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*Transmittal via Email*

**RE: Delta Conveyance Project Draft Environmental Impact Report**

Friends of the River (FOR), California Water Impact Network (C-WIN), Environmental Protection Information Center (EPIC), Institute for Fisheries Resources (IFR), Northern California Council, Fly Fishers International (NCCFFI), Pacific Coast Federation of Fishermen's Associations (PCFFA), Planning and Conservation League (PCL), South Yuba River Citizens League (SYRCL), and Tryg Sletteland respectfully submit the following comments and recommendations for the Draft Environmental Impact Report (DEIR) pursuant to California Environmental Quality Act (CEQA) for the California Department of Water Resources' (DWR or "Department") proposed Delta Conveyance Project (DCP, "Project," or "Delta Tunnel"). We request that these comments be considered regarding substance of the environmental review and the potential impacts of the proposed project on Northern California watersheds and communities.

In summary, FOR believes the DEIR does not meet the legal requirements of the California Environmental Quality Act ("CEQA") due to the following:

- The DEIR is inherently flawed because the project purpose and beneficiaries are unclear.
- The DEIR inappropriately and illegally narrows the geographic scope of the project.
- The DEIR inappropriately and illegally narrows the scope of subject matter area in its analysis, including operational impacts.

- The Project is effectively part of larger projects to increase dams and diversions from rivers in the state to augment exports to the south state.
- Due to the above flaws, the DEIR does not provide adequate safeguards and mitigation measures for California's rivers.

More details are provided below regarding these assertions. FOR appreciates DWR's extension allowing for additional time for public comment. Robust public engagement is vital to truly assess the environmental impacts of this project to public trust resources, and the full geographic scope of the project impacts to the state's major watersheds, rivers, and to the San Francisco Bay/Sacramento-San Joaquin Delta, one of the largest estuaries in the United States.

## I. Overarching Comments

**The DEIR is inherently flawed because the project purpose and beneficiaries are not adequately disclosed.**

The DEIR states the purpose of the project is, "to restore and protect the reliability of State Water Project (SWP) water deliveries *and, potentially, Central Valley Project (CVP) water deliveries south of the Delta*, consistent with the State's Water Resilience Portfolio in a cost-effective manner."<sup>1</sup> [Emphasis added].

FOR finds three key issues with this statement of purpose.

(1) First, the purpose inherently suggests the Project will result in changes that will be adverse to the environment. "Restoring" water "deliveries" to the State's two largest water projects indicates that some previous "deficiency" will be recovered. At face value, *that means more water will be taken*. Millions of additional acre-feet of water could be exported from California rivers, which creates impacts that this DEIR does not disclose, analyze, or mitigate. Relative to current conditions, excess diversions would cause serious harm to rivers and watersheds tributary to the Delta. The prospect of additional exports from the Delta also perturbed the United States Environmental Protection Agency, which stated in a 2010 letter regarding the Bay Delta Conservation Plan, "EPA does not believe that we can attain the goal of a sustainable estuary if we are simultaneously trying to export an additional 1 million acre feet from that estuary."<sup>2</sup>

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<sup>1</sup> State of California, Department of Water Resources (2022). Draft Environmental Impact Report. *Delta Conveyance Project*. p. ES-1.

<sup>2</sup> "RE Purpose Statement for Bay Delta Conservation Plan," Letter to federal agencies (USBR, USFWS, NMFS) from the United States Environmental Protection Agency, June 2010, p.5. [Access online](#). This document, and all other references to a specific website or hyperlink, are hereby incorporated by reference.

Pumping constraints in the Delta have limited the amount of water that can be drawn from storage throughout the network of reservoirs already existing in the Sierra Nevada and Coast Mountain Ranges. These natural and stored river flows have formed the remaining essential, and mostly north-state, public trust resources since the creation of the modern water system.

(2) Second, the Project purpose does not even indicate, with confidence, who will be beneficiaries of the Project. CVP water exports will "potentially" be restored. The CVP is the largest purveyor of water in the State. Inclusion of CVP delivery reliability as a project purpose could more than double Project impacts, and greatly alter any potential project operations. Additionally, including the CVP would produce a huge subset of indirect and cumulative impacts that were not considered in this DEIR. DWR must disclose all potential project impacts to the public, but it simply can't adequately disclose impacts without knowing who the project will benefit.

In fact, the SWP and CVP storage reservoirs are not the only facilities proposed to be used by the project. Other non-federal and non-state actors would also find their south of Delta transfers to be facilitated by the Tunnel. These could include Yuba County Water Agency's transfer program,<sup>3,4</sup> the major groundwater transfers from the upper Sacramento Valley,<sup>5</sup> Sacramento County regional groundwater transfers,<sup>6</sup> and Placer County Water Agency's sales from its Middle Fork American River project.<sup>7</sup> This is not necessarily a comprehensive list. The DEIR does not examine the impact of Tunnel-facilitated additional water exports on source watersheds and the water system.

Further, if federal facilities are indeed included as part of the Delta Tunnel project, then a full EIS must be completed, along with a slew of other requirements, including compliance with the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act. The CVP and State Water Project contractors are not the only proposed beneficiaries of the project.

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<sup>3</sup> "Yuba Water approves agreement to transfer water to Bay Area agencies in 2022," Yuba Water Agency, December 7, 2021. [Access online.](#)

<sup>4</sup> "Lower Yuba River Accord," Yuba Water Agency, web page with details about the Water Transfer Program. [Access online.](#)

<sup>5</sup> "2022 Sacramento Valley Water Transfers," State Water Resources Control Board, web page, March 15, 2022. [Access online.](#)

<sup>6</sup> "Groundwater Substitution Transfer," City of Sacramento, web page. [Access online.](#)

<sup>7</sup> "Notice of Petition for Temporary change Involving the Transfer of up to 21, 053 acre-feet of Water from Placer County Water Agency to East Bay Municipal Utility District Under Permit 13856 (Application 18085)," State Water Resources Control Board, June 3, 2022. [Access online.](#)

(3) Third, the Project purpose is not clearly, nor honestly, defined. Historic iterations of Delta "conveyance" facilities indicate the true purpose of the project – to increase water exports to contractors south of the Delta for consumptive use. The current articulation of the project purpose is uninformed regarding California water history, and therefore misleads the public and decisionmakers by obfuscating a significant and reasonably foreseeable impact of the Tunnel: it is the great enabler in a plan to dam more rivers to increase water exports. Confusing language, meant to conceal the honest intent of the project, has misled the public and decisionmakers, and has prevented an honest and holistic analysis of environmental impacts.

Additionally, this confusing purpose statement has created a false dichotomy that limited the development of a reasonable suite of alternatives. The public needn't choose only between (1) status quo infrastructure with seismic vulnerability, and (2) various export tunnel options to mitigate such vulnerability. Numerous other alternatives exist to protect water supply reliability, such as nature-based solutions, and demand management. In fact, in Executive Order N-10-19, which established the Water Resilience Portfolio, Governor Newsom's orders agencies to "prioritize multi-benefit approaches," and "utilize natural infrastructure."<sup>8</sup> This project does not embody either of these principles. Deficiencies in the selection of alternatives is described in more detail in the comments of Sierra Club California et al.

**The DEIR improperly narrows the Project Area and Study Area and accordingly, fails to identify and analyze all potential Project impacts.**

The DEIR does not adequately consider upstream impacts of the Project and its operation, and instead wrongly narrows the geographic scope of its environmental analysis. The scope has been narrowed to include only the Project footprint, the Delta, and CVP/SWP project areas.<sup>9</sup> Due to the interconnected nature of environmental resources in streams and rivers, and water supply and demand dynamics across the state, this narrowed approach is unfounded. Although this is a large area, it is not large enough: The current project scope does not adequately capture potential direct and indirect impacts to upstream communities and riverine systems as a result of the project and subsequent increased exports.

As discussed throughout these comments, the scope of the DEIR should be larger. The Tunnel will also facilitate water transfers from independent facilities (non-SWP and non-CVP) to beneficiaries that may or may not be within the SWP or CVP service areas. Impacts to these source areas and additional service areas must be disclosed and analyzed in this DEIR. Failing to do so violates CEQA. For more

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<sup>8</sup> California Executive Order N-10-19, April 29, 2019. [Access online](#).

<sup>9</sup> DEIR, Section 1.4, Project Area and Study Areas, p. 1-29.

discussion of CEQA violations, please refer to the comments of NRDC et al., sections IV and V, titled "The DEIR Fails to Consider the Whole of the Action, Violating CEQA," and "The DEIR's Analysis of Cumulative Impacts Violates CEQA," respectively, incorporated herein.<sup>10</sup>

*This approach is also deaf to the entire history of California water.* Every historical iteration of this project was part of a plan to increase water exports south of the Delta. The DCP is no different.

The Delta Tunnel is a project of statewide significance and has the potential to further exploit north state water resources to serve south state demand centers. Therefore, DWR, the CEQA lead agency, should expand the geographic scope of environmental analysis to capture reasonably foreseeable project impacts "upstream" of the Delta. Friends of the River et al. details some of these potential impacts below, and identifies direct and imminent threats to the American River, Eel River, Klamath River, McCloud River, Sacramento River, San Joaquin River, Trinity River, and the Yuba River.

**North state water supply development is a reasonably foreseeable outcome of the Delta Conveyance Project**

The purpose of the Delta Conveyance Project is to "...restore and protect the reliability of State Water Project (SWP) water deliveries and, potentially, Central Valley Project (CVP) water deliveries south of the Delta..."<sup>11</sup> Again, the implication here is that these "deliveries" were once more viable and now should be restored. Of course, these water projects have always had more entitlements than they are able to exercise in any given year, either due to naturally occurring hydrological conditions (drought) or operational and physical constraints.

Nevertheless, over time more demand for surface waters has built up (think large expansions of orchard crop acres in production). Millions of acre-feet of groundwater are now used unsustainably. The combination of excess demand and unrealized entitlements creates political demand to eliminate supply bottlenecks. The Tunnel is just such a response. In such circumstances, removing Delta physical constraints will reasonably and undoubtedly result in more water exports from project facilities north of the Delta to contractors south of the Delta.

Operational discretion and demand pressures could therefore reasonably be expected to cause lower north-state reservoir levels (SWP, CVP, and otherwise) in some or many years with consequent adverse temperature and flow impacts to

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<sup>10</sup> Similarly, we adopt by reference the comments of the California Sportfishing Protection Alliance (CSPA) on the Draft Environmental Impact Report for the Delta Conveyance Project.

<sup>11</sup> DEIR, Executive Summary, ES-1.

downstream fisheries and reservoir amenities. In one case, such operational changes could affect a legally protected wild and scenic river (discussed in greater detail below).

More importantly, with operational constraints reduced, south-of-Delta water interests are more likely to find attractive new water storage projects on Northern California rivers. Such reservoir expansions or new dams and diversions, in the absence of the DCP, would otherwise be poor or risky investments. In fact, several major water interests south of the Delta have stated on record their unwillingness to invest in water storage north of the Delta without Delta workaround infrastructure (described below). The Delta Tunnel is precisely the workaround infrastructure needed to pipe more water from north to south. Some poorly conceived projects even include dams and diversions that conflict with state and federal laws to protect the extraordinary values and free-flowing character of wild and scenic rivers.

Lastly, some lawmakers are even seeking to unravel such protections (i.e. State and Federal wild and scenic designations), to move reckless water storage projects forward (discussed in greater detail below). Thus, any project which serves to export water from north of the Delta to south of the Delta must carefully consider direct and indirect impacts from water supply development on Northern California rivers. Mitigation, perhaps unsurprisingly, is not proposed by the draft EIR.

**The DEIR does not adequately consider the "growth-inducing impact" of the Project**

Completion of the Delta Tunnel project will open the proverbial faucet, where water exports flow from Northern California watersheds to Southern California users. California Public Resources Code states, "The environmental impact report shall include a detailed statement setting forth... the growth-inducing impact of the proposed project."<sup>12</sup> The DEIR failed to adequately consider the growth-inducing impact from the Delta Tunnel project on the California water system, and the resulting impacts from additional infrastructure.

Under CEQA, this "growth inducing" test is often applied to roadway projects, which could allow more traffic through an area and therefore increase the likelihood of development and population growth. It is also applied to other infrastructure which may remove bottle necks for a necessary resource (i.e. capacity of a wastewater treatment facility limits local population size). However, this statute should not be interpreted only to consider *population growth* and its resultant impacts.

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<sup>12</sup> California Code of Public Resources, Division 13, Chapter 3, § 21100 (b)(5).

The CEQA Guidelines provide clear instruction that "growth" includes the impact of new water infrastructure and consequent changes to system operations on the environment:

Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. [...] *Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively.* It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.<sup>13</sup> [Emphasis added].

The DEIR must consider the growth-inducing impact this project will have on the California water system and infrastructure. Construction of the Delta Tunnel will remove a major bottleneck to water conveyance (Delta pumping limitations) – a bottleneck which has historically made infeasible additional dams and diversions. However, there is an assemblage of these projects throughout the State that are either approved, proposed, or aspirational. Some are even partially funded. Removing the Delta bottleneck will remove one of the greatest financial and physical roadblocks for these projects. The Delta Tunnel is the first domino.

DWR, however, shunts aside its CEQA responsibility to analyze the Tunnel's likeliness to encourage and facilitate other activities that could significantly affect the environment. Instead, it completely ignores any of the potential dams and diversions that the Tunnel would enable, or their resultant impacts. New dams and diversions would also cause additional impacts from construction, operations, and increased demands on scarce resources such as water, with impacts to fish, wildlife, sensitive species, and communities. Because the DEIR fails to analyze or disclose these impacts, the DEIR also fails to provide appropriate mitigation for such impacts.

FOR discusses, in detail, this chain of dominos below.

### **The DEIR inappropriately and illegally narrows the scope of subject matter area in its analysis, including operational impacts.**

Broadly, the DEIR fails to consider the effects of the Tunnel on existing and future circumstances. It constrains its analysis, excluding important history, operational changes, and political pressures – all of which will contribute to outcomes that have not been considered. This project is potentially the most significant water project of our generation due to its scale and impact on state water supply and transport. The

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<sup>13</sup> California Code of Regulations, Title 14, Division 6, Chapter 3, § 15126.2 (e).



DEIR impact analyses must (1) occur at a comparable scale, and (2) reflect a realistic or probable future that would occur as a result of project construction and operation. This iteration of the DEIR fails to do so.

### **The DEIR is not consistent with the State's Water Resilience Portfolio.**

The NOP for the Tunnels asserted that the DCP would be consistent with the State's Water Resilience Portfolio.<sup>14</sup> However, FOR finds that the Delta Tunnels project fails to meet this objective for the following reasons:

(1) Impacts to rivers, especially dams and diversions enabled by the completion of the Delta Tunnel, are ignored in the DEIR (discussed in great detail below). However, the health of California rivers is a one of four main goals outlined in the Governor's Water Resilience Portfolio.<sup>15</sup> It asserts:

State leadership is essential to restore the environmental health of many of our river systems (See Goal 2, Executive Summary).<sup>16</sup>

While using water from our rivers has fueled our state's growth and prosperity, taking too much water from river systems degrades ecosystems and water quality, affecting the state's long-term health and economic viability (p. 11).<sup>17</sup>

The DEIR should be consistent with the Water Resilience Portfolio and Executive Order N-10-19. Instead, it fails to consider the impacts of additional dam projects that would be enabled by the tunnel. This DEIR does not uphold the values of restoring environmental health of rivers or minimizing take from river systems.

(2) Uncertainty in climate change modeling coupled with unrealistic model assumptions has undermined any attempt to determine a likely climate future. As described in more detail in the NRDC et al. comments, the DEIR climate modelling is completely inconsistent with the DEIR's descriptions of the effects of climate change and the best available science. The DEIR modeling assumptions predict that climate change will *increase runoff*, and

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<sup>14</sup> "Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project," State of California, Department of Water Resources, January 15, 2020, p. 2. [Access online.](#)

<sup>15</sup> "Water Resilience Portfolio, January 2020" California Natural Resources Agency, California Environmental Protection Agency, and California Department of Food and Agriculture, 2020, see Executive Summary. [Access online.](#)

<sup>16</sup> Ibid, Executive Summary.

<sup>17</sup> Ibid, p. 11.



create a hotter, *wetter* future. This is highly unlikely and contradictory to more recent State documents such as the Governor's Water Supply Strategy.<sup>18</sup>

(3) Impacts from existing aging infrastructure are not disclosed. The State's aging water infrastructure is a component of Tunnel operations. Such infrastructure, already vulnerable to catastrophic failure, is subject to increased pressures by climate-related natural disasters. Further, with climate aridification and warming, the Delta Tunnel revenue stream will be jeopardized. Funding streams necessary to maintain the Tunnel and the required repairs of its network of 50+ year old canals and dams will likely dissolve. Resulting rate increases and/or lack of revenue will significantly and disproportionately impact rural and disadvantaged communities both from where this water is taken and to where it is exported. Excluding these impacts does not support water resilience, and these impacts must be disclosed.

Unfortunately, DWR selected a single modeled future with a low probability to design this project. Instead, for system resiliency, model design and selection must be robust enough to handle a range of different climate futures. This incorrect forecasting will only heighten the risk of dangerous proposals such as Auburn Dam and is more reason why this DEIR should be revised and recirculated.

## **II. The Delta Conveyance Project will Increase Pressure for Projects that Dam and Divert North-State Rivers**

A consequence of the DCP is that its beneficiaries (SWP and CVP contractors and perhaps unnamed others)<sup>19</sup> will be more likely to invest in additional water storage in Northern California due to the perception of greater and more reliable transport capacity through the Delta. Put simply, investments in increased north-state reservoir capacity and diversions will be more attractive to export customers. This will also be true regarding non-SWP/CVP reservoirs.

Land dedicated to reservoirs becomes denuded of natural vegetation and becomes a biological desert relative to historical ecology. Dams fragment ecosystems, block fish passage, and have major impacts on riparian habitat. Dam operations alter flows in natural channels and can cause temperature changes that negatively impact native

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<sup>18</sup> "Water Supply Strategy" California Natural Resources Agency, California Department of Water Resources, State Water Resources Control Board, California Environmental Protection Agency, and California Department of Food and Agriculture, August 2022. [Access online.](#)

<sup>19</sup> According to the stated purpose in the DEIR, the SWP and *potentially* the CVP will experience increased exports as a result of the Project. We note that increased exports from other projects may also occur. Impacts from these major water projects are considered in FOR's comments to provide the most holistic analysis of potential project impacts.

fish species, riparian vegetation, and on-river recreation. These impacts are consequential and reasonably foreseeable results of the Tunnel.

***A long history of developing Northern California water for Southern California supply***

As stated above, the DEIR is completely deaf to the history of California water. DWR is the CEQA lead agency on this project and its contractors are contemplated to be key beneficiaries of this project. DWR has also historically championed efforts to add concrete to every river in Northern California to export water southward.<sup>20</sup> Ignoring this history ignores a key liability to the public, and fails to disclose a multitude of potential Project impacts. FOR provides in these comments some important history to consider in the context of the Delta Tunnel. First, from the Department's 1957 California Water Plan:

The California Aqueduct System would be unprecedented in its concept and scope. It would include many large dams, canals, tunnels, streamways, hydroelectric power plants, pumping plants, drainage ways, and other structures proposed to supplement existing water resource development works. It would ultimately develop nearly 22,000,000 acre-feet of surplus water each year, on the average, about half of which would be from the North Coastal Area and half from the Sacramento River Basin, and would transport this water to deficient areas to the south.... (p. 166)

The Delta Division of the California Aqueduct System would accomplish the transfer of water across the Sacramento-San Joaquin Delta *on its journey from norther areas of water surplus to central and southern areas of deficiency. **It would be the "hub" of the California Aqueduct System***, bringing together the surplus waters developed by the Klamath-Trinity, Eel River, and Sacramento Divisions, and lifting these waters from the southerly side of the Delta into major conduits for conveyance southward and westward. (p. 185) [Emphasis added].

Facilities of the Trans-Delta System would ultimately transfer some 18,333,000 acre-feet of water per season, on the average, across the Delta for conveyance to areas of deficiency in central and southern California and in the San Francisco Bay Area. The ultimate transfer across the Delta of water developed in the Sacramento River Basin would be accomplished by construction of an isolated canal and control structures.... (p. 186)

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<sup>20</sup> *Bulletin No. 3, The California Water Plan*, State of California, Department of Water Resources, Division of Resources Planning, May 1957. [Access online](#).



A few years later, DWR updated the provisional Trans-Delta design with a fresh isolated canal design, the *Peripheral Canal*, to the SWP in a 60s-era effort to bypass the Delta. The canal was considered an essential part of its plan to achieve the SWP yield necessary to meet original contract demands. In fact, DWR was confident that a revised but downscaled series of river-to-reservoir conversions of North Coast rivers<sup>22</sup> would ultimately produce five million acre-feet *annually* for "the areas of deficiency."<sup>23</sup>

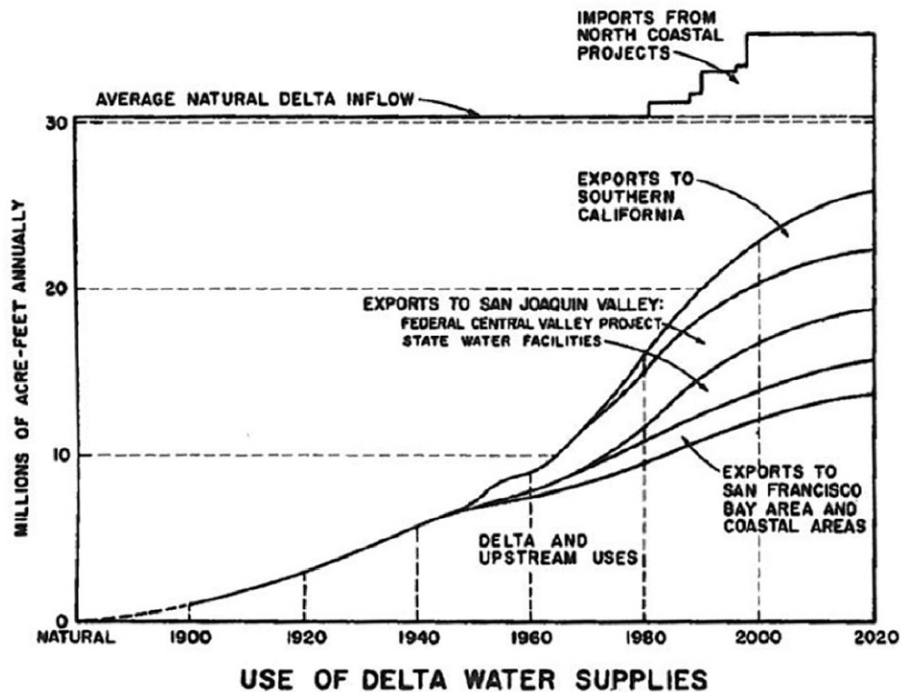


Figure: Use of Delta Water Supplies from 1900-2020. This graph was published by DWR in 1960, thus the years 1960-2020 are modeled projections.<sup>16</sup> See the expected "imports from north coastal projects" on the top right, which was expected to significantly increase "average natural delta inflow."

The Department's 1960s to 1980s north-coast river storage dam focus was on the Eel River, from which it hoped to annually yield 2 million acre-feet for the SWP. After the defeat of the Peripheral Canal in a statewide ballot measure in 1982, the department continued to recognize that extracting water from the Eel River across the Delta, absent an isolated facility, would lose "substantial" water.<sup>24</sup> Then and

<sup>22</sup> Klamath and Trinity River dam and reservoir maps, DWR Bulletin 3, The California Water Plan, Plate 5, May 1957. [Access online.](#)

<sup>23</sup> Department of Water Resources, Bulletin 76, 1960, p.13. [Access online.](#)

<sup>24</sup> "You also asked about the cost of getting Eel River water "to and through the Delta without the Peripheral Canal." Physical works required would include conveyance systems on lower Stony and Cache Creeks... channel improvements in the Southern Delta, and the additional pumping units at the Delta Pumping Plant. Costs of these measures are not readily available, but they would not be great in



now, isolated facilities in the Delta improve the functional and economic feasibility of existing and contemplated north of Delta dams – something that today's Tunnel necessarily shares with its predecessors. If the Tunnel project is to claim that it does not, durable assurances to protect affected or potentially affected rivers must accompany the proposal. Yet none are proposed.

The Eel River, along with many other north coast rivers, were added to the state wild & scenic river system in 1973. However, such protections could be removed by a vote of the legislature and approval by the Governor. In response to concerns that the legislature's approval of the peripheral canal in 1980 might result in the loss of California's wild & scenic rivers, voters passed Proposition 8, establishing a two-thirds-vote hurdle to divert and store water in the system for export into other hydrological basins if the Peripheral Canal is built. The expense of the canal and the higher hurdle to remove state wild & scenic river protections for the Eel and other north-coast rivers prompted Tulare Basin water interests<sup>25</sup> to finance the 1982 Proposition 9 referendum campaign on SB 200. That bill directed DWR to construct the Peripheral Canal and authorized construction of other major facilities in the SWP. Proposition 9 was ultimately successful and SB 200 was repealed in 1982, along with the previously described additional protections for California's wild & scenic rivers that had been joined with it.

It should not escape notice that the Department is not proposing similar additional state constitutional hurdles for the state's protected rivers as part of the tunnel DCP project, its reiteration of the Peripheral Canal.

The need for such protection has not disappeared. Although more than 30 years had passed since the referendum, Tulare County has still not forgotten that the state Wild and Scenic Rivers Act constrains opportunities to increase SWP yield. The Tulare County Board of Supervisors wrote the following to the legislature in 2013:

"The legislature should revisit Wild and Scenic Rivers status of the North Coast waters, where nearly one-third of California's water supply

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comparison to the \$3.6 billion (\$16.5 billion 2022 dollars<sup>24</sup>) of the entire [Eel River development] plan. *The major "cost" of getting the added water through the Delta would be the additional Delta outflows required to allow it to be conveyed to the pumps.* In effect, part of the new water would have to be devoted to Delta outflows so that the remainder could be pumped. The percentage of Eel Project water that could be pumped is a function of how the project would operate and the Delta quality standards to be met.... for now, all we can say is that a "substantial" amount of the Eel Project yield would be lost in crossing the Delta via existing channels." Memo of Albert Dolcini, Chief DWR Northern District, to Gerald Meral, Deputy Director, DWR, January 26, 1978, p. 2-3. [Access online](#). For a detailed read on the Eel River planning effort and the political reaction to it, see *The River Stops Here, Saving Round Valley, A Pivotal Chapter in California's Water Wars*, by Ted Simon, University of California Press, 1994, 2000, and 2001.

<sup>25</sup> "Bitterness Runs Deep in California Battle over Bringing More Water South," Philip Shabecoff, Special to the New York Times, Published: February 27, 1982. [Access online](#).

flows to the ocean, when there is such a demonstrated need to put available resources to their highest and best use."<sup>26</sup>

Although Eel River dams and diversions could produce water for export (at the sacrifice of the river), they would not be the likely first storage project consequential to the DCP. In former DWR Director David Kennedy's report to the legislature on the Eel in 1985 (at that time required under the state Wild and Scenic Rivers Act) he noted:

"Engineering studies over the last few years have disclosed alternative developments that may be more cost effective than Eel River development... reservoir developments in the Central Valley, including offstream storage south of the Delta, may be more practical than development of the Eel River. It is also recognized that ground water storage will play a larger role in meeting dry period needs than previously assumed. Also, based on what is known today, enlarging Shasta Dam appears more cost effective than Eel River development."

However, he did wish to keep DWR's options open:

"It is important to note that, while potential cost-effective alternatives to the Eel River have been identified, no program of alternatives has been accepted which would preclude the possibility of the eventual need for the Eel River as a feature of the SWP."<sup>27</sup>

At that time, DWR was focused on tributaries on the west side of the Sacramento Valley and the Glenn Reservoir complex,<sup>28</sup> and raising Shasta Dam.<sup>29</sup> Decades later, DWR produced an administrative draft EIR for Sites Reservoir,<sup>30</sup> *a project that is expressly intended to export water to south-of-Delta customers*. However, it languished waiting for a local sponsor to buy-in to complete its preparation.

Sponsorship came from the Sites Project Authority, an independent actor (non-SWP, non-CVP), which picked up where DWR left off. It expects to submit its petition for

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<sup>26</sup> "Supps: Without storage, no on bond, Board says more water storage needed to protect agriculture," Porterville Recorder, July 24, 2014. [Access online.](#)

<sup>27</sup> Letter to legislative committee chairs from Dave Kennedy, DWR Director, August 30, 1985, p. 5-6. [Access online.](#)

<sup>28</sup> SB 200, the 1980 Peripheral Canal authorization authorized the large Glenn Reservoir Complex, the water rights for had been applied for as state filings in 1978. (§11255 (g)) The modern Sites Reservoir Authority has applied for an assignment of these water rights. Notably, for purposes here, SB 200 also would have provided state authority for the Sites Reservoir as a CVP facility. (§11255 (h)) SB 200, as described was repealed by referendum in 1982.

<sup>29</sup> SB 200, the Peripheral Canal authorization legislation, would have also authorized the Department to participate in investigations to enlarge Shasta Reservoir or other reservoirs for joint use by the SWP and CVP.

<sup>30</sup> "Preliminary Administrative Draft EIR/EIS, North-of-the-Delta Offstream Storage Project," California Department of Water Resources, US Department of Interior, Bureau of Reclamation, 2013. [Access online.](#)

assignment of state filings for the state's proposed SWP Glenn Reservoir complex early in 2023.<sup>31</sup> The majority of Sites's contemplated customers are SWP contractors in southern California.<sup>32</sup> But as much as things change, they remain the same: The proposed 1.5 million acre-foot Sites Reservoir is not attractive to the key export interests without a facility to move water around the Delta. According to Metropolitan Water District of Southern California (MWD) General Manager Jeffrey Kightlinger:

"Sites Reservoir from the MWD perspective looks like a good sound project. The problem is, for us, it's north of the Delta. And right now, we can't move water through the Delta because we were so restricted in our ability to move water, that it wouldn't provide any real benefits to anyone south of the Delta... I say well, the problem is *I don't know why I would fund it unless I could get some of that water and I can't actually get the water unless we build a conveyance system.*"<sup>33</sup> [Emphasis added].

MWD is apparently willing to fund part of the costs of environmental review to preserve a spot in the line of Sites beneficiaries, however.<sup>34</sup>

In other words, to be operationally viable, this project needs the Tunnel constructed. Sites Reservoir physically cannot deliver water to its investors without it. This is an example of independent actors planning a project contingent on greater export capacity through the Delta. Sites Reservoir will have site-specific impacts as well as operational impacts from disrupting flow regimes and river resources. The DEIR ignores these likely impacts by improperly narrowing its scope, segmenting the project, and ignoring "growth-inducing" properties of the Tunnel project. These impacts must be analyzed in the DEIR.

Public trust resources on the Sacramento River will likely be affected by construction and operation of Sites dam complex, reservoir, and diversion facilities.<sup>35</sup> Sites is proposed as a tool to operate in coordination with other complete and proposed projects tributary to the Sacramento River and Delta. To the extent that Sites and the Delta Tunnel may coordinate operations with Shasta Dam, for which a dam raise

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<sup>31</sup> See Sites Project Authority website: <https://sitesproject.org/>.

<sup>32</sup> At this point, Sites Reservoir project partners are committing a share of the planning expenses in order to have a proportionate share of reservoir capacity, something that project partners expect will translate into a proportionate share of water that the capacity might develop. (Personal communication, Sites Project Authority). See also, "California drought resurrects decades-old plan for controversial Sites Reservoir," Louis Sahagun, Los Angeles Times, May 31, 2022. [Access online](#).

<sup>33</sup> "A conversation with Jeffrey Kightlinger," Maven's Notebook, July 31, 2016. [Access online](#).

<sup>34</sup> "Big LA water agency antes up for a share of Valley's Sites Reservoir," Sacramento Bee, April 11, 2017. [Access online](#).

<sup>35</sup> For a summary of the Sites Reservoir Project and public trust resources that may be affected, see this [Fact Sheet](#) prepared by Friends of the River and Sacramento River Preservation Trust, 2017. (This fact sheet was prepared before the Sites Project Authority completed its draft EIR/EIS)



project has been proposed and awaits a decision at the federal level, DWR must also consider these pressures as part of its responsibility under the state Wild and Scenic Rivers Act (more on Shasta Dam Raise and wild and scenic responsibilities below).

As noted throughout these comments, these are not the only existing or contemplated projects that propose to use export facilities to sell water south of the Delta.

***The Delta Conveyance Project will expressly endanger rivers protected by the Wild and Scenic Acts in California***

As noted earlier, the proposed Delta Conveyance Project does not include any additional safeguards to prevent rivers protected by Wild & Scenic Rivers Acts from being unprotected and dammed due to increased conveyance capacity through the Delta. Instead, the proposed project and scope for environmental analysis relies on current conditions and legal obligations, which ignores the historical context from whence the DCP came.

An isolated facility to convey water supply through the Delta has long wetted the appetites of export interests, even to the extent that such interests have sought to repeal protections embedded in the state's Wild and Scenic Rivers Act, or have attempted to pre-empt the Act through federal law.<sup>36</sup> The following excerpt serves as a reminder of the purpose of this body of California law:

It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. **The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water** within the meaning of Section 2 of Article X of the California Constitution. (Public Resources Code § 5093.50) [Emphasis added].

We have already discussed two threats to California's protected rivers: (1) former DWR Director Dave Kennedy's 1985 assertion that California's protected north coast rivers may be DWR's future object of desire, and (2) Tulare Basin interest's

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<sup>36</sup> Federal wild and scenic river protections, once described as permanent protections, overlap state protection on the north-coast rivers and the lower American River. Protections for federally protected rivers have twice been the subject of successful “de-designations” by the House of Representatives (Merced River, CA). *See* (1) [California Wild and Scenic Rivers Memo](#), Stork and Evans, p. 12-14, and (2) [Merced River Wild and Scenic Fact Sheet](#), Friends of the River, 2018. In response, in 2018 the legislature in provided the California Natural Resources Secretary the authority to add national wild & scenic rivers in California the authority to add rivers threatened by adverse Congressional or Administrative actions to the state wild & scenic rivers system. This authority sunsets in 2025. (AB 2975) The DCP draft EIR does not propose to make a recommendation to make this authority permanent.

involvement in the repeal of Proposition 8 and the County's contemporary desire to *un-protect* north coast rivers. However, there are more immediate potential threats to protected rivers, which would be exacerbated by increased conveyance capacity through the Delta.

### **McCloud River: Shasta Dam Raise**

Raising Shasta Dam is illegal because it would permanently drown a reach of the McCloud River protected under the California Wild and Scenic Rivers Act.<sup>37</sup> To circumvent this legal protection, the MWD Board of Directors voted in 2012 to support "administrative/legislative actions to remove existing prohibition for state funding to raise Shasta Dam."<sup>38</sup> Presumably, this means MWD supports efforts to remove protections for the McCloud River under the California Wild & Scenic Rivers Act provisions in the Public Resources Code – so that it could participate as a project beneficiary of Reclamation's CVP Shasta Dam Raise. As has been noted before (and likely by many other commenters in this proceeding), MWD is a major water contractor of DWR, and SWP urban customers have been identified as potential buyers of Shasta Dam Raise water exports by Reclamation *despite the SWP being outside of the CVP service area*.<sup>39</sup>

Others, have decided to ignore the Act. Westlands Water District (WWD), located in Fresno and King Counties (and a whopping 340+ miles south of Shasta Reservoir), has also been an interested party in the Shasta Dam Raise. Westlands is a CVP export contractor and the largest agricultural water district in the nation. WWD had agreements in principle to be the non-federal sponsor of Reclamation's proposed reservoir expansion and was attempting to undertake an EIR for the project when the California Attorney General and environmental groups sued and blocked the EIR as a violation of the California Wild & Scenic Rivers Act.<sup>40</sup> In response, the general manager of the District opined in the press that it would do a study to determine that expanding the reservoir would not have an adverse effect on the free-flowing status of the portion of the McCloud River to be inundated by the reservoir expansion.<sup>41</sup> Westlands has even anted up and bought up some land along the shores of the McCloud River – land that is being held by the District to become

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<sup>37</sup> "Supplemental Comments on Revised Proposed Regulations for the California Water Commission's Water Storage Investment Program Quantification Regulations," Friends of the River et al., October 3, 2016, p. 5-10. [Access online.](#)

<sup>38</sup> Bacher, Dan, "MWD votes to support Shasta Dam raise," Fish Sniffer, December 13, 2012. [Access online.](#)

<sup>39</sup> "Summary of Chapter Nine Shasta Lake Water Resources Investigation (SLWRI) Final Feasibility Report and Environmental Impact Statement (EIS)," Friends of the River, Planning And Conservation League, Winnemem Wintu Tribe, May 10, 2016, p. 3-4. [Access online.](#)

<sup>40</sup> "The Facts about Raising Shasta Dam," Friends of the River, [Access online.](#)

<sup>41</sup> "Westlands backs off Shasta Dam environmental permitting work," Debra Kahan, Politico, September 30, 2019. [Access online.](#)

part of the expanded reservoir.<sup>42</sup> Earlier, however, according to a press account, the then Westlands Deputy General Manager Jason Peltier stated that *raising Shasta Dam wouldn't be a high priority for the District until a major roadblock is removed to send freshwater south: the Delta.*<sup>43</sup>

Ignoring issues of legality and challenging state authority, Reclamation has an ongoing planning effort to expand Shasta Reservoir over a reach of the McCloud River protected by the California Wild & Scenic Rivers Act. In 2014 and 2015, it completed its Final Environmental Impact Statement (EIS) and Feasibility Report determining (1) that expanding the reservoir was indeed in conflict with state law and (2) its preferred alternative (although no project "recommendation" was made).<sup>44</sup>

In 2020, Reclamation completed a supplemental EIS that concluded that the reservoir expansion was exempt from the California Wild and Scenic Rivers Act and, further, that it had no obligation to examine whether state law prohibited the expansion of the reservoir.<sup>45</sup>

Seemingly unaware of Reclamation's circa-2015 unresolved concerns, legal difficulties of potential non-federal cosponsors, and the illegality of the project under state and federal law, members of Congress continue to push for federal funds for and/or federal authorization of the Shasta Reservoir expansion. In 2017 Rep. Newhouse introduced HR 875 to "streamline" Reclamation's water projects. The bill explicitly authorized the Shasta Dam Raise Project.<sup>46</sup> The bill stalled after introduction. Just this year Rep. Valadao introduced HR 9084, affectionately titled the WATER Act, to supersede some of California's water laws for the benefit of State Water Project and Central Valley Project contractors. This bill specifically seeks to secure funding for the Shasta Dam Raise project.<sup>47,48</sup>

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<sup>42</sup> Arthur, Damon, "McCloud River takes central role in dam-raising proposal," Record Searchlight, June 19, 2013. Appendix 15. [Access online.](#)

<sup>43</sup> "Tunnel Vision Part Two: Rivers in Peril," Robert Gammon and Joaquin Palomino, East Bay Express, p. 6. [Access online.](#)

<sup>44</sup> "Summary of Chapter Nine SLWRI Feasibility Report and EIS" FOR et al.

<sup>45</sup> Reclamation's conclusions are, of course, incorrect. The reservoir expansion provisions are not exempt from the California Wild & Scenic Rivers Act. Neither is Reclamation exempt under federal law from the provisions of this state law. For a thorough discussion and rebuttal to Reclamation's conclusions, see our comments on Chapters 1 & 5 of Reclamation's draft supplemental EIS [here.](#)

<sup>46</sup> Bureau of Reclamation Water Streamlining Act, H.R. 875, 115<sup>th</sup> Cong. February 6, 2017. [Access online.](#)

<sup>47</sup> WATER for California Act, H.R. 9084, 117<sup>th</sup> Cong. September 29, 2022. [Access online.](#)

<sup>48</sup> "Congressman Valadao Introduces Sweeping California Water Legislation," Office of U.S. Congressman David G. Valadao, September 29, 2022. [Access online.](#)

This means DWR's consideration of the consequences and impacts of the DCP are even more important under its broad state Wild and Scenic Rivers Act responsibilities.<sup>49</sup>

These responsibilities are found in three sections of the Act. Two sections are important for rivers in the state wild & scenic river system:

(1) PRC §5093.50 It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 2 of Article X of the California Constitution.

(2) PRC §5093.61 All departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the free-flowing state of each component of the system and the extraordinary values for which each component was included in the system.

For the McCloud River, provision 1 applies, as well as the following special provisions of the Act:

PRC §5093.542(d) All state agencies exercising powers under any other provision of law with respect to the protection and restoration of fishery resources shall continue to exercise those powers in a manner to protect and enhance the fishery of those segments designated in subdivision (b).

PRC §5093.542(c): Except for participation by the Department of Water Resources in studies involving the technical and economic feasibility of enlargement of Shasta Dam, no department or agency of the state shall assist or cooperate with, whether by loan, grant, license, or otherwise, any agency of the federal, state, or local government in the planning or construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery.

As demonstrated by the Westlands' CEQA litigation, some of these responsibilities extend to EIR preparation. While the DCP does not directly include dams and diversions on rivers protected by the California Wild & Scenic Rivers Act, its 1960s-era predecessors have included them (see subsequent discussion). There is some

irony there since both the Department historically and its SWP contractors even currently, have concluded that isolated/canal/tunnel facilities are required, in practice, to further exploit north-coast and north-state rivers, including rivers protected by the Act. Yet there is no discussion in the DCP draft EIR of these impacts – or how to mitigate this increased vulnerability.

### Lower American River: CVP Operations

CVP operations already directly affect the Lower American River (LAR), which is a State wild and scenic river. Releases from CVP dams affect flows, temperature, habitat, and recreation in the LAR. Using models created by DWR and Reclamation, WaterFix participants demonstrated that a point-of-diversion change associated with previous delta conveyance facilities (WaterFix) would adversely impact LAR resources. DCP modeling assumptions may under represent the impact of the point-of-diversion change on CVP operations, indicating adverse impacts to fish and wildlife, and their associated recreation impacts, such as angling success.<sup>50</sup> After all, the purpose of the DCP is to reduce the Delta bottleneck that inhibits access to north-state water resources.

Public Resources Code § 5093.1 requires that "[a]ll departments and agencies of the state shall exercise their powers granted under any other provision of law in a manner that protects the free-flowing state of each component of the system and the extraordinary values for which each component was included in the system." The Lower American River Parkway Plan, adopted by the California Legislature, is the state wild and scenic river management plan for the LAR. It identified the wild and scenic river corridor (the LAR Parkway) and the extraordinary values as anadromous fishery and recreation.<sup>51</sup> The plan also discusses goals and means to achieve river flows consistent with plan objectives.<sup>52</sup>

The Department of Water Resources, in accordance with CEQA, must analyze impacts from the DCP on rivers tributary to the Project. However, it also must consider such impacts under its state Wild and Scenic Rivers Act responsibilities. Protecting state wild and scenic rivers is clearly in the public interest and an affirmative responsibility of state agencies and even political subdivisions of the state.

Mitigations were proposed in the Water Fix hearings by American River parties. We are not aware that any meaningful and durable assurances have been proposed within the DCP draft EIR.

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<sup>50</sup> WaterFix hearings Part 1, Closing Brief of City of Folsom, SSWD, and SJWD, p, 11-17.

<sup>51</sup> "County of Sacramento, Lower American River Parkway Plan 2008," County of Sacramento Municipal Services Agency, Planning and Community Development Department. *See wild and scenic river provisions.* [Access online.](#)

<sup>52</sup> *Ibid, see water and flood elements of the Plan.* [Access online.](#)

### *American River: Auburn Dam*

The Auburn Dam is another project that would likely become more attractive to Southern California water interests if operational constraints to transport through the Delta were minimized. The 2-million acre-foot capacity Auburn reservoir, proposed on the American River, lost its state water rights in 2009. The Bureau of Land Management has found the Auburn Dam Project lands to be eligible for a National Recreation Area designation,<sup>53</sup> and Reclamation has determined that most Project lands are eligible for federal wild and scenic river designation.<sup>54</sup>

Nevertheless, Congressional boosters have remained active. The Congressman who represents the Auburn dam area and champions the proposed dam formerly represented legislative districts in Southern California in the legislature.<sup>55</sup> The area's previous Congressman (who got his start in politics as an aid to Southern California State Senator H.L. Richardson), in an Association of California Water Agencies meeting in Palm Springs, once offered Auburn dam water "to sweeten the Salton Sea." Quite a challenge in the absence of expanded conveyance to that part of the state. The author of SB 200, State Senator Ruben Ayala (D-Chino), in addition to his authorship of the bill to authorize the Peripheral Canal, regularly authored bills in the legislature to authorize the Auburn dam.

If constructed, Auburn Dam would be upstream of the lower American River, which is a state wild and scenic river. The original project was federally authorized in 1965, and the project has not been deauthorized.<sup>56</sup> The Auburn dam facilities would have bypassed the lower American River. Facilities included a large canal beginning at Lake Natoma Reservoir, which would run south and join with a Sacramento River diversion at Hood. This canal would become the East-Side Canal, envisioned to parallel the state and federal canals travelling south from the Delta along the west side of the San Joaquin Valley. The Folsom-South Canal was the subject of federal litigation challenging the diversion on grounds of harm to the lower American River.<sup>57</sup>

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<sup>53</sup> Final NRA Study, American River Feasibility Study, USDO, BLM, September 1990. [Access online.](#)

<sup>54</sup> Determination of Wild and Scenic Eligibility of Segments of the American River (General Investigation Program), USBR, March 23, 1993.

<sup>55</sup> "Could dam plan be back? McClintock poised to lead Congress for Auburn Dam revival," Auburn Journal, December 12, 2020 and "Auburn Dam back in play as McClintock takes over House panel," Sacramento Bee, January 15, 2011. [Access online.](#)

<sup>56</sup> To our knowledge, the Auburn Dam is not the only still unbuilt federally authorized 2-million acre-foot north-state Sierran dam. The proposed Marysville dam on the Yuba River is a U.S. Army Corps of Engineers project, currently inactive but still on the books. The current (1972) Corps of Engineers reservoir regulation manual for the state's second largest reservoir, the reservoir formed by Oroville Dam, for the most part assumes the existence of Marysville dam. The Department declined to participate in this project around 1976–77 because of concerns about the adverse effects the dam would have on the important Yuba River fisheries.

<sup>57</sup> NRDC, Save the American River Association, and the Environmental Defense Fund vs. Gilbert Stamm, et al.



Today, the Auburn dam is just one more proposed north state project waiting for customers in the south state to find it worth their while to finance it. And once again, the Delta bottleneck is an obstacle, just as it was in Senator Ayala's day, forty years ago.

### III. Area of Origin Law Will Not Protect North State Public Trust Water Uses

The U.S. Bureau of Reclamation's (Reclamation) Central Valley Project (CVP) contractors routinely face some degree of shortage. Reclamation's shortage policies govern, to a considerable extent, the allocation of waters under the CVP purview. In recent years, the Tehama-Colusa Canal Authority argued in federal court that state area-of-origin statutes<sup>58</sup> should have provided a preferential shortage policy to areas of origin against export uses.<sup>59</sup> Others have argued that these statutes should be interpreted to provide area of origin rights for public trust resources.<sup>60</sup> The trial court and the Ninth Circuit made clear that no such preference within the CVP was required. They affirmed Reclamation's discretion to provide shortage-provision contracts, north and south, to users within various contract classes, asserting that Reclamation's shortage policies need not be constrained by area-of-origin statutes.<sup>61</sup> This is and has been Reclamation's position, and is reflected in contracts.<sup>62</sup>

Of significance to the DCP, the court did note that export water-service contractors usually bear the greater burden of shortages.<sup>63</sup> This is by no means untypical, as can be seen in Reclamation's operations forecasts, reports, and complaints by CVP south-of-delta contractors.<sup>64</sup> This can be accounted for to some degree by different contract types. However, the *Tehama* court here is referring to differences in

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<sup>58</sup> The "Area of Origin statutes" apply to the federal Central Valley Project and the State Water Project. See "Laws Protecting Areas of Origin," Porter A. Towner, Chief Counsel, Department of Water Resources, the Resources Agency, State of California, p. 4-5. [Access online](#). Significant quote: "In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

<sup>59</sup> *Tehama-Colusa Canal Authority v. U.S. Department of Interior* (9<sup>th</sup> Cir. 2013) 721 F.3d 1088,1090. [Access online](#).

<sup>60</sup> "Area of Origin Protection: Our Fisheries and Other Public Trust Interests," 2010, Felix E. Smith, retired Field Supervisor of the California office of the U.S. Fish and Wildlife Service. [Access online](#). Of note, the *Tehama* appeals court took a narrow view of the applicability of the statutes and did not discuss a broad area-of-origin doctrine for fish and wildlife/public trust resources.

<sup>61</sup> *Tehama v. U.S.* 1095-1097

<sup>62</sup> *Tehama v. U.S.* 1092-1093

<sup>63</sup> *Tehama v. U.S.* 1089

<sup>64</sup> For background on recent operations, see "Central Valley Project Operations: Background and Legislation" Charles V. Ster, and Pervaze A. Sheikh, Specialists in Natural Resources Policy, Congressional Research Service, April 26, 2017, p. 7-9. [Access online](#).



deliveries among the same or similar classes of contract priorities due to facility/geographical realities described as "operational constraints" by the court.<sup>65</sup> It is these operational constraints that the Delta Tunnel will reduce. Although the *Tehama* case did not involve the State Water Project, the principles would be similar, although a much greater portion of SWP contracts are south of the Delta than the CVP's.

Operational experience demonstrates that this north-vs-south court-affirmed delivery discretion can have direct implications on public trust resources. Increased north state delivery reliability can mean higher reservoir levels and consequent better conditions for public trust resources, such as better temperatures and flows during critical months for priority fish stocks in some important years. In other words, operational constraints can tend to bottleneck water, leaving more in north-state reservoirs in some years. These operational constraints will be reduced or eliminated by the Delta Conveyance Project. This is especially critical for north-state rivers, because the proposed project does not include any new constraints on operational discretion of the State Water Project or the Central Valley Project.

It is important to note that, with retained operational discretion, project operators can and likely will change operations to meet different objectives. Temporary change petitions, flow variances, and other forms of relaxed regulatory requirements will reasonably continue to occur if the DCP is constructed. Because DWR cannot assume how they will operate the system, nor can it assume that future operations will mirror past operations, it must analyze potential impacts of operational changes on northern California rivers as well as the Study Area.

#### **IV. The SWP and CVP are incomplete projects, thus their ultimate project operations and water deliveries are uncertain.**

The DEIR asserts that SWP and CVP operations will not significantly change as a result of the DCP. According to Chapter 5 of the DEIR Executive summary, "Changes to surface water resources, by themselves, are not considered an impact of the project under CEQA, and are thus not evaluated as impacts in this chapter."<sup>66</sup>

This conclusion *inherently cannot be true*.

First, the project purpose calls for changes in current operating conditions ("restoring deliveries"). Delivering more water will fundamentally result in operational changes that will be damaging to the environment, especially public trust resources in Northern California - an impact that must be analyzed and disclosed to the public.

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<sup>65</sup> *Tehama v. U.S.* 1089

<sup>66</sup> DEIR, Executive Summary, p. ES-48.

Second, the DEIR can't even confidently declare project beneficiaries. Whether the final project includes or does not include the CVP means that project impacts and footprint could more than double – an impact that must be analyzed and disclosed to the public.

Third, SWP and CVP projects have "paper water" – water that is contracted for and cannot be delivered either due to operational constraints or supply constraints. The DCP is meant to transform paper water into wet water. The \$15 billion dollar price tag is proof that this project is meant to further develop supply – an impact that must be analyzed and disclosed to the public.

Lastly, it is a known fact that SWP and CVP projects are not in their final configuration. These projects have tangible plans and aspirations for growth in the coming years. As these projects grow and change, it will necessitate changes to operations. That the DCP will not impact or be impacted by these changes is a naïve and uninformed assumption. These known and predictable changes must be analyzed and disclosed to the public.

The last two points are discussed in greater detail below.

### **SWP and CVP project exports are routinely less than contracts and water rights**

The SWP and CVP each have some proportion of paper water – rights to water that can't actually be appropriated and delivered due to operational constraints or drought conditions. Project beneficiaries hope that the Delta Tunnel can reduce regulatory constraints on project operations within their *existing* water rights permits. Their contractors have made clear their hope that this will increase diversions from SWP and CVP reservoirs. Without anything but a change in conveyance, paper water in the system would become "wet" water.

Since additional exports are often releases from storage, SWP and CVP project operators will have more discretion to decrease north-state reservoir storage – again with adverse implications on cold-water pools, downstream fisheries, and recreation both in and below reservoirs.

*SWP and CVP project exports and operations are uncertain because the projects are not in their final forms*

Both the SWP and the CVP have unmet demand in their project areas. The SWP has contracts for somewhere north of four million acre-feet in its service areas with a significant shortfall in deliveries due to lack of water availability.<sup>67</sup>

In addition to the desire to ramp up exports to meet unmet contract obligations, the SWP is an incomplete project, with a major south-of-Delta storage project, the 1.73 million acre-foot Los Banos Grandes reservoir, authorized<sup>68</sup> but unconstructed. Los Banos Grandes is unmodeled by the DCP. It is reasonable to conclude, then, that this additional major project in the SWP would alter its operation. Impacts of such reasonably foreseeable changes must be analyzed in the DCP DEIR.

The SWP is also listed as a customer or project beneficiary in the draft Sites Reservoir project/environmental feasibility reviews. And, it or its contractors are listed by Reclamation as a project customer or beneficiary in the final environmental/feasibility document for the Shasta Dam Raise.<sup>69</sup>

Growing unmet demand paired with these potential projects in *advanced* planning stages suggest that the SWP will become a significantly larger operation than current DCP modeling suggests. As a reminder, excess unmet demand is located largely in the SWP service areas south of the Delta. This demand paired with the aforementioned new facilities, then coupled with some degree of operational discretion suggest that the Delta Conveyance Project could likely be a conduit to the loss of and harm to public trust resources in Northern California rivers and reservoirs. Impacts of such reasonably foreseeable changes must be analyzed in the DCP DEIR.

Although Reclamation's CVP appears to be a complete project, Reclamation is an interested party in the Delta Conveyance Project because it would aid in delivery of CVP project waters to the Delta pumps according to the Coordinated Operating Agreement. Reclamation also cautioned the State Water Resources Control Board (SWRCB or "Board") in 2009 that, preparatory to licensing its water rights, it could not determine final project demand and diversions:

Reclamation has further determined that it is not possible at this time to accurately predict future operations and diversion levels at specific times

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<sup>67</sup> "State Water Project Supply," Dierdre Des Jardins, California Water Research. [Access online.](#)

<sup>68</sup> 2013 California Water Code – Division 6. Conservation, Development, and Utilization of State Water Resources Part 3. Central Valley Project, Chapter 2. Description of the Project, Article 9.2, Los Banos Grandes Reservoir. [Access online.](#)

<sup>69</sup> SLWRI Feasibility Report, p. 4-30, Table 4.4.

[...] Major uncertainties that include possible future [Board] actions involving additional conditions to CVP permits, outcome of the Bay-Delta Conservation Program (BDCP) process, as well as any other future actions necessary for compliance with the Federal Endangered Species Act, frustrate any attempt to make such predictions at this time. *As a result, Reclamation is unable to determine what the ultimate diversions under its CVP permits will be.*<sup>70</sup> [Emphasis added].

In response, Reclamation noted the following:

Reclamation also envisions that prior to 2030, it may be necessary to request [...] adjustments in order to conform the authorized CVP places of use to match water use demands anticipated to exist at the time of build-out, but that would be met with no changes in permitted diversion quantities, permitted diversion rates, or contract totals. Reclamation would prefer having any necessary place-of-use adjustments completed prior to licensing, and to have been serving water accordingly, rather than going to license sooner and for authorized places of use *that may not reflect demands existing under the CVP contractors' future built-out conditions.*<sup>71</sup> [Emphasis added].

However, the CVP is fully constructed in order to divert and beneficially use water under the subject permitted applications.<sup>72</sup>

Reclamation has also completed a Draft Feasibility Study and Draft Environmental Impact Statement for the Temperance Flat Dam on the San Joaquin River – a dam that, if constructed, would be the second tallest dam in California and add more than a million acre-feet to storage capacity to the CVP. Although the success of this dam is speculative as it would be built on a fully appropriated river,<sup>73,74</sup> it has powerful backers in the Republican (soon-to-be majority) party of the House of Representatives.<sup>75</sup> Reclamation envisioned that the SWP may be a customer of the

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<sup>70</sup> “Protest of the California Sportfishing Protection Alliance, Extension of Time of Bureau of Reclamation’s CVP permits,” October 31, 2009. [Access online.](#)

<sup>71</sup> “Reclamation’s Response to Protest,” USBR Mid Pacific Region, May 10, 2010, p. 2-3. [Access online.](#)

<sup>72</sup> Ibid, p. 2

<sup>73</sup> “Temperance Flat Dam Fact Sheet,” Friends of the River, February 5, 2021. [Access online.](#)

<sup>74</sup> Letter from Katherine Mrowka, SWRCB, to Robert Colella, USBR, August 7, 2014. [Access online.](#)

<sup>75</sup> “McCarthy Celebrates Important Step Forward for Temperance Flat,” Mojave Desert News, August 18, 2017. Appendix 34. [Access online.](#) Congressman Kevin McCarthy released the following statement in April 2017 regarding the San Joaquin Valley Water Infrastructure Authority’s (SJWVIA) grant application for the Upper San Joaquin Valley Water Storage Project (Temperance Flat):

Years of drought have demonstrated the vital need for additional water storage. This past winter delivered historic rainfall and snowpack to the Valley and the Sierras [sic]. With additional water storage capacity, Californians could have stored more water for the inevitable dry seasons to come. That’s why storage projects, such as the Temperance Flat proposal, are crucial to California’s continued growth. I commend the SJWVIA on its efforts to expand our state’s water capacity, and I congratulate the Authority

project. And, as has been discussed earlier, Reclamation also has a Final Feasibility Study, EIS, supplemental FEIS, and a preferred configuration for the 750,000 acre-foot Shasta Dam and Reservoir Expansion Project. It also has a Draft EIR/EIS in partnership with the Sites Project Authority for the proposed 1.8 million acre-foot Sites Reservoir,<sup>76</sup> both projects with uncertain beneficiaries and therefore operational plans. The San Luis and Delta-Mendota Water Authority is working on converting the seismic upgrade project to the joint-use B.F. Sisk Dam into a 130,000 acre-foot reservoir expansion project. It is thus a bit difficult to reconcile Reclamation's characterization to the Board in 2010 that it is fully constructed with these rather large potential changes to the CVP.

But it doesn't stop there. The San Joaquin Valley Blueprint is a plan developed largely by the Friant Unit of the CVP as a supply-side solution to the groundwater mining in the southern San Joaquin Valley. It envisions increased Delta export capacity via an enlarged Delta-Mendota Canal, and the Mid-Valley Canal<sup>77</sup> to deliver water to the Friant Unit. Additional canals could journey east from the state's California Aqueduct to Friant Unit and the Cross Canal might be enlarged. The Blueprint would add an additional 2 million acre-feet to Delta pumping<sup>78</sup> – water that would have to be conveyed to the Delta and through the Delta.

And, as always, there is more. The Governor's Water Resiliency Portfolio calls for a consolidation of the place of use of the comparatively water rich CVP and the comparatively water poor SWP. This proposed consolidation is yet another great enabler in the scheme to extract water from north-state resources to export to south-state special interests.

In summary, it is not possible to assume that the CVP and SWP have reached their final physical or operational configurations; nor are they meeting their existing and future contract demands. Contracts and water rights do not appear to be limiting the thirst of SWP and CVP contractors. The Delta Conveyance Project will directly affect operation of these projects, and remove operational constraints which historically have helped support public trust water resources in Northern California. The fate of some public trust resources impacted by alleviation of operational constraints in the Delta must be examined closely in the DEIR.

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on successfully submitting a grant application for California Proposition 1A water infrastructure funding. This is a critical first step to build the Temperance Flat Reservoir which will store an additional 1.26 million acre-feet of water for use from Stockton to Bakersfield.

<sup>76</sup> See *joint press release*: “Offstream Storage Project in Northern California Takes Critical Step Forward Submittal of Application to the California Water Commission for Prop 1 Funds and Release of Draft Environmental Review Documents,” Sites Project Authority and USBR, August 14, 2017. [Access online](#).

<sup>77</sup> Notably, for purposes here, the Mid-Valley Canal, which would take water delivered from the Delta by the Delta-Mendota Canal, was to be authorized along with the Peripheral Canal in SB 200. (§11255(k))

<sup>78</sup> “Water Blueprint for the San Joaquin Valley,” Scott Hamilton, Power Point Presentation given to the California Water Commission, November 2020. [Access online](#).

## V. Conclusion

### *Plumbing is destiny*

The Delta Tunnel is the heir to the Trans-Delta System (part of the CA Aqueduct in the CA Water Plan), the Peripheral Canal, and California WaterFix – all of which were plumbing projects conceived to export *more* water south of the Delta. The Tunnel is but another attempt to enable additional exports, which would place greater demand on California rivers. Concrete plans already exist to meet this demand: the numerous dam and export projects described throughout these comments which are ongoing or could be resurrected. Thus, the Tunnel project is bigger than it seems.

The Delta Conveyance Project is the key that will unlock California rivers for these projects. It will remove a major physical barrier to exporting water, and in many, if not every case, the largest financial barrier to building more dams and export projects. "Upstream" projects are inextricably linked, to one another, and to Delta conveyance.

The Tunnel is a project of statewide significance, with likely and resounding impacts on water supply – *statewide*. This DEIR has reduced the scope of environmental analyses such that it doesn't even consider impacts outside of SWP and CVP infrastructure and service areas. The scope simply does not consider the big picture, and does not capture the true range of impacts this project will have on our state. This narrowed DEIR scope is flawed and conceals real and reasonably foreseeable impacts of the Tunnel from the public and decisionmakers.

In fact, the DEIR fails to properly frame this project for the public. We offer an analogy of a simple garden hose to illustrate this point: The DEIR has analyzed a hose which will move water from the north to the south. It looks closely at specific characteristics of the hose: diameter, length, connection points, material, even color. The DEIR doesn't, however, analyze how the hose will be used relative to the system. It does not consider the important and relevant historical context which produced a desire for the hose, and which will inevitably cause further damming of California rivers and their precious public trust resources.

By narrowing the project scope and thereby failing to consider or analyze broader impacts to rivers, *the DEIR failed to provide mitigation and assurances for North State rivers and public trust resources.*

We urge the Department of Water Resources to withdraw this DEIR and recirculate a new draft after correcting the numerous deficiencies.

Respectfully,



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