

1 OSHA R. MESERVE (State Bar No. 204240)
2 SOLURI MESERVE, A LAW CORPORATION
3 510 8th Street
4 Sacramento, California 95814
5 Telephone: (916) 455-7300
6 Facsimile: (916) 244-7300
7 Email: osha@semlawyers.com

8
9 Attorneys for Protestants
10 Friends of Stone Lakes National Wildlife Refuge and
11 Save Our Sandhill Cranes

12
13 **BEFORE THE**
14 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

15 HEARING IN THE MATTER OF
16 CALIFORNIA DEPARTMENT OF WATER
17 RESOURCES AND UNITED STATES
18 BUREAU OF RECLAMATION'S
19 REQUEST FOR A CHANGE IN POINT OF
20 DIVERSION FOR CALIFORNIA WATER FIX

21 **FRIENDS OF STONE LAKES NATIONAL**
22 **WILDLIFE REFUGE'S AND SAVE OUR**
23 **SANDHILL CRANES' JOINDER IN**
24 **NATURAL RESOURCES DEFENSE**
25 **COUNCIL'S OBJECTION TO AND**
26 **PETITION FOR RECONSIDERATION OF**
27 **AUGUST 31, 2017 RULING REGARDING**
28 **SCHEDULING OF PART 2 AND OTHER**
PROCEDURAL MATTERS

1 Protestants Friends of Stone Lakes National Wildlife Refuge (“FSL”) and Save Our
2 Sandhill Cranes (“SOS Cranes”) join in the National Resources Defense Council’s (“NRDC’s”)
3 Objection to and Petition for Reconsideration of the State Water Resource Control Board’s
4 (“SWRCB’s”) August 31, 2017 ruling regarding scheduling Part 2 of the hearing on the
5 Department of Water Resources’ and the U.S. Bureau of Reclamation’s (“Petitioners”) Petition
6 for a Change in Point of Diversion (“Petition”) for the California Waterfix (“Project”).¹ The
7 August 31, 2017 Ruling (“Ruling”) ordered all Protestants to file their case-in chief for Part 2 on
8 November 30, 2017, at the same time as Petitioners. Implementing the Ruling’s briefing
9 schedule would prejudice Protestants’ ability to fully brief their cases.²

10 Protestant FSL is a volunteer organization dedicated to the conservation, protection,
11 enhancement and promotion of the Stone Lakes National Wildlife Refuge (“Stone Lakes NWR”
12 or “Refuge”) whose members have been actively engaged in reviewing the Project for the
13 benefit of the Refuge for many years.

14 Protestant SOS Cranes is a 501(c)(3) non-profit organization that formed over a decade
15 ago to protect Sandhill Crane wintering habitat in the Sacramento region through outreach,
16 education, and direct engagement in both policy and projects that effect that habitat. SOS
17 Cranes was involved in numerous meetings during Project development in an effort to improve
18 mitigation and avoidance and minimization measures in the Stone Lakes area and on Staten
19 Island.

20 Part 2 of SWCRB’s hearing on the Petition will address whether the changes proposed
21 by the Petition will unreasonably affect fish and wildlife or recreational uses of water, or other
22 public trust resources. (SWRCB, Notice of Petition and Notice of Public Hearing and Pre-
23

24 ¹ FSL and SOS agree with other Protestant submittals that allege it is premature to start
25 Part 2 prior to the completion of Endangered Species Act permitting, issuance of the Record of
26 Decision under the National Environmental Policy Act, and a complete petition, project
27 description and operations plan, among other defects. Without waiving any of those
28 arguments, this Joinder addresses the Hearing Officers’ August 31, 2017, ruling regarding
scheduling Part 2.

² Nothing in the regurgitation of previously disclosed (and still insufficient) operating
criteria provided by Petitioners on September 8, 2017, changes the FLS and SOS position that
insufficient information regarding the change proposed by the Petition has been provided.

1 Hearing Conference to Consider the Petition [Oct. 30, 2015], p. 11.) FSL and SOS Cranes
2 share NRDC's concerns that the inadequate and inconsistent Project descriptions provided by
3 the Project's Final Environmental Impact Report ("December 2016 FEIR"), the Biological
4 Opinions issued by the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries
5 Service, and the Department of Fish and Wildlife-issued Incidental Take Permit ("ITP"), will
6 prejudice Protestants' ability to fully brief their cases with regard to Project impacts to species,
7 especially Fully Protected avian species.

8 As just one example, the greater sandhill crane (*Grus canadensis tabida*) that winters in
9 the Delta, including the Stone Lakes National Wildlife Refuge and the Woodbridge Ecological
10 Reserve (AKA Isenberg Crane Reserve), among other places, is a Fully Protected Species
11 under the Fish and Game Code. Thus, "take" of the Crane is strictly prohibited and cannot be
12 authorized through an ITP. (Fish & G. Code, §§ 3511, subd. (b)(8).) Consequently, the
13 Project must meet a zero-"take" performance standard for greater sandhill cranes to avoid
14 running afoul of the crane's Fully Protected Species status. (Fish & G. Code, § 3511, subd.
15 (b)(8).) Given this strict standard, one would expect the Petition and supporting documents to
16 provide a robust description of Project elements designed to satisfy the zero-"take" standard.
17 This is not the case.

18 The insufficient discussion of Project's approximately 20 miles of new power
19 transmission lines illuminates just one of Petitioners' failures to describe how the Project will
20 achieve the zero-"take" standard. Petitioners previously conceded in the 2013 Draft Bay-Delta
21 Conservation Plan ("2013 BDCP") that the Project would likely result in take of 48 cranes per
22 year, violating the no-"take" standard for the greater sandhill crane due to crane collisions that
23 would occur with Project transmission lines in crane habitat. (See 2013 BDCP, Attachment
24 5.J.C, Analysis of Potential Bird Collisions at Proposed BDCP Powerlines. pp. 16-26.) The
25 EIR suggests that some of these lines would be temporary, limiting the duration of "take"
26 (December 2016 FEIR, p. 12-3549 to 51), and the FWS Biological Opinion makes only passing
27 reference to the possibility of temporary transmission lines (see FWS Biological Opinion, p.
28

1 60). Neither document provides location-specific detail on which transmission lines would be
2 temporary or permanent, which is essential to an analysis of take.³

3 The Ruling indicates that the ITP may fill in the blanks left open by other documents by
4 “impos[ing] a list of operating restrictions necessary to protect covered species.” (Ruling, p. 6.)
5 Yet, the ITP fails to close the informational gap related to how the Project will satisfy the zero-
6 “take” protective standard for the greater sandhill crane.

7 Like the EIR and FWS Biological Opinion, the ITP indicates that the Project will include
8 new power transmission lines (ITP, p. 34), which would likely cause take of the greater sandhill
9 crane. (See 2013 BDCP, Attachment 5.J.C, Analysis of Potential Bird Collisions at Proposed
10 BDCP Powerlines. pp. 16-26; December 2016 FEIR, p. 12-3549 to 51.) Yet the ITP provides
11 no discussion of how take of the cranes will be avoided, and furthermore does not include any
12 clear indication of which lines would be temporary versus permanent.⁴ The two figures that
13 purportedly show the location of both temporary and permanent Project transmission lines, yet
14 these figures also lack any identification of which lines will be temporary. (ITP, p. 34; Figures
15 4c, 4d, attached, collectively as Exhibit A.) The narrative discussion of Power Supply and Grid
16 Connections does not correct the problem. (ITP, pp. 34-35.)

17 The character of the power supply component, which has major impacts on wildlife, is
18 just one of many examples of the inadequacy of the Project description provided by the
19 existing environmental review and permit documents. Without sufficient Project-level detail of
20 every component of the Project, including how the massive power supply demand will be met,
21 Protestants cannot sufficiently brief their case on the Project’s impacts to wildlife.

22 Thus, FSL and SOS Cranes respectfully request that the briefing schedule be
23 staggered, consistent with Part 1 of the Hearing. This would allow Petitioners to provide the
24 necessary detail regarding important wildlife issues such as avoidance of take of cranes and
25

26 ³ FSL and SOS have long advocated for the feasible avoidance measure of
27 undergrounding of the power transmission lines to avoid take from birdstrikes. Take of special
28 status bird species may still occur, however, as a result of habitat disturbance during
construction and operation, among other Project activities.

⁴ Though both types of transmission lines would likely cause take given the long
construction period, temporary transmission lines may limit the duration of take.

1 other species. To allow Protestants sufficient time to provide a case in chief testimony that
2 relates specifically to the Project information Petitioners must still provide to meet their burden
3 of proof, Protestants further request that SWRCB set a Protestant case-in-chief filing deadline
4 that falls 90 days after Petitioners' filing deadline. Given the scale of the Project and the
5 magnitude of impacts to fish and wildlife, such a schedule would better promote the public
6 interest in a having these issues fully considered and reflected in a complete record.

7
8 Dated: September 11, 2017

SOLURI MESERVE,
A LAW CORPORATION

9
10 By: _____

11 Osha R. Meserve
12 Attorneys for Protestants
13 Friends of Stone Lakes National Wildlife Refuge
14 Save Our Sandhill Cranes
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Figure 4c

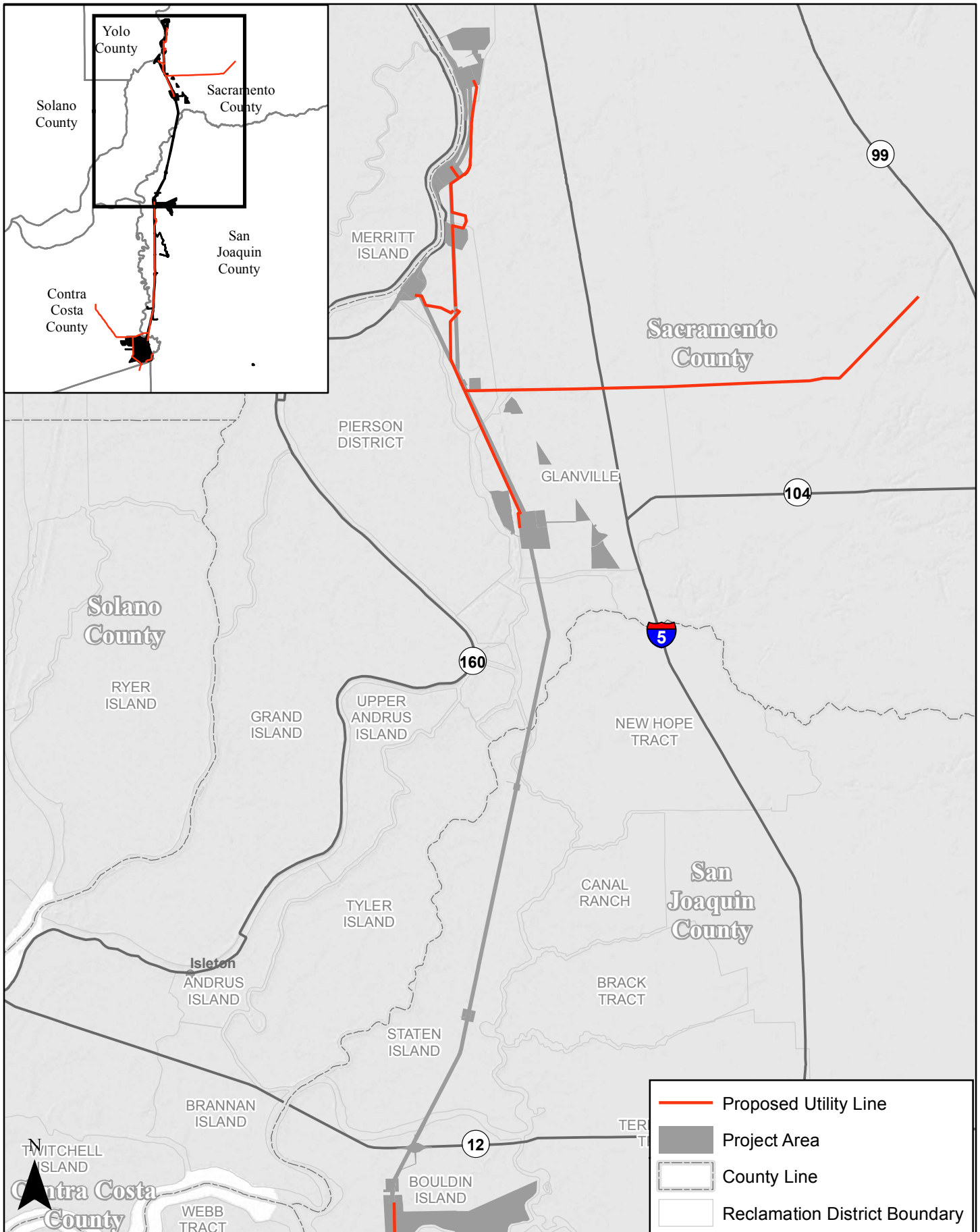
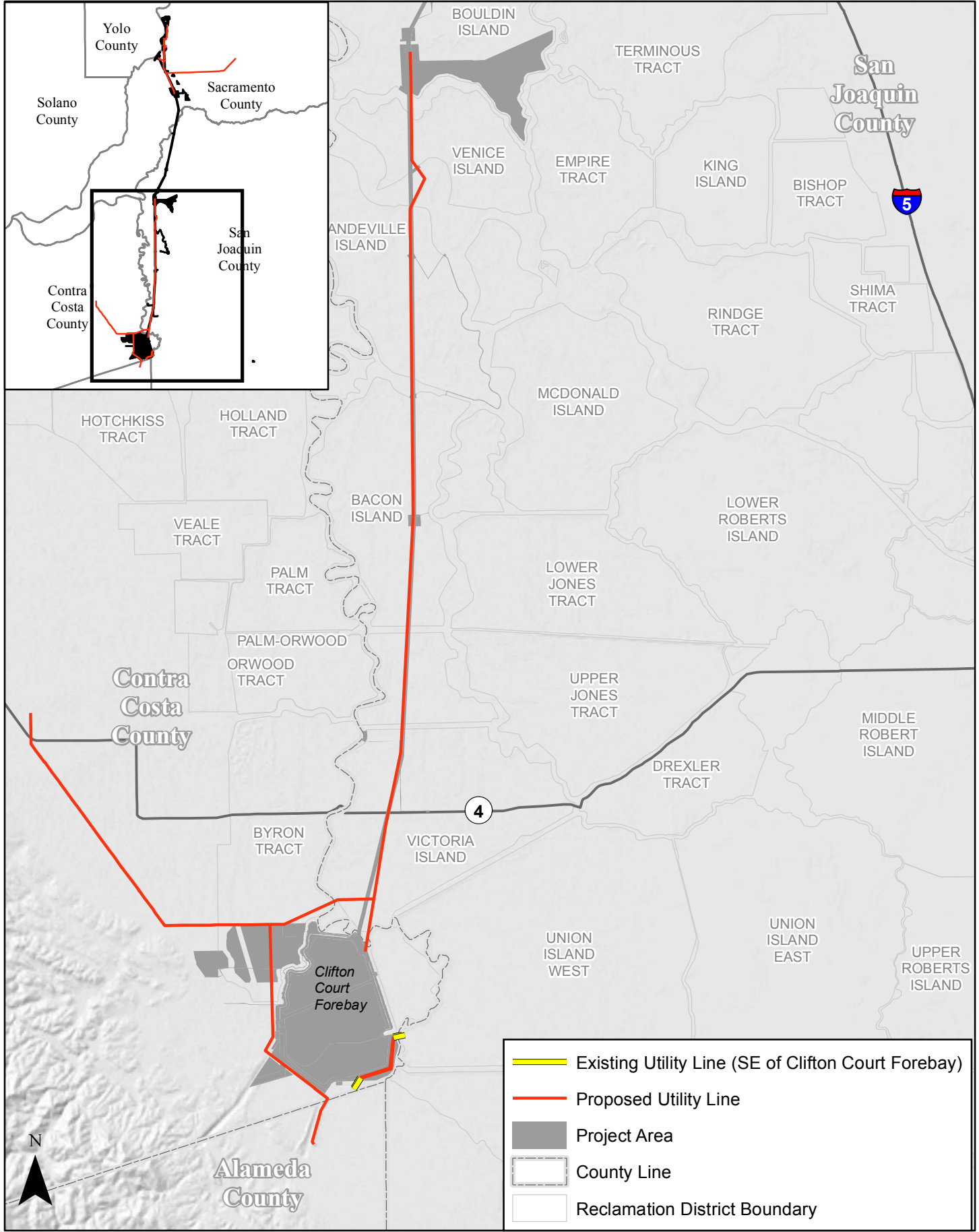


Figure 4d



California Department of Fish and Wildlife. D.Mastair. 20170223

1 **STATEMENT OF SERVICE**


2 **CALIFORNIA WATERFIX PETITION HEARING**
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have on September 11, 2017, submitted to the State Water
5 Resources Control Board and caused a true and correct copy of the following document:

6 **FRIENDS OF STONE LAKES NATIONAL WILDLIFE REFUGE AND SAVE OUR SANDHILL**
7 **CRANES' JOINDER IN NATIONAL RESOURCES DEFENSE COUNCIL'S OBJECTION TO**
8 **AND PETITION FOR RECONSIDERATION OF AUGUST 31, 2017 RULING REGARDING**
SCHEDULING OF PART 2 AND OTHER PROCEDURAL MATTERS

9 to be served by Electronic Mail (email) upon the parties listed in Table 1 of the Current Service
10 List for the California WaterFix Petition Hearing, dated August 11, 2017, posted by the State
11 Water Resources Control Board at
[http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfi](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)
12 [x/service_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml).

13 I certify that the foregoing is true and correct and that this document was executed on
14 September 11, 2017.

15 Signature: 
16 Name: Mae Ryan Empleo
17 Title: Legal Assistant for Osha R. Meserve
Soluri Meserve, A Law Corporation

18 Party/Affiliation:
19 Friends of Stone Lakes National Wildlife Refuge
Save Our Sandhill Cranes

20 Address:
21 Soluri Meserve, A Law Corporation
22 510 8th Street, Sacramento, CA 95814
23
24
25
26
27
28