

MEMORANDUM

**PREPARED FOR POSTING ON TRLIA WEBSITE**

To: PAUL BRUNNER, EXECUTIVE DIRECTOR, TRLIA  
From: SCOTT L. SHAPIRO  
JOSEPH S. SCHOFIELD  
Date: FEBRUARY 23, 2009  
Re: **TRLIA'S AUTHORITY TO FUND ONGOING MAINTENANCE OF IMPROVED LEVEES**

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**I. ISSUE AND SUMMARY**

This memorandum addresses whether the Three Rivers Levee Improvement Authority's (TRLIA's) formation document grants it the legal authority to fund the increased maintenance activities needed to sustain the levees at the design level of newly installed flood control improvements. It is our conclusion, based on the reasoning described below, that TRLIA may fund the increased level of maintenance.

For purposes of this analysis, we have assumed:

- TRLIA's financing will not cover Reclamation District No. 784's (RD 784's) historical level of maintenance of the levees, but only the new or enhanced activities required to ensure that TRLIA's levee improvements continue to meet the new design level of flood protection,
- RD 784 will continue to rely on an existing assessment to fund its historical level of maintenance, and
- No local entity other than RD 784 and TRLIA has a role in physically maintaining and operating the levees within RD 784's boundaries.

TRLIA was formed by a Joint Exercise of Powers Agreement (Agreement) executed by Yuba County and RD 784. The Agreement gives TRLIA the general power to provide improved flood protection in the county and to finance the improvements and related activities, and specifically authorizes it to maintain the public improvements it acquires, constructs or installs. But the Agreement also states it "is not contemplated that" TRLIA will finance or contract for the periodic levee maintenance that RD 784 is obligated to do or has otherwise previously conducted.

We believe that, read together, these provisions are intended to ensure that RD 784 continues providing its historical level of maintenance at its own cost, while authorizing TRLIA to fund or contract for any additional maintenance necessary to assure that the enhanced level of flood protection will be provided in the long-term. First, the Agreement expressly authorizes TRLIA

to provide levee maintenance. Given that TRLIA was formed for the immediate primary purpose of improving the levee segments within RD 784's boundaries, the Agreement's express grant of maintenance authority would be made meaningless if TRLIA were prohibited from playing any role in maintaining those same improvements. Second, the periodic maintenance provision focuses on RD 784's historical level of activity (maintenance done "otherwise in the past"), suggesting that the provision was intended to simply preserve the status quo—i.e., RD 784's existing maintenance role—not provide for an expanding one over time. Third, the provision speaks in terms of RD 784's "obligation" to provide maintenance. The Agreement appears to be carving out a category for maintenance that *RD 784* is obligated to do and that *TRLIA* is *not*. Because TRLIA has assumed most of the maintenance obligations, and the remainder are shared between TRLIA and RD 784, the provision does not appear to apply. Fourth, there is no apparent rationale for a provision that would prevent TRLIA from funding maintenance of its own levee improvements. Fifth, the provision is not expressed as a binding limitation, but rather as a general statement of intent. Agreements tend to rely on general statements of intent when the parties fear that an express restriction might have unintended consequences. It seems likely that the RD 784 maintenance provision was drafted as a general statement of intent in order to avoid preventing TRLIA from being able to provide for the maintenance of its own levee improvements.

## II. DISCUSSION

### A. Factual Background

#### 1. Purpose of the Agreement

Yuba County and RD 784 are the two parties to the Agreement. Their purpose in executing the Agreement was to form a joint powers agency (TRLIA) that would implement new flood control improvements, primarily in the flood-prone but urbanizing areas along the Yuba, Bear, and Feather River levees under RD 784's jurisdiction. RD 784 had primarily maintained the levees for agricultural purposes, and on its own lacked the funding and institutional support necessary to undertake a large-scale levee improvement project of the type proposed. Acting together through a new joint powers agency, the County and RD 784 could more effectively provide enhanced flood protection in this developing area.

#### 2. Development and Components of Three Rivers Maintenance Program

TRLIA is entering the final stages of improving 29.3 miles of the RD 784 levee system. The improvements include installation of slurry walls, relief wells, monitoring wells, stability berms, and seepage berms, as well as new setback levees, increased rock erosion protection, and widened toe access corridors.<sup>1</sup> To ensure the improved levee system continues to provide the design level of flood control, it will be necessary both to maintain the new and modified features and to develop and implement a more rigorous maintenance regimen for the levees in general.

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<sup>1</sup> See generally MBK Engineers, TRLIA O&M Needs for Assessment District (Sept. 2008).

The levees are currently maintained by RD 784 on a modest budget, and RD 784 will continue maintaining the levees after the improvements are complete. Although RD 784 has passed all State levee inspections in the past, it was necessary to develop a program to maintain the levees at the design level contemplated for the improvements. The program identifies the baseline maintenance activities historically performed by RD 784, and outlines the new and modified activities to be undertaken upon completion of the levee improvements. The baseline maintenance activities included inspection of erosion, seepage, and rodents; vegetation management (principally burning); periodic repairs; trapping of rodents; and operation of pumps. The enhanced maintenance program will include increased inspection, surveying, a more rigorous vegetation management program, more frequent repairs, tracking or dragging of levees, road resurfacing, equipment replacement, and additional electrical costs, as well as maintenance of the new levee features.<sup>2</sup>

A significant increase in funding will be needed for RD 784 to implement the new maintenance program. The funds will be provided largely by an assessment district established by TRLIA for that purpose.<sup>3</sup> The Engineer's Report for the new assessment includes a comprehensive breakdown of the existing maintenance costs (\$247,000 per year) and the costs of the new maintenance program (\$1,047,500 per year).<sup>4</sup>

### **3. Responsibilities for Maintenance Program**

RD 784 is obligated to maintain the existing levees, which are part of the Sacramento River Flood Control Project. Pursuant to Federal law, the U.S. Army Corps of Engineers (Corps) may not expend money to develop flood control projects unless it receives assurances from the State (or a political subdivision) that it will maintain and operate all the completed works in accordance with the regulations prescribed by the Secretary of the Army.<sup>5</sup> The State provided the assurances for the Sacramento River Flood Control Project pursuant to a Memorandum of Understanding in 1953, and then transferred the responsibility for maintenance of the levees to local districts, in this case to RD 784.<sup>6</sup>

The new levee improvements are a different matter. To install the new levee improvements, TRLIA needed a series of State and Federal regulatory approvals, including encroachment permits<sup>7</sup> from the Central Valley Flood Protection Board and permission from the Corps to alter

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<sup>2</sup> The levee maintenance program is discussed in detail in TRLIA O&M Needs for Assessment District and the TRLIA Levee and Flood Control Facilities Assessment District Engineer's Report (Feb. 4, 2009) (Engineer's Report).

<sup>3</sup> This memorandum does not discuss the details of the assessment process.

<sup>4</sup> Engineer's Report at 12, Table 3.

<sup>5</sup> See, e.g., 33 U.S.C. § 701c.

<sup>6</sup> See, e.g., *Paterno v. State of California*, 113 Cal. App. 4th 998, 1005 (1998); Memorandum of Understanding Regarding the Sacramento River Flood Control Project (effective Nov. 30, 1953).

<sup>7</sup> An encroachment permit is a State approval necessary to modify any levee under the jurisdiction of the Central Valley Flood Protection Board (formerly the Reclamation Board). See, e.g., 23 Cal. Code Regs., § 6 et seq.

the Sacramento River Flood Control Project pursuant to 33 USC section 408. The encroachment permits obligate TRLIA to maintain the new levee improvements (e.g., slurry walls, seepage berms):

The permittee shall maintain the permitted encroachment(s) and the project works within the utilized area in the manner required and as requested by the authorized representative of the Department of Water Resources or any other agency responsible for maintenance.<sup>8</sup>

In addition, as a condition of the grant funding it received to construct the flood control improvements, TRLIA was obligated to operate, maintain and repair the improvements. As stated in Standard article A-9 of the grant contracts:

For the useful life of the Project or Implementation Unit and in consideration of the Grant made by the State, the Local Public Entity agrees to expeditiously commence and to continue operation of the Project or Implementation Unit and shall cause the Project or Implementation Unit to be operated in an effective and economical manner; shall provide for all repairs, renewals, and replacements necessary to the efficient operation of the same; and shall cause the same to be maintained in as good and efficient condition as upon its construction, ordinary and reasonable wear and depreciation accepted. Refusal of the Local Public Entity to operate and maintain the Project or Implementation Unit in accordance with this provision may, at the option of the State, be considered a breach of this Grant Agreement and may be treated as default under Article B-2.

Finally, prior to modifying any component of the Sacramento River Flood Control Project (Project), approval must be obtained from the Corps. Because the State formally assumed responsibility from the United States for operation and maintenance of the Project, it is the State (through the Central Valley Flood Protection Board) that must seek the Corps' approval of any modifications and, in turn, provide the associated maintenance assurances. After obtaining Corps approval and making the associated assurances, the State typically assigns those maintenance responsibilities to the local flood control district, such as through a Cooperation Agreement.<sup>9</sup>

All but one of the Cooperation Agreements executed for the TRLIA levee improvements state that TRLIA *and* RD 784 shall operate and maintain the facilities and related features constructed as part of the Project.<sup>10</sup> Other provisions also suggest a shared obligation: "If the District and Three Rivers have failed or refused to perform the obligations set forth in [the operation and

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<sup>8</sup> Reclamation Board Permit No. 17782 BD, Special Permit Condition 25 (May 19, 2005); *see also* Reclamation Board Permit No. 17921 GM, Special Permit Condition 15 (July 21, 2005).

<sup>9</sup> *See, e.g.*, ER 1130-2-530 § 3-1 (Corps Flood Control Operations and Maintenance Policies Report).

<sup>10</sup> One of the Cooperation Agreements states that the operation and maintenance responsibility is RD 784's but that "This obligation shall not diminish [TRLIA's] obligation to operate and maintain the facilities and related features constructed as part of the Project described in [the relevant encroachment permit]." Cooperation Agreement Between the Central Valley Flood Protection Board, the Three Rivers Levee Improvement Authority, and Reclamation District No. 784 for Alteration of the Federal Project Levees on the Feather River, § IIC.

maintenance section of the Cooperation Agreement],” the Board may act in their stead.<sup>11</sup> Regarding payment for the work, the Cooperation states: “[TRLIA and the District] agree[] that [they] will levy and collect assessments or user charges as may be necessary and permissible under State law to satisfy [their] obligations to the State and the Board as required by this Agreement.”<sup>12</sup>

**B. The Agreement Grants Broad Authority for Flood Control Improvements with a Narrow Maintenance Restriction.**

The Agreement gives TRLIA broad power to improve and finance flood control within Yuba County. As stated in section 2.01:

The primary purpose of this Agreement is to provide for flood control improvements located in the County, including improvements to the levee system and related drainage improvements. The Authority may undertake any activities necessary or desirable to achieve its primary purpose including but not limited to . . . the provision of financing for improvements and related activities. . . .

This grant would unquestionably be sufficient for TRLIA to provide funding for the maintenance of the new flood protection control improvements. The provision of flood protection improvements includes maintenance because maintenance is an essential feature of flood protection, without which the project works would steadily decline below their design level over time. The Agreement also expressly gives TRLIA the authority to finance both improvements and “related activities,” and maintenance would qualify as a related activity. Moreover, section 4.03(c) of the Agreement gives the Authority the power to “acquire, construct, manage, *maintain* or operate *any* Public Improvement” (emphasis added). A “Public Improvement” includes “any levee, drainage or flood control improvement and related works and facilities that are within the common powers of [TRLIA’s members] to acquire, construct, or install.” Agreement, Art. I.

This grant of power, however, is informed by the following statement of intent:

It is not contemplated that the Authority will in any way contract for or finance periodic levee maintenance activities which the District [RD 784], other reclamation districts or other governmental or non-governmental entities are obligated to do or which otherwise in the past have been done by them.

*Id.* § 2.01. The Agreement itself does not define the relevant terms of, or further elaborate on, this statement.

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<sup>11</sup> *Id.* § IIIB.

<sup>12</sup> *Id.* § IVA&C.

**C. The Agreement Must Be Interpreted According to General Principles of Contract Law, Focusing on the Parties' Intent.**

The Agreement is a joint powers agreement made pursuant to Government Code section 6500 et seq. Although joint powers agreements establish the governance and authority of public entities that are separate and distinct from the agencies that form them,<sup>13</sup> the Court of Appeal has repeatedly held that such agreements are to be interpreted in the same way as other contracts, with the parties' intent being the controlling factor, rather than with reference to generally applicable law. *See Orange County Water Dist. v. Ass'n of Cal. Water Agencies Jt. Powers Ins. Auth.*, 54 Cal. App. 4th 772, 778 (1997) (party intent, not insurance law, should be used to interpret scope of joint powers self-insurance pooling agreement); *accord City of S. El Monte v. S. Cal. Joint Powers Ins. Auth.*, 38 Cal. App. 4th 162, 1639–40 (1996). The controlling principles of contract interpretation include effectuating the parties' mutual intention at the time of contracting, reading the sections of the contract together to ensure reasonable consistency across the sections, and giving a plain, commonsense reading to the contractual language. *See, e.g.*, Civ. Code §§ 1636, 1638, 1641. In addition, a “contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.” *Id.* § 1647.

**D. RD 784's Obligation to Conduct Maintenance Activities**

**1. It Would Thwart the Agreement to Prohibit RD 784 from Funding Maintenance of the Levee Improvements.**

The general tenor of the Agreement strongly suggests that TRLIA will play some role in financing maintenance of levees within RD 784's boundaries. As quoted above, the Agreement specifically contemplates that TRLIA will finance maintenance for the flood control improvements it provides. Agreement §§ 2.01, 4.03(c). And TRLIA was formed for the immediate purpose of enhancing the level of flood control provided by the levees within RD 784's jurisdiction. Thus, the maintenance intent provision cannot reasonably be read to foreclose *all* financing by TRLIA of the levees periodically maintained by RD 784. To so interpret would make one of TRLIA's most significant express powers (provision of maintenance) essentially meaningless and thereby violate one of the fundamental provisions of contract law, i.e., that one provision of a contract cannot nullify other provisions. *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 503 (2005) (“the rule's effect [Civil Code § 1641], among other things, is to disfavor constructions of contractual provisions that would render other provisions surplusage”).

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<sup>13</sup> *County of San Joaquin v. Stockton Swim Club*, 42 Cal. App. 3d 968, 971 (1974) (determining that JPA is separate public agency in light of Gov't Code §§ 6500, 6506–07).

**2. The Provision Was Apparently Intended to Maintain the Status Quo: No TRLIA Funding for RD 784’s Historical Level of Operation**

**i. The Language of the Provision Is Focused on Current and Past Maintenance Activities.**

Linguistically, the provision suggests it was intended merely to preserve RD 784’s historical maintenance role (i.e., the status quo), not to make all new or expanded maintenance activities within its boundaries the exclusive province of RD 784. The provision says it is not contemplated that TRLIA will fund or contract for periodic maintenance activities that RD 784 “[is] obligated to do, or which otherwise in the past have been performed by [it].” Had the provision been intended to cover any *future* extensions of RD 784’s obligations, it could easily been phrased so. Instead, it employed words focused on RD 784’s current (“is/are obligated”) and past (“in the past”) activities.

**ii. The Only Apparent Rationales for the Provision Are to Preserve the Status Quo, Not to Prohibit TRLIA from Funding the Maintenance of Its Own Levee Improvements.**

The rationale behind the maintenance provision is unstated, and is not immediately obvious. Nonetheless there are a few plausible motivations for each party to the Agreement to have wanted that provision, and none of them is consistent with prohibiting TRLIA from funding maintenance for the new improvements.

First, the County may have wanted the provision in order to ensure RD 784 continues its ongoing maintenance activities at its own cost. The Agreement’s general purpose was to create a new entity to increase flood protection, not to completely assume flood protection responsibilities in the area. The County may have wanted to ensure that it was not helping to take over duties that another public entity was already responsible for. Moreover, RD 784 has an existing assessment, and assessments are notoriously difficult to increase since adoption of Proposition 218. If there was an implication that TRLIA would assume all funding for the levees, the existing assessment might be lost.

Second, RD 784 may have wanted the provision to ensure it retained its historical function as the local maintaining agency. RD 784’s primary role is to maintain the local levees, and the landowners who have run the district historically may have wanted to ensure that their district was not displaced by a new entity. Entities do not lightly sacrifice authority.

Both of these rationales are consistent with TRLIA’s funding the maintenance of the improved levees in a way that respects the status quo—i.e., RD 784’s continued maintenance of the levees using its existing assessments—but with additional financing to be provided by TRLIA to cover new or enhanced maintenance activities.

**iii. The Wording of the Provision Implies an Intent to Avoid Unintended Interference with Maintenance Funding.**

The provision's phrasing suggests that the parties wanted to avoid interference with TRLIA's ability to provide for maintenance of the improvements. The provision is not worded as an express prohibition or limitation, even though it easily have been so phrased (e.g., "[TRLIA] *will not* in any way contract for or finance periodic levee maintenance activities . . ."). Rather than use terms such as "will not" or "shall not," it states that certain types of maintenance funding are "not contemplated." Contracting parties tend to rely on these more general intent statements when they fear that a more binding provision may thwart one of the underlying purposes of the contract. In this case, it seems highly likely that the provision was phrased as a statement of intent to avoid interference with TRLIA's authority to fund new maintenance activities necessitated by the levee improvements.

**3. RD 784 Is Not Solely Obligated to Maintain the Improvements.**

Even though the parties appear to have intended for TRLIA to be able to fund maintenance of the new levee improvements, the "obligation" language warrants further discussion because (as discussed above) RD 784 is legally "obligated" to maintain the improvements due to a clause in the Cooperation Agreements. At any rate, the obligation of a reclamation district to maintain levees derives from two sources: (i) its general jurisdictional authority the reclamation works within its boundaries pursuant to the Reclamation District Law, Water Code § 50000 et seq., and (ii) the assurances it makes to the State of California and other sovereign and regulatory authorities as to specific flood control works via contract or permit condition.

The Water Code is somewhat vague regarding a reclamation district's obligation to maintain levees, and could not be reasonably said to obligate RD 784 to maintain the levees according to any particular plan, including the O&M plan prepared by TRLIA. Section 50652 says that a reclamation district's board of trustees "shall exercise general supervision and complete control over the . . . maintenance and operation of the reclamation works." *See also* Water Code § 50300 (district may be formed by petition to "reclaim the land" or to "maintain[], protect[] or repair[ existing] reclamation works"). Reclamation works are broadly defined as "such public works necessary for the watering, unwatering, or irrigation of district lands." *Id.* § 50013. The Reclamation District Law does not specify any particular level of maintenance, though Section 8608 requires the Central Valley Flood Protection Board to establish and enforce maintenance and operation standards for levees. However, those standards are not specific enough to require implementing the TRLIA to sustain plan. For example, "maintenance activities" are defined broadly as "any work required to retain or maintain the intended functions of flood control." Cal. Code Regs., tit. 23, § 4(u). The levee-specific standards are fairly precise regarding construction, but much less so regarding maintenance activities. *See generally id.* § 120. The State regulations do require levees to be built and designed in accordance with the Corps' manual "Design and Construction of Levees." But the manual does not impose precise standards. Rather it is "intended as a guide for designing and constructing levees and not intended to replace the judgment of the design engineer." Manual No. 1110-2-1913 (Apr. 30, 2000); *see also Tilton v. Reclamation District No. 800*, 142 Cal. App. 4th 848, 862-63 (2006).

Other applicable standards are also discretionary. *See Tilton* at 861–63. In this regard, it is worth noting that RD 784 has consistently passed its State levee inspections under its historical maintenance regimen,<sup>14</sup> suggesting that its historical maintenance was all it was “obligated” to do under the Water Code.

Regarding contractual and conditioned obligations to undertake maintenance, most of the obligations were assumed by TRLIA, not RD 784, and TRLIA undertook those obligations with RD 784’s knowledge; two of the five positions on TRLIA’s Board of Directors are filled by members of RD 784’s Board of Trustees. As discussed above, TRLIA’s maintenance obligations for the new improvements derive from conditions in grants and in encroachment permits.

However, the Cooperation Agreements have imposed the maintenance obligation upon *both* TRLIA *and* RD 784. Thus, in a literal sense, the Cooperation Agreement does obligate RD 784 to maintain the levee improvements. However, RD 784’s obligation under the Cooperation Agreement is probably the same as that under the Water Code—i.e., the requirement to maintain the levees, though not in any particular way. The TRLIA maintenance plan is, in that sense, voluntary.

Moreover, the “obligation” language seems inconsistent with the fact that this legal obligation occurred only after the Agreement was executed. It would be strange for the Agreement to have made TRLIA’s funding authority subject to a potential future condition—i.e., RD 784’s being assigned the maintenance obligation (along with TRLIA) of the levee improvements—rather than subject to an existing and knowable condition at the time the Agreement was executed.

Perhaps more importantly, the maintenance provision seems to reflect an attempt to carve out a category for maintenance activities that RD 784 alone is obligated to do, and that TRLIA is not. The provision discusses RD 784’s obligations and its past activities as if they were the sole obligations. Given that the Agreement enabled TRLIA to execute documents that gave it a shared legal obligation to maintain the levee improvements, it would be irrational for the Agreement to simultaneously prohibit TRLIA from meeting those obligations.

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<sup>14</sup> Conversation between J. Schofield and Larry Dacus, MBK Engineers, 2-11-2009.