

**CALIFORNIA STATE LANDS COMMISSION**

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*Established in 1938*

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**APR 23 2019**

**STATE CLEARINGHOUSE**

File Ref: SCH #2019039146

Bryan Kelly  
Merced Irrigation District  
744 W 20<sup>th</sup> Street  
Merced, CA 95344

VIA REGULAR & ELECTRONIC MAIL ([bkelly@mercedid.org](mailto:bkelly@mercedid.org))

**Subject: Draft Initial Study/Mitigated Negative Declaration (IS/MND) for the Merced River Instream and Off-Channel Habitat Rehabilitation Project, Merced County**

Dear Mr. Kelly:

The California State Lands Commission (Commission) staff has reviewed the Draft IS/MND for the Merced River Instream and Off-Channel Habitat Rehabilitation Project (Project), which is being prepared by the Merced Irrigation District (District). The District, as the public agency proposing to carry out the Project, is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The Commission is a trustee agency for projects that could directly or indirectly affect State sovereign land and their accompanying Public Trust resources or uses. Additionally, because the Project involves work on State sovereign land, the Commission will act as a responsible agency.

### **Commission Jurisdiction and Public Trust Lands**

The Commission has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The Commission also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6009, subd. (c); 6009.1; 6301; 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the common law Public Trust Doctrine.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The state holds these lands for the benefit of all people of the state for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal

waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the state holds fee ownership of the bed of the waterway landward to the ordinary low-water mark and a Public Trust easement landward to the ordinary high-water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

After reviewing the Draft IS/MND, portions of the Project area include the bed of the Merced River below the ordinary low-water mark, which is subject to the Commission's leasing jurisdiction. Proposed work within the Commission's jurisdiction will require a lease from the Commission, and work between the ordinary high-water mark and ordinary low-water mark must be compatible with the Public Trust easement. As such, the Commission has received an application for a new lease for the Project that staff is currently processing.

### **Project Description**

The overall vision of the Project is to restore (rehabilitate/enhance) habitat for native fish species particularly during drought conditions, emphasizing spawning and rearing habitat for Central Valley (CV) salmonids.

From the Project Description, Commission staff understands that the Project aims to protect, improve, and restore riverine habitat, including benefits to fish, wildlife, vegetation, and water quality. The Project includes several components and incorporates multiple strategies to meet the goals of the United States Fish and Wildlife Service Anadromous Fish Restoration Program. These goals include long-term habitat restoration for CV fall-run salmonid populations in the Merced River, including augmenting appropriate spawning substrate for these species, as well as recovering side channel and floodplain habitats that support juvenile salmonid growth and survival.

The specific goals and objectives of this restoration Project are to: 1) augment, rehabilitate, and enhance productive lower Merced River juvenile salmonid rearing habitat and adult spawning habitat that is resilient to drought conditions; 2) enhance juvenile salmonid access to historic floodplain habitat; 3) reduce main channel habitats potentially conducive to invasive fish species; 4) create additional flooding capacity, improving flood management in wet years; 5) address goals of existing recovery plans and work synergistically with existing restoration efforts; and 6) improve community opportunities to participate in, learn about, and support salmonid habitat restoration that is resilient to present and future drought conditions.

### **Environmental Review**

Commission staff requests that the District consider the following comments on the IS/MND to ensure that impacts to State sovereign land are adequately analyzed for the Commission's use of the IS/MND to support an approval of a new lease for the Project.

### **General Comments**

1. Current CEQA Amendments: New amendments to the CEQA Guidelines went into effect on December 28, 2018, which included amendments to the Appendix G Environmental

Checklist (<http://opr.ca.gov/ceqa/updates/guidelines/>). Amendments to the Environmental Checklist included additions of new affected resource sections and considerable changes and additions to existing resource sections. Please consider whether the IS/MND is subject to the current CEQA amendments in accordance with CEQA Guidelines section 15007, subdivisions (b), (c), and (d), and disclose this information in the IS/MND.

### Greenhouse Gas (GHG) Emissions

2. GHG Analysis: The Draft IS/MND identifies a GHG emissions analysis consistent with the California Global Warming Solutions Act (Assembly Bill [AB] 32) with the results of the analysis being below the thresholds of significance. Please provide a copy of the GHG analysis to support the results provided in the Draft IS/MND and include it in any subsequent versions of the document as an attachment or an appendix. This analysis should show the GHG emissions emitted as a result of construction and ultimate build-out of the Project.

### Tribal Cultural Resources

3. Tribal Engagement and Consideration of Tribal Cultural Resources: Commission staff recommends that the District expand the discussion of Tribal engagement and consideration of Tribal cultural resources in order to demonstrate compliance with AB 52 (Gatto; Stats. 2014, ch. 532), which applies to all CEQA projects initiated after July 1, 2015.<sup>1</sup> Commission staff notes that the Draft IS/MND does not contain sufficient information as to how the District has complied with AB 52 provisions, which provides procedural and substantive requirements for lead agency consultation with California Native American Tribes, consideration of effects on Tribal cultural resources (as defined in Pub. Resources Code, § 21074), and examples of mitigation measures to avoid or minimize impacts to these resources. Even if no Tribe has submitted a consultation notification request for the Project area covered by the Draft IS/MND, the District should:

- Contact the Native American Heritage Commission to obtain a general list of interested Tribes for the Project area
- Include the results of this inquiry within the IS/MND
- Disclose and analyze potentially significant effects to Tribal Cultural Resources and avoid impacts when feasible

Since the Draft IS/MND does not disclose if notification or outreach to interested Tribes has occurred and does not document their response, Commission staff recommends that the District include this information in the Draft IS/MND to maintain a clear record of the District's efforts to comply with AB 52.

4. Determination of Significance: Additionally, with respect to significance determinations, CEQA section 21084.2 states that, "A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment." When feasible, public agencies must

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<sup>1</sup> Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 were added to CEQA pursuant to AB 52.

avoid damaging effects to Tribal Cultural Resources and shall keep information submitted by the Tribes confidential. Commission staff believes that the Draft IS/MND lacks adequate support for the District's conclusion that impacts to Tribal Cultural Resources are less than significant with incorporation of the mitigation measures described on page 109 of the Draft IS/MND. Commission staff recommends that the District provide additional discussion on how it determined the appropriate scope and extent of resources meeting the definition of Tribal Cultural Resources, and whether locally-affiliated Tribes were consulted as part of this determination.

Thank you for the opportunity to comment on the Draft IS/MND for the Project. As a responsible and trustee agency, the Commission will need to rely on the adopted MND for the issuance of a new lease as specified above and, therefore, we request that you consider our comments prior to adoption of the MND.

Please send copies of future Project-related documents, including electronic copies of the adopted MND, Mitigation Monitoring Reporting Program, Notice of Determination, and approving resolution when they become available. Please be advised that Commission staff cannot schedule your lease application for a future Commission meeting until these documents have been provided to Commission staff. Please refer questions concerning environmental review to Christopher Huitt, Senior Environmental Scientist, at (916) 574-2080 or [christopher.huitt@slc.ca.gov](mailto:christopher.huitt@slc.ca.gov). For questions concerning archaeological or historic resources under Commission jurisdiction, please contact Staff Attorney Jamie Garrett, at (916) 574-0398 or [jamie.garrett@slc.ca.gov](mailto:jamie.garrett@slc.ca.gov). For questions concerning Commission leasing jurisdiction, please contact Lucien Pino, Public Land Management Specialist, at (916) 574-1858 or [lucien.pino@slc.ca.gov](mailto:lucien.pino@slc.ca.gov).

Sincerely,



Eric Gillies, Acting Chief  
Division of Environmental Planning  
and Management

cc: Office of Planning and Research  
L. Pino, Commission  
E. Kennedy, Commission  
J. Garrett, Commission  
C. Huitt, Commission