the Interior] is unable to provide a recommendation for implementation of the SLWRI NED Plan until these considerations are addressed.”<sup>9</sup> (The National Economic Development [NED] Plan is the preferred alternative in the SLWRI FEIS.)

In reviewing chapter nine for the preparation of these comments, the still unresolved issues discussed in the SLWRI Feasibility Report chapter nine (or of the obvious sequelae) include some of the following: outstanding issues with Central Valley Project (CVP) contractors for participation of State Water Project (SWP) contractors in a federal project, conflict with state law, state permitting constraints, and the unavailability of non-federal partners due to state law. None of these unresolved constraints on the action alternatives have been resolved — nor are likely to be resolved. The DSEIS does not resolve them or describe any actions to resolve them. The DSEIS mostly omits, obscures, fails to understand, and misleads on these matters. However, the obvious

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<sup>8</sup> [http://www.virtualpublicengagement.com/usbr\\_shasta/history.html](http://www.virtualpublicengagement.com/usbr_shasta/history.html). (FOR Exhibit 11)

<sup>9</sup> Chapter 9, Considerations and Recommendations, Department of the Interior, Final Shasta Lake Water Resources Investigation, Feasibility Report, July 2105. p. 9-1.

failure to resolve the “unresolved considerations” of the SLWRI should result in non-dam-raise alternative as the preferred and recommended alternative for the SLWRI.

The only major resolution of the SLWRI Feasibility Report chapter nine unresolved issues was the passage of the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN), which established rules for federal/non-federal participation in Reclamation WIIN storage projects and rules for WIIN projects. The significant new provisions of the WIIN “that have a bearing on the proposed action” (DSEIS p. 1-2) are not discussed in the DSEIS, contrary to NEPA regulations discussed in the DSEIS and our comments.

The WIIN also requires a Secretarial determination of feasibility according to Reclamation law. (§4007(b)(3)(a)) Reclamation law now includes the WIIN, a law that was passed after the SLWRI Feasibility Report. The demonstrated California Wild & Scenic Rivers Act (CAWSRA (PRC §5093.542(c)) prohibition applying to nearly all likely non-federal cost-sharing partners, discussed later in our comments, should make a Secretarial feasibility determination impossible, since cost-sharing is a requirement under the WIIN. (WIIN §4007(b)(2)) The reservoir construction prohibition of CAWSRA that, among others, applies to Reclamation, §5093.542(b), should also result in an “infeasible determination.” Other provisions of the WIIN discussed in these comments make a Reclamation feasibility and Secretarial feasibility determination unsupportable and contrary to Reclamation law and common sense. These matters should be disclosed in a background section of the DSEIS and in other relevant sections of the DSEIS.

The WIIN expires on January 1[6], 2021.<sup>10</sup> The DSEIS does not describe the consequences of the expiration of the WIIN. The DSEIS does not disclose how Reclamation intends to advance this project and meet its obligations under Reclamation law either before or after the expiration of the WIIN. The DSEIS does not discuss how this may affect the feasibility and environmental obligations of the project.

***Failure to properly revise the SLWRI chapter 26*** — The DSEIS attempts to revise the SLWRI FEIS chapter 25 to include only analysis of National Wild and Scenic Rivers Act (WSRA) (DSEIS p. 5-3) eligibility considerations (and consistency with the Shasta-Trinity National Forest Land and Resource Management Plan), but as just discussed

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<sup>10</sup> “WIIN §4013. Duration – Subtitle J, California, expires five years from the date of enactment with the exception of §4007 storage projects already under construction.” The DSEIS correctly notes that Congress has neither “authorized construction or appropriated funds for construction.” (DSEIS p. 1-2)

above and later in these comments, the provisions of the CAWSRA are relevant to the DSEIS action alternatives. The SLWRI FEIS had its problems, but in contrast to the DSEIS it reached some relevant conclusions “that have a bearing on the proposed action” (DSEIS p. 1-2) to Reclamation’s DSEIS action alternatives. Some are the following:

As described in more detail under “Regulatory Framework,” the PRC and Federal WSRA share several similar components: the establishment of a wild and scenic rivers system; the purpose of protecting certain rivers in their “free-flowing” condition; the identification of extraordinary or outstandingly remarkable values that make such rivers eligible for protection; a study process and procedure for including rivers in the system; and classifications of “wild,” “scenic,” and “recreational.” Both the Federal WSRA and PRC prohibit new water impoundments on designated rivers, and both contain directives to government agencies to use their powers to further the policies of the legislation. (SLWRI FEIS p. 25-3)

The McCloud River’s fishery and its free-flowing condition are identified in both the USFS evaluation and the PRC. (SLWRI FEIS p. 25-13)

The Federal WSRA defines free flowing as “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway” (16 USC Section 1286). The PRC defines free-flowing as “existing or flowing without artificial impoundment, diversion, or other modification of the river.” (SLWRI FEIS p. 25-18)

Despite upstream and downstream dams and diversions, the lower McCloud River meets the definition of a free-flowing river under both the Federal WSRA and PRC. (SLWRI FEIS p. 25-19)

Impact WASR-4 (CP3, CP4, CP4A, and CP5): Effects to McCloud River Free-Flowing Conditions, as Identified in the California Public Resources Code, Section 5093.542 ... [T]he impacts would conflict with the State PRC. (SLWRI FEIS p. 25-40)

As discussed in these comments, the DSEIS unlawfully apparently proposes to omit these passages from the SLWRI FEIS.

The DSEIS omits that, of course, the PRC, itself, essentially establishes for purposes of state law, the free-flowing nature of the McCloud River, including the portion of the



McCloud River that would be converted into Shasta “Lake” by the SLWRI action alternatives.

... The Legislature further finds and declares that maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River within the segments designated in subdivision (b), and is a reasonable use of water within the meaning of Section 2 of Article X of the California Constitution. §5093.542(a)

These are matters “that have a bearing on the proposed action” (DSEIS p. 1-2) to the SLWRI and are thus appropriately required to be disclosed in the supplemental environmental impact statement.

The DSEIS discloses that “[b]oth the SLWRI Feasibility Report and SLWRI FEIS were submitted to U.S. Congress [sic].” (DSEIS p. 1-2) This 2015 action may have been contrary to statute. The 2004 federal statute<sup>11</sup> authorizes the Secretary of the Interior to, *in consultation with the Governor of California*, submit the feasibility report of this and other named federal projects to the Congress *once the Secretary determines that it should be constructed*<sup>12</sup> using in whole or in part federal funds.<sup>13</sup>

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<sup>11</sup> HR 2828, 108<sup>th</sup> Congress. The “Water Supply, Reliability, and Environmental Improvement Act.” P.L. 108–361.

<sup>12</sup> “(i) IN GENERAL.—If on completion of the feasibility study for a project described in clause (i) or (ii) of subparagraph (A), the Secretary, in consultation with the Governor, determines that the project should be constructed in whole or in part with Federal funds, the Secretary shall submit the feasibility study to Congress.” (Public Law 108–361, §103(d)(1)(B)(i)) (HR 2828) The Shasta Dam raise is listed in clause (i).

<sup>13</sup> *MP-15-122 Reclamation Transmits to Congress Final Report on Proposed Shasta Dam Raise*, U.S. Bureau of Reclamation, Mid Pacific Region News Release, July 29, 2015. *MP-720, ENV-6.00, United States Department of the Interior, Bureau of Reclamation, Mid-Pacific Regional Office, November 24, 2015*, letter to Interested Parties: “The U.S. Department of the Interior has released the Final Feasibility Report and Final EIS for the SLWRI for review by the general public and U.S. Congress.” “The Final Feasibility Report *does not include a recommendation* for Congressional action, but rather describes outstanding issues the Secretary of the Interior has identified for resolution before making a recommendation.” (Emphasis added) <https://www.friendsoftheriver.org/wp-content/uploads/2020/10/MP-15-122-Reclamation-Transmits-to-Congress-Final-Report-on-Proposed-Shasta-Dam-Raise.doc>, adopted by reference.

To our knowledge, Reclamation has not documented gubernatorial consultation or a lawful determination that the project should be constructed. However, the 2015 SLWRI Feasibility Report does concede Reclamation’s awareness of some of this subject area:

Section 103(d)B(i) of Public Law 108-361 makes clear the intent of Congress that the Secretary consult with the State prior [to] submitting the report. From discussions with the State, it is our understanding there has been a determination that the PRC protecting the McCloud River prohibits State participation in the planning or construction of enlarging Shasta Dam other than participating in technical and economic feasibility studies. (p. 9-2)

As discussed in our comments on the DSEIS above and below, a determination by the state, as described above, would necessarily be on the basis of determination that the river-to-reservoir conversion over the free-flowing portion of the PRC §5093.542(b)-described reach of the McCloud River/Mc Cloud Arm of Shasta Reservoir would mean, under PRC §5093.542(c), that the Shasta Dam raise and consequent reservoir expansion could have an adverse effect on the free-flowing status of the McCloud River and/or its wild trout fishery. Reclamation could not have been unaware of this. After all, the SLWRI FEIS chapter 25 made adverse free-flowing<sup>14</sup>, spawning habitat<sup>15</sup>, and potential fishery<sup>16</sup> determinations too. SLWRI FEIS chapter 25 also made a “would conflict with the State PRC” determination on the basis of river-to-reservoir conversion impact on free-flowing.<sup>17</sup> It also stated “Significant effects were identified related to the compatibility of the project with the PRC, Section 5093.542.”<sup>18</sup> It is not clear, however, whether this SLWRI FEIS chapter 25 statement was related to the §5093.542(b) reservoir prohibition or the §5093.542(c) “assist or cooperate...in the planning and construction” prohibition — or both. Neither the SLWRI FEIS chapter 25 nor the DSEIS directly discuss that the §5093.542(b) no-reservoir provision applies to Reclamation. Either violation alone is fatal to the action alternatives of the SLWRI. The DSEIS in any revision of FEIS chapter 25, should have made both easy determinations.

Nevertheless, the DSEIS, in the context of determinations by the potential federal wild & river manager, continues to establish the potential adverse fishery impacts, makes the

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<sup>14</sup> SLWRI FEIS pp. 25-32, 25-34–35, 25-40.

<sup>15</sup> SLWRI FEIS pp. 25-30, 25-34, 25-29.

<sup>16</sup> SLWRI FEIS pp. 25-31, 25-35, 25-40.

<sup>17</sup> SLWRI FEIS chapter 25 p. 25-40.

<sup>18</sup> SLWRI FEIS chapter 25 p. 25-44.

adverse effect on spawning determination, and makes the free-flowing conflict determination on the McCloud River, although purportedly only in the context of the National Wild & Scenic Rivers Act. Thus the DSEIS provides the required findings necessary to make a conflict determination with the California Wild & Scenic Rivers Act. The CAWSRA conflict conclusion should, therefore, also be disclosed in the DSEIS as it was in the SLWRI FEIS chapter 25.

## **DSEIS Chapter 1.2 Scope of the Supplemental Environmental Impact Statement**

*NEPA regulation responsibilities* — We appreciate the DSEIS setting the stage here:

Pursuant to NEPA, an agency must prepare a supplemental environmental impact statement if ... “there are significant new circumstances or information relevant to environmental concerns that have a bearing on the proposed action or its impacts.<sup>19</sup> An agency may also prepare a supplemental analysis if it determines that the purposes of NEPA will be furthered by doing so.”<sup>20</sup> (DSEIS p. 1-2)

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<sup>19</sup> NEPA regulations 40 C.F.R. (§ 1502.9(c)) at the time of preparation of the DSEIS, stated: “Agencies (1) Shall prepare supplements to either draft or final environmental impact statements if:

- (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

Current regulations 40 C.F.R. § 1502.9(d) state: “(d) Supplemental environmental impact statements. Agencies: (1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

- (i) The agency makes substantial changes to the proposed action that are relevant to environmental concerns; or
- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

<sup>20</sup> Current 40 C.F.R. §1502.9(d)(2) “Agencies: May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.” Regulations at the time of preparation of the DSEIS were the following: “§1502.9 (c) Agencies: ... (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.”

Despite setting forth this standard for supplementation, Reclamation did not follow it. As explained in these comments, there are significant new circumstances and information arising subsequent to the SLWRI FEIS and Final Feasibility Report that have not been adequately analyzed by Reclamation as required by NEPA.

***Clean Water Act responsibilities*** — The DSEIS is brief. The stated purpose is also narrow.

The purpose of the SLWRI SEIS is to provide information relevant to the application of Section 404(r) of the Clean Water Act (CWA) for the SLWRI, to respond to issues identified by USACE and EPA on the previous EIS, to update operations and modelling [sic<sup>21</sup>] to the latest regulatory requirements, and to update information included in the 2015 SLWRI FEIS that is relevant to environmental concerns.

CWA 404(r) states:

*The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after the date of enactment of this subsection, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 301(a) or 402 of the Act (except for effluent standards or prohibitions under section 307), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for each construction.*  
(DSEIS p. 1-2, emphasis added)

The DSEIS go on:

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<sup>21</sup> “Modelling” is a United Kingdom and its Commonwealth spelling.

The SLWRI FEIS was developed with consideration of the CWA 404(b)(1) guidelines. In order to apply CWA 404(r), Reclamation has prepared this supplement to provide: (1) an updated and adequate description of the discharges to wetlands and other Waters of the U.S. (WOTUS) resulting from the relocations of infrastructure and recreation structures; (2) a programmatic approach to conducting alternatives analyses and determination of the Least Environmentally Damaging Practicable Alternative for relocation activities with significant impacts to wetlands and other WOTUS; and (3) a compensatory wetland mitigation plan for all significant and unavoidable impacts to wetlands and other WOTUS. (DSEIS p. 1-3)

*The DSEIS fails to meet Clean Water Act requirements* — The DSEIS does not achieve these purposes. In order for CWA 404(r) to exempt a project from certain requirements of the Clean Water Act (CWA), Reclamation must analyze the impacts of the project, including the effects of the discharge of dredge or fill material, in an EIS that complies with NEPA, transmit that EIS to Congress, and Congress must subsequently specifically authorize<sup>22</sup> the project.

Comments by Natural Resources Defense Council (NRDC) et al. (adopted by reference here) demonstrate that Reclamation’s DSEIS does not meet the requirements of 404(r) of the Clean Water Act, and therefore cannot excuse Reclamation from complying with the permit requirements of Section 404 of the Clean Water Act. More specifically: (1) The DSEIS does not provide the necessary site-specific analysis and factual determinations regarding the short-term and long-term effects of discharges of dredge and fill material required by the 404(b)(1) Guidelines; (2) the DSEIS does not demonstrate that the proposed project is the least environmentally damaging practicable alternative as required by the 404(b)(1) Guidelines; (3) the DSEIS does not demonstrate that the proposed project will not result in jeopardy to or adverse modification of critical habitat of threatened or endangered species as required by the 404(b)(1) Guidelines; (4) the DSEIS does not demonstrate that the proposed project will not cause or contribute to violations of any state water quality standards as required by the 404(b)(1) Guidelines; and (5) the DSEIS fails to analyze and ensure compliance with state law requirements governing the discharge of dredge and fill material.

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<sup>22</sup> Reliance on P.L. 96-375 or the CALFED Bay-Delta P.L. 108-361 for a “specific” authorization is not sufficient. These statutes authorized project studies and are not authorizing statutes for construction of the SDREP or SLWRI elements, apparently conceded in DSEIS p. 1-2.

Congress, of course, has not authorized the SDREP for construction. (DSEIS p. 1-2)

*State permits still required and not available by law* — Although the DSEIS fails in its purpose, there may have been a broader purpose in mind for the DSEIS: escaping any permitting jurisdiction by the state of California. Nevertheless, in addition to the deficiencies noted above, there are other state permits that Reclamation still must comply with not disclosed in the DSEIS. Some of these have not been discussed in any SLWRI documents.

In this regard, the DSEIS did not examine such previously unexamined circumstances or fresh insights “that have a bearing on the proposed action.” (DSEIS p. 1-2) For example, in 2019, after the completion of the SLWRI FEIS, the State Water Resources Control Board (Board or State Board) laid out one of the major problems with the SLWRI action alternatives.

In addition to prohibiting cooperation in the planning of a project that could adversely affect the free-flowing condition of the McCloud River, section 5093.542 of the Public Resources Code prohibits assistance or cooperation by “license, or otherwise.” This language bars the State Water Board and other agencies of the state from issuing any permit or other approval for a project that could adversely affect the free-flowing character of the McCloud River or its wild trout fishery. Necessary permit approvals for the State Water Board includes approvals under sections 401 and 402 of the Clean Water Act and time extensions for U.S. Bureau of Reclamation’s (Reclamation) water right permits, as discussed below.<sup>23</sup> (Emphasis added)

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<sup>23</sup> Letter from Eileen Sobeck, executive director of the State Water Resources Control Board to Jose Gutierrez, Westlands Water District, Comments on Westlands Water District's Initial Study/notice of Preparation for the Shasta Dam Raise Project; Shasta County, January 19, 2019, cc to Mr. Michael Ryan, Acting Regional Director Bureau of Reclamation Mid-Pacific Regional Office Federal Office Building 2800 Cottage Way Sacramento, CA 95825. (Letter to Jose Gutierrez, WWD, 2019) (with a cc to Mr. Michael Ryan, Acting Regional Director Bureau of Reclamation Mid-Pacific Regional Office Federal Office Building 2800 Cottage Way Sacramento, CA 95825). [https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC\\_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf) and also in Exhibit H, NRDC et al. comments on the SLWRI DSEIR, adopted by reference here.

The State Board's constraints under a three-decade-old provision of the CAWSRA were not discussed in the SLWRI FEIS and — remarkably, given the stated purpose of the DSEIS — appropriately should, given the unmistakable clarity in the Board's 2020 letter, have been disclosed in the DSEIS under the DSEIS's self-admonition to follow one of its stated purposes: "to update information included in the 2015 SLWRI FEIS that is relevant to environmental concerns." (DSEIS p. 1-2) The DSEIS does not allow Reclamation to escape the state permitting consequences of the McCloud River provisions of the California Wild & Scenic Rivers Act (Public Resources Code Section 5093.542 (abbreviated in these comments as §5093.542 or PRC) or other provisions of the California Wild & Scenic Rivers Act (CAWSRA) and California law.

In addition, the Board has state Porter Cologne Act and other federal Clean Water Act permitting responsibilities that remain unaffected by a procedurally and substantively executed 404(r) EIS.<sup>24</sup>

The Board's constraints and their relevance to the action alternatives should have been part of an introductory discussion of the purpose of the Supplemental environmental impact statement and in other relevant parts of the DSEIS.

In summary, the supplemental environmental impact statement and the SLWRI FEIS do not meaningfully support the limited procedural escape from some California-required permits that would necessarily be required of Reclamation for the action alternatives of the SLWRI. Nor can it provide escape for some other state non-CWA permitting requirements.

*SLWRI FEIS chapter 25 comments preview* — The DSEIS devotes most of its pages to a revised SLWRI Chapter 25 analysis:

Reclamation has also revised the SLWRI FEIS Chapter 25 on Wild and Scenic River Considerations for the McCloud River and included the revised chapter within this Draft SEIS. (DSEIS p. 1-3)

To say it another way, the DSEIS Chapter 5 appears to be intended to be the substitute for the SLWRI FEIS Chapter 25. Many of our comments on the DSEIS will be offered to help Reclamation sort out conclusions of law and fact and omissions in the DSEIS's proposed revisions to the SLWRI FEIS Chapter 25.

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<sup>24</sup> See comments to the DSEIS from Natural Resources Defense Council et al., Center for Biological Diversity (CBD) et al., and the State Water Resources Control Board.

## Chapter 3. Supplemental Information on Stormwater and Other Point-Source Discharges

### *Additional discussion on why the DSEIS does not meet Clean Water Act requirements*

– The DSEIS asserts the following:

By following CWA 404(r) Reclamation is not subject to CWA 404(r) regulations under CWA 402 if information on the effects of the discharge, including guidelines developed under CWA 404(b)(1), are included in an EIS. Reclamation utilized existing CWA 402 permits as a guideline to describe the effects of the proposed discharges. (DSEIS p. 3-1)

The DSEIS here omits that CWA 404(r) regulations are also only applicable to projects that are “specifically authorized by Congress.” There is no showing in the DSEIS that the Shasta Dam raise project here, in the DSEIS called the SLWRI, but in other Reclamation sites the Shasta Dam and Reservoir Expansion Project (SDREP),<sup>25</sup> has been authorized by the Congress. Indeed, the DSEIS properly asserts that Congress has not authorized construction or appropriated funds for construction (DSEIS p. 1-2), a perhaps even more precise statement of the facts.

The DSEIS also overreaches here. The NRDC et al. comments on the DSEIS, adopted by reference here, are illustrative:

The exemption in Section 404(r) applies only to discharges of dredge and fill materials. 33 U.S.C. § 1344(r) (specifying “discharge of dredged or fill material as part of the construction”); see *S.C. Wildlife Fed’n v. Alexander*, 457 F. Supp. 118, 128 (D.S.C. 1978) (requiring section 402 permit for any discharges beyond those caused by dredge and fill in construction). Thus, even if Congress authorizes an exemption pursuant to Section 404(r), Reclamation remains required to meet all state and federal laws beyond this limited exception, including but not limited to permits required by section 402 of the CWA and the California Water Code for project elements that are not the discharge of dredge and fill materials. As such, and contrary to Reclamation’s position in the DSEIS, Reclamation is required to seek CWA section 402 permits and all applicable State-law based Waste Discharge Requirements from the State of California in order to complete the proposed enlargement of Shasta Dam. The failure of the

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<sup>25</sup> <https://www.usbr.gov/mp/ncao/docs/gen-faq-nov.pdf>. FOR Exhibit 11.



DSEIS to fully and adequately disclose Reclamation's obligation to obtain these permits, as well as to explain and analyze the actions it will take to comply with these permits, is a failure to comply with NEPA. We also note that the State of California is precluded by Public Resources Code section 5093.542 from granting these permits to Reclamation.

## Chapter 4.3 Environmental Impacts

*Other commentary on the Fish & Wildlife Coordination Act Report* – This DSEIS section is striking for what it does not review. One noteworthy matter which these comments addressed previously is that it does not include a discussion of the November 2015 Fish & Wildlife Coordination Act Report. (2015 FWCAR) However, the supplemental environmental impact statement needs to review this new matter in greater depth.

An appendix to the 2015 FEIS includes recommendations that Reclamation identified from FWS throughout the process of consulting under the Fish and Wildlife Coordination Act (FWCA). *See* Fish and Wildlife Coordination Act Recommendations for the Shasta Lake Water Resources Investigation Appendix April 2015 ["Recommendations in FEIS appendix"]. However, the FEIS does not include the FWCA report itself.

After the FEIS was released in April 2015, the Fish & Wildlife Service (FWS) issued a revised FWCA report in November 2015.<sup>26</sup> Although the appendix in the FEIS predates the November 2015 FWCA report, the 2015 SLWRI appendix captures nearly all of the recommendations that are in the report. However, the 2015 FWCAR includes recommendations that were not picked up in the FEIS appendix.

The 2015 report also includes extensive analysis from FWS about the various species at risk from the project, which is not included in the Recommendations in the FEIS

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<sup>26</sup> This November 2015 Fish & Wildlife Coordination Act Report is not identified as either "final" or "draft," but it is the first FWCA report to cover the SLWRI preferred alternative. However, a 2017 briefing paper by the Field Supervisor of the San Francisco Bay-Delta Fish and Wildlife Office identifies the latest version as a "draft" and indicated that FWS was "prepared to complete further revisions to the Draft FWCAR if necessary," and that the "FWCAR will not be finalized until Section 7 consultation on the project is initiated and completed." See FOIA doc: Status of Fish and Wildlife Coordination Act Report (FWCAR) for Shasta Lake Water Resources Investigation (SLWRI) by Kaylee Allen (May 2017). FOR Exhibit 12.

appendix. These portions of the FWCAR appear to be significant new information about the environment that must be considered in a supplemental environmental impact statement.

#### *FWS Recommendations*

FWS identifies various recommendations to protect fish and wildlife and notes that Reclamation removed these measures from further consideration during the 2015 EIS, except for “limited spawning gravel augmentation and proposed floodplain/side channel restoration.” *Id.* at 176.

Reclamation ignores some recommendations and fails to adequately respond to others. Many of the recommendations are measures that FWS believes would be more effective for anadromous fish than raising the dam.

#### *Ignored recommendations*

The recommendations in the FEIS appendix do not include some of the measures specifically identified in the 2015 report. For example, in the 2015 report, FWS included a recommendation to “Implement appropriate actions from the Recovery Plan for the Evolutionarily Significant Units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead (Chinook salmon and Steelhead Recovery Plan) (NMFS 2014).” (2015 FWCAR at x.) Yet Reclamation does not address the Recovery Plan in the FEIS appendix.

FWS asked Reclamation to clarify and quantify the extent that the cold water pool would be used to augment flows to provide additional benefits for fish and wildlife species and recommended that the authority for use of the cold pool be at the discretion of FWS, NOAA, and CDFW. (2015 FWCAR at x–xi.) Reclamation failed to respond to the direct request that the agencies be given the authority to determine use of the cold water pool, instead recharacterizing this recommendation as one to clarify whether FWS, NOAA, and CDFW would have an authority. (Recommendations in SLWRI FEIS appendix at 1-7 and 1-35.) The agency also failed to provide any additional explanation as to how decision-making under adaptive management will be made.

FWS also recommended that Reclamation increase water use efficiency to a specified level. (2015 FWCAR at xi.) Reclamation ignored this recommendation, responding more generally that “All action alternatives would include a water conservation program for

increased water deliveries” but declining to discuss the designation of specified levels of efficiency. (Recommendations in SLWRI FEIS appendix 1-9.)

FWS also recommended that Reclamation “restore habitat at inactive gravel mines along the Sacramento River and lower reaches of tributaries.” (Nov. 2015 FWCAR at x.) Reclamation responded by describing the CAR process, asserting that all of the CAR recommendations were considered, and concluding that three non-operational measures were prioritized. (Recommendations in FEIS appendix at 1-7.) Reclamation failed to address this measure or explain why it was dismissed.

#### *Inadequate response*

Some of the responses by Reclamation are irrational or arbitrary. For example, FWS recommended that Reclamation “Collaborate with the Anadromous Fish Screen Program to screen diversions and improve fish passage in mainstem Sacramento River and lower reach of nonnatal tributaries.” (2015 FWCAR at x.) Although FWS explicitly notes that its recommendations are “beyond any actions identified and/or required in the Central Valley Project Improvement Act (CVPIA), CALFED, and existing biological opinions,” *id.*, Reclamation responded by saying that this recommendation was not considered because “Reclamation has other ongoing programs implementing these actions (e.g. CALFED ERP and CVPIA).” (Recommendations in FEIS appendix at 1-7.) Reclamation provides no explanation why this measure was dismissed.

FWS recommended that Reclamation increase minimum flow in the Sacramento River “from the current 3,250 cubic feet per second (cfs) to 4,000 cfs Oct 1 - Apr. 30, if end-of-September storage is 2.4 million af (MAF) or greater (per the AFRP Final Restoration Plan, USFWS 2001).” at 2015 FWCAR p. x. Reclamation responded that dedicating additional water from increased storage provided greater benefit to the species, and that “adaptive management plan may include operational changes to the timing and magnitude of releases primarily to improve the quality and quantity of aquatic habitat. These changes may include increasing minimum flows, timing releases from Shasta Dam to mimic more natural seasonal flows, meeting flow targets for side channels, or retaining the additional 191,000 acre-feet (for CP4A) or 378,000 acre-feet (for CP4) of water in storage to meet temperature requirements.” (Recommendations in FEIS appendix at p. 1-7.) Reclamation fails to substantiate its assertion that increased storage would provide greater benefits or to explain why minimum flows could not be combined with increased storage.

In addition, multiple agencies worked together to design a specific adaptive management plan. *See* Status of Fish and Wildlife Coordination Act Report (FWCAR)

for Shasta Lake Water Resources Investigation (SLWRI) by Kaylee Allen (May 2017) (FOR Exhibit 12). FWS recommended that the specific measures of this plan be included. (2015 FWCAR at xi.) Reclamation simply responded that it accepted this recommendation. (Recommendations in FEIS appendix at 1-39.) However, the DSEIS does not include additional information on adaptive management, so it is unclear whether and to what extent FWS recommendations will be implemented.

FWS identified a number of measures which it believes should be included as an alternative to raising the dam. (2015 FWCAR p. xi.) Reclamation responded that each of these measures was evaluated in the plan formulation process, and since the EIS tiers to that process, it is not required to consider these measures again, although “many of the management measures, including measures not related to the raising of Shasta Dam, were also evaluated during the SLWRI plan formulation process.” (Recommendations in FEIS appendix at p. 1-3.)

#### *Analysis of impacts to fish and wildlife resources*

The November 2015 Report contains extensive analysis of the potential impacts to fish and wildlife from the dam raise, including impacts from the reservoir and downstream, as well as throughout the CVP/SWP service area (which “could experience reservoir water surface elevation fluctuations and stream flow changes downstream from their facilities due to an enlarged Shasta Dam” (2015 FWCAR at iv).

The report highlights the risk to six rare species, each of which is endemic to the vicinity of Shasta Lake: the Shasta snow-wreath, Shasta salamander, Shasta sideband snail, Wintu sideband snail, Shasta chaparral snail, and Shasta hesperian snail. *Id.* at xi. The report also discusses impacts to the purple martin, bald eagle, Pacific fisher, NSO, bank swallows, and yellow billed cuckoo. *Id.* at xii. The “widespread impacts to unique species within the Shasta Lake basin resulting from lake enlargement” was a primary concern of FWS. *See* Status of Fish and Wildlife Coordination Act Report (FWCAR) for Shasta Lake Water Resources Investigation (SLWRI) by Kaylee Allen (May 2017) (FOR Exhibit 12).

The report details impacts to Shasta Lake and adjacent habitat and other rare and special status species aquatic that would be destroyed by the enlarged reservoir, 86–90, as well as additional terrestrial and wetlands habitat and species, *id.* at 90–106.

The report also discusses the effects of changes in the timing, frequency, and duration of flood flows on the habitat and species downstream, *id.* 106-120, including anadromous fish, *id.* at 109-118. In addition, the 2015 report provides in-depth critiques of the models

CALSIM II, 142, and SALMOD, 143-52. The 2017 briefing paper by the Field Supervisor of the San Francisco Bay-Delta Fish and Wildlife Office identifies the fact that the modeling likely over estimates actual benefits to Chinook salmon runs as one of FWS's main points of concern. *See* Status of Fish and Wildlife Coordination Act Report (FWCAR) for Shasta Lake Water Resources Investigation (SLWRI) by Kaylee Allen (May 2017) (FOR Exhibit 12).

Finally, the report discusses impacts from the changes in flow to the Sacramento River from RPBB to the Delta, *id.* at 120-9, and the effects of increased reliability on water use through the CVP and SWP water service area. 2015 FWCAR *id.* at 130.

#### *Benefits to anadromous fish from dam raise*

The Nov. 2015 FWCAR states that the project would only provide minimal benefit to anadromous fish upstream of the RBPP, and that this minimal benefit would be "likely offset" due to the impacts on rearing habitat. (2015 Report at xii.) Although the Recommendations in the FEIS appendix identify FWS's concern with the limited benefits to anadromous fish downstream of the dam, that document does not include the conclusion that these impacts would be "likely offset." The report also includes an extensive discussion of the impacts on anadromous fish downstream.

The FWS Field Supervisor of the San Francisco Bay-Delta Fish and Wildlife Office noted that the adverse effects to long-term riparian vegetation recruitment by altered hydrological regime was a primary concern. *See* Status of Fish and Wildlife Coordination Act Report (FWCAR) for Shasta Lake Water Resources Investigation (SLWRI) by Kaylee Allen (May 2017). (FOR Exhibit 12)

### **Species Not Discussed in DSEIS**

#### **Specific Species**

Gray Wolf and northern spotted owl

Reclamation's Construction BA on Threatened and Endangered Species discusses impacts to these two species but they were not discussed in the DSEIS.

Valley elderberry longhorn beetle and Shasta crayfish

Reclamation's Paleoflood BA names these species but they were not discussed in the DSEIS

Shasta salamander

Pacific fisher and bald eagles

California red-legged frog

Winter-run Chinook salmon and Delta Smelt at Livingston Stone National Fish Hatchery

Winter-run Chinook salmon are mentioned in the DSEIS but the impact to this hatchery is not discussed.

### **ROC for the LTO**

The Reinitiation of Consultation (“ROC”) for the Long Term Operations (“LTO”) of the Central Valley Project (“CVP”) / State Water Project (“SWP”) identified a number of species that would be adversely affected by ongoing operations at Shasta Dam, including the dam raise. The species that were anticipated to be adversely affected by the LTO should have likewise been analyzed in the DSEIS, because raising the height of Shasta Dam is going to have ripple effects on long-term operations at Shasta Dam. All of the following species were identified as likely to experience adverse effects from the LTO, as described in the LTO’s Chapter 7 [here](#)

Central Valley Spring-Run Chinook Salmon  
Southern OR/Northern CA coastal coho salmon  
North American green sturgeon  
Delta smelt  
Riparian brush rabbit  
Riparian woodrat  
Salt marsh harvest mouse  
Least Bell’s vireo  
Giant garter snake  
Valley elderberry longhorn beetle  
Pacific coast salmon (essential fish habitat)  
Pacific coast groundfish (essential fish habitat)

## **Chapter 5. Wild and Scenic River Considerations for McCloud River**

*Reclamation’s apparent intent for DSEIS Chapter 5* — DSEIS Chapter 5 focuses on whether and how the project alternatives could impair the eligibility of or make ineligible for inclusion in the National Wild & Scenic Rivers System the McCloud River reaches proposed for conversion to reservoir. The DSEIS also analyzes consistency with the 1994 Shasta-Trinity National Forest Land and Resource Management Plan (LRMP). On these matters, the DSEIS does not differ markedly with Chapter 25 of the SLWRI FEIS. However, in contrast to the SLWRI FEIS Chapter 25, the DSEIS Chapter 5 purports to not include assessments of conflicts that the action alternatives of the

SLWRI/SDREP have with the California Wild & Scenic Rivers Act (CAWSRA), and thus apparently attempting to omit these discussions and conclusions from the SLWRI NEPA documents.

As discussed earlier, the Supplemental Environmental Impact Report appears to be intended to substitute the Chapter 5 of the DSEIS for the SLWRI FEIS Chapter 25:

Reclamation has also revised the SLWRI FEIS Chapter 25 on Wild and Scenic River Considerations for the McCloud River and included the revised chapter within this Draft SEIS. (DSEIS p. 1-3)

Although there were some problems with the SLWRI FEIS Chapter 25, this apparent revision is even more ill-considered — and not just because compliance with the California Wild and Scenic Rivers Act (CAWSRA) is required for nearly any non-federal partner for the dam raise and Reclamation is required by federal law to comply with the CAWSRA as well. Moreover, Reclamation’s revision of Chapter 25 should have been informed by post-SLWRI FEIS interaction with the state of California, the potential federal wild & scenic river manager, the experience of aspiring cost-sharing partners, and rulings by the California courts. It was not.

Reclamation’s current FAQ on the Shasta Dam and Reservoir Expansion project and Virtual Open House may be even more instructive than the DSEIS in illustrating the depth of Reclamation’s misunderstanding of the CAWSRA. In relevant part, the FAQ and Virtual Open House<sup>27</sup> say the following:

What is the project’s effect on the McCloud River?

Chapter 5 of the Draft Supplemental Environmental Impact Report was revised to reflect and re-focus the analysis on the federal requirements.

The State of California has not designated the McCloud River as Wild and Scenic under the State Wild and Scenic Rivers Act. Instead, portions of the river were designated in the California Public Resources Code Section 5093.542 as supporting a wild trout fishery. Reclamation’s view is that

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<sup>27</sup> [http://www.virtualpublicengagement.com/usbr\\_shasta/faqs.html](http://www.virtualpublicengagement.com/usbr_shasta/faqs.html) (accessed August 27, 2010).

<https://www.friendsoftheriver.org/wp-content/uploads/2020/10/SLWRI-Draft-SEIS-Virtual-Open-House.pdf>. FOR Exhibit 03

there is a question as to whether the legislature intended to prohibit the Shasta Dam raise by enacting section 5093.542 given its support for studying the proposal. (p. 3)<sup>28</sup> (emphasis added)

Well, part of that is clear, although muddled and without, apparently, any successful review of the CAWSRA. Unlike the FAQ, the DSEIS does not state there is a question regarding legislative intent. Reclamation's newfound question about legislative intent is erroneous, but consistent with that, the DSEIS appears to be intended to omit the SLWRI FEIS Chapter 25 stated finding that the SLWRI action alternatives conflict with §5093.542.

Our comments on the DSEIS should be instructive to Reclamation regarding (1) the DSEIS's decision to "reflect and re-focus" on federal requirements. In a nutshell, Reclamation's action violates NEPA regulations. With regard to the second and third sentences of the FAQ, (2) the legislature enacted a special McCloud River section (§5093.542) of the California Wild & Scenic River Act to protect the river's free-flowing status and wild trout fishery. With regard to the final sentence in the FAQ, (3) the California Wild & Scenic Rivers Act would not have prohibited departments and agencies of the state from assisting and cooperating with Reclamation on projects that could adversely affect free-flowing or the wild trout fishery of the McCloud River with the sole exception of the California Department of Water Resource's (DWR) technical and economic studies on the Shasta Dam raise if the legislature did not believe that the Shasta Dam raise would be in conflict with the Act. The California Natural Resources Agency, state departments and other state agencies, and state courts have uniformly interpreted the provisions of §5093.542 as a legislative intention to apply to the Shasta Dam raise. And so did Reclamation. The SLWRI FEIS Chapter 25 concluded that the SLWRI action alternatives were in conflict with the California Wild and Scenic Rivers Act. The SLWRI supplemental environmental impact statement should do so as well.

*Introduction to DSEIS chapter 5* — The DSEIS too often describes matters poorly, incompletely, and with mistakes. In addition, it fails to identify obvious mistakes in the SLWRI FEIS chapter 25.

Chapter 5 of the DSEIS begins with the following:

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<sup>28</sup> <https://www.usbr.gov/mp/ncao/docs/sdrep-faq.pdf> (accessed August 27, 2020). FOR These were also in station 8 of the DSEIS Virtual Open House. FOR Exhibit 11.



This chapter describes the effects of the dam and reservoir modifications proposed under SLWRI action alternatives on the wild and scenic river values of the lower McCloud River, one of the major tributaries to Shasta Lake. (DSEIS p. 5-1)

In the view of the DSEIS, this is because the U.S. Forest Service, in the 1994 Shasta-Trinity NF Land and Water Resources Plan (LRMP), found segments of the McCloud River eligible for addition to the National Wild and Scenic River System, including a segment that “could be periodically inundated if Shasta Dam and Shasta Lake were enlarged.” (DSEIS p. 5-3) This conclusion is true and supported by the SLWRI and DSEIS.

*The DSEIS does not describe the effect of the CAWSRA accurately* — The DSEIS also includes a short summary of the McCloud River and the California Wild and Scenic Rivers Act. The DSEIS does not do well here. More precisely, the DSEIS describes the basis of the McCloud River provisions of the California Wild & Scenic Rivers Act (CAWSRA) incompletely enough to be misleading.

The State of California also did not identify the McCloud River as Wild and Scenic under the State Wild and Scenic Rivers Act. Instead, portions of the river were designated in the California Public Resources Code (PRC) Section 5093.542 as supporting a wild trout fishery. (DSEIS p. 5-3)

“Identify” is not the proper word in the first sentence. “Designate” is correct. The second sentence uses the verb “designated” in a somewhat awkward sense. “Included” would be the more accurate word. More importantly, the second sentence misses the test of accuracy by serious omission as to the purpose and effect of the legislature’s action. Interestingly, Chapter 25 of the SLWRI FEIS managed to get this one better, although not without error itself:

The Resources Agency study<sup>29</sup> found it eligible, but the California legislature declined to add the river to the California wild and scenic river system. The legislature instead passed an amendment to the California Wild and Scenic Rivers Act to protect the river’s free-flowing condition

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<sup>29</sup> The 1998 Natural Resources Agency Report is the “*McCloud River Wild and Scenic River Study Report*, Final Study Report, Prepared for the California Resources Agency, Prepared by Jones and Stokes Inc, June 1998” (Jones & Stokes Report).

and the river's fishery below McCloud Dam through the PRC. (SLWRI FEIS p. 25-3)

The SLWRI FEIS here only gets the geographic extent of the protection wrong. The actual legislation also applies the described protections in subdivisions (b), (c), and (d) from Algoma to Huckleberry Creek; that is, the so-called upper McCloud River above the PG&E McCloud Reservoir (PRC §5093.542(b)).<sup>30</sup>

*Comments provide an introduction to the CAWSRA* — It should be understood that §5093.542 of the PRC is a portion of the California Wild and Scenic Rivers Act (CAWSRA). PRC in discussions here and in Reclamation SLWRI documents refer to the applicable portions of the CAWSRA. The key relevant protective provisions of CAWSRA (PRC §5093.542) were signed into law by former California Attorney General and then California Governor George Deukmejian in 1989. Other relevant provisions date back to the organic act of the California Wild & Scenic River System in 1973. (We have a signed copy of the bill by the author.) The DSEIS should have described the statute, given its relevance here. We provide some relevant review in these comments. The first sentence of CAWSRA is instructive:

It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. (PRC §5093.50)

The dual purposes of the special McCloud River CAWSRA provisions are well summarized by the second subdivision of the McCloud River provisions of the CAWSRA:

The continued management of river resources in their existing natural condition represents the best way to protect the unique fishery of the McCloud River. The Legislature further finds and declares that maintaining the McCloud River in its free-flowing condition to protect its

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<sup>30</sup> In addition to §5093.542(b), see the Jones and Stokes Report: “Candidate segments on the McCloud River begin at Algoma and proceed to McCloud Reservoir (upper McCloud River) and extend from McCloud Dam to Shasta Lake (lower McCloud River). The upper and lower segments are 20 and 23 miles long, respectively.” (p. i, Jones & Stokes Report) The USFS also applied the term “upper McCloud River” to the Algoma to McCloud Reservoir reach. (DSEIS p. 5-5)

fishery is the highest and most beneficial use of the waters of the McCloud River within the segments designated in subdivision (b), and is a reasonable use of water within the meaning of Section 2 of Article X of the California Constitution. (PRC §5093.542)

The DSEIS should be corrected to properly describe the dual purposes of the California legislature's addition of §5093.542 to the CAWSRA. In addition, the DSEIS should quote the statutory language rather than omit or misdescribe it.

*Contrary to the DSEIS, NEPA regulations require an analysis of effect of CAWSRA* — The DSEIS does not disclose the legal basis on which it omits relevant portions of Chapter 25 of the SLWRI FEIS with the following statement:

Reclamation has no obligation to analyze state law requirements under the California Wild and Scenic Rivers Act, and this section is therefore being revised to reflect and re-focus the analysis on the federal requirements. (DSEIS p. 5-3)

There is no legal basis for this DSEIS decision. The decision is in conflict with NEPA regulations. Existing<sup>31</sup> NEPA regulations are clear: 40 C.F.R. 1502.16 Environmental Consequences (a) states:

"The discussion shall include: ... (5) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§1506.2(d) of this chapter)"

Not only is an accurate analysis of state law requirements properly a subject of NEPA review, the DSEIS does not change the SLWRI Final Feasibility Report. "The alternative ultimately chosen as the recommended plan will need to be consistent with State water law..." (Chpt 9, p. 1) Of course, our comments describe that the action alternatives are required to be consistent with more than water law. Commenters should not have to remind Reclamation of the consequences here of the CAWSRA *controls* on state and federal actions. Nevertheless, we do, as should Reclamation in the SLWRI supplemental

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<sup>31</sup> The previous NEPA regulation under which the DSEIS may have been prepared do not materially differ from existing NEPA regulations here: "It shall include discussions of: ... (c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)" (previous 40 C.F.R. 1502.16(c))

environmental impact statement. Existing<sup>32</sup> NEPA regulations also require impacts to be discussed in relation to their significance. 40 C.F.R. 1502.2(b) Implementation states:

... (b) Environmental impact statements shall discuss impacts in proportion to their significance ...

CAWSRA controls are highly significant for the SLWRI. The SLWRI FEIS, no matter its faults, at least got some of its basic NEPA responsibilities right: environmental impact analysis and discussion relevant to CAWSRA is a key issue for the SLWRI/SDREP.

*The SDREP is subject to state law* — Let us review why. To the extent that the DSEIS takes the erroneous view that state law is irrelevant to federal law in the case of the SLWRI/SDREP, this DSEIS assumption is unwarranted, for federal Reclamation law requires conformance with state law:

Reclamation Act § 8 — That nothing in this Act shall be construed as affecting or is intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws...

§ 3406(a) Amendments to Central Valley Project Authorizations Act of August 26, 1937. — Section 2 of the Act of August 26, 1937 (chapter 832; 50 Stat. 850), as amended, is amended.

(4) By adding at the end the following: “(e) Nothing in this title shall affect the State's authority to condition water rights permits for the Central Valley Project.”

§ 3406(b) “The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under state and federal law, including but not limited to the federal Endangered Species Act, 16 U.S.C. § 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable

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<sup>32</sup> The previous NEPA regulations do not materially differ: “§ 1502.2 Implementation. To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner: ... (b) Impacts shall be discussed in proportion to their significance....”

licenses and permits for the project. (1992 Central Valley Project Improvement Act, § 3406(b) (in part), title 34 Public Law 102-575).

Shasta Dam is a major facility of the Central Valley Project (CVP). Reclamation is the operator of the project, but it is subject to the authority of the State Water Resources Control Board and must meet all obligations of state and federal law. Under NEPA regulations, Reclamation does have the obligation to disclose and discuss the consequences of state law requirements under the California Wild and Scenic Rivers Act for the action alternatives of this project. It disclosed the conflict with the CAWSRA and incompletely disclosed the consequences in the 2015 SLWRI FEIS. The DSEIS should have disclosed the conflict and more completely disclosed the consequences of the project's conflict with the CAWSRA, but it did not. Rather, it concealed the conflict in violation of NEPA regulations.

There is another new and significant circumstance not discussed well in the DSEIS: a new provision of Reclamation law was created in 2016 — the Water Infrastructure Improvements for the Nation Act of 2016 (WIIN).<sup>33</sup> Reclamation SLWRI DSEIS Virtual Open House, in response to mitigation questions, notes that the SLWRI is a WIIN project: "Since this project falls under the Water Infrastructure Improvements for the Nation Act,..."<sup>34</sup> Reclamation reports that the SLWRI has received pre-construction and design phase funding pursuant to the WIIN<sup>35</sup> and the Department of the Interior purports to have made a Secretarial "Determination of Readiness for Construction" under the WIIN.<sup>36</sup> The project being analyzed by the DSEIS is the SDREP, which is consequently in Reclamation's view a WIIN project. However, the WIIN requires that Reclamation comply with applicable environmental laws,<sup>37</sup> and it does not remove Reclamation's obligations to comply with state law; rather, it reaffirms them.<sup>38</sup> And if

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<sup>33</sup> <https://www.usbr.gov/mp/ncao/docs/sdrep-facts.pdf>. FOR Exhibit 11.

<sup>34</sup> [http://www.virtualpublicengagement.com/usbr\\_shasta/faqs.html](http://www.virtualpublicengagement.com/usbr_shasta/faqs.html). FOR Exhibit 11.

<sup>35</sup> SLWRI DSEIS p. 1-2.

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<https://www.friendsoftheriver.org/wp-content/uploads/2019/07/Adm-rprt-on-2018-CA-reservoir-enlargement-approps-request-ocr.pdf>, FOR Exhibit 02.

<sup>37</sup> WIIN §4007(b)(4) ENVIRONMENTAL LAWS. — In participating in a federally owned storage project under this subsection, the Secretary of the Interior shall comply with all applicable environmental laws, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

<sup>38</sup> WIIN §4007(j) "Consistency with State Law: Nothing in this section preempts or modifies any obligation of the United States to act in conformance with applicable State law." §WIIN §4012 Savings Language. Subtitle J, California, can be summarized as follows: the WIIN

the SDREP is not subject to the WIIN, it still would be subject to the other provisions of Reclamation law, which (as noted earlier) also makes Reclamation subject to the requirements of state law.

The WIIN also requires projects such as the SDREP to have cost-sharing partners (§4007(b)(2)).<sup>39</sup> As discussed in these comments, nearly any potential Reclamation non-federal cost-sharing partners are subject to state law, including the California Wild and Scenic Rivers Act. This was not disclosed in the DSEIS or other Reclamation materials associated with the DSEIS.

There has already been litigation on this subject against the SDREP's most likely cost-sharing partner.<sup>40</sup> It was filed by Earthjustice on behalf of environmental and fishery group plaintiffs (FOR et al.) and the California Attorney General, and a subsequent preliminary injunction blocking the preparation of an environmental impact report on

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should not be interpreted or implemented in a manner that preempts state law, affects obligations of the Central Valley Project Improvement Act, changes the Endangered Species Act (ESA), would cause additional adverse effects on listed fish species, and affects obligations of the Pacific Fishery Management Council under the ESA or Magnuson Stevens Act to manage California to Washington coastal fisheries.

<sup>39</sup> "According to the WIIN Act, the federal government can cover up to 50 % of the cost of the project, and a non-federal cost share partner is required to come up with the rest of the funding. A non-federal cost share partner could be water agencies, groups of water users, state agencies or private entities." [http://www.virtualpublicengagement.com/usbr\\_shasta/faqs.html](http://www.virtualpublicengagement.com/usbr_shasta/faqs.html), FOR Exhibit 11. Consequentially, departments and agencies of the state (including water districts and many other subdivisions of the state) are prohibited by the CAWSRA from assisting and cooperating with, "whether by loan, grant, license, or otherwise, any agency of the federal, state, or local government in the planning or construction" (PRC §5093.542(c)) of the SDREP. Local governments have their own responsibilities under the CAWSRA as noted in these comments. Private entities (and Reclamation) must comply with §5093.542(b) and are also subject to certain state permitting requirements on the basis of federal and state law.

<sup>40</sup> "As you may be aware, the Westlands Water District is considering participation as a non-federal cost share partner for the U.S. Bureau of Reclamation Shasta Dam Raise Project. Westlands is currently undertaking the development of an EIR to this end." (Dan Pope, Special Projects Manager, Westlands Water District) <https://www.friendsoftheriver.org/wp-content/uploads/2020/10/073-20190306-Westlands-EIR-is-to-cost-share.pdf>. (FOR Exhibit 13) Westlands Water Districts' environmental impact report being undertaken under the California Environmental Quality Act in conflict with the CAWSRA was later enjoined by a preliminary injunction and an order by the Shasta County Superior Court. (Exhibit I, Comments by NRDC et al. to the DSEIS and included by reference in these comments.)

the Shasta Reservoir Expansion Project was secured.<sup>41</sup> The appeals of this preliminary injunction was unsuccessful before the Appellate Court and the California Supreme Court.<sup>42</sup> The judgment resulted in an agreement and a court order that a California water district (Westlands) not enter into any cost-sharing agreement with Reclamation in violation of PRC §5093.542.<sup>43</sup>

The passage of the WIIN, Reclamation's apparent decision to move the SDREP forward without solving the "unresolved concerns" in the SLWRI that prevented a "recommended alternative," Reclamation's apparent intent to move this project to construction under the authority of the WIIN, the provisions of the WIIN, the status of cost-sharing partners, a broad and detailed opposition from the state, and the litigation in state court all occurred after the 2015 SLWRI FEIS and Feasibility Report. The environmental requirements imposed or reaffirmed by the WIIN on Reclamation and the constraints that state environmental law imposes on the SDREP environmental and water rights permitting and other requirements from the state, as well as the consequences of state law on cost-sharing partners, were not disclosed in the SLWRI FEIS. Their absence from a supplemental environmental impact statement that purports "to update information included in the 2015 SLWRI FEIS that is relevant to environmental concerns" (DSEIS p. 1-2) should be corrected. As it stands, the DSEIS does not meet Reclamation's obligations under NEPA to consider all new information or changed circumstances that are significant to the selection of project alternatives or may impact the environment in ways not previously considered.

In summary, state law applies to Reclamation under federal law. State law also applies to most, if not all, of Reclamation's potential cost-sharing partners. State law applies to state agencies with permitting or other requirement authority. State law prohibits state agencies from issuing approvals for the SDREP. Any supplemental EIS that seeks to update Chapter 25 of the SLWRI FEIS cannot avoid analysis of the consequences of state law. Our comments discuss this further.

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<https://www.friendsoftheriver.org/wp-content/uploads/2019/08/2019-0731-Order-Granting-PI.pdf>, and in Exhibit I, comments of NRDC et al., included by reference here.

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<https://www.friendsoftheriver.org/wp-content/uploads/2019/09/Cal-Supremes-weigh-in-on-Shasta-case-Redding-Searchlight-9-25-2019.pdf>, FOR Exhibit 14.

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<https://www.friendsoftheriver.org/wp-content/uploads/2019/11/2019-1120-Notice-of-Entry-of-Stipulated-Judgment.pdf>, and in Exhibit I, comments of NRDC et al., included by reference here.

## Chapter 5.1 Background

*DSEIS begins with small mistakes and omissions* — The DSEIS makes small mistakes or awkward descriptions:

Although the LRMP found the McCloud River eligible for listing, the LRMP direction was to not formally designate any reach of the river as wild and scenic. Instead, the direction was to manage the lower McCloud River under a CRMP (USFS 1995a). (DSEIS p. 5-3)

The Forest Service does not “designate” wild & scenic rivers. Congress does.<sup>44</sup> The direction to form a Coordinated Resources Management Plan (CRMP) was to provide measures to protect the values that make the Shasta-Trinity National Forest Land and Resource Management Plan (LRMP)-described portions of the McCloud River eligible for designation by Congress as a national wild and scenic river.<sup>45</sup> Unfortunately, in practice, the most significant threat has been the U.S. Bureau of Reclamation, something that the CRMP is apparently ill-prepared to deal with.

*The DSEIS omits much about California’s enforcement of the CAWSRA* — The DSEIS (and, to a lesser extent, the SLWRI FEIS) does not cover this critical aspect of environmental law well. For example, the DSEIS asserts the following:

California has expressed an opinion that PRC 5093.542 prohibits the State from being involved in the planning or construction of the proposed action. (DSEIS p. 5-3)

As discussed in these comments and not described in the DSEIS, not only have California officials “expressed an opinion,” but much more. As discussed earlier, NEPA regulations require disclosure that, in addition to communications with Reclamation preceding the SLWRI FEIS, California officials have sharpened and emphasized the communications of their responsibilities under the CAWSRA.

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<sup>44</sup> The other route into the federal wild & scenic river system is through an acceptance of a state wild and scenic river by the Secretary of the Interior on petition by its state governor that the river be added to the national system. (National Wild & Scenic Rivers Act §2(a)(ii))

<sup>45</sup> “A primary objective of the Plan [CRMP] is to retain the character of the waterways which made them eligible for wild and scenic river consideration.” (LRMP p. 4-28–29)



- The California Attorney General defended important aspects of the McCloud River protection in the CAWSRA from Westlands' planning and cooperation with Reclamation on Westlands/Reclamation's proposed SLWRI Shasta Dam Raise Project (SDRP)<sup>46</sup>/SDREP in state court and won a preliminary injunction in Shasta County Superior Court<sup>47</sup> expressing his "opinion" and successfully defending that preliminary injunction all the way to the California Supreme Court.<sup>48</sup>
- California Natural Resources Secretary John Laird told Congressional leadership that the project would violate California law.<sup>49</sup>
- Secretary Laird's successor, Wade Crowfoot, noted that "[t]he state's concerns center on the project's adverse impacts on the McCloud River, which is specifically protected under state law."<sup>50</sup>
- Secretary Crowfoot then mentioned the comment letter sent to Reclamation from the Department of Fish and Game, a department of the Natural Resources Agency, which reached conclusions about Westlands Water District's proposed

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<sup>46</sup> "Redding, Calif. – Westlands Water District (District) is preparing an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) for the Shasta Dam Raise Project (Project). Formerly known as the Shasta Lake Water Resources Investigation (SLWRI), the Project would increase the height of Shasta Dam by 18.5 feet and expand capacity of Shasta Lake by up to 634,000 acre feet." ("Shasta Dam Raise Project Scoping Meeting Notice," Westlands Water District, November 30, 2018, p. 1)  
<https://www.friendsoftheriver.org/wp-content/uploads/2018/12/shasta-dam-raise-eir-press-release.pdf>. FOR Exhibit 15.

<sup>47</sup>  
<https://www.friendsoftheriver.org/wp-content/uploads/2019/08/AG-Becerra-Secures-Ruling-in-Shasta-County-Halting-Westlands.pdf>, FOR Exhibit 16.

<sup>48</sup>  
<https://www.friendsoftheriver.org/wp-content/uploads/2019/09/Cal-Supremes-weigh-in-on-Shasta-case-Redding-Searchlight-9-25-2019.pdf>, FOR Exhibit 14.

<sup>49</sup>  
[https://www.friendsoftheriver.org/wp-content/uploads/2018/04/Shasta-Dam-letter-3.13.18\\_LL\\_M.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2018/04/Shasta-Dam-letter-3.13.18_LL_M.pdf), also in Exhibit H, comments of NRDC et al. on the SLWRI DSEIS, included by reference here.

<sup>50</sup>  
<https://www.watereducation.org/western-water/californias-new-natural-resources-secretary-takes-challenge-implementing-gov-newsoms>, FOR Exhibit 17.

Shasta Dam Raise Project (SDRP) action alternatives that would make them in conflict with the CAWSRA.<sup>51</sup>

- Secretary Crowfoot also referenced the State Water Resources Control Board letter, which concluded that the CAWSRA barred “the State Water Board and other agencies of the state from issuing any permit or other approval for a project that could adversely affect the free-flowing character of the McCloud River or its wild trout fishery” — adverse effects that the Board assumes in the absence of evidence otherwise.<sup>52</sup> The Board is part of the California Environmental Protection Agency for administrative purposes.
- The California State Historic Preservation Officer provided Reclamation “written notification that her office will not engage in consultation with Reclamation regarding the SDREP due to prohibitions delineated in California Public Resources Code Section 5093.542.”<sup>53</sup>

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[https://www.friendsoftheriver.org/wp-content/uploads/2019/01/CEQA-2018-0321\\_SHA\\_TEH\\_WWD\\_Shasta-Dam-Raise-Project\\_NOP-ocr.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2019/01/CEQA-2018-0321_SHA_TEH_WWD_Shasta-Dam-Raise-Project_NOP-ocr.pdf), also included in Exhibit H, comments of NRDC et al. to the SLWRI DSEIS, included here by reference.

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[https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC\\_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf) and included in Exhibit H, comments of NRDC et al. to the SLWRI DSEIS, included here by reference. These state comments, communications, and litigation should not have come as a surprise to Reclamation. “The Department appreciates the inclusion of the McCloud River as an issue that needs resolution prior to additional steps taken on the SLWRI. Raising the water level behind Shasta Dam will convert part of the McCloud River into reservoir habitat, changing the free-flowing condition of the McCloud River.” Letter to Ms. Michelle Denning, Bureau of Reclamation, Planning Division 2800 Cottage Way, MP-720 Sacramento, CA 95825-1893 and to Mr. Mark Littlefield, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room W-2605 Sacramento, CA 95825-1846, “California Department of Fish and Wildlife Comments on the U.S. Department of the Interior, U.S. Fish and Wildlife Service, Fish and Wildlife Coordination Act Report for the Proposed Shasta Dam Enlargement Project, Shasta Lake Water Resources Investigation” p. 3, February 13, 2015.

[http://www.friendsoftheriver.org/wp-content/uploads/2016/01/20150214-Fwd\\_-CDFW-cmts-Adobe-OCR.pdf](http://www.friendsoftheriver.org/wp-content/uploads/2016/01/20150214-Fwd_-CDFW-cmts-Adobe-OCR.pdf), and included in exhibit H, comments on the SLWRI DSEIS of NRDC et al., included here by reference. This letter, subsequent to the December 2014 SLWRI FEIS, was consistent with CAWSRA conflict conclusions in Chapter 25 of the FEIS, but before the publication of the July 2015 SLWRI Final Feasibility Report. It is not referenced in the DSEIS.

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[https://www.friendsoftheriver.org/wp-content/uploads/2020/10/FOR-Exhibit-18-155-Bureau\\_of\\_Reclamation-to-fed-Advisory-Council-on-Historic-Preservation-ocr.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2020/10/FOR-Exhibit-18-155-Bureau_of_Reclamation-to-fed-Advisory-Council-on-Historic-Preservation-ocr.pdf). FOR Exhibit 18.

- The California Department of Transportation apprised Reclamation of the restrictions applying to state departments and that Caltrans would be unable to participate in the Bureau of Reclamation's efforts to revise a Programmatic Agreement for Reclamation's Shasta Dam and Reservoir Enlargement Project (SDREP) for compliance with the National Historic Preservation Act.<sup>54</sup>
- The State Lands Commission wrote to the Westlands Water District that "[o]n March 13, 2018, the California Secretary of the California Natural Resources Agency wrote a letter to Congressional leaders expressing opposition to the Project and referencing California Public Resources Code section 5093.542, prohibiting state agencies and departments from assisting in the Project in any way. The Commission concurs with Secretary Laird's letter."<sup>55</sup>
- The staff of the California Water Commission, in another action also not documented by the DSEIS, in spite of requests by Reclamation to find a way around the law, excluded the Shasta Dam raise by regulation from the list of CALFED projects in the Commissions Water Supply Investment Program (WSIP), in spite of the project's presence in the CALFED project list in HR 2828, 108th Congress, the "Water Supply, Reliability, and Environmental Improvement Act." P.L. 108-361. Why? Because the California Water Bond excluded projects under the protection of the state and federal wild and scenic rivers acts from the WSIP.<sup>56</sup>

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/10/CalTrans-notice-to-Reclamation-RE-Reclamation-SDREP-NHPA-Compliance-PA.pdf> FOR Exhibit 19.

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[https://www.friendsoftheriver.org/wp-content/uploads/2020/10/SLC-2018111058\\_Shasta-Dam-Raise\\_NOP\\_CommentLetter\\_final-ocr.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2020/10/SLC-2018111058_Shasta-Dam-Raise_NOP_CommentLetter_final-ocr.pdf), also in comments NRDC et al. Exhibit H, incorporated here by reference.

<sup>56</sup>California Water Bond Act, Chapter 4, 79711(e) "Nothing in this division [bond act] shall be construed to affect the California Wild and Scenic Rivers Act (Chapter 1.4 (commencing line 5 with Section 5093.50) of Division 5 of the Public Resources Code) or the federal Wild and Scenic Rivers Act (16 U.S.C. Sec. 1271 line 7 et seq.) and funds authorized pursuant to this division shall not be available for any project that could have an adverse effect on the values upon which a wild and scenic river or any other river is afforded protections pursuant to the California Wild and Scenic Rivers Act or the federal Wild and Scenic Rivers Act." By regulation (California Code of Regulations Title 23. Waters. Division 7. California Water Commission, Chapter 1 Water Storage Investment Program, §6001(a)(10)), the Shasta Dam Project was excluded from the California Water Commission list of Water Supply

- The State Water Resources Control Board entertained a hypothetical for Westlands and Reclamation’s benefit (after describing the unlawful nature of the hypothetical), again demonstrating the infeasibility of the project:

In addition to prohibiting cooperation in the planning of a project that could adversely affect the free-flowing condition of the McCloud River, section 5093.542 of the Public Resources Code prohibits assistance or cooperation by “license, or otherwise.” This language bars the State Water Board and other agencies of the state from issuing any permit or other approval for a project that could adversely affect the free-flowing character of the McCloud River or its wild trout fishery....

If the proposed Project could proceed in compliance with the Wild and Scenic Rivers Act, the proposed Project would require time extensions for several water right permits. Water diversion and storage at Shasta Dam is regulated by the State Water Board pursuant to Reclamation water right Permits 12720, 12721, 12722, 12723, and 12724 (Applications 5625, 5626, 9363, 9364, and 9365, respectively). Reclamation's water right permits include a deadline to complete construction work by December 1, 1985, and a deadline to complete application of the water to beneficial use by December 1, 1990. Construction activities involving expanding the capacity of Shasta Reservoir, which would allow for increase in beneficial use under the permits, cannot commence unless and until the State Water Board approves extensions of time for Reclamation's water rights. (Wat. Code, §§ 1397, 1398.) Reclamation previously filed petitions

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Investment Program CALFED projects. Staff explained the exclusion: “Shasta Enlargement has been removed from the eligible projects list. Although certain CALFED projects are deemed eligible under Section 79751 (a), the exception in this Section incorporating by reference prohibitions in the Wild and Scenic Rivers Act, including Section 5093.542(c) of such Act, would preclude the enlargement of Shasta Dam from being an eligible project under current law.” [https://cwc.ca.gov/-/media/CWC-website/Files/Documents/2015/07\\_July/July2015\\_Agenda\\_Item\\_13\\_Attach\\_2\\_Summary\\_of\\_SA\\_C\\_Comment\\_Letters.pdf](https://cwc.ca.gov/-/media/CWC-website/Files/Documents/2015/07_July/July2015_Agenda_Item_13_Attach_2_Summary_of_SA_C_Comment_Letters.pdf), FOR Exhibit 20.

with the State Water Board requesting extensions of time until December 2030 to complete construction and use pursuant to the water right permits. The petitions have been publicly noticed and numerous protests of the proposed time extensions remain active. CEQA compliance is also necessary before the State Water Board can approve the time extensions.<sup>57</sup>

California and its courts have done more than express an opinion. Comments on the DSEIS prepared by NRDC et al. (adopted here) provide some additional insight into the relevance of California's opinion:

Reclamation's interpretation of state law is not entitled to deference. See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (granting no deference to federal board's interpretation of state law); see also *Baber v. Schweiker*, 539 F. Supp. 993, 995 (D.D.C. 1982) (finding that deference does not attach to an agency's interpretation of state law); see also *Soliman v. Gonzales*, 419 F.3d 276, 281 (4th Cir. 2005) (holding that federal agency's interpretation of state law was not entitled to deference). Rather, it is the State's interpretation of the law which is entitled to deference. See *Lincoln Am. Corp. v. Victory Life Ins. Co.*, 375 F. Supp. 112, 118 (D. Kan. 1974) ("an interpretation of state law by a state agency delegated the responsibility of enforcing that law, is entitled to great weight.")

These events occurred after the SLWRI FEIS (or were not discussed in the SLWRI FEIS), and although they should have been anticipated in 2015, most were not. The DSEIS should have covered these matters as part of its commitment "to update information included in the 2015 SLWRI FEIS that is relevant to environmental concerns." (DSEIS p. 1-2)

***Problems with the DSEIS conclusion that California's views on state law are not relevant, and DSEIS background information on CAWSRA is flawed*** — The DSEIS repeats its contrary-to-regulation and facts conclusion that a CAWSRA analysis is irrelevant to a NEPA analysis:

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[https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC\\_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf](https://www.friendsoftheriver.org/wp-content/uploads/2019/01/WQC_NFisch.JKSahota.-Comments-on-Shasta-Dam-Raise-Project.pdf) pp. 2 and 3. Also included in exhibit H, comments on the SLWRI DSEIS of NRDC et al., included here by reference.

Reclamation does not believe California's views are relevant for the purposes of this NEPA analysis. However, because Reclamation previously addressed PRC 5093.542 in the 2015 SLWRI FEIS, it is addressed here as background information. (DSEIS p. 5-4)

As discussed in these comments, California has more than a view. It has laws and obligations and responsibilities to follow and enforce. So does Reclamation under federal law with respect to state law. California law is therefore relevant to an SLWRI NEPA analysis under NEPA regulations,<sup>58</sup> as well as other Reclamation SLWRI decision documents. The DSEIS chapter 5 background information provided does not repeat earlier DSEIS statements that the DSEIS chapter 5 is apparently meant to revise chapter 25 of the SLWRI FEIS, the latter where at least some analysis of California law was made. Not providing an analysis of California law in the SLWRI is contrary to NEPA regulations.

The DSEIS background discussion needs to be well done. Instead, the DSEIS stumbles badly attempting to provide background on the legislature's action providing provisions on the McCloud River in the California Wild & Scenic Rivers Act. The stumbling begins with the following:

The legislature instead passed an amendment to the California Wild and Scenic Rivers Act to protect the river's wild trout fishery below McCloud Dam, PRC Section 5093.542. (DSEIS p. 5-4)

As noted earlier, this PRC section also applies protections to the McCloud River above the McCloud Reservoir as well (§5093.542(b) (Algoma to Huckleberry Creek)). Here, as well as elsewhere in the DSEIS, the DSEIS fails to explain that the river's free-flowing status is protected by the CAWSRA, contrary to NEPA regulations, and a deficiency described in our comments and not encountered to this degree in the parallel section of Chapter 25 of the SLWRI FEIS. The DSEIS then proceeds:

The PRC was a compromise between the landowners and the State and served to prevent an energy company from constructing three small dams along the river. These structures were planned in the upper watershed of the McCloud and specifically cited in 5093.542(b). (DSEIS p. 5-4)

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<sup>58</sup> As discussed earlier in these comments, NEPA regulations require Reclamation to discuss potential conflicts with state law. See 40 CFR 1502.16(c) and 1506.2(d).

The legislature's concerns about these proposed dams were part of the reason for the enactment of §5093.542. However, "these structures" are not cited anywhere in subdivision (b) or anywhere in §5093.542, specifically or otherwise, contrary to this assertion in the DSEIS. However, the next subdivision, §5093.542(c), does mention a specific project: the Shasta Dam raise, obviously a concern in the legislature. This subdivision provides exclusive and narrow relief for DWR from certain broad provisions that would otherwise apply to it prohibiting cooperation with any agency of the federal government on the Shasta Dam raise. The prohibition applies to departments and agencies of the state, including DWR (with the two study exceptions for DWR). The supplemental environmental impact statement should be corrected. The DSEIS then continues with a notable and misleading omission and apparent misunderstanding of the California Wild & Scenic Rivers Act:

However, the legislature separately addressed DWR's participation in the feasibility of enlarging Shasta Dam, authorizing DWR to participate in technical and economic feasibility studies while directing that the agency could not assist or cooperate with planning of *any other* projects involving construction of a dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River or on its wild trout fishery (PRC Section 5093.542). (DSEIS p. 5-4) (emphasis added)

The DSEIS passage here (and the immediately following one subsequently discussed in these comments) may be interpreted that the assist or cooperate prohibition on DWR only applies to other projects but NOT the Shasta dam raise. In concert with the next statement of the DSEIS, subsequently discussed in these comments, the above DSEIS passage can also be read that the CAWSRA only prohibits assistance and cooperation with projects *other* than the Shasta Dam raise. Both assertions are incorrect.

To be clear, the DSEIS is referring to PRC §5093.542(c), which provides DWR an exclusive but narrow exception for DWR's technical and economic feasibility studies of enlarging Shasta Dam from the §5093.542(c) prohibition on cooperation with Reclamation on the SLWRI/SDREP. Clearly, such studies or other assistance and cooperation with Reclamation on the SLWRI would otherwise be prohibited for any department or agency of the state under this CAWSRA code subdivision.

To say it again, the DSEIS omits that (with the narrow exception of DWR) any assistance by departments and agencies of the state to Reclamation on the planning and construction of the Shasta Dam raise is prohibited since this project (in the eyes of the



legislature) could adversely affect the wild trout fishery and rather unambiguously the free-flowing condition of the river at the site of the expanded reservoir.

The SLWRI FEIS and even the DSEIS establish these “adversely affect” or “potentially adverse effect” determinations. To clarify further, DWR is a department of the state, and §5093.542(c) applies to departments and agencies of the state. The DSEIS’s apparent contention that §5093.542(c) only prohibits DWR from participating in other reservoir projects on the McCloud is contrary to the plain language of the statute, DWR’s and the state’s reading<sup>59</sup>, the SLWRI FEIS chapter 25 reading, the California Attorney General’s reading, and the Shasta County Superior Court’s reading.

*The DSEIS fails to understand the breadth of the CAWSRA* – The SLWRI FEIS and the DSEIS fail to disclose and discuss the breadth and reach of the CAWSRA to the actions of state agencies. In addition to the breadth and reach of §5093.542(b) & (c), the following CAWSRA McCloud River code section is never mentioned or discussed.

§5093.542(d) All state agencies exercising powers under any other provision of law with respect to the protection and restoration of fishery resources shall continue to exercise those powers in a manner to protect and enhance the fishery of those segments designated in subdivision (b).

The SLWRI FEIS and the DSEIS fail to disclose and discuss that DWR and state departments and agencies are not the only parties prohibited from assisting Reclamation on this project. The California Government Code and Water Code define certain political subdivisions of the state as agencies of the state. They include special districts,<sup>60</sup> of which many are Reclamation water-service and repayment contractors. They would

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<sup>59</sup> At the risk of repeating this again, Reclamation knew this once too, although it conflated the DWR with the state and the governor of the state.

From discussions with the State, it is our understanding there has been a determination that the PRC protecting the McCloud River prohibits State participation in the planning or construction of enlarging Shasta Dam other than participating in technical and economic feasibility studies. (SLWRI Final Feasibility Report, p. 9-2) (emphasis added)

<sup>60</sup> See Cal. Gov. Code § 16271(d) and Cal. Water Code § 37823.



also include many State Water Project contractors. The CAWSRA also imposes obligations on local government agencies.<sup>61</sup>

§5093.542(c) is easy to understand if read in its entirety:

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 other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

*The DSEIS appears to adopt a reading of CAWSRA in complete conflict with the statutory language* — The DSEIS then expresses an opinion that §5093.542(c) should be read in the exact opposite way it is written:

In other words, the legislature specifically excepted enlargement of Shasta Dam from the prohibition on assisting or cooperating in projects such as the facilities identified in PRC Section 5093.542(b). (DSEIS p. 5-4)

No, it did not. That is not the meaning of, except for DWR's technical and economic studies on the Shasta Dam raise, "no department or agency of the state shall assist or cooperate with...any agency of the federal...government..." We should not have to remind Reclamation that this matter has already been before the state courts, and a large CVP contractor found its actions to assist and cooperate with Reclamation in the planning of the Shasta Dam raise contrary to CAWSRA enjoined. The DSEIS's contention here is without support.

In addition, §5093.542(b) has nothing to do with prohibiting cooperation and assistance with specific (Reclamation's reading) facilities "mentioned" in it. No *specific* facilities are mentioned in §5093.542(b) as asserted earlier in DSEIS p. 5-4 and perhaps implied here.

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<sup>61</sup> PRC §5093.61: All local government agencies shall exercise their powers granted under any other provision of law in a manner consistent with the policy and provisions of this chapter. §5093.50: It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. (emphasis added, "chapter" is the CAWSRA)

Rather, §5093.542(b) establishes the geographic extent of and the no-new-reservoir prohibition. Subdivision (b) makes no distinction among local, state, or federal agencies. It is applicable to everyone, including Reclamation and DWR. Specific facilities (the Shasta Dam raise) are mentioned in §5093.542(c). §5093.542(c) imposes a no-cooperation-or-assistance prohibition on departments and agencies of the state on the enlargement of Shasta Dam (and other projects that would impair free-flowing and the wild trout fishery), while providing an exception for DWR to conduct technical and economic feasibility studies for the enlargement of Shasta Dam. It could not be clearer. The Shasta County Superior Court found it to be clear and reached the opposite conclusion regarding §5093.542(c) reached by the DSEIS excerpt above:

The Shasta Dam by its very nature can limit the McCloud River's free-flowing state by converting free-flowing waters into reservoir waters. Even the language of the statute confirms this point, as section 5093.542, subdivision (c) begins, "Except for participation by the Department of Water Resources in studies involving the technical and economic feasibility of enlargement of Shasta Dam..." If the State Legislature did not believe that the Shasta Dam could have an impact on the McCloud River's free-flowing state, then it would not have felt the need to carve out an exception for studies performed by the Department of Water Resources involving enlargement of the Shasta Dam.<sup>62</sup>

Again, (§5093.542(b)) does, of course, prohibit the construction of a reservoir on the river segment that the SDREP would convert to part of the "reservoir waters." This subdivision does not mention any specific projects.<sup>63</sup> Both subdivisions (b) and (c) are relevant to the SLWRI, the first (b) applying most obviously to Reclamation, the second

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<sup>62</sup> PEOPLE VS. WESTLANDS WATER DISTRICT Case Number: 192487, Tentative Ruling on Preliminary Injunction, Shasta County Superior Court. (August 2019) pp. 11–12. <https://www.friendsoftheriver.org/wp-content/uploads/2019/08/2019-07-28-Tentative-Ruling-on-PI.pdf>. Also included in Exhibit I, NRDC et al. comments on the DSEIS, adopted here by reference. The injunction was against Westlands' environmental impact report to support a potential decision to cost share with Reclamation on the Shasta Dam Expansion Project.

<sup>63</sup> A specific project is mentioned in another subdivision of §5093.542: "(e) Nothing in this section shall prejudice, alter, affect in any way, or interfere with the construction, maintenance, repair, or operation by the Pacific Gas and Electric Company of the existing McCloud-Pit Development (FERC 2106) under its license, or prevent Pacific Gas and Electric from constructing a hydroelectric generating facility by retrofitting the existing McCloud Dam if the operation for the facility does not alter the existing flow regime below the dam." §5093.542(e)

(c) (and §5093.61, not discussed in the SLWRI) applying to state departments and agencies and most of the state’s relevant political subdivisions. Subdivisions (a) and (b) (and §5093.61), though complementary, should not be confused.

The DSEIS continues with its aberrant reading of the California Wild & Scenic Rivers Act:

Emphasizing the point, the legislature referred to the Shasta Dam project as an “enlargement,” and separately referenced other projects as construction of “any dam, reservoir, diversion, or other water impoundment facility” [PRC Section 5093.542(b),(c)]. (DSEIS p. 5-4)

Irrelevant and a misreading of the statute. Again, §5093.542(b) imposes the prohibition on reservoir construction that would invade the protected portions of the McCloud River and defines the river reaches for which new reservoir construction is prohibited. It does not reference any projects by name. §5093.542(c) specifically references the Shasta Dam enlargement and establishes the special responsibilities of departments and agencies of the state to not assist and cooperate with Reclamation in the planning of and enlargement of Shasta Dam or other projects that could adversely affect the wild trout fishery and free-flowing nature of the McCloud River.

*Our comments help to explain CAWSRA* — The DSEIS analysis is at best incoherent and at worst seems as if an attempt to mislead. The DSEIS should be corrected. Perhaps a greater familiarity with the state and federal wild and scenic river systems could illuminate.

The introduction the McCloud River provisions of CAWSRA Act are as follows:

5093.542. The Legislature finds and declares that the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state. Portions of the river have been appropriately designated by the Fish and Game Commission, pursuant to Chapter 7.2 (commencing with Section 1725) of Division 2 of the Fish and Game Code, as wild trout waters, with restrictions on the taking, or method of taking, of fish. The Legislature has determined, based upon a review of comprehensive technical data evaluating resources and potential beneficial uses, that potential beneficial uses must be balanced, in order to achieve protection of the unique fishery resources of the McCloud River, as follows: (a) The continued management of river resources in their existing natural condition represents the best way to protect the unique

fishery of the McCloud River. The Legislature further finds and declares that maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters of the McCloud River within the segments designated in subdivision (b), and is a reasonable use of water within the meaning of Section 2 of Article X of the California Constitution.

It is a special version of the introduction to the CAWSRA:

5093.50. It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.

This CAWSRA introduction was modeled after the introduction to the National Wild & Scenic Rivers Act (WSRA):

§1(b) It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes.

PRC §5093.542(b) is modeled after PRC §5093.55:

Other than temporary flood storage facilities permitted pursuant to Section 5093.57, no dam, reservoir, diversion, or other water

impoundment facility may be constructed on any river and segment thereof designated in Section 5093.54;

PRC §5093.55 is modeled after a portion §7 of the National Wild & Scenic Rivers Act. These matters are discussed in a Wild & Scenic River Coordination Council technical memo. First, here is the first relevant WSRA statutory language:

The Federal Power Commission [FERC] shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 3 of this Act as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, ...

Reservoirs are fundamentally in conflict with the purposes of these two wild & scenic rivers acts since they are the very opposite of free-flowing. That is why the construction of new reservoirs under either statute is prohibited. Just as the officials in California and Chapter 25 of the SLWRI FEIS have concluded that the Shasta Reservoir expansion would be in conflict with the CAWSRA, FERC and federal wild and scenic river managers have concluded that expansion of reservoirs into federal wild and scenic rivers would be in conflict with the WSRA.<sup>64</sup>

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<sup>64</sup> "Implementing the Wild & Scenic Rivers Act: Authorities and Roles of Key Federal Agencies" Council Contact: Jackie Diedrich U.S. Forest Service Portland, Oregon, Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council (FOR Exhibit 22):

Coordination Processes: The Commission has a three-stage consultation process for hydro-power licensing that requires applicants for a license or applicants seeking an exemption to identify any potential conflicts between the project and any WSR prior to filing. If a conflict is identified, the proponent seldom files an application.

Once an application is filed, the FERC routes applications for preliminary permits, licenses and exemptions from licensing for proposed hydroelectric facilities to the river-administering agencies for determination of whether the project is 'on or directly affecting' a designated WSR or congressionally authorized study river. If the river-administering agency determines that any project would be "on or directly affecting" a designated WSR or congressionally authorized study river, the permit, license or exemption application may be dismissed without further processing. FERC recreation and land use staff also maintain copies of the current list of designated WSRs or congressionally

§5093.542(c) is modeled after PRC §5093.56.

No department or agency of the state may assist or cooperate, whether by loan, grant, license, or otherwise, with any department or agency of the federal, state, or local government, in the planning or construction of a dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition and natural character of the river and segments thereof designated in Section 5093.54 as included in the system.

§5093.56 was modeled after another part of §7 of the WSRA

[N]o department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. (p. 14)

These matters are discussed in an Interagency Wild & Scenic River Coordination Council “Section 7” technical memo, matters that also bear on what would be a conflict with the similar provisions of the CAWSRA.<sup>65</sup> With regard to a reservoir expansion onto a WSRA-protected river, the Coordination Council technical memo assessment on whether there is a violation of the WSRA and that the project needs to be modified or dropped is short:

The initial question to be addressed is whether or not the proposed project invades the designated river. The term invade is defined as encroachment or intrusion upon. If the project is determined to invade the designated river, the proponent would be advised to develop measures to eliminate this unacceptable effect. (p. 29)

With regard to what “construction” is under the WSRA, the Interagency “Section 7” technical memo is also clear:

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authorized study rivers as a basis to identify whether a project has the potential to conflict with the WSRA. (p. 14)

<sup>65</sup> “Wild & Scenic Rivers Act: Section 7” October 2004, Council Contact: Jackie Diedrich U.S. Forest Service Portland, Oregon, Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council. (FOR Exhibit 23)

The Act does not define the terms expressed in Section 7; however, the Department of Agriculture has codified regulations for Section 7 at 36 CFR 297, including definitions. The following definitions are based on 36 CFR 297 and additional interpretation by the river-administering agencies:

Construction: Any action carried on with federal assistance affecting the free-flowing characteristics or the scenic or natural values of a wild and scenic river or congressionally authorized study river. (p. 3)

Again, the primary goals of the CAWSRA and federal WSRA are clear, to protect free-flowing rivers. Both statutes have both been in existence for around half a century. An Interagency Wild & Scenic River Coordinating Council exists and includes a Bureau and two Services within the Department of the Interior. The Forest Service is a Council member from the Department of Agriculture.<sup>66</sup> The State of California implements its wild and scenic rivers act. Professionals within the Council and the state can provide expert guidance for Reclamation and should have been involved in the DSEIS.

Reservoir expansions into rivers protected by these statutes are contrary to law. The conclusion of the SLWRI FEIS chapter 25 was clear that the SLWRI action alternatives are in conflict with the CAWSRA. The DSEIS appears to be an attempt to omit the SLWRI FEIS chapter 25's conclusion (while at the same time providing the analysis to support a conclusion of an SDREP conflict with the CAWSRA). As discussed in these comments, the DSEIS attempt to avoid reaching and, indeed, omitting obvious SLWRI FEIS conclusions about the impact of its project on the CAWSRA is in conflict with law and regulation.

*Untangling the DSEIS federal wild & scenic river review history* – The DSEIS, nevertheless, goes on to garble the federal history some more:

The USFS defined the lower McCloud River as the portion of the river that is currently periodically inundated by Shasta Lake – referred to in this chapter as the transition reach – as part of the lake rather than part of the river. The USFS defined the lower river as extending from McCloud Dam downstream to an elevation of 1,070 feet mean sea level (msl) (approximately 22 total river miles), which corresponds to the current full-pool elevation of Shasta Lake. The USFS determined that this portion of

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<sup>66</sup> FOR Exhibit 24.

the river does not meet the definition of natural or free flowing because it is downstream of McCloud Dam and some portions of the river offer public access. (p. 5-4)

Looking at the first sentence above, the US Forest Service did not define the lower McCloud as the reach periodically inundated by Shasta “Lake.” The Forest Service defined the Lower McCloud River to be the reach from below the PG&E McCloud Dam to the gross pool of Shasta Reservoir. It is true that the Forest Service properly considered what was defined in the SLWRI FEIS Chapter 25 as the “transition reach” (the portion of the McCloud Arm of Shasta Reservoir between the upper limit of the reservoir in a statistical critical dry year and gross pool)<sup>67</sup> to be part of Shasta Reservoir — as noted in the second sentence. Here, the second sentence got it right in the context of WSRA — and is therefore in conflict with the first sentence. Again, the portion of the first DSEIS sentence defining (for SLWRI purposes) the so-called “transition reach” as the portion of the “Lake” periodically inundated by the reservoir and the second sentence are mostly correct;<sup>68</sup> the Forest Service considered the McCloud Arm of Shasta Lake below gross pool as part of the “lake” (SLWRI FEIS p. 25.4). However, the meaning of the final DSEIS sentence above is obscure. If the demonstrative pronoun “this” is intended to refer to the upper McCloud Arm of Shasta Reservoir, it is correct that this portion of “river” was properly determined to not be free-flowing in the context of the WSRA by the USFS. However, the reason for the USFS determination was because the upper McCloud Arm of Shasta Reservoir is inundated by the gross pool of Shasta Reservoir (and thus not free-flowing). It was not because the “transition reach” is downstream of the McCloud Dam or because there was public access as stated by the DSEIS. The DSEIS provides no evidence for this statement. The DSEIS gets this right in a later page.<sup>69</sup>

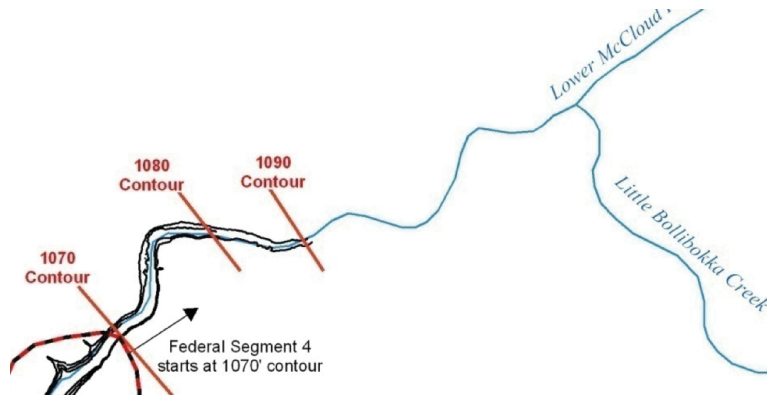
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<sup>67</sup> SLWRI FEIS chapter 25, p. 25-5.

<sup>68</sup> The imprecise phrase “periodically inundated by the reservoir” to be equal to the “the transition reach” is, of course, incorrect. A moments thought would reveal that the McCloud Arm of Shasta Reservoir extends farther down the ancestral McCloud River than the *high-water mark* of a statistical critical dry year.

<sup>69</sup> “The upper extent of the lake encompasses the transition reach, which varies between about 920 and 1,070 feet msl. Because of the effects of Shasta Lake on the McCloud Arm, the STNF determined that the transition reach did not meet the eligibility requirements of a wild and scenic river (USFS 1994). The USFS defined the upper limit of the McCloud Arm as an elevation of 1,070 feet, or approximately 5,400 feet above the McCloud River Bridge. This elevation corresponds to the lower limit of Segment 4 as defined in the STNF LRMP.” (DSEIS p. 5-12)





Excerpt from Figure 5.2 SLWRI FEIS and SLWRI DSEIS showing expansion of Shasta "Lake" from elevation 1070' gross pool to elevation 1090' gross pool

It is noteworthy, however, that the DSEIS got the following nearly right:

The USFS concluded that all 10 segments of the McCloud River were eligible for listing as a Federal wild and scenic river because they are free flowing, possess good water quality, and exhibit ORVs in the areas of cultural and historical resources, fisheries, geology, and scenic resources. (DSEIS p. 5-7)

The DSEIS got the following paragraph right (although the second sentence may have a need for clarification):

Part of the lowermost segment – Segment 4 – would be periodically inundated if Shasta Lake is expanded. Segment 4 extends from about 5,400 feet upstream from the McCloud River Bridge, beginning at an elevation of 1,070 feet msl, to about Little Bollibokka Creek. The lower extent of this segment corresponds with the current full-pool elevation of Shasta Lake ... (DSEIS p. 5-5)

With regard to the second sentence, the Figure 5.2 DSEIS map depiction of the proposed enlarged Shasta Reservoir (gross pool of elevation 1090') is not consistent with the preceding DSEIS full-pool estimate of "about Little Bollibokka Creek."<sup>70</sup> Elevation 1,070 (gross pool) is some distance from Little Bollibokka Creek, perhaps 1.5 to 2 miles

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<sup>70</sup> Chapter 25 of the SLWRI FEIS also seems to interpret the about "to the confluence with Little Bollibakka Creek" rather broadly. The writers of both the DSEIS and FEIS could have done better here.

downstream of the Little Bollibokka Creek confluence with the McCloud River. This is depicted rather clearly in the Reclamation maps.

## **Chapter 5.2 Regulatory Framework**

### **5.2.1 Federal**

*Classification vocabulary* — The DSEIS can be imprecise in its descriptions of the National Wild & Scenic Rivers Act (WSRA). The DSEIS should describe the statute and federal regulations and guidance more completely.

Depending on the specific conditions of a river, it may be designated as “wild,” “scenic,” or “recreation [sic].” Different segments of a single river can receive different designations; in other words, some segments can be designated wild, some scenic, and some recreation [sic] or combinations of these designations.

The DSEIS is trying to describe “classification,” not “designation,” and it does this with errors. There is no “recreation” classification. There is a “recreational” classification. Classification is, in fact, predominantly done on the basis of shoreline development and road access, not on whether the river and its viewshed are scenic or used recreationally. The authors of the DSEIS should familiarize themselves with “A Compendium of Questions & Answers Relating to Wild & Scenic Rivers – A Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council” (Compendium) and other technical reports of the Interagency Council. (FOR Exhibit 25)

Once determined eligible, river segments are tentatively classified for study as either wild, scenic, or recreational based on the level of development of the shoreline, watercourse and access at the time of river is found eligible. (Compendium p. 20)

The DSEIS provides an incomplete description of §5(d)(1) of the WSRA:

The Federal WSRA does not prohibit water developments that may affect portions of rivers that are eligible for inclusion in the National Wild and Scenic Rivers System. Section 5(d)(1) of the act does, however, require that in all planning for the use and development of water and related land resources, consideration be given to potential national wild, scenic, and recreational river areas by all Federal agencies involved. (DSEIS p. 5-7)

**§5(d)(1) responsibilities** — This DSEIS WSRA §5(d)(1) explanation of federal practice is not particularly clear or complete. The Council’s “Compendium of Questions & Answers” referenced above should be helpful to the supplemental environmental impact statement:

In response to Section 5(d)(1) of the Act, administering agencies also involve the public in the determination of potential WSRs through normal inventory and study processes. (p. 15)

When is a river or river segment evaluated for eligibility for possible inclusion in the National System? There are three instances when federal agencies assess eligibility: 1) at the request of Congress through specific authorized studies; 2) through their respective agency inventory and planning processes; or 3) during NPS evaluation of a Section 2(a)(ii) application by a state. River areas identified through the inventory phase are evaluated for their free-flowing condition and must possess at least one ORV. (p. 17)

The 1994 Shasta-Trinity National Forest Land and Resource Management Plan (LRMP) was the §5(d)(1) planning process mentioned in instance (2) above that resulted in the McCloud River eligibility determination. The Council’s “Compendium” provides greater insight than the DSEIS about how federal agencies protect rivers found to be eligible in the §5(d)(1) planning process.

A river identified for study under Section 5(d)(1) is protected by each agency’s policy; i.e., the Act provides no statutory protections. To the extent of each agency’s authority, the river’s free-flowing condition, water quality, ORVs and classification are protected.

This Compendium is reflected in Section 12 of Forest Service Regulations:

Management Guidelines: Water Resources Projects (Water Supply/Flood Control).

Wild, Scenic, Recreational. Development of water supply dams, diversions, flood control works, and other water resources projects on a section 5(a) study river shall be analyzed under section 7(b) of the Act. A water resources project is defined in 36 CFR part 297 as the construction of developments that affect the river's free-flowing characteristics. Water resources projects determined to have a direct and adverse effect on river values (free-flow, water quality, and outstandingly remarkable values)

under section 7(b) are prohibited. Water resources projects proposed on a section 5(d)(1) study river are not subject to section 7(b), but will be analyzed as to their effect on a river's free-flow, water quality, and outstandingly remarkable values, with adverse effects prevented to the extent of existing agency authorities (such as special-use authority).

§5(d)(1) also clearly mandates federal agencies to consider federal wild and scenic protection as an alternative to water resources development. The subsection requires the following:

“In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic, and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss such potentials.”

The subsection also directs the Interior and Agriculture Secretaries to “make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of water and related land resources involved.” The §5(d)(1) direction is particularly pertinent to the SLWRI since the Forest Service is committed to recommend the eligible segments of the McCloud River for federal wild and scenic river designation if the CRMP fails and the river’s eligibility is threatened.<sup>71</sup>

The federal mandate to consider wild and scenic protection in “all planning for the use and development of water and related land resources” and as “potential alternative uses of water and related land resources,” applies not only to the McCloud River but other streams and rivers that flow into the existing Shasta Reservoir. Other free-flowing streams flowing into Shasta Reservoir that will also be flooded by the reservoir enlargement include (but are not limited to) segments of the upper Sacramento River, Pit River, and Squaw Creek.

The Sacramento River from Box Canyon Dam to the Whiskeytown-Shasta-Trinity National Recreation Area (WSTNRA) was determined to be eligible by the Forest Service. The river is free-flowing and possesses outstandingly remarkable fish and

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<sup>71</sup> Forest Service 1995, Shasta-Trinity National Forests Land and Resource Management Plan (LRMP), pg. 3-23.

scenery values.<sup>72</sup> But this eligible stream was not recommended by the agency for wild and scenic due to the limited National Forest lands on the river upstream of the WSTNRA.<sup>73</sup> Nevertheless, §5(d)(1) demands its reconsideration as an alternative to water resources development.

This requirement also applies to the Pit River upstream of the current Shasta Reservoir and Squaw Creek. Potential outstandingly remarkable values of these stream segments include scenery, wildlife (TES species), botany (Shasta snow-wreath and other rare plants), and Native American cultural values. The Forest service believes that Squaw Creek “rivals the McCloud for attractiveness” (a possible outstandingly remarkable scenery value).<sup>74</sup> In addition, the management area through which Squaw Creek flows “contains significant cultural and historical values” (a possible outstandingly remarkable cultural value).<sup>75</sup> Unfortunately, the Forest Service has not assessed Squaw Creek or the Pit River for their wild and scenic eligibility and suitability. But §5(d)(1) requires this assessment in response to the SLWRI, as it does for reconsideration of wild and scenic eligibility and suitability of the McCloud and Sacramento Rivers.

There is existing precedent in California for Reclamation meeting the requirements of §5(d)(1) in regard to water resource projects. While studying the feasibility of the proposed Auburn Dam project on the North and Middle Forks of the American River, Reclamation implemented §5(d)(1) by convening a multi-agency interdisciplinary team that included Reclamation, Army Corps of Engineers, Forest Service, BLM, and the California Department of Parks and Recreation (all of which managed public lands or possessed regulatory authority within the Auburn Reservoir take-line). The §5(d)(1) assessment ultimately found 23 miles of the Middle Fork American and 21 miles of the North Fork American to be eligible because they are free flowing and possess outstandingly remarkable scenery, recreation, fish, wildlife, cultural, and ecological values.<sup>76</sup>

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<sup>72</sup> Forest Service 1995, Shasta-Trinity National Forests LRMP, FEIS Appendix E- Wild & Scenic Rivers Evaluation, Table E-2, p. E-17, 1995.

<sup>73</sup> Forest Service 1995, Shasta-Trinity National Forests LRMP FEIS Record of Decision (ROD) p. 17.

<sup>74</sup> Forest Service 1953 & 2014, Shasta Lake Recreation Area Development Plan, Management Guide Shasta and Trinity Units, p. 2-159.

<sup>75</sup> Forest Service 1995, Shasta-Trinity National Forests LRMP, p. 4-129.

<sup>76</sup> Bureau of Reclamation 1993, *Determination of Wild and Scenic Eligibility of Segments of the American River*.

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/auburn\\_dam/ex](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/auburn_dam/ex)

Reclamation has not appeared to have considered such Reclamation assessments in the SLWRI.

*National Rivers Inventory status and responsibilities* — The National Rivers Inventory was also prepared under the authority of §5(d)(1).<sup>77</sup> The upper and lower McCloud River are still part of the inventory.<sup>78</sup> Federal agencies have some specific guidance on proposed projects in the National Rivers Inventory (NRI):

The Council on Environmental Quality (CEQ), under 5(d)(1) Wild and Scenic River Act authority, provides guidance to federal agencies with permitting and/or granting authority for projects on or near rivers listed on the NRI. In accordance with executive memorandum, all agencies must “take care to avoid or mitigate adverse effects” to rivers identified in the Nationwide Rivers Inventory.<sup>79</sup>

The National Park Service website offers additional guidance.<sup>80</sup>

1. Determine whether the proposed action could affect an NRI river.
  - Check the current regional/state NRI list to determine whether the proposed action could affect an NRI river (i.e., is the proposed action location in the vicinity of the NRI segment).
  - If an NRI river segment could be affected by the proposed action, an environmental assessment or and environmental impact statement may be required depending on the significance of the effects.

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[hibits/x\\_26.pdf](#). FOR Exhibit 26.

<sup>77</sup> “...The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved.” (§5(d)(1)

<sup>78</sup> <https://www.nps.gov/maps/full.html?mapId=8adbe798-0d7e-40fb-bd48-225513d64977>, included by reference.

<sup>79</sup> <https://www.nps.gov/subjects/rivers/consultation-instructions.htm>, (last updated February 27, 2019), adopted here by reference.

<sup>80</sup> Ibid.

2. Determine whether the proposed action could have an adverse effect on the natural, cultural, and recreational values of the NRI segment. These values are listed as “outstandingly remarkable values” (ORVs) on the state NRI list. Adverse effects on NRI rivers may occur under conditions which include, but are not limited to:

- Destruction or alteration of all or part of the free flowing nature of the river;
- Introduction of visual, audible, or other sensory intrusions which are out of character with the river or alter its setting;
- Deterioration of water quality; or ...

The Forest Service Handbook provides direction to Forest Service managers. It provides direction for management of NRI rivers.

§2354.62: Management of NRI Rivers — Rivers occurring within the National Forest and listed in the National Rivers Inventory must be protected to the extent initial studies indicate the river has outstanding values and therefore is eligible for designation by Congress....

Neither the SLWRI nor the DSEIS disclose the NRI status or management direction to federal agencies. The federal status, direction, and consequences should have been comprehensively disclosed in the SLWRI Feasibility Report and NEPA documents. These matters are relevant to the discussion of WSRA §5(d)(1), as well as specific responsibilities of the Forest Service and other federal agencies, including Reclamation.

The DSEIS discusses the CRMP, formed by a memorandum of understanding between landowners and the California Department of Fish and Wildlife. This was the means chosen by the Shasta-Trinity NF to prevent impairment of WSRA eligibility and tentative classification found in the Forest’s §5(d)(1) wild and scenic river eligibility assessment. Clearly, Reclamation’s preferred alternative determination in its final SLWRI EIS and Feasibility Reports, represent a failure of CRMP scope to protect the river values (free-flowing condition, water quality, and Outstandingly Remarkable Values (ORVs)). Reclamation’s unparried action also represents a failure of the Forest Service to invoke the CRMP “provision stating that the USFS reserves the right to pursue designation if the CRMP is terminated or fails to protect these values.” (DSEIS p. 5-4-5)

*PG&E McCloud-Pit Project pending new-license update* — The DSEIS discusses the presence of PG&E’s McCloud-Pit Hydroelectric Project in a number of contexts on DSEIS pp. 5-11 and 5-18–19. We offer some additional information.

PG&E’s McCloud-Pit Hydroelectric Project (FERC Project No. 2106), began relicensing in 2006. PG&E filed its Final License Application in July of 2009, followed by FERC’s FEIS in February of 2011. The Forest Service under the authority of §4(e) of the Federal Power Act established revised minimum stream flows for the upcoming license in 2010.<sup>81</sup> The required minimum flows from McCloud Dam are higher, 175 cubic feet per second (cfs) as compared to 40–50 cfs in the existing license. The requirement at Ah Di Nah, about 3.5 miles downstream, is basically unchanged at 200 cfs. However, accretions below the minimum dam release (or spill) will often mean a higher effective minimum at Ah Di Nah. New to the existing license, the upcoming license provides for winter and spring minimum flows that will be substantially higher based on watershed conditions, up to 875 cfs in wet years. Issuance of a new license is pending the release of the California State Water Resources Control Board’s final water quality certification. The Board released a draft certification document in November 2019.

*PG&E assessment of impacts of their existing project* — PG&E offered some comments on project impacts in its Final License Application (FLA):

The Licensee acknowledges Project effects consistent with FERC’s January 8, 2007, letter in lieu of Scoping Document 2 that states, “...there is no indication that effects from the McCloud-Pit Project extend past the confluence of Squaw Creek and the McCloud River.” This assessment is supported by Licensee’s study data that demonstrate that flows in the Lower McCloud River downstream of Squaw Valley Creek are primarily influenced by tributary accretion. The Lower McCloud River had reputation as being a great fishery (with associated private fishing resorts) long before the Project was constructed, and this reputation continues today. In fact, the Lower McCloud River is marketed on the Internet and in print by angler guides, fishing supply shops, backpackers, hikers, fly fishing enthusiasts, and The Nature Conservancy for its natural beauty and world class “blue ribbon” river fishing. (FLA p. E1-55)

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/09/Revised-Preliminary-4e-Condition.pdf>, FOR Exhibit 27.



## 5.4.1 The McCloud River's Wild and Scenic Values

The introduction to this DSEIS section begins with the following:

This section focuses on the wild and scenic river characteristics and ORVs of the lower McCloud River identified by the USFS in the wild and scenic river evaluation performed for the STNF LRMP (USFS 1994) and the wild and scenic river characteristics and extraordinary value protected under the PRC. (DSEIS p. 5-13)

The DSEIS then did provide some insight about how the USFS wild and scenic rivers analysis was also complementary to the PRC analysis:

The McCloud River's fishery and its free-flowing condition are identified in the USFS evaluation. These characteristics are discussed first, followed by a discussion of the wild and scenic characteristics and values – water quality, geology, cultural/historical resources, and visual quality/scenery – that are identified only in the USFS evaluation. (DSEIS p. 5-13)

*Helping the DSEIS through its reading of the Jones & Stokes Report* – The DSEIS discussion on the subsection “Free-Flowing Condition” misleads at the following:

The 1988 Natural Resources Agency Report specified that the lower reach was not eligible for designation as “free-flowing” because its flows are controlled by the McCloud River Dam and affected by the existing Shasta reservoir. (DSEIS p. 5-19)

The 1988 Natural Resources Agency Report is the “*McCloud River Wild and Scenic River Study Report, Final Study Report*, Prepared for the California Resources Agency, Prepared by Jones and Stokes Inc., June 1988” (Jones & Stokes Report). The DSEIS does not reference its conclusion on DSEIS p. 5-19, but as some of our organizations were involved in the original study and designation, we may have some insights into where the SLWRI improperly summarized the Jones & Stokes Report. Our comments, thus, clarify the DSEIS misleading characterization of the Jones & Stokes Report. The DSEIS statement above is in conflict with the conclusions of the Jones & Stokes Report. Our comments excerpt the relevant conclusions of the Jones & Stokes Report that clarify:

The presence of one or more extraordinary resource values along a free-flowing river generally qualifies the river for eligibility. The upper

McCloud River..., lower McCloud River..., and Squaw Valley Creek all maintain extraordinary resource values and are eligible for inclusion in the System. (p. v) (emphasis added)

In essence, the presence of one or more extraordinary resource values qualifies a free-flowing river for eligibility. (p. 5-8) (emphasis added)

The presence of these extraordinary resources in free-flowing environments qualifies Segments 2-4, 6-10, and 12-13 as eligible for inclusion in the California Wild and Scenic Rivers System. (p. 5-9) (emphasis added)

The DSEIS mischaracterization of the Jones & Stokes Report's description of the free-flowing status of the Lower McCloud River and thus the implied inconsistencies with the Jones & Stokes Report eligibility determination are reconcilable without much difficulty by reading the Report. The DSEIS appears to imply that "the lower reach" is equivalent to the Lower McCloud River (or the lower McCloud reaches found to be eligible by the Forest Service), a DSEIS misunderstanding of the Jones & Stokes Report. The short three-words within quotation marks, "the lower reach," used in DSEIS p. 5-19, are easily misread to refer the "Lower McCloud River." The DSEIS three-word quote from the Jones & Stokes Report actually refers to the portion of the McCloud River immediately below the PG&E McCloud Dam where tributary flow accretions are minimal and to the portion of the McCloud Arm of Shasta Reservoir downstream of the McCloud River Bridge. To help resolve the confusion, read the discussion in the rest of the full Jones and Stokes Report paragraph on which the DSEIS p. 5-19 implied mischaracterization is based, especially the last sentence of the paragraph:

A large percentage of water is diverted from the McCloud River at McCloud Dam. The diversion precludes designation of the lower McCloud River as "free-flowing." Other State designated rivers such as the lower American, Trinity, and Klamath Rivers, however, also are controlled by large impoundments. Likewise, Federal Guidelines state that "the fact that a river segment may flow between large impoundments will not necessarily preclude its designation" (47 FR 39457). The lower McCloud River maintains high summer flows responsible for many of the extraordinary values of the McCloud River. Consequently, the segment from 0.25 mile below McCloud Dam to the McCloud Bridge located near Shasta Lake is considered to have extraordinary water resources. The 0.25-mile segment below McCloud Dam and the segment below the McCloud Bridge (distance depending upon reservoir water levels) are not

extraordinary because of major river channel modifications caused by a dam and impoundment, respectively. (Jones & Stokes Report p. 3-9)

This interpretation is summarized succinctly in the introduction of the Jones & Stokes Report.

The lower 10 miles of the upper McCloud River, as well as the entire 23 miles of the lower McCloud River, maintains extraordinary resource values and are eligible for inclusion in the System. Short reaches below McCloud Reservoir and upstream of McCloud Reservoir and Shasta Lake are ineligible because of resource degradation caused by water diversion or reservoir fluctuations. (p. ii)

In the Jones & Stokes Report, state segment 10 is the segment that would be affected by an expanded reservoir, a segment that the report found to be eligible for inclusion in the California Wild and Scenic Rivers System. The legislature, in response, fashioned the McCloud River provisions of the CAWSRA.

*Beginning observations on the DSEIS USFS ORV discussion* — The DSEIS then follows with a discussion of the “Outstandingly Remarkable Values Identified in [the] USFS Evaluation.”

The DSEIS discussion needs work. The DSEIS introduces three outstandingly remarkable values (ORV) that the Forest Service identified in the LRMP: but (1) it omits the “nationally significant trout fishery” ORV. (see DSEIS pp. 5-20–23 & LRMP p. E-6); and (2), the p. 5-23 DSEIS discussion on the Forest Service tentative scenic *classification* of Forest Service segment 4 (the segment that would be directly affected by the reservoir expansion) in the “Outstandingly Remarkable Values Identified in USFS Evaluation” subsection is misplaced. Nevertheless, it is noteworthy that this DSEIS classification discussion notes that “[s]egment 4 does not contain any human-made or other impoundments that affect its free-flowing conditions.” This statement is about a classification criteria but obviously also relevant to the many Chapter 5 discussions confirming the free-flowing status of the USFS-defined lower McCloud River.

## **5.5.2 Criteria for Determining Significance of Effects**

*DSEIS significance wild & scenic river and USFS plan criteria are too narrow* — The DSEIS p. 5-25 significance criteria are too narrow:

Impacts of an alternative on the wild and scenic river values of the lower McCloud River would be significant if project implementation would:

- Affect the eligibility for Federal listing as a wild and scenic river of any portion of the lower McCloud River above the 1,070-foot elevation
- Conflict with the STNF LRMP or with management of the McCloud River under the CRMP

These significance criteria involve the Forest Service administration of §5(d) of the WSRA and the Shasta-Trinity NF Land and Resource Management Plan. However, the significance criteria are incomplete. There are closely related significance criteria that belong in the DSEIS. As discussed in these comments, significance criteria should also include the following:

- Consistency with the California Wild & Scenic Rivers Act
- Consistency with the Whiskeytown-Shasta-Trinity National Recreation Area management Guide
- Consistency with federal guidance on project that would place a reservoir on a National Rivers Inventory (NRI) river
- Consistency with the Forest Service Handbook or other Forest Service Guidance
- Does proposed new gross pool inundate inventoried USFS roadless areas protected by the USFS Roadless Rule

### **5.5.3 Direct and Indirect Effects**

*Introduction* — The DSEIS analysis of the significance of impacts of the action alternatives in this chapter is difficult to parse out. Therefore, comments are necessary.

The DSEIS and SLWRI FEIS adopt the Forest Service free-flowing, water quality, and Outstandingly Remarkable Values determinations. That may be appropriate as they were supported by the Forest Service in its §5(d)(1) planning effort in the 1994 Shasta-Trinity NF Land and Resource Management Plan (LRMP).

However, it is Reclamation's SLWRI FEIS and DSEIS that analyzes the significance and consequences of its action alternatives here. The most complete SLWRI discussion is on the first of the action alternatives, the 6.5 foot raise, the smallest of the action

alternatives. The discussion of the other action alternatives tends to be a “like the 6.5-foot raise, but only more” discussion.

The DSEIS p. 5-27–30 wild & scenic river analysis consistently finds that the portion of the McCloud River that would be inundated by the gross pool of the expanded reservoir would become ineligible for inclusion in the National Wild & Scenic Rivers System because of adverse impacts to free-flowing and water quality. This analysis is consistent with the SLWRI FEIS. For many reasons discussed in our comments and the DSEIS, we agree.

*DSEIS ORV discussion* — The discussion on outstandingly remarkable values is the difficult discussion to follow. With regard to the fishery ORV, the DSEIS concludes that there are:

potential adverse effects on the fish that occur in the river. Potential adverse effects on fish could include a reduction in spawning habitat for trout in the expanded transition reach and an increase in the range of warmwater fish in the lower McCloud River. (DSEIS p. 5-29)

The DSEIS concludes that “only the amount of spawning gravels in the expanded transition reach represents only a small percentage of the suitable spawning habitat in the lower McCloud River. However, any effect on spawning habitat would be considered adverse.” (DSEIS pp. 5-30, 5-33, and 5-38)

The SLWRI FEIS found the fishery ORV impact to be potentially significant. So does the DSEIS. These conclusions did and would meet the CAWSRA conflict criteria of “could” have a significant adverse impact on the fishery and, as discussed in these comments, should be disclosed.

However, the DSEIS does not include the expert conclusions of the post SLWRI FEIS California Department of Fish and Wildlife comments concerning the significant impact on the McCloud River fishery:

Inundation of the McCloud River would result in a significant loss of this river ecosystem to a reservoir ecosystem, resulting in direct and indirect adverse impacts to the current trout fishery in conflict with State law and policy. Likely changes to the trout fishery would include a shift from riverine trout habitat to habitat that supports non-native lake dwelling fish species. (Letter to Jose Gutierrez, WWD, 2020 p. 8) *Supra*

The California Department of Fish and Wildlife conclusions are relevant to the federal fishery ORV and the CAWSRA analysis and should have been included in the DSEIS. They are also relevant to the state's administration of this portion of the CAWSRA.

However, the DSEIS discussion of fishery impacts lacks any ORV explicit eligibility impairment conclusion, state or federal, although the discussion would seem to warrant a conclusion of an adverse impact on this ORV that would impair eligibility. Based on the first bullet of the DSEIS p. 5-25 significance criteria, the DSEIS should determine a fishery ORV adverse effect that would impair eligibility. The USFS, the §5(d)(1) eligibility and potential wild & scenic river manager, should also be asked to make its determination in consultation with state and federal agencies with responsibilities for fishery management.

Regarding an adverse-effect conclusion on the geology ORV, there is some discussion in the DSEIS that some features will be subject to inundation and erosion. However, the DSEIS reaches the conclusion that the geology ORV would not be adversely affected. (DSEIS p. 5-30) That, of course, is Reclamation's opinion. The USFS, the §5(d)(1) eligibility and potential wild & scenic river manager, should also be asked to make its determination.

The DSEIS discussion on cultural ORV losses, in particular, seems inconsistent with the apparent lack of finding of an adverse impact on ORV eligibility. (DSEIS pp. 5-28-29) The DSEIS should make a determination on whether the impacts on this ORV impair eligibility. The USFS, the §5(d)(1) potential wild & scenic river manager, in consultation with affected Native Americans and knowledgeable historians, should also be asked to make its determination.

The DSEIS has further trouble understanding the Forest Service ORV analysis:

As described above under Affected Environment, the ORVs that make Segment 4 of the McCloud River eligible for listing as a wild and scenic river are cultural/historical resources, fisheries, geology, and visual quality/scenery. (DSEIS p. 5-28)

The Forest Service did not determine that visual quality/scenery was an outstandingly remarkable value in the segment 4 reach of the McCloud River, although it did in other segments. (LRMP p. E-6). Nevertheless, the DSEIS consistently found that visual quality would be impaired by the action alternatives:

The visual quality of the affected portion of Segment 4 would decrease as the vegetation along the banks becomes inundated and eventually dies, the bathtub ring expands, and evidence of flow is reduced. (DSEIS p. 5-30)

The DSEIS ORV analysis does make a muddled adverse eligibility impact determination for the action alternatives on either the basis of an impairment in an ORV or tentative classification:

The affected portion of Segment 4 would no longer have the qualities that contributed to its classification by the USFS as “scenic.” (DSEIS p. 5-30)

The DSEIS determination of an eligibility impairment of a “scenic” classification or a “scenic” ORV or both — or conflict with the LRMP on some other basis — requires clarification. The supplemental environmental impact statement should reanalyze and clarify what is intended.

***DSEIS analysis of Forest Planning conflicts and consistency*** — In the DSEIS discussion of the action-alternatives conflicts with the Shasta-Trinity National Forest Land and Resource Management Plan (LRMP), the DSEIS contains some omissions and reaches some erroneous conclusions:

Impact WASR-2 (CP1): Conflict with Shasta-Trinity National Forest Land and Resource Management Plan. The inundation of approximately ... feet of Segment 4 would not conflict with the provisions in the STNF LRMP to protect the ORVs that make the McCloud River eligible for listing under the Federal WSRA. Although raising Shasta Dam would result in inundation of part of Segment 4, the McCloud River and the adjoining lands in this part of the segment are not National Forest System lands and therefore not subject to the LRMP. (In various forms on DSEIS pp. 5-30–31, 5-34, 5-38)

***Proper significance criteria for this subject area*** — The above are DSEIS conclusions. However, the Forest Service has the authority to accomplish all or part of a §5(d)(1) study of the McCloud River within its reservation boundary,<sup>82</sup> as it did in the 1994 LRMP. The Forest Service has the duty and authority to determine that reservoir expansion and flooding of an eligible segment of the McCloud within its reservation

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[https://www.friendsoftheriver.org/wp-content/uploads/2020/10/Shasta\\_Trinity\\_National\\_Forest\\_Map.png](https://www.friendsoftheriver.org/wp-content/uploads/2020/10/Shasta_Trinity_National_Forest_Map.png), FOR Exhibit 28.

boundary violates Forest Service policy and its LRMP. The Forest Service has the duty and authority to determine that the reservoir expansion within its reservation boundary would be on a National Rivers Inventory river and violates direction to protect such rivers. The Forest Service has the duty and authority to determine that the reservoir expansion within its reservation boundary and on its land would be on a National Forest roadless area protected by the roadless rule and impair its potential to be added to the National Wilderness System. The Forest Service has the duty and authority to determine that the reservoir expansion within its reservation boundary and its lands could negatively affect special status species that it has committed to protect. It has the duty and authority to determine that the reservoir expansion within its reservation boundary violated the intent of and constitutes failure of the CRMP and that it also violates the protective management proposed in the LRMP and Forest Service Policy. The Forest Service is also bound by its own ROD to consider and recommend wild and scenic river protection for the eligible segments of the McCloud River if the CRMP fails.

The DSEIS provides an incomplete analysis of whether the expansion is inconsistent with the LRMP. For example, the enlarged reservoir footprint of DSEIS action alternatives would be within the described boundary of one inventoried roadless areas — the Backbone Roadless Area.<sup>83</sup> These areas are protected under the Forest Service’s Roadless Area Conservation Rule.<sup>84</sup> The Forest Service should be asked to determine

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<sup>83</sup> Appendix E of the LRMP describes the Backbone Roadless Area as “immediately adjacent to (and west of) Shasta Lake. (Shasta-Trinity National Forest LRMP Appendix C, Roadless Area Descriptions and Evaluations, 1994, p. 8). This Roadless Area is immediately west of and adjacent to the Sacramento Arm of Shasta Reservoir and the part of it immediately adjacent to the reservoir is on Forest Service land within the reservation boundary and would be inundated by the expanded reservoir. On the basis of clear map references, the West Girard Roadless Area comes quite close to touching the McCloud Arm of Shasta Reservoir. A detailed map analysis of the proposed gross pool would be required to establish whether the expanded reservoir would inundate part of the roadless area. It is unclear from the description and the maps whether the Devil’s Rock Roadless Area touches the Pit Arm of Shasta Reservoir. A detailed new gross-pool map depiction and comparison with a detailed map of the roadless area would be needed to determine if the new gross pool would inundate part of the Devil’s Rock Roadless Area.

<sup>84</sup> While the Roadless Rule focuses on road building policy, “...The intent of this final rule is to provide lasting protection for inventoried roadless areas within the National Forest System in the context of multiple-use management.” (summary, 36 CFR Part 294 Special Areas; Roadless Area Conservation; Final Rule).



whether the action alternatives would impair the eligibility of the affected portions of roadless areas for inclusion in the National Wilderness System.<sup>85</sup>

The expanded bathtub rings associated with the action alternatives would affect all the arms of Shasta Reservoir. As described in p. 5-30 of the DSEIS for the proposed McCloud Arm of Shasta Reservoir, this would impair the Forest Service tentative wild & scenic river “scenic classification” and eliminate the qualities that contributed to qualities that contributed to its proposed classification.<sup>86</sup> The DSEIS does not disclose and discuss any conflict with the LRMP with the expanded bathtub rings of the action alternatives, but the DSEIS clearly finds an adverse effect on scenic quality, as noted in the DSEIS and the SLWRI FEIS chapter 25, and the DSEIS narrative discussion and conclusion should have come in the conflict with the Shasta-Trinity National Forest plans. The expanded bathtub ring would be located all along the reservoir and not confined to the McCloud Arm. The SLWRI LRMP Record of Decision makes the following commitments:

The Shasta and Trinity Units of the National Recreation Area (NRA) will continue to be managed to retain scenic values (LRMP ROD p. 9)

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<sup>85</sup> Stewardship of roadless area lands is not just a Forest Service or BLM responsibility or opportunity. FERC recently denied a preliminary permit application for a project in a designated wilderness area (167 FERC ¶ 62,162) even when a preliminary permit is not a license to construct. “A permit is issued to allow the permit holder to conduct investigations and studies to determine the feasibility of the proposed project and to prepare a license application, and it does not grant land-disturbing or other property rights.” The Commission, however, noted “Although the Commission has stated that section 4 of the Wilderness Act does not prohibit issuance of a preliminary permit for a proposed project, the Commission has also denied preliminary permit applications ‘where licensing of the project to be studied is clearly statutorily precluded, because no purpose would be served by issuing a permit for a proposed development that could not be licensed.’ ” Similarly, while Reclamation is not statutorily prohibited from conducting investigations into prohibited projects, it’s time to adopt a non-action alternative for the SLWRI because the SDREP is statutorily precluded on at least CAWSRA grounds.

<sup>86</sup> “Visual Quality/Scenery The visual quality of the affected portion of Segment 4 would decrease as the vegetation along the banks becomes inundated and eventually dies, the bathtub ring expands, and evidence of flow is reduced. These conditions would be similar to those in the current transition reach. The affected portion of Segment 4 would no longer have the qualities that contributed to its classification by the USFS as ‘scenic.’ ” (DSEIS p. 5-30)

Also, in describing the LRMP preferred alternative, the ROD leads with the following bullet:

This alternative also emphasizes

- visual quality because only a small portion of the land base is within allocations that permit development or disturbance (LRMP ROD p. 12) (emphasis added)

The Management Area Direction for the NRA Shasta Unit states the following:

The Shasta Unit of this MA is managed as a showcase recreation area. It provides high quality recreation opportunities at a variety of lake levels. Associated scenic, scientific, and historical values are conserved and interpreted through an actively managed interpretive program. (LRMP 4-111) (emphasis added)

And again in the 2014 NRA Guide:

Management direction for the Whiskeytown-Shasta-Trinity National Recreation Area (NRA) will be based on and responsive to the following (as written in Title 36, CFR, sec. 251.40[a]): 1. provide public outdoor recreation opportunities; 2. conserve scenic, scientific, historic, and other values that contribute to public enjoyment; and 3. manage, use, and dispose of renewable natural resources which will promote, but do not significantly impair, public recreation or conservation of scenic, scientific, historic, or other values contributing to public enjoyment. (LRMP p. 4-24) (emphasis added)

And again in 2014:

Management Guide, Shasta and Trinity Units, Whiskeytown-Shasta-Trinity National Recreation Area, Shasta-Trinity National Forest, 2014

NRA Purpose

The primary purposes of the National Recreation Area are (1) public outdoor recreation benefits and (2) the conservation of scenic, scientific, historic, and other values which contribute to public enjoyment of the recreation resources. Natural resources will be managed, utilized and

disposed of to the extent that the Forest Service determines such uses are compatible with and do not significantly impair recreation and scenic, scientific, historic, or other values contributing to public enjoyment. (NRA Legislation Section 4) (NRA Management Guide p. 1-2) (emphasis added)

NRA Goals (in legislation)

The goals of the NRA, as expressed in the Law, were "...to provide, in a manner coordinated with the other purposes of the Central Valley Project, for the public outdoor recreation use and enjoyment of the Whiskeytown, Shasta, Clair Engle [Trinity], and Lewiston reservoirs and surrounding lands...by present and future generations and the conservation of *scenic*, scientific, historic, and other values contributing to public enjoyment of such lands and waters...." (p. 1-10) (emphasis added)

Given the SLWRI FEIS and DSEIS discussion and conclusion about the adverse effects of the action alternatives on the LRMP tentative "scenic classification" of the affected reach of the McCloud River, the DSEIS should identify loss of visual quality associated with reservoir bathtub rings as a conflict with the LRMP and NRA Guide.

The DSEIS does not provide information on the LRMP conflicts with Reservoir expansion and the Shasta Snow Wreath. These comments do so briefly here. Let's start with LRMP:

#### Rare Plants – Analysis of the Management Situation

Management and protection of sensitive plants is accomplished through identification and inventory of suitable habitat, surveys of project areas for potentially affected populations, protection of habitat, and population monitoring. (LRMP p. 3-7, repeated in the LRMP ROD p. 3-4)

The new shrub species, Shasta snow-wreath, has been found in this management area. This species, first discovered in 1992, has been proposed for addition to the Regional Forester's Sensitive Species list. (LRMP p. 4-111)

Management Area Direction  
8 – National Recreation Area – Shasta Unit

Threatened, endangered, and sensitive species management focuses on protecting, enhancing, and restoring their habitat. Species Management Guides have been developed and are being implemented for plant species of interest. (LRMP p. 4-112)

11 – Pit Management Area (LRMP p. 4-125)

Threatened, endangered, and sensitive species management focuses on protecting, enhancing, and restoring their habitat.

LRMP Chapter 4: General Management Direction for all STNF (including NRA) lands

Threatened, Endangered, and Sensitive Species (Plants and Animals)  
(LRMP p. 4-5)

32. Monitor and protect habitat for Federally listed . threatened and endangered (T&E) and candidate species. Assist in recovery efforts for T&E species. Cooperate with the State to meet objectives for State-listed species.

33. Manage habitat for sensitive plants and animals in a manner that will prevent any species from becoming a candidate for T&E status.

4. Botany (LRMP p. 4-14–15)  
Sensitive and Endemic Plants

a. Map, record, and protect essential habitat for known and newly discovered sensitive and endemic plant species until conservation strategies are developed.

b. Analyze the potential effects of all ground-disturbing projects on sensitive and endemic plants and their habitat. Mitigate project effects to avoid a decline in species viability at the Forest level.

- c. Monitor the effects of management activities on sensitive and endemic plants. If monitoring results show a decline in species viability, alter management strategy.
- d. Provide reports of sensitive plant populations to the California Natural Diversity Data Base (Department of Fish and Game [DFG]) annually.
- e. Coordinate sensitive plant inventory and protection efforts with the DFG, the U.S. Fish and Wildlife Service, the Nature Conservancy, the California Native Plant Society, and other concerned agencies, organizations, and adjacent landowners.
- f. Develop at least one conservation strategy per year.
- g. Review the Forests' sensitive species list periodically. Recommend appropriate changes to the Regional Forester.
- h. Protect type localities of sensitive and endemic plants for their scientific value.

#### Sensitive Plants (LRMP 4-44)

- 13. Conduct inventories of known populations, habitat analysis, and field reconnaissance for potential populations in project influence zones.
- 14. Known sensitive plants, and those identified in the future, will be afforded the protection necessary to maintain or increase populations. Suitable habitat will be maintained or increased at a level that will assure the successful survival of the species throughout their range.
- 15. Modify projects so that sensitive plants will not be jeopardized; document such action. If actions that may have an adverse effect on sensitive species cannot be avoided, the activity will be deferred until such time as the effect of the proposed action can be assessed. Subsequent action will follow the recommendation resulting from such study, (i.e., protection, mitigation or action as planned).
- 16. Information pertaining to numbers, distribution, population dynamics, and response to the management of Forest sensitive plant species will be recorded and

communicated to the Regional Office annually. Forest personnel will make recommendations to the Region for status revision or retention.

18. Attempt to acquire identified critical habitat through land exchange.

Subsequent to the LRMP, the Shasta snow-wreath became a Forest Service sensitive plant.<sup>87</sup> It is endemic to lands around Shasta Reservoir.

The DSEIS does not mention the September 30, 2019, petition to list the species as endangered or the California Fish and Game Commissions April 21, 2020, notice that the Shasta snow-wreath is a candidate species under the California Endangered Species Act (CESA). The DSEIS only mentions the Shasta snow-wreath in passing in the geology section of Chapter 5, which covers the wild & scenic river eligibility of the McCloud River. The SDREP was identified by the California Fish and Game Commission and the California Department of Fish and Wildlife (CDFW) as the primary threat to the Shasta snow-wreath and its habitat.

On Sep 30, 2019, CDFW received a petition to list the Shasta snow-wreath as endangered under CESA. After reviewing the petition, CDFW staff summarized the threats to the species in a staff summary on February 21, 2020. Based on the staff summary and its administrative record, the California Fish and Game Commission found on April 21, 2020, that the information provided would lead a reasonable person to conclude there is a substantial possibility that the requested listing could occur. In addition, also on April 21, 2020, the California Fish and Game Commission provided notice that the Shasta snow-wreath is a candidate species under CESA. The DSEIS, according to NEPA regulations discussed earlier, should have disclosed and discussed this new circumstance.

According to the CESA listing record, the Shasta snow-wreath is endangered with significant destruction, modification, and curtailment of its habitat and range. Inundation resulting from the Project, with the additive impacts from changed hydrology and construction, would destroy or significantly impact a total of 19 of 24 known occurrences, or 79 percent of extant locations (CDFW 2020).

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<https://www.friendsoftheriver.org/wp-content/uploads/2020/09/Copy-of-Regional-Foresters-Sensitive-Plant-Lichen-Fungi-species-list-2013-California.xlsx>, included here by reference.

CESA candidate species enjoy the same protection as listed species unless their candidate status is terminated. As noted previously in our comments, the LRMP calls for the Forest to cooperate with the state to protect state-listed species and with DFG (now the California Department of Fish & Wildlife - CDFW) on sensitive plant protection efforts.

The USFWS received the petition to list the Shasta snow-wreath and to designate Critical Habitat for the Shasta snow-wreath on October 3, 2019. To date, the USFWS has not responded to the petition with a 90-day finding, pursuant to Section 4(b)(3)(A) of the ESA and its implementing regulations, to determine whether or not the petition contains sufficient information to move forward with the listing process. Although not currently responsive to the petition, Reclamation and the USFWS will need to give full consideration to the California Fish and Game Commission findings and notice of the CESA status of the Shasta snow-wreath, pursuant to ESA Section 4(b)(1)(B)(ii). (16 U.S.C. § 1533(b)(1)(B)(ii)) The DSEIS should disclose and discuss the USFWS petition and the CDFW status of the listed, candidate, and sensitive species in the DSEIS. In some cases, as discussed here, these are “significant new circumstances or information relevant to environmental concerns that have a bearing on the proposed action or its impacts.” (DSEIS p. 1-2)

The DSEIS is conspicuously silent on the existence of the November 2015 Final Fish and Wildlife Coordination Act Report for the Project (2015 FWCAR, USFWS 2015). There is significant discussion of the threats of the Project to the Shasta snow-wreath. The 2015 FWCAR found that 46 percent of all known occurrences of the plant species would be adversely affected by the Project; however, the current scientific understanding of the Project is that it is expected to impact 79 percent of the known locations (CDFW 2020).

In the SLWRI FEIS, Reclamation concluded that the fragmented Shasta snow-wreath populations around Shasta Lake are more vulnerable to extirpation (SLWRI FEIS, p. 12-219), and at multiple locations in the FEIS noted that the mitigation calling for relocation, transplanting, and artificial propagation of Shasta snow-wreath are unproven, with Reclamation concluding that the impacts would remain significant and unavoidable. The DSEIS should clearly state the updated CESA status of the species, the USFWS delay on the ESA petition to list the species and its Critical Habitat, and specifically report the impact to the species in the listing process in the spring of 2020 by CDFW and the California Fish and Game Commission.

The LRMP sensitive plant management commitments are in some degree of conflict with the action alternatives. The supplemental environmental impact statement should discuss this and add this as a conflict and a potential conflict with the LRMP.

Another new circumstance requiring additional environmental analysis is the recent determination by biologists based on genetic testing to split the Shasta salamander (*Hydromantes shastae*) into three distinct species, the Shasta salamander, Samwell salamander (*Hydromantes samweli*), and Wintu salamander (*Hydromantes wintu*). Before the split into three separate species, the Shasta salamander had the smallest known range of any Pacific Northwest amphibian. Many populations are located adjacent to the existing reservoir. The range of these three species is now even more limited and threatened by the reservoir expansion proposed in SLWRI. The Forest Service will likely update its sensitive species list to include all three species. The SLWRI DSEIS fails to recognize this changed circumstance. Comments to the DSEIS by the Center for Biological Diversity et al., adopted here, provide more detail on the Shasta, Samwell, and Wintu salamander.

*The DSEIS 12.5-ft. raise impacts on the wild trout fishery is incomplete and conflicts with its own analysis and of expert agencies* — The DSEIS contains an edited-down version of the SLWRI FEIS “Effects to McCloud River Wild Trout Fishery, as Identified in the California Public Resources Codes, Section 5093.542” under a 12.5-foot dam raise alternative. (DSEIS p. 5-34)

Comparing the DSEIS with the SLWRI FEIS chapter 25 section, the reviewer needs to look at the described SLWRI FEIS PRC impact for the 6.5 foot dam raise, where the discussion was more complete (the higher dam-raise alternative discussions tended to say “the same as 6.5 feet, only more so”). The DSEIS draws no conclusion. The SLWRI FEIS did not make this mistake. Here are two of the conclusions of the corresponding SLWRI FEIS subsection:

Implementation of proposed modifications to Shasta Dam and Shasta Lake could affect the wild trout fishery (access and ecology) of the lower McCloud River identified in the State PRC. This impact would be potentially significant.

... While the overall impacts to the fishery (populations and habitat) are small in the context of the entire lower McCloud River. This impact would be potentially significant. (p. 25-31)

The DSEIS does not contain any explanation on why it should drop these conclusions from the original SLWRI FEIS.



As discussed elsewhere in our comments, the DSEIS does not include the conclusions of the post SLWRI FEIS California Department of Fish and Wildlife expert comments concerning the significant impact of the SDRP on the McCloud River fishery:

Inundation of the McCloud River would result in a significant loss of this river ecosystem to a reservoir ecosystem, resulting in direct and indirect adverse impacts to the current trout fishery in conflict with State law and policy. Likely changes to the trout fishery would include a shift from riverine trout habitat to habitat that supports non-native lake dwelling fish species. (Letter to Jose Gutierrez, WWD, 2020 p. 8) *Supra*

As discussed in our comments earlier, one of the two PRC statutory thresholds prohibiting Agencies of the State from assisting and cooperating with Reclamation is whether a project “could” have an adverse effect on the wild trout fishery. The Department’s conclusion is that there “would” be “direct and indirect adverse impacts to the current trout fishery in conflict with State law...” The absence of the corresponding SLWRI FEIS conclusions and the Department of Fish & Wildlife’s conclusions renders the title of this DSEIS subsection, “Impact WASR-3 (CP2): Effects to McCloud River Wild Trout Fishery, as Identified in the California Public Resources Code, Section 5093.542,” inaccurate.

The DSEIS discusses the SLWRI FEIS’s and DSEIS’s well-supported conclusions that the action alternatives result in a reduction of eligible the river reaches. In that discussion, however, there is an irrelevant and, in part, erroneous sentence:

The property along the 3,550 feet river corridor is owned by Westlands Water District<sup>88</sup> and no public access is available. (DSEIS p. 5-35)

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<sup>88</sup> There is some controversy over Westlands ownership of the Bollibakka Fly Fishing Club. In the Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate filed by Earthjustice, of behalf of Friends of the River; Golden Gate Salmon Association; Pacific Coast Federation of Fishermen’s Associations; Institute for Fisheries Resources; Sierra Club; Defenders of Wildlife; and Natural Resources Defense Council, against the Westlands Water District, an Agency of the State, in the Shasta County Superior Court, May 13, 2019, the following was noted:

In fact, Westlands has been assisting and cooperating with planning and construction of the proposed dam raise for over a decade. According to Westlands’ financial statements, in 2007, Westlands purchased approximately 3,000 acres of property along the McCloud River “to facilitate the raising of

**Wild & Scenic River eligibility irrelevancy** — The property immediately around the potentially affected SDREP portion of the McCloud River is largely owned by the Westlands Water District, although there are nearby Shasta-Trinity Nation Forest lands and the property is within the boundaries of the reservation.<sup>89</sup> However, public access is not an eligibility determination criteria.<sup>90</sup> Free-flowing and ORVs certainly are. The Forest Service identified ORVs in the Lower McCloud are cultural/historic, fisheries, and geology.

Additionally, the DSEIS statement that there is “no public access” available is incorrect. The navigation easement for small watercraft is well established in California. The use of such watercraft create one form of public access to the river. Public access (including for anglers) is also a legal right within the bed and banks of the McCloud River, which is navigable by small watercraft. It is true that public access, *across* private property *outside* the bed and banks of the river, is more restricted in the absence of easements and other access mechanisms within state law. The State Lands Commission discusses these matters in one of its publications:

Under California law, the public has a general legal right to access and enjoy California’s navigable waterways at any point below the high water mark. While there are several navigability tests under state and federal laws, a waterway is “navigable” for purposes of the California public right of navigation if it is “capable of being navigated by oar or motor propelled small craft.

The public’s right to access and use California’s navigable waters is not, in general, affected by who owns the waterway’s bed and banks, be it a

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Shasta Dam by the U.S. Department of the Interior.” This property is known as the Bollibokka Fishing Club. Westlands acquired it for over \$30,000,000, a sum greater than the original asking price.

§5093.542(c) forbids Agencies of the State such as Westlands from assisting and cooperating with planning and construction with Reclamation on projects that could have an adverse effect on the fishery or free-flowing status of the McCloud River.

<sup>89</sup> Shasta Trinity NF boundary map, [https://www.friendsoftheriver.org/wp-content/uploads/2020/10/Shasta\\_Trinity\\_National\\_Forest\\_Map.png](https://www.friendsoftheriver.org/wp-content/uploads/2020/10/Shasta_Trinity_National_Forest_Map.png). FOR Exhibit 28.

<sup>90</sup> Public access may have a bearing on the “recreational ORV,” but that matter is, in part, irrelevant here since the Forest Service did not find this area to possess a recreational ORV.

government entity or a private party. California's public right of navigation applies to waterways where the underlying land is currently or was formerly state-owned and also to waterways where the underlying land is privately owned and has never been state owned. In fact, private landowners may not interfere with the public use of recreationally navigable waters on their property.<sup>91</sup>

Also, access to the Bollibokka Club property is available to members of the Club. Members can bring guests who are not members. The Bollibokka property is described by its managers in this way:

The Club surrounds more than 3,000 acres, and slightly more than seven miles of some of the best wild trout fishing in the American West.

The seven private miles of the majestic McCloud on Bollibokka tumble through beautiful, rugged mountain terrain and, arguably, some of the finest fly fishing water on the continent. Bollibokka is bordered upstream by more than a dozen miles of other private property. All of it extends to the high ridges on either slope of the McCloud and, collectively, this has been some of the most jealously guarded angling in the nation for more than a hundred years.

The McCloud River is famous for its breathtaking beauty and its trout. The river itself is a classic freestone stream, with one set of terraced riffles, and deep rainbow and brown trout-filled pools after another. Bollibokka is surrounded by Shasta-Trinity National Forest but located just 36 miles north and east of Redding on the south slope of Mount Shasta. The McCloud's rainbow trout (*salmo shasta*) were used to successfully stock New Zealand, Argentina, Chile, and to establish healthy rainbow populations in many of our western states. These beautiful, native rainbows are noted for their strength, aggression, and are the most famous and widely distributed trout in the world.

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<sup>91</sup> A Legal Guide to the Public's Rights to Access and Use California's Navigable Waters, State Lands Commission, November 20, 2017, pp. 29–30.  
<https://www.slc.ca.gov/wp-content/uploads/2018/11/2017-PublicAccessGuide.pdf>, FOR Exhibit 29.

Bollibokka is managed by The Fly Shop® as a club, not a lodge. Bollibokka Club annual memberships are perfect for individuals, groups of friends, corporations, companies, clubs, or organizations. More information on club membership is described below under “Membership and Fees”.

The pristine waters of the McCloud River and their famed hard fighting, beautiful Rainbow Trout are unspoiled and thriving in this majestic wilderness.

Dry fly fishing can be good to amazing from April through November, with late spring, early summer, and fall being traditionally the strongest times of year for hatches. Caddis, Stoneflies, and a myriad of mayflies thrive in the nutrient-rich emerald water. Midsummer days with a hopper dropper or Turk’s Tarantula can also be rewarding. Nymphing all season long can be very productive and the variety of water holds a challenge for all levels of angler. Many nice fish are also caught each year on streamers. Bollibokka is a wild, fly fishing only, catch and release fishery.

The property has an extensive and well maintained trail system along the entire river, with side trails providing easy access to many of the best pools and riffles. Fishing on the Bollibokka Club is a combination of hiking and fishing the terraced pocket water and casting into broad, deep pools, often sight-casting to individual feeding trout. Guides are available upon request through The Fly Shop® Guide Service and have extensive knowledge and experience at Bollibokka.<sup>92</sup>

That is nice writing.<sup>93</sup>

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<sup>92</sup> <https://www.theflyshop.com/adventures/bollibokka.html> (accessed September 21, 2020), FOR Exhibit 30.

<sup>93</sup> The Westlands Water District appears to have argued in its reply brief against the California Attorney General’s motion for a preliminary injunction against their Shasta Dam Raise Project EIR (and may offer comments on the DSEIS) that public access is required for a “fishery.”

A “fishery” connotes catching fish, and generally a particular location for doing so. (Webster’s 3d New Internat. Dict. (2002) p. 858; see also Fish & G. Code § 7650(c); 16 U.S.C. § 1802(13).) There is no public access for fishing along the banks of the portion of the lower McCloud River that would be newly inundated. Westlands owns that property. (Memorandum of Points and

Sincerely,



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Authorities in Opposition to Motion for Preliminary Injunction, in the case of *People of the State of California ex Rel. Attorney General Xavier Becerra*, Plaintiff and Petitioner, v. *Westlands Water District and Does 1-20*, Defendants and Respondents. pp. 14–15.)

Setting aside the issue of whether anglers are required for a fishery, there is public access *within* the bed and banks of the lower McCloud. There is also Bollibakka Club member and guest access *outside* of the bed and banks to the river to what Club managers describe as “some of the best wild trout fishing in the American West.” See also PG&E’s comments on the Lower McCloud fishery from their final license application quoted earlier in these comments. The Forest Service and the Jones and Stokes Report report outstandingly remarkable and extraordinary resources fishery values for this reach of river. PRC §5093.542 leads with, “[t]he Legislature finds and declares that the McCloud River possesses extraordinary resources in that it supports one of the finest wild trout fisheries in the state.” (emphasis added) Under these circumstances, the supplemental environmental impact statement should neither accept the argument that there is not an outstanding fishery along the Lower McCloud nor that there are no anglers who fish it.



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Exhibits: These comments are submitted with 30 exhibits

cc. California Natural Resources Agency  
California Department of Fish & Wildlife  
State Water Resources Control Board  
California Attorney General  
House Interior Committee  
Senate Natural Resources Committee