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October 23, 2019

Governor's Office of Planning & Research

**OCT 24 2019**

**STATE CLEARINGHOUSE**

Eric Limas, General Manager  
Lower Tule River Irrigation District  
357 East Olive Avenue  
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**Subject: Tule River Spillway Enlargement Road Realignment and Right Abutment Spillway Cut Project (Project),  
NOTICE OF INTENT TO ADOPT A MITIGATED NEGATIVE DECLARATION  
SCH No. 2019099084**

Dear Mr. Limas:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) from Lower Tule River Irrigation District for the above-referenced Project pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through exercise of its own regulatory authority under the Fish and Game Code.

### **CDFW ROLE**

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

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<sup>1</sup> CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

CDFW is also submitting comments as a **Responsible Agency** under CEQA (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, construction associated with the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 *et seq.*). Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 *et seq.*), related authorization as provided by the Fish and Game Code will be required.

**Fully Protected Species:** CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. CDFW prohibits and cannot authorize take of any fully protected species.

**Nesting Birds:** CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, their eggs and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

**Water Pollution:** Pursuant to Fish and Game Code section 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into "Waters of the State" any substance or material deleterious to fish, plant life, or bird life, including non-native species. It is possible that without mitigation measures, activities associated with the Project could result in pollution of Waters of the State from storm water runoff or construction-related erosion. Potential impacts to the wildlife resources that utilize these watercourses include the following: increased sediment input from road or structure runoff; toxic runoff associated with development activities and implementation; and/or impairment of wildlife movement along riparian corridors. The Regional Water Quality Control Board and United States Army Corps of Engineers also has jurisdiction regarding discharge and pollution to Waters of the State.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Lower Tule River Irrigation District (District) and United States Army Corps of Engineers

**Objective:** The proposed Project is a spillway cut to widen the Success Dam Emergency Spillway and to realign a portion of an existing road (Worth Drive/Avenue 146) from the spillway to a bench on the right abutment of the spillway. To accommodate the modified spillway, the paved access road that currently passes through the spillway would need to be relocated/realigned. The spillway would be

widened from 200 to 365 feet by blasting and removing the rock forming the right abutment during Project construction. A bench for the road would be blasted and excavated as part of the cut on the right abutment. Rock from the abutment would be used for the new roadbed and stockpiled for later construction phases.

**Location:** Success Dam and Reservoir is located along the Tule River approximately five miles east and upstream of the City of Porterville in Tulare County. The subject roadway realignment (portion of Worth Drive/Avenue 146) is located on the southwestern side of Success Lake, in the vicinity of the existing dam and is aligned down the invert of the existing Success Lake emergency spillway.

**Timeframe:** Construction is expected to start in January 2020 and end in 2021.

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the comments and recommendations below to assist the District in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

Currently, the MND indicates that the Project's impacts would be less than significant with the implementation of mitigation measures described in the MND. However, as currently drafted, it is unclear whether the mitigation measures described will be enforceable or sufficient in reducing impacts to a level that is less than significant.

The MND acknowledges the potential for Project activities to impact several special-status species, including the State threatened and federally endangered San Joaquin kit fox (*Vulpes macrotis mutica*), the State and federally endangered southwestern willow flycatcher (*Empidonax traillii adastus*), the State and federally endangered Least Bell's Vireo (*Vireo bellii pusillus*), the State and federally endangered and State fully protected California condor (*Gymnogyps californianus*), the State endangered, federally threatened and California Rare Plant Ranked (CRPR) 1B.1 San Joaquin adobe sunburst (*Pseudobahia peirsonii*), and the State threatened and CRPR 1B.1 striped adobe-lily (*Fritillaria striata*). A Biological Assessment was prepared for the Project; however, it does not include survey methodology, a habitat map or a detailed description of existing biological conditions. Without additional information, CDFW cannot conclude that the Project's impacts will be less than significant.

CDFW is also concerned regarding potential of the Project to impact other special-status species not analyzed in the MND including, but not limited to, the State endangered and fully protected bald eagle (*Haliaeetus leucocephalus*), the State fully protected golden eagle (*Aquila chrysaetos*), the State threatened tricolored blackbird (*Agelaius tricolor*), the State threatened Swainson's hawk (*Buteo swainsoni*), the State

endangered and CRPR 1B.2 Springville clarkia (*Clarkia springvillensis*), the State candidate for listing as threatened foothill yellow-legged frog (*Rana boylei*), the State threatened bank swallow (*Riparia riparia*), the State species of special concern northern California legless lizard (*Anniella pulchra*), and other nesting birds. In addition, lakes or streams and associated wetland or other hydrologically connected features that are subject to CDFW's lake and streambed alteration regulatory authority (Fish & Game Code, § 1600 et seq.) exist within the Project area.

If significant environmental impacts will occur as a result of Project implementation and cannot be mitigated to less than significant levels, an MND would not be appropriate. Further, when an MND is prepared, mitigation measures must be specific, clearly defined, and cannot be deferred to a future time. However, when an Environmental Impact Review (EIR) is prepared, the specifics of mitigation measures may be deferred, provided the lead agency commits to mitigation and establishes performance standards for implementation. Regardless of whether an MND or EIR is prepared, CDFW recommends that the CEQA document provide quantifiable and enforceable measures as needed that will reduce impacts to less than significant levels.

#### **I. Environmental Setting and Related Impact**

**Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or the United States Fish and Wildlife Service (USFWS)?**

#### **COMMENT 1: San Joaquin Kit Fox (SJKF)**

**Issue:** The MND identifies the potential for SJKF to occur in the Project area. CDFW acknowledges that Mitigation Measure (MM) BIO-1 includes an employee education program and MM BIO-2 includes the minimization measures outlined in the 2011 USFWS "Standardized recommendations for the protection of the San Joaquin kit fox prior to or during ground disturbance." However, the measures do not require surveys to assess SJKF presence/absence prior to Project initiation, nor do they provide guidance should SJKF be detected in the Project area. For these reasons, as currently drafted, the provisions described in MM BIO-1 and BIO-2 may not be enforceable or adequate in minimizing impacts to SJKF to a level that is less than significant.

**Specific impact:** Without appropriate avoidance and minimization measures for SJKF, potential significant impacts associated with Project construction include den collapse, inadvertent entrapment, reduced reproductive success, reduction in health and vigor of young, and direct mortality of individuals.

**Evidence impact is potentially significant:** Habitat loss resulting from agricultural, urban, and industrial development is the primary threat to SJKF (Cypher et al. 2013). Very little suitable habitat remains in Tulare County (Cypher et al. 2013). The Project area represents some of the only remaining suitable habitat in the vicinity, which is otherwise intensively managed for agriculture, increasing the potential for SJKF to be encountered at the Project site. Therefore, ground-disturbing activities within the Project area have the potential to significantly impact local SJKF populations.

**Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact Shortcoming)**

Because the MND identifies the potential for SJKF to occur in the Project site, CDFW recommends editing the MND to include the following measures and that these be made conditions of approval for the Project.

**Recommended Mitigation Measure 1: SJKF Surveys**

CDFW recommends assessing presence/absence of SJKF by conducting surveys following the protocol referenced in the USFWS "Standardized recommendations for protection of the San Joaquin kit fox prior to or during ground disturbance" (2011). Specifically, CDFW advises conducting these surveys in all areas of potentially suitable habitat no less than 14 days and no more than 30 days prior to beginning of ground disturbing activities.

**Recommended Mitigation Measure 2: SJKF Take Authorization**

SJKF detection warrants consultation with CDFW to discuss how to avoid take, or if avoidance is not feasible, to acquire an Incidental Take Permit (ITP) prior to ground-disturbing activities, pursuant to Fish and Game Code section 2081(b).

**COMMENT 2: Southwestern Willow Flycatcher (SWF)**

**Issue:** The MND identifies the potential for SWF to occur in the Project area based on the nearby presence of adequate riparian habitat; however, the only mitigation measure that addresses potential Project impacts to SWF is the employee education program required in BIO-1.

**Specific impact:** Potentially significant direct impacts associated with the Project's construction include nest abandonment, reduced reproductive success and reduced health and vigor of eggs and/or young.

**Evidence impact would be significant:** SWF is a neotropical migrant that breeds in the western U.S. and in California is primarily restricted to the Sierra Nevada and

southern Cascades (Serena 1982). SWF was historically widespread in riparian willow thickets and montane meadow complexes; however, the quantity and quality of suitable habitat has been significantly reduced by many factors including urban development and the removal and destruction of riparian vegetation (USFWS 2014).

### **Recommended Potentially Feasible Mitigation Measure(s)**

To evaluate potential impacts of the Project to SWF, CDFW recommends conducting the following assessment of the Project area and including the following measures as conditions of Project approval in the MND.

#### **Recommended Mitigation Measure 3: Focused SWF Surveys**

CDFW recommends that a qualified biologist conduct protocol-level surveys for SWF in areas of suitable habitat for the species. Specifically, CDFW recommends that surveys be conducted in accordance with the "Willow Flycatcher Survey Protocol for California" (Bombay et al. 2003).

#### **Recommended Mitigation Measure 4: SWF Avoidance**

If nesting SWF are observed, CDFW recommends the establishment of a ¼-mile no-disturbance buffer from May 1 to August 31, or until a qualified wildlife biologist has determined that the young have fledged and are no longer reliant on parental care for survival. Further, CDFW advises potential nesting and roosting habitat be retained to encourage occupancy by willow flycatchers within the Project area.

#### **Recommended Mitigation Measure 5: SWF Take Authorization**

If SWF are detected and implementation of a ¼-mile no-disturbance buffer is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take. If SWF take cannot be avoided, acquisition of an ITP, pursuant Fish and Game Code section 2081(b) prior to vegetation- or ground-disturbing activities may be necessary to comply with CESA.

### **COMMENT 3: Least Bell's Vireo (LBV)**

**Issue:** The MND identifies the potential for LBV to occur in the Project area based on reported sightings of LBV on the northeast side of Lake Success in 2014, and the presence of adequate riparian habitat in the vicinity of the Project area. Review of aerial imagery indicates riparian habitat is present in the southern portion of the Project area adjacent to the spillway. Despite this, the MND does not include any mitigation measures for LBV other than the employee education program required in BIO-1.

**Specific impact:** Potentially significant direct impacts associated with the Project's construction include nest abandonment, reduced reproductive success and reduced health and vigor of eggs and/or young.

**Evidence impact is potentially significant:** LBV were abundant and widespread in the U.S. until the 1950s (Grinnell and Miller 1944). By the 1960s, they were considered scarce (Monson 1960), and by 1980, there were fewer than 50 pairs remaining (Edwards 1980), although this number had increased to 2,500 by 2004 (Kus and Whitfield 2005). The primary cause of decline for this species has been the loss and alteration of riparian woodland habitats (USFWS 2006). Fragmentation of their preferred habitat has also increased their exposure to brown-headed cowbird (*Molothrus ater*) parasitism (Kus 2002). Current threats to their preferred habitat include colonization by non-native plants such as *Arundo donax* and altered hydrology (diversion, channelization, etc.) (USFWS 2006).

#### **Recommended Potentially Feasible Mitigation Measure(s)**

To evaluate potential impacts of the Project to LBV, CDFW recommends conducting the following assessment of the Project area and including the following measures as conditions of Project approval in the MND.

#### **Recommended Mitigation Measure 6: LBV Habitat Assessment**

CDFW recommends that a qualified biologist conduct a habitat assessment in advance of Project implementation, to determine if the Project Area or its immediate vicinity contains suitable habitat for LBV. Although LBV inhabit riparian woodlands, the species has also been found to benefit from non-riparian systems including brushy fields, second-growth forest or woodland, scrub oak, coastal chaparral, and mesquite brushlands (Kus and Miner 1989 in Poulin et al. 2011).

#### **Recommended Mitigation Measure 7: LBV Avoidance**

CDFW recommends that Project activities be timed to avoid the typical bird breeding season (February 1 through September 15).

#### **Recommended Mitigation Measure 8: LBV Surveys**

If Project activities must take place during the typical bird breeding season, and suitable LBV habitat is detected during habitat assessments, CDFW recommends assessing presence/absence of LBV by conducting surveys following the USFWS' "Least Bell's Vireo Survey Guidelines" (2001) well in advance of the start of Project implementation to evaluate presence/absence of LBV nesting in proximity to Project activities and to evaluate potential Project-related impacts and permitting needs. Additionally, CDFW advises conducting focused pre-construction surveys for LBV in

all areas of potentially suitable habitat within 10 days of Project implementation, when initiated during the bird breeding season.

#### **Recommended Mitigation Measure 9: LBV Take Authorization**

LBV detection warrants consultation with CDFW to discuss how to avoid take, or if avoidance is not feasible, to acquire an ITP prior to ground-disturbing activities, pursuant to Fish and Game Code section 2081(b).

#### **COMMENT 4: Nesting Raptors, Including California Condor (CACO), Bald Eagle (BAEA), Golden Eagle (GOEA), and Swainson's Hawk (SWHA)**

**Issue:** CACO and GOEA are known to occur in the vicinity of the Project area, and BAEA have been documented within 30 miles both to the north and south of the Project area (CDFW 2019). SWHA are known to nest in riparian habitat, which is present in the Project area. Although the Project is located on the eastern edge of the SWHA's range, there is potential for the species to occur. These species, and other nesting raptors, can forage in open grasslands, woodland foothills and riparian habitats. The MND states there is no appropriate nesting habitat for CACO within the Project area, but it is unclear how this determination was made, whether habitat was assessed for other nesting raptor species, and, if a survey was conducted, how far it extended beyond the Project area.

**Specific impact:** Without appropriate avoidance and minimization measures for nesting raptors, potential significant impacts associated with the Project's construction include loss of foraging and/or nesting habitat, nest abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young.

**Evidence impact would be significant:** Without appropriate survey methods, CACO and GOEA nesting in the vicinity of a project can remain undetected resulting in avoidance and minimization measures not being effectively implemented (AERI 2010). In addition, human activity near nest sites can cause reduced provisioning rates of GOEA chicks by adults (Steidl et al. 1993 *in* Kochert et al. 2002). The primary threat to SWHA in California is loss of foraging and nesting habitat resulting from urban development and incompatible agriculture (CDFW 2016). Depending on the timing of construction, Project activities including noise, vibration, odors, and movement of workers or equipment could affect nests and have the potential to result in nest abandonment, significantly impacting local nesting raptors.

#### **Recommended Potentially Feasible Mitigation Measure(s)**

To evaluate potential impacts to nesting raptors associated with Project construction, CDFW recommends conducting the following evaluation of the Project area and including the following mitigation measures as conditions of approval.

### **Recommended Mitigation Measure 10: Focused Surveys for Nesting Raptors**

CDFW recommends that a qualified wildlife biologist conduct surveys for nesting raptors following the survey methodology developed by the SWHA Technical Advisory Committee (SWHA TAC 2000) prior to project initiation, the Protocol for Golden Eagle Occupancy, Reproduction, and Prey Population Assessment (Driscoll 2010), and the Protocol for Evaluating Bald Eagle Habitat and Populations in California (Jackman & Jenkins 2004), as appropriate for specific species. If ground-disturbing activities take place during the normal bird breeding season (February 1 through September 15), CDFW recommends that additional pre-construction surveys for active nests be conducted by a qualified biologist no more than 10 days prior to the start of construction.

### **Recommended Mitigation Measure 11: Raptor Avoidance**

If an active raptor nest is found, CDFW recommends implementation of a minimum ½-mile no-disturbance buffer until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

### **Recommended Mitigation Measure 12: Take Authorization**

If nesting raptors are detected and the ½-mile no-disturbance nest buffer is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take. If SWHA take cannot be avoided, acquisition of an ITP, pursuant Fish and Game Code sections 2081(b) prior to vegetation- or ground-disturbing activities may be necessary to comply with CESA. Please note that CACO, BAEA and GOEA are State fully protected species. Therefore, no take, incidental or otherwise, of those species can be authorized by CDFW.

### **COMMENT 5: Special Status Plants**

**Issue:** Several special-status plants have been documented to occur in the Project area, including San Joaquin adobe sunburst, striped adobe-lily and Springville clarkia (CDFW 2019). The Initial Study included with the MND describes an extant population of San Joaquin adobe sunburst covering an estimated 10-acre area along the west side of Success Lake. It also refers to two historical populations documented closer in proximity to the right abutment and spillway, but notes that these populations were not observed during the biological surveys performed in December and February. An additional survey in April 2019 detected populations of San Joaquin adobe sunburst but states those populations will not be affected by the Project. Without further information on survey methodology and timing, or a detailed map depicting the Project area in relation to these occurrences, CDFW cannot conclude that the Project will not impact special-status plants.

**Specific impact:** Without appropriate avoidance and minimization measures for special-status plants, potential significant impacts resulting from ground- and vegetation-disturbing activities associated with construction of the Project include inability to reproduce and direct mortality.

**Evidence impact would be significant:** Many of the special-status plant species with potential to occur at the Project site are threatened by agricultural, urban, energy, and road construction and development. Many historical occurrences of these species are presumed extirpated (CNPS 2018). Though new occurrences have recently been discovered, impacts to existing populations have the potential to significantly impact these species.

### **Recommended Potentially Feasible Mitigation Measure(s)**

Because suitable habitat for special-status plant species has already been determined to be present in the Project area, CDFW recommends including the following measures and that these be made conditions of approval for the Project.

#### **Recommended Mitigation Measure 13: Special-Status Plant Surveys**

CDFW recommends that the Project area be surveyed for special-status plants by a qualified botanist following the "Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities" (CDFW 2018). This protocol, which is intended to maximize detectability, includes the identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. In the absence of protocol-level surveys being performed, additional surveys may be necessary.

#### **Recommended Mitigation Measure 14: Special-Status Plant Avoidance**

CDFW recommends special-status plant species be avoided whenever possible by delineation and observing a no-disturbance buffer of at least 50 feet from the outer edge of the plant population(s) or specific habitat type(s) required by special-status plant species. If buffers cannot be maintained, then consultation with CDFW is warranted to determine appropriate minimization and mitigation measures for impacts to special-status plant species.

#### **Recommended Mitigation Measure 15: State-listed Plant Take Authorization**

If a plant species listed pursuant to CESA or the Native Plant Protection Act is identified during botanical surveys, consultation with CDFW is warranted to determine if the Project can avoid take. If take cannot be avoided, take authorization prior to any ground-disturbing activities may be warranted. Take authorization would

occur through issuance of an ITP by CDFW, pursuant to Fish and Game Code section 2081(b).

#### **COMMENT 6: Tricolored blackbird (TRBL)**

**Issue:** TRBL have been documented in the vicinity of the Project area (CDFW 2019). TRBL are known to nest in riparian habitat, which is present in the southern portion of the Project adjacent to the spillway. Despite this, the MND does not consider Project impacts to TRBL.

**Specific impact:** Without appropriate avoidance and minimization measures for TRBL, potential significant impacts associated with the Project include nest and/or colony abandonment, reduced reproductive success, and reduced health and vigor of eggs and/or young.

**Evidence impact would be significant:** TRBL aggregate and nest colonially, forming colonies of up to 100,000 nests (Meese et al. 2014). Approximately 95% of the global population is found in California (Kelsey 2008). Increasingly, TRBL are forming larger colonies that contain progressively larger proportions of the species' total population (Kelsey 2008). Their narrow geographic range and highly colonial breeding habits make TRBL particularly susceptible to disturbance and habitat loss (Kelsey 2008). Nesting can occur synchronously, with all eggs laid within one week (Oriens 1961). For these reasons, depending on timing, disturbance to nesting colonies can cause abandonment, significantly impacting TRBL populations (Meese et al. 2014).

#### **Recommended Potentially Feasible Mitigation Measure(s)**

To evaluate potential impacts to TRBL, CDFW recommends conducting the following evaluation of the Project site and its vicinity and including the following mitigation measures as conditions of approval.

#### **Recommended Mitigation Measure 16: TRBL Surveys**

CDFW recommends that construction be timed to avoid the normal bird breeding season (February 1 through September 15). However, if construction must take place during that time, CDFW recommends that a qualified wildlife biologist conduct surveys for nesting TRBL no more than 10 days prior to the start of implementation to evaluate presence/absence of TRBL nesting colonies in proximity to Project activities and to evaluate potential Project-related impacts.

### **Recommended Mitigation Measure 17: TRBL Avoidance**

If an active TRBL nesting colony is found during preconstruction surveys, CDFW recommends implementation of a minimum 300-foot no-disturbance buffer in accordance with CDFW's "*Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015*" (CDFW 2015). CDFW advises that this buffer remain in place until the breeding season has ended or until a qualified biologist has determined that nesting has ceased, the birds have fledged, and are no longer reliant upon the colony or parental care for survival. It is important to note that TRBL colonies can expand over time, and for this reason, the colony should be reassessed to determine the extent of the breeding colony within 10 days of Project initiation.

### **Recommended Mitigation Measure 18: TRBL Take Avoidance**

In the event that a TRBL nesting colony is detected during surveys, consultation with CDFW is warranted to discuss how to implement the project and avoid take, or if avoidance is not feasible, to acquire an ITP, pursuant to Fish and Game Code section 2081(b), prior to any ground-disturbing activities.

### **COMMENT 7: Special-status species**

**Issue:** Project-related activities have the potential to impact other special-status species not analyzed in the MND. Northern California legless lizard has been documented to occur in the Project area (CDFW 2019). CDFW has received past reports of bank swallows occupying the spillway. The Project area is also within the range of foothill yellow-legged frog and contains potentially suitable riparian habitat. CDFW recommends that the MND be revised to include an impact analysis on all species with the potential to occur in the Project area including, but not limited to, Northern California legless lizard, bank swallow, and foothill yellow-legged frog.

**Specific impact:** Without appropriate avoidance and minimization measures for the species mentioned above, potential significant impacts associated with the Project's construction include burrow or den collapse, nest destruction, inadvertent entrapment, reduced reproductive success, reduction in health and vigor of eggs and/or young; and direct mortality of individual special-status wildlife species.

**Evidence impact would be significant:** The San Joaquin Valley supports a high number of narrowly distributed endemic species (USFWS 1998). Habitat loss resulting from development is among the primary threats to special-status species in the greater San Joaquin Valley. As a result, ground-disturbance resulting from development of the Project has the potential to impact habitat that supports special-status species, which may result in significant impacts to local populations of these species.

### **Recommended Potentially Feasible Mitigation Measure(s)**

To evaluate potential impacts of the Project to special-status species, CDFW recommends conducting the following assessment of the Project area, including the following mitigation measures, and requiring them as conditions of approval in the Project's MND.

#### **Recommended Mitigation Measure 19: Habitat Assessment**

CDFW recommends that a qualified biologist conduct a habitat assessment, well in advance of Project implementation, to determine if individual project areas or their immediate vicinity contain habitat suitable to support special-status plant or animal species, including, but not limited to, those mentioned above.

#### **Recommended Mitigation Measure 20: Species-Specific Surveys**

If suitable habitat is present, CDFW recommends assessing presence/absence of special-status species by conducting surveys following recommended protocols or protocol-equivalent surveys. Recommended protocols vary by species. More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (<https://www.wildlife.ca.gov/Conservation/Survey-Protocols>).

#### **Recommended Mitigation Measure 21: Take Avoidance**

Detection of special-status plant or animal species within or in the vicinity of the Project area, warrants consultation with CDFW to discuss how to implement ground-disturbing activities and avoid take.

#### **Recommended Mitigation Measure 22: Take Authorization**

In the case of State-listed species, detection warrants consultation with CDFW to discuss how to avoid take, or if avoidance is not feasible, to acquire an ITP prior to ground-disturbing activities, pursuant to Fish and Game Code section 2081(b).

**Would the Project have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by CDFW or USFWS?**

#### **COMMENT 8: Riparian Habitat Removal and Disturbance**

**Issue:** The Project proposes blasting to widen the spillway channel and to accommodate road realignment adjacent to and through the spillway. The feature referred to as the spillway channel is for most of its length a natural, pre-existing stream that drains a higher elevation area to the west and north toward the main

channel of the Tule River, and is therefore a tributary stream. Aerial imagery shows that this stream supports vegetation within its bed and banks, including woody (i.e., tree/shrub) and herbaceous or grass species of plants. The MND concludes that no mitigation is needed for impacts to riparian habitat because there is no riparian habitat. This is incorrect; the vegetation that is within and dependent upon the stream is riparian habitat, and it is currently not clear what impacts the project will have, for example whether the riparian vegetation will be removed in its entirety as a result of blasting and other activities. In addition, other streams that drain either into the tributary stream or the Tule River, in addition to the Tule River itself, are present in the areas identified as blasting radii, and it is not clear what impacts to those stream areas will occur and whether direct or indirect impacts to riparian vegetation will occur in those streams. The MND does not quantify or describe the riparian vegetation in streams that are within the impact zone of the Project and does not identify the types of impacts that are possible within different distances from blasting or as a result of other activities. Specifically, it is not clear whether all riparian habitat within the spillway stream could be removed. As a result, the MND does not identify any avoidance, minimization, or mitigation for potentially significant impacts to riparian habitat.

**Specific impact:** The MND does not address direct and indirect impacts to riparian vegetation because it concluded that no riparian vegetation is present. Riparian vegetation is present within the spillway stream channel as well as other streams that could be affected by Project activity, according to figures in the MND. Direct impacts to riparian vegetation could include removal either prior to or during blasting activity, or during the construction of roads within the extent of the stream and any floodplain that is present. Indirect impacts could occur as a result of blasted material becoming projectiles that hit riparian vegetative features causing breakage or other damage, or by fine materials and dust settling on riparian vegetation.

**Evidence impact is potentially significant:** Riparian and associated floodplain and wetland areas along the Tule River and its tributaries are valuable for their ecosystem processes such as protecting water quality by filtering pollutants and transforming nutrients; stabilizing stream banks to prevent erosion and sedimentation/siltation; and dissipating flow energy during flood conditions, thereby spreading the volume of surface water, reducing peak flows downstream, and increasing the duration of low flows by slowly releasing stored water into the channel through subsurface flow. The riparian vegetation in the Project area provides potential habitat for many species, potentially including those with special status such as SWF, LBV, or SWHA, all addressed above. In addition, dust creation from Project activities could settle on plant material in riparian habitats onsite or offsite and affect processes such as respiration, photosynthesis, pollination, and seed set.

## **Recommended Potentially Feasible Mitigation Measure(s)**

### **Recommended Mitigation Measure 23: Avoidance, Minimization and Mitigation of Riparian Habitat Impacts**

CDFW recommends that the riparian habitats of the spillway stream and offsite streams potentially impacted by the Project, including the Tule River and other tributaries that are within the blasting radii, be described to establish the baseline condition. CDFW also recommends that the potential direct and indirect impacts to riparian habitat be analyzed according to each Project activity. Based on those potential impacts, CDFW recommends that the MND include measures to avoid, minimize, and/or mitigate those impacts. CDFW recommends that impacts to riparian vegetation take into account the effects to stream function and hydrology from riparian habitat loss or damage, as well as potential effects from the loss of riparian habitat to special status species already identified herein. CDFW specifically recommends that the widened spillway stream channel that is created incorporate an appropriate design to address and replace, as needed, the current stream function with riparian habitat restoration using native vegetation to replace the value to fish and wildlife provided by the riparian habitats that are lost when the existing stream is altered. The amount of riparian habitat that is restored may need to exceed the area lost during Project implementation, due to the increased stream width and resulting channel capacity. If onsite restoration to replace riparian habitat that is lost due to Project activity is not feasible or not proposed, CDFW recommends offsite mitigation by restoring in-kind riparian habitat and providing for the long-term management and protection of the mitigation area. CDFW recommends that the riparian habitat analysis and any proposed mitigation be available for CDFW review and comment prior to adoption of the MND and Project approval.

## **II. Editorial Comments and/or Suggestions**

**Federally Listed Species:** CDFW recommends consulting with the USFWS on potential impacts to federally listed species including, but not limited to, SJKF, SWF, LBV, CACO, BAEA and plants. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS in order to comply with FESA is advised well in advance of any ground-disturbing activities.

**Lake and Streambed Alteration:** The Project area and areas of potential indirect impact contain stream features that are subject to CDFW's lake and streambed alteration regulatory authority, pursuant to Fish and Game Code section 1600 *et seq.* These features include the spillway in its entirety, the Tule River, and tributaries to the

spillway and the Tule River. Jurisdictional Project activities are subject to the notification requirement of Fish and Game Code section 1602, which requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation); (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. Based on the description in the MND, notification will be warranted for stream widening and road related work in the spillway. Notification may also be warranted for Project activities and indirect impacts to other streams that may substantially alter the bed, bank, or channel, as through the deposition of debris or other Project activity. The MND notes the use of existing roads as haul routes; for the Frazier Dike Haul Road it is not clear if improvements to the road will be needed to accommodate heavy equipment and/or the anticipated number of vehicle trips per day, or if use of the road in its current condition for Project purposes could result in impacts to the area of the reservoir that the road crosses. CDFW recommends that the MND identify the need for notification to CDFW for Project activities in the spillway, and for early consultation with CDFW regarding the additional potential need to notify for Project impacts to other streams and the reservoir.

CDFW is required to comply with CEQA in the issuance of a Lake or Streambed Alteration Agreement (Agreement); therefore, if the CEQA document approved for the Project does not adequately describe the Project and its impacts, a subsequent CEQA analysis may be necessary for Agreement issuance. For additional information on notification requirements, please contact CDFW staff in the Central Region Lake and Streambed Alteration Program at (559) 243-4593.

**Nesting birds:** CDFW encourages Project implementation occur outside of bird nesting season. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project's applicant is responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes as referenced above.

To prevent Project-related impacts on nesting birds, CDFW recommends that a qualified wildlife biologist conduct pre-activity surveys for active nests no more than 10 days prior to the start of ground disturbance to maximize the probability that nests that could potentially be impacted are detected. CDFW also recommends that surveys cover a sufficient area around the work site to identify nests and determine their status. A sufficient area means any area potentially affected by the Project. In addition to direct impacts (i.e. nest destruction), noise, vibration, and movement of workers or equipment could also affect nests. Prior to initiation of construction activities, CDFW recommends a qualified biologist conduct a survey to establish a behavioral baseline of all identified nests. Once construction begins, CDFW recommends a qualified biologist continuously monitor nests to detect behavioral changes resulting from the Project. If behavioral

changes occur, CDFW recommends the work causing that change cease and CDFW consulted for additional avoidance and minimization measures.

If continuous monitoring of identified nests by a qualified wildlife biologist is not feasible, CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival. Variance from these no disturbance buffers is possible when there is compelling biological or ecological reason to do so, such as when the construction area would be concealed from a nest site by topography. CDFW recommends that a qualified wildlife biologist advise and support any variance from these buffers and notify CDFW in advance of implementing a variance.

## **ENVIRONMENTAL DATA**

CEQA requires that information developed in EIRs and negative declarations be incorporated into a database that may be used to make subsequent or supplemental environmental determinations (Pub. Resources Code, § 21003, subd. (e)). Accordingly, please report any special status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link:

<https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address:

[CNDDDB@wildlife.ca.gov](mailto:CNDDDB@wildlife.ca.gov). The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## **FILING FEES**

The Project, as proposed, has the potential to impact fish and/or wildlife, and assessment of filing fees may be necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

## **CONCLUSION**

CDFW appreciates the opportunity to comment on the MND to assist Lower Tule River Irrigation District in identifying and mitigating subsequent project's impacts on biological resources.

Eric Limas  
Lower Tule River Irrigation District  
October 23, 2019  
Page 18

Questions regarding this letter or further coordination should be directed to Jennifer Giannetta, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014 extension 216, or by electronic mail at [Jennifer.Giannetta@wildlife.ca.gov](mailto:Jennifer.Giannetta@wildlife.ca.gov).

Sincerely,

A handwritten signature in blue ink that reads "Craig Bentley".

*for* Julie A. Vance  
Regional Manager

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