

Little Hoover Commission  
Concerning the Governance of the CALFED Bay Delta Program  
September 22, 2005

Testimony of  
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Introduction

The Winnemem Wintu Tribe [Winnemem] would like to express their appreciation and thanks to Chairman Alpert and members of the Commission for giving us the opportunity to speak before you today on the issue of CALFED Bay-Delta Program governance.

The Winnemem are an historic Native California Tribe listed as a recognized California Native Tribe by the California Native American Heritage Commission (NAHC), a California Agency. The Winnemem Wintu are not currently listed as federally recognized.

The Winnemem have testified before the US Senate Select Committee on Indian Affairs, in numerous hearings of implementing agencies involved in the CALFED project, and before the California Bay-Delta Authority (CBDA) and Bay-Delta Public Advisory Committee (BDPAC), regarding elements of the CALFED program.

Like many members of the Commission, the Winnemem were thrown into the CALFED issue out of necessity and not by choice. The Winnemem's necessity stems from the need to protect the tribe's very survival, both culturally and spiritually - elements of the CALFED project endanger both of those.

The Winnemem do not pretend to be water experts, but we do know water in our own way. We sing to it. We pray to it. We dance and celebrate around it. It is the lifeblood of Mother Earth and all things. It is part of what identifies us as a people – Winnemem means “Middle Water” and Wintu means “People”. We are the Middle Water People.

We have been taught through time immemorial by our leaders and elders that you must protect the water or the fires will come, bringing death and destruction. We were also taught to protect the sacred fires or the floods will come, bringing death and destruction. It is this matter of ‘Balance’ that keeps all things healthy and vibrant. That is the problem with CALFED – there is NO BALANCE.

## Issues Affecting Governance

The first and foremost issue affecting CALFED governance is, EVERYBODY is in charge, but NO BODY is in charge. There is no single authority that has “authority” over EVERY implementing agency. That includes federal and state. Each implementing agency is in charge of its own area of concern, and is not accountable to any other area of concern. This, in and of itself, should be cause for serious concern when you consider that CALFED is attempting to address water issues that will affect California for generations to come. I will explain.

Unfortunately, when you look to how best to determine the governance of CALFED, you must first look at and understand the very basic, core issue – water – and how / who manages it, regulates it, decides who / how much they get, and decides where / when they get it. This necessarily includes water rights, entitlements, permits, and contracts. Each of these elements has a significant impact on how CALFED governance is accomplished, and how the four main goals of CALFED are to be achieved.

Those four goals are:

**Water Supply Reliability** - Expand water supplies to ensure efficient use of the resource through an array of projects and approaches

**Water Quality** - Improve water quality from source to tap for the 22 million Californians whose drinking water supplies come from the Bay-Delta watershed

**Ecosystem Restoration** - Improve the health of the Bay-Delta system through restoring and protecting habitats and native species

**Levee System Integrity** - Improve Bay-Delta levees to provide flood protection, ecosystem benefits, and protect water supplies needed for the environment, agriculture, and urban uses

The goals are affected by any implementing agency’s ability to form its own regulations, management procedures, contracts, allocations, delivery promises, etc...etc... outside of CALFED, because any of those can, and HAVE had an effect on the ability of CALFED to work towards and meet its goals.

Here are some examples:

In June 2004 the Bureau of Reclamation, a member of CALFED, issued its Central Valley Project Long Term Operations Criteria and Plan – CVP-OCAP. This plan significantly changed the way the Bureau would manage water throughout the CVP.

Two key elements in the plan having a direct impact on CALFED goals are: 1) the elimination of the “cold water pool” behind Shasta Dam, which was to be

used to regulate river temperatures for the protection of anadromous fish – specifically salmon and steelhead, and 2) reducing the length of temperature regulation in the Sacramento River from Shasta Dam to Red Bluff by approximately 19 miles, thereby eliminating approximately 42% of current spawning habitat.

Those two policies alone are in direct conflict with the CALFED goal of protecting habitats and native species contained in the Ecosystem Restoration element, and appear to be in direct violation of mandates in the Central Valley Project Improvement Act (CVPIA).

**Relevance:**

It is hard to govern a project or program when you have no control over decisions or actions that directly impact the very project or program you are trying to govern.

**Long Term Water Contracts / Renewals**

The Bureau of Reclamation is currently in the process of renewing, or has renewed, more than 200 long term CVP water contracts with settlement contractors, utility districts, water districts, cities, counties, irrigation districts, and agencies. These water contracts are being entered into for terms of 25 to 40 years with near-automatic renewal clauses. The terms of the contracts, i.e. who gets how much water, for how long, for what use, and at what cost, are decisions that are being made behind closed doors with little or no public scrutiny. [See: *US Senator Boxer's letter to Governor Schwarzenegger re New Long Term Contracts in California's Central Valley, Feb. 24, 2005*]

These contracts are being renewed for more water than has been historically delivered in spite of the fact that some of the districts are retiring hundreds of acres of land, and that in the Central Valley more than 2.5 acres of irrigated land are taken out of production an **hour** due to urban sprawl. Additionally, the total acre feet promised in the contracts is more water than the Bureau of Reclamation currently has available to it.

[See: *Sacramento Bee: Pending Deal Would Undermine State's Water Solutions – 2/25/05 – Peter H. Gleick, and, Sac. Bee: Bumper Crop of Preservationists – 12/05/04 – Mike Lee*]

The monetary terms of the contracts are pennies on the dollar, and do not come close to covering the capitol costs associated with increasing the amount of water available to meet the terms of the contracts, but allow for increased profits through sales of water.

[See: *LA Times: Water Pact Gives State Growers New Profit Stream – 2/16/05 – Bettina Boxall, and Sac. Bee: Water Worries Never Run Dry – 3/14/05 – Dale Kasler*]

A very serious concern is the renewing of contracts for delivery of water to areas that have already created environmental damage from their farming practices.

[See: *North County Times: Though Land is Poisoned, California Water Districts lock in Supplies* – 3/15/05 – *Juliana Barbassa, Associated Press*]

At first blush, it would appear that some terms of the contract renewals may be in violation of the Central Valley Project Improvement Act (CVPIA), and some may be specifically in violation of the California Constitution, Article 10, Section 2 prohibition against “waste or unreasonable use”.

**Relevance:**

I believe that the relevance of the water contracts to the ability to govern CALFED and meet its program goals is self-evident. The contracts will, and have, affected the way decisions can be made; priorities can be set, and the ability to establish a “beneficiary pays” structure to meet programmatic goals and funding. Why would somebody want to sit down at a table to negotiate a “beneficiary pays” structure when they’ve already got theirs, for a guaranteed delivery, at a guaranteed price?

Signing contracts for more water than is currently available means you HAVE to build more storage, you HAVE to increase pumping, you HAVE to increase transfers, etc. to meet the contracted supply. Alternatives are diminished, if not eliminated altogether.

**Biological Opinions**

But the real kicker is, there were two Biological Opinions issued on the basis of the CVP-OCAP – which allowed the Bureau of Reclamation to begin renewal of the long term water contracts. One by the US Fish and Wildlife Service (a member of CALFED) regarding the Delta Smelt, and one by National Marine Fisheries Service (NMFS or NOAA Fisheries, also a member of CALFED), on the Salmon / Steelhead populations. Each of these species has one or more populations listed as “threatened” or “endangered” under the Endangered Species Act (ESA). Yet both of these opinions assessed a ‘no jeopardy’ finding despite data to the contrary contained within the body of the opinions themselves.

The latter opinion was so controversial that it caused US Senator Boxer (D-CA) to call for an investigation to determine if political pressure had been placed on NMFS to change the “jeopardy” conclusion from the draft Biological Opinion to the “no-jeopardy” conclusion, and caused US Rep. George Miller (D-Martinez), along with 18 other members of Congress to ask the Inspectors General of the Commerce Department to investigate whether federal appointees played a role in encouraging NMFS to ignore the scientific basis for the initial jeopardy conclusions and to override those conclusions. State Senator Mike Machado, Chair of the Natural Resources and Water Subcommittee on Delta Resources, made a similar request.

In response to Congressional concerns, on July 8, 2005, the Department of Commerce's Inspector General issued a report on the NMFS consultation on the OCAP, and criticized NMFS for "circumvent[ing] key internal controls established to ensure the integrity of the biological opinion," and stated that the flawed process leading up to the issuance of the Biological Opinion, "understandably raises questions about the integrity of the OCAP opinion."

Earlier in May, the Directors of the Department of Water Resources, the Department of Fish and Game, and the State Water Resources Control Board responded to Senator Machado's request in a letter dated May 17, 2005, that noted with concern, among other things, that "the State anticipates increased impacts to winter-run Chinook and spring-run Chinook will occur as a result of the changes in water project operation and less stringent temperature compliance requirements." [*Ibid at p.4*]

As to the former Biological Opinion regarding the Delta Smelt - the Delta Smelt is currently experiencing the lowest population on record. The crisis for the endangered Delta Smelt could be catastrophic.

[See: *San Francisco Estuary & Watershed Science: Critical assessment of the delta smelt population in the San Francisco Estuary, California, Volume 3, Issue 2, September 2005* (direct link available from CALFED home page)] [See also: *Contra Costa Times: Delta Smelt dwindling to record low numbers - 7/15/05 - Mike Taugher*]

Because of the seriousness of the implications to endangered species, and the questionable science and methods used to obtain the "no jeopardy" findings in the biological opinions, there have been at least two lawsuits filed in Federal Court that we are aware of:

"Natural Resources Defense Counsel, et al v. Gale A Norton, et. al." (C 05-00690 CW) challenging the Biological Opinion issued on the Delta Smelt;

And,

"Pacific Coast Federation of Fisherman's Associations/Institute for Fisheries Resources, et. al. (including the Winnemem Wintu Tribe) v. Gale A Norton, et al" [filed 8/9/05 in federal court in Oakland) challenging the Biological Opinion issued on the Salmon/Steelhead.

We would like to point out that currently the State is not named as a defendant in either of these suits. We have been urging the state to intervene as Plaintiffs, but have received no word on a decision.

In a related lawsuit regarding the Bureau of Reclamation's water contract renewals and the Biological Opinions issued to support them, US District Court Judge Lawrence K. Karlton ruled that they were fatally flawed, and that the Bureau's actions based on the opinions were "arbitrary and capricious".

[See: *Sac Bee: Agencies Ignored Impact of Water Deal, Judge Rules – July 30, 2005 – Denny Walsh*]

**Relevance:**

All three agencies involved in long term water contracts and biological opinions are members of CALFED, i.e. the Bureau of Reclamation, the US Fish and Wildlife Service, and NMFS (NOAA fisheries). The actions they are taking outside of CALFED are having a profound influence on CALFED ability to govern effectively and in a balanced and equitable manner. Because of the lack of authority of CALFED to control the actions of implementing agencies, stakeholders are leaving the table and resorting to the courts because that is the only place they feel they can protect California's resources for generations to come.

**Elements Missing From Governance**

CALFED ROD / Environmental Justice

There are two program elements that the CALFED ROD specifically set out to cover and be included in all program elements. Those are: Science and Environmental Justice. [Ibid]

It is clear that Science has been determined to be an intricate part of CALFED by the level of funding it receives. It is also clear that Environmental Justice is way off the radar when you view the level of funding it receives, approximately 1%.

The CALFED ROD made a specific commitment to Environmental Justice to ensure that:

“Consistent with Federal and State authorities including Federal Executive Order 12898, Title VI of the Civil Rights Act of 1964 and recent State legislation, the CALFED Agencies are committed to addressing environmental justice challenges related to the management of water in the Bay-Delta watershed. . . . . The CALFED Program and its participating agencies are committed to seeking fair treatment of people of all races, cultures, and incomes, such that no segment of the population bears a disproportionately high or adverse health, environmental, social or economic impact resulting from CALFED's programs, policies, or actions. The CALFED Agencies will be responsible for ensuring this policy is carried out across all program areas through the development of environmental justice goals and objectives. (Emphasis added)” [ROD Implementation Commitments, p.32]

Yet, Environmental Justice concerns are seriously lacking throughout the CALFED program elements.

The Bay Delta Public Advisory Committee (BDPAC) established an Environmental Justice Subcommittee in December 2001, and the committee held its first meeting in February 2002. Many population segments, groups and organizations were hopeful in the establishment of this committee and felt their concerns would finally have a forum. However, after years of attending EJ Subcommittee meetings, and realizing no response or benefit, these populations, groups and organizations have discounted this forum as just another ‘lip service’ attempt at appeasement, and have stopped participating.

There are three serious flaws with Environmental Justice in CALFED and the Environmental Justice Subcommittee. They are: 1) no real level of funding to accomplish the tasks that EJ needs to accomplish; 2) no representation sits on either the CBDA or BDPAC to advocate EJ issues; and, 3) the current structure and personnel involved in the EJ Subcommittee are not capable of carrying out the necessary tasks to ensure EJ across program elements, even if they had numbers 1 and 2 above.

The Winnemem Wintu Tribe has appeared before the EJ Subcommittee on several occasions to voice our concerns regarding the proposed enlargement of Shasta Dam – an enlargement that will inundate remaining cultural, sacred and historical sites on the lower McCloud River that we still use today.

We felt that this was an appropriate forum in which to voice our concerns and present our case. We offered a proposed resolution to be presented before BDPAC /CBDA, sponsored by the EJ Subcommittee in June of this year, to address the serious issue of the proposed Shasta Dam enlargement. It appeared that the EJ Subcommittee was supportive and behind the proposed resolution. In fact, some of their documentation regarding the agenda item would lead you to believe that.

However, in their supporting documentation for the agenda item, the EJ Subcommittee discounts the proposed recommendation as “beyond the purview of CALFED,” inaccurately sites Assembly Concurrent Resolution (ACR) 185 as having been referenced and cited as an authority in support of the recommendation, distorted facts contained in the History of the Winnemem Wintu Tribe, and basically argued that the State of California could not do anything for us because we are not a “federally recognized” tribe. [See: [http://calwater.ca.gov/CBDA/CBDAMeetingMaterials\\_6-8-05.shtml](http://calwater.ca.gov/CBDA/CBDAMeetingMaterials_6-8-05.shtml) Recommendation re: Winnemem Wintu and Shasta Enlargement]

The EJ Subcommittee placed this item on the agenda as an ‘information item’ and not as an action item. Since the June 8, 2005 Joint CBDA/BDPAC meeting, the EJ Subcommittee has taken NO FURTHER ACTION, on the proposed resolution, and appears to have tabled the matter for some future date, if ever.

#### California Historic Tribes:

Throughout California there are numerous California Historic Tribes that are not federally recognized. The tribes are not federally recognized for a number of reasons, but mostly as a result of the failure of the US Senate in 1852 to ratify the 18 treaties signed

with the tribes. They are recognized, however, through the California Native American Heritage Commission. This is a fact which was considered in the passage and signing into law last year of SB-18. [Senate Bill No. 18 - An act to amend Section 815.3 of the Civil Code, to amend Sections 65040.2, 65092, 65351, 65352, and 65560 of, and to add Sections 65352.3, 65352.4, and 65562.5 to the Government Code, relating to traditional tribal cultural places.] [full text: [http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb\\_0001-0050/sb\\_18\\_bill\\_20040930\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_18_bill_20040930_chaptered.pdf) ]

This law requires local governments, i.e. city and county, to consult with federally and non-federally recognized California Native American tribes that are on the contact list with the Native American Heritage Commission when developing and implementing their general development plans. This law establishes a government-to-government relationship for all California Native American tribes within the context of localized planning and development consultations. We believe that the California Legislature's intent in passing this law was to protect the rights of all California Native American tribes, and to redress some of the inequities levied upon the 'non-recognized' tribes brought on by the federal Bureau of Indian Affairs established class system.

The non-federally recognized California tribes are not represented ANYWHERE in CALFED. Yet many of the non-federally recognized tribes are going to suffer the brunt of CALFED operations and programs. This inequity needs to be rectified, and the CALFED ROD amended to include ALL California Tribes. The current structure for tribal consultation and representation is inadequate and not a true representation of tribal concerns in California.

Previous Testimony before the Commission:

On August 25, 2005, this Commission heard testimony from a variety of individuals who were responsible for the creation of CALFED, who had managed CALFED, and who are currently responsible for the management and oversight of CALFED.

You heard former Secretary Babbitt say; we need more storage, more storage, more storage, and a revisit to take into account the effects of global warming.

You heard former Governor Wilson say that bureaucracy has taken over CALFED because of requirements such as 404, NEPA, CEQA, ESA, CESA, and a myriad of other "mystic" challenges.

You heard former Assistant Secretary Raley clearly point out that the CBDA has no authority over the federal agencies; that if the CBDA questions a decision made by one of the federal agencies – it is just a rehashing or revisiting of federal agency decisions that CBDA members or staff don't like, - and, should litigation ensue over long-term water contract renewals, the expansion of Banks to 8500 cfs, or the validity of the OCAP, then the fundamental rationale for CALFED is no longer valid.

And you heard various other testimony regarding, funding, non-voting members, and extending full partnership as solutions to the governance issue.



We would like to include feedback on this prior testimony as part of our statement here today, because it is relevant to our current testimony.

Feedback on Prior Testimony:

First, we would like to point out whose water we are talking about managing. The water belongs to the People of the State of California, and through our elected officials and government agencies we authorize through statute, regulation, or permit who can move it, manage it, or control it. This is true, whether it is the State Water Project, the Central Valley Project, or any other water management system.

We must keep that concept clear when we are deciding the future of water in California for the next decades and generations to come.

Secondly, the suggestion inferred in Assistant Secretary Raley's testimony, that if members of the CBDA (or anybody for that matter) question a decision made by one of the federal agencies is just sour grapes and inappropriate, is offensive and condescending - especially if the question arises due to an agency decision that may result in a profound impact on the ability of CALFED to achieve its goals. The references to the long term contracts, Banks expansion (SDIP), and the OCAP, fall with the same context as stated above.

I believe that the clear misuse of authority and disregard for procedures by the Bureau of Reclamation, US Fish and Wildlife Service, and NOAA fisheries as set out in the Inspector General's opinion referenced above, and the findings by a US District Court Judge, also referenced above, clearly indicates that there may be MANY decisions made by federal agencies that need to be called into question.

Thirdly, we hope that the Commission does not take to heart the inference by former Governor Wilson that the problem with CALFED governance is because of bureaucracy imposed by federal and state legal requirements mandated under the NEPA, CEQA, ESA, CESA, and the myriad of other "mystic" protections that were put in place to protect the environment, fish, wildlife, cultural, social, and historical resources.

Lastly, we agree with the testimony that CALFED needs a reliable source of funding in order to govern properly. However, we question whether the disconnect of the federal agencies is due to a "non-voting" status as members, or whether it is due to the fact that they really don't think they need CALFED in order to do whatever they want. Full partnership is a two-way street.

It could be that the only reason the federal agencies have remained at the CALFED table is that they need a state sponsor in order for the Bureau to accomplish projects they have set sight on, such as enlarging Shasta Dam, building new storage sites, increased pumping, and various other projects. They certainly are not bringing the necessary funding levels to the program to support the programmatic goals.

Summary:

It is clear by previous testimony, and by our observations, that there is NO single governing authority over CALFED or its participating members. In order for CALFED to be effective, there needs to be a single accountable authority that can modify, veto or approve any element of CALFED and any project implementation by any member of CALFED whether it be state or federal. We are not sure what form that would take, but we are sure that it will take Congressional approval to grant the narrow scope of authority over federal agencies in the specific matters concerning the waters of California. This could force funding into the CALFED projects if the necessary approvals to go forward on any project were subject to additional authority.

It could also be done by re-looking at the permitting process, and re-looking at the existing permits issued. Permitting could be a way to regulate federal projects, and exert a small measure of control over CVP water operations and long term contracts.

We, meaning all Californians, are at a critical confluence of events centered around California's water. Contracts are being signed as we speak that will tie up millions of acre feet of water for a pittance over the next 25 to 50 years. Our fisheries are under siege, and many species may not survive the onslaught. Water is being privatized, both above and below ground throughout the state. Small farmers, rural communities, minority populations, and the underserved have suffered, and will continue to suffer if the current direction of water management in California does not change.

Environmental Justice needs to be elevated to the level of science throughout the CALFED program elements, and the very structure of Environmental Justice within the program needs to be changed.

Tribal consultation needs to require that all agencies involved in CALFED must consult with any California Native American Tribe that is listed on the California Native American Heritage Commission's contact list, whether federally or non-federally recognized, where that tribe's cultural, religious, or historical resources may be impacted by an agency's implementation of any CALFED program element.

The tribal representation on the CBDA or BDPAC must truly represent the tribal make-up of California, and that means representation by non-federally recognized California Native American tribes as well as federally recognized.

Whatever actions we take or don't take now, and whatever decisions we make or don't make now – will have a profound effect on all Californians for decades and generations to come. It is time for California to take real control over the governance of how California's water is managed, distributed, enhanced, and paid for. It is a matter of Public Trust.

Thank You